Federal Court of Appeal | Cour d'appel fédérale

Date: 20180508

Docket: A-31-17

Citation: 2018 FCA 89

CORAM: **GAUTHIER J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

BIGSTONE CREE NATION

Applicant

and

NOVA GAS TRANSMISSION LTD. AND THE ATTORNEY GENERAL OF CANADA

Respondents

and

NATIONAL ENERGY BOARD

Intervener

Heard at Calgary, Alberta, on October 30, 2017.

Judgment delivered at Ottawa, Ontario, on May 8, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an application for judicial review of Order in Council P.C. No. 2016-962 (the Order or the OIC) made by the Governor in Council (the GIC) dated October 28, 2016. The Order directed the National Energy Board (the NEB or the Board) to issue an environmental assessment decision statement concerning the 2017 Nova Gas Transmission Ltd. (NGTL, Nova or the Company) System Expansion Project in northern Alberta (the Project), and to issue the Certificate of Public Convenience and Necessity GC-126 (the CPCN or the Certificate) authorizing the construction and operation of the Project. The authorization is subject to the Certificate Conditions contained in the CPCN (the Conditions), which are attached as Appendix III to the *GH-002-2015 National Energy Board Report In the Matter of NOVA Gas Transmission Ltd.* (the NEB Report) (Applicant's Record (AR), vol. 6 at 1031-1048).

[2] The applicant Bigstone Cree Nation (the applicant or Bigstone) requests *inter alia* orders declaring that Canada breached its constitutional and common law obligations to consult and accommodate Bigstone, that the Crown improperly delegated its duty to assess the Project's effects on the environment and on Bigstone's rights protected under subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11 (the Section 35 Rights), and that the GIC erred in law in issuing the OIC as it does not comply with the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the *NEB Act*) and is otherwise unreasonable for failing to provide reasons or sufficient reasons, and for failing to publish the Order in the *Canada Gazette*. The applicant requests an order declaring that the OIC is unenforceable, invalid and unlawful and/or without legal effect and prohibiting the Project approval decision, as well as

an order quashing the OIC and the Certificate. In the alternative, Bigstone requests an order requiring the Crown to enter into consultations with Bigstone subject to the Court's supervision and on specific and detailed terms.

[3] For the reasons that follow, I would dismiss the application with costs. I am of the view that the Crown has adequately fulfilled its duty to consult and accommodate Bigstone and I see no reason to interfere with the GIC decision to approve the Project.

I. Context

[4] The applicant is a First Nation in Alberta with a membership of approximately 7,752. It is also a band under the *Indian Act*, R.S.C. 1985, c. I-5, and its members are Aboriginal peoples pursuant to subsection 35(1) of the *Constitution Act, 1982*. They have been using and occupying lands in north-central Alberta (Bigstone Territory) prior to and at the time of the Crown's assertion of sovereignty. Bigstone relies on its territory to exercise activities, practices, customs and traditions that include hunting, fishing and harvesting. These traditions are essential for Bigstone people's survival and the preservation of its distinct way of life and culture.

[5] On or about August 14, 1899, Bigstone's ancestors and the Crown concluded Treaty No. 8, which covers a portion of Bigstone Territory and provides for harvesting and governance rights on this territory (Bigstone Treaty Rights). Bigstone asserts unextinguished Section 35 Rights, which protect its territory, as well as harvesting and governance rights against interference and infringement from the Crown. It is not in dispute that the Project is located in Bigstone Territory. In Reasons for Order issued as part of these proceedings (2017 FCA 54),

Justice André Scott recognized that "[t]he Pelican Lake Section is located directly within Bigstone Territory and runs roughshod through three identified ranges of the threatened boreal woodland caribou" and that "the Boreal Caribou is an important and significant element for Bigstone" (at paras. 3 and 49).

[6] On December 15, 2014, Nova, a wholly-owned subsidiary of TransCanada PipeLines Limited, submitted to the NEB a Project Description, thereby triggering the federal regulatory review of the Project. The $1.29 billion Project aims at expanding the existing Nova Gas Transmission Ltd. System in northern Alberta to receive and deliver sweet natural gas. It provides for 230 kilometers of new pipeline in five separate sections looping existing NGTL pipelines, and two compressor station unit additions. This application for judicial review relates to one of the five sections, approximately 56 kilometers long, comprised of the Liege Lateral Loop No. 2, in Pelican Lake Section. It is located entirely on provincial Crown land, and it parallels existing rights-of-way and other disturbances for 93% of the route.

[7] For the Project to proceed, a CPCN was required pursuant to sections 31, 52 and 54 of the *NEB Act*. Since the Project includes more than 40 kilometers of new pipeline, it is also a "designated project" for the purposes of subsection 2(1) of the *Canadian Environmental Assessment Act*, S.C. 2012, c. 19 (the *CEAA*); as such, the NEB was required to conduct an environmental assessment under section 52 of that act (see also sections 2 and 4 of the *Regulations Designating Physical Activities*, S.O.R./2012-147, and section 46 of its schedule).

[8] Being a "major resource project" as defined by Canada's *Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects* (AR, vol. 14 at 2371-2378), the Project was subject to Canada's Major Project Management Office (the MPMO) Initiative. The MPMO coordinated Canada's overall approach to Indigenous consultation for the Project among interested federal departments, which led to the *Project Agreement for the 2017 NGTL System Expansion Project in Alberta* (AR, vol. 14 at 2549-2558). This overall approach to Indigenous consultation was integrated to the extent possible with the NEB hearing process. The consultation process for the Project was carried out in four phases.

A. *Phase I: The Early Engagement Phase*

[9] Prior to filing its Project Application, NGTL engaged and consulted with Bigstone and other Indigenous groups, as required by the *NEB Filing Manual* at 3-3 to 3-11 (AR, vol. 15 at 2666-2674). A list of potentially affected Indigenous groups was established in the Project Description (AR, vol. 14 at 2509), and on February 17, 2015, the Board contacted potentially affected Aboriginal groups, including Bigstone, and provided information about the Project and the review process. A letter from the MPMO was attached, specifying that it "intend[ed] to rely on the NEB's public hearing process, to the extent possible, to fulfil its duty to consult Aboriginal groups" (Nova's Record (NR), vol. 1 at 234-242) and the way it intended to do so. Additional telephone calls and email correspondence between the NEB and Bigstone were exchanged, and a meeting with Bigstone took place on April 29, 2015 to provide information about the Project (AR, vol. 17 at 2944-2970).

B. *Phase II: The NEB Hearing Phase*

[10] On March 31, 2015, Nova formally applied to the NEB and filed a Project Application for approval of the construction and operation of the Project. Attached were an Environmental and Socio-economic Assessment and a summary of the Company's engagement with Indigenous groups, including Bigstone, up to that point in time (AR, vol. 1 at 122-198). Once the Project Application was considered complete, on May 29, 2015 the Board issued a Notice of Hearing and Application to Participate (NR, vol. 1 at 317-328). In its Ruling No. 1, the Board granted intervener status to a number of parties including Bigstone (AR, vol. 2 at 205-230). Through the Board's Participant Funding Program, Bigstone was also granted funding in the amount of $27,000 to participate as an intervener in the hearing.

[11] On July 31, 2015, the Board issued Hearing Order GH-002-2015, which established the process for the public hearing. As an intervener, Bigstone was able to submit written evidence, present oral traditional evidence, ask questions in writing about NGTL's and other interveners' evidence, submit and respond to motions, and present a final argument. Bigstone participated in all of these steps throughout the hearing, which took place from July 2015 to March 2016.

[12] Bigstone issued 197 Information Requests (IRs) to NGTL over two rounds; it brought a motion to the Board to compel further responses, but the Board determined that NGTL had sufficiently answered Bigstone's IRs (AR, vol. 4 at 689-692). Bigstone presented a panel of four elders in Edmonton on November 4, 2015 (AR, vol. 4 at 549-589), and filed written evidence consisting of a *Bigstone Cree Nation Traditional Use Study: TransCanada NGTL 2017 – Interim Report* (Interim TLU Study) and a *Review of Appendix 9-I Preliminary Caribou Habitat*

Restoration and Offset Mitigation Plan (AR, vol. 4 at 615-688). Finally, Bigstone filed written submissions addressing, among other things, the impact of the Project on Bigstone's Aboriginal and Treaty Rights, Bigstone's Project-related concerns with respect to the boreal woodland caribou (the Caribou), Caribou habitat and traditional land and resources use, Bigstone's concerns regarding cumulative effects in its traditional territory, perceived deficiencies in consultation, and comments on the draft Conditions (AR, vol. 5 at 758-780). In January 2016, Bigstone submitted a revised version of its Interim TLU Study: *Bigstone Cree Nation Traditional Use Study: TransCanada NGTL 2017 – Final Report* (Final TLU Study).

[13] Both prior to and parallel with the NEB process, NGTL engaged directly with Bigstone. Eight meetings were held, Bigstone was invited to provide input on preliminary information, it participated in three NGTL biophysical studies and received $225,000 in funding to conduct a TLU Study and otherwise engage in relation to the Project.

C. *Phase III: The NEB Recommendation Phase*

[14] On June 1, 2016, the Board released its 187-page report. The Board recommended that the GIC approve the Project, subject to 36 Conditions. It found that the consultation undertaken and proposed by NGTL for the Project was appropriate for the scope and scale of the Project, and that potentially affected Aboriginal groups had been provided with sufficient information about the process and had had enough opportunities to provide their views (NEB Report at 70-71; AR, vol. 6 at 931-932). The Board was also of the view that the Project-specific effects on use of land and resources for traditional purposes were not likely to be significant, even though it was concerned with the Project's cumulative effects. It was further of the view that the potential

impact of the Project on the rights and interests of Aboriginal groups would be appropriately mitigated given the nature and scope of the Project, NGTL's commitments, proposed mitigation measures and regulatory requirements, and Conditions imposed by the Board for the Project (NEB Report at 83-84; AR, vol. 6 at 944-945).

[15] With respect to its environmental assessment, the Board found that "sufficient routine design and standard mitigation measures ha[d] been identified to mitigate most of the potential adverse environmental effects identified" (NEB Report at 111; AR, vol. 6 at 972). It also found that NGTL was implementing a number of known best practices to mitigate potential adverse environmental effects associated with the presence of species at risk, rare plants and ecological communities, weeds and wetlands (NEB Report at 112; AR, vol. 6 at 973). As regards the cumulative effects analysis, the Board recognized NGTL's efforts to route the pipeline to follow existing rights-of-way and minimize new disturbances, especially in Caribou ranges; it expected the Company to respect the timing window set out to avoid adverse impact on Caribou (NEB Report at 132-133; AR, vol. 6 at 993-994). Given the already substantial ongoing cumulative effects on Caribou in the region due to both direct and indirect habitat disturbance, the Board required all residual effects on Caribou habitat to be considered and compensated (NEB Report at 141; AR, vol. 6 at 1002).

[16] The Board imposed a number of Conditions on NGTL, the most significant being: a commitments tracking table (Condition 5), an environmental protection plan (Condition 6), a revised version of the Caribou Habitat Restoration and Offset Measures Plan (Condition 7), a report on outstanding traditional land use investigations (Condition 8), evidence that it has

received heritage resources permits and clearances from provincial authorities (Condition 10), a plan for Aboriginal participation in monitoring construction activities (Condition 12), a report summarizing NGTL's engagement with all potentially affected Aboriginal groups identified (Condition 13), various programs and manuals regarding construction, operation, maintenance and safety (Condition 15), a construction schedule (Condition 16), construction progress reports (Condition 18), a hydrostatic testing plan (Condition 25), a Caribou habitat restoration implementation report and status update (Condition 31), a Caribou habitat restoration and offset measures monitoring program (Condition 32), Caribou monitoring reports (Condition 33), a Caribou habitat offset measures implementation report (Condition 34), and post-construction monitoring reports (Condition 36) (NEB Report at 170-183; AR, vol. 6 at 1031-1044).

D. *Phase IV: The Post-NEB Report Phase*

[17] On June 2, 2016, the day after the NEB Report was released, the MPMO wrote to Bigstone expressing Canada's interest in consulting directly with Bigstone and advising it that the Crown considered the depth of its duty to consult with Bigstone as being at the high end of the consultation spectrum. To ensure the Crown consultation would be meaningful, the Governor in Council extended, on June 17, 2016, the statutory time limit for Canada's decision in respect of the Project by two months. Bigstone was awarded the maximum amount of $8,500 in funding to participate in post-hearing consultations. The MPMO made efforts to meet as early as mid-July, but Bigstone was unavailable to meet due to an "organizational restructuring process"; officials from the MPMO and the NEB eventually met with officials from Bigstone on August 24 and September 1, 2016. At those meetings, Bigstone was invited to discuss the outstanding issues and proposed accommodation measures. On September 20, 2016, the MPMO shared a

draft Crown Consultation and Accommodation Report (the CCAR) for Bigstone's comments, accompanied by a draft annex specific to Bigstone (the Bigstone Annex). On September 27 and September 30, 2016, the MPMO wrote to Bigstone to request its comments and extended the time initially to September 29, 2016, and then to October 11, 2016. On October 3, 2016, Bigstone advised Canada it wished to comment on the draft CCAR; having heard nothing further from Bigstone on October 24, 2016, the MPMO finalized the draft CCAR and the Bigstone Annex. Chief Gordon T. Auger requested a meeting between Bigstone leadership and the MPMO on October 25, 2016, and suggested that the MPMO consider seeking an extension to current timelines. That letter remained unanswered.

[18] Based on its analysis of the available information, the Crown anticipated minimal impact on Bigstone's Section 35 Rights from its contemplated conduct, and considered that any adverse impact would be addressed by the Conditions proposed by the NEB to ensure the safe construction and operation of the Project. The Crown also believed that it had met its duty to consult with Bigstone.

[19] On October 28, 2016, the Governor in Council issued the Order directing the NEB to issue a Certificate to NGTL in respect of the Project and subject to the Conditions set out in Appendix III of the NEB Report. In the preamble of the Order, it is explained that the Governor in Council came to its conclusion after having considered Aboriginal concerns and interests, being satisfied they had been appropriately accommodated and that the consultation process was consistent with the honour of the Crown. It also accepted the Board's recommendation that, if the Company complied with all the Conditions, the Project would be required by the present and

future public convenience and necessity and would not likely cause significant adverse environmental effects. As a last consideration, the GIC took into account that "the Project would enhance natural gas transmission infrastructure for adequate gas supply and support environmentally sustainable resource development" (AR, vol. 1 at 16).

[20] On November 4, 2016, the NEB issued the Certificate. On December 10, 2016, the Order was published in the *Canada Gazette*, along with an Explanatory Note. While this note is not part of the impugned Order, it proves useful in terms of understanding the context that surrounds it. Worth mentioning is the fact that the GIC considered that NGTL correctly assessed the impacts of the Project on existing infrastructure such as roads and highways. The GIC also determined that the mitigation measures proposed by NGTL to limit disturbance on the Caribou were satisfactory, given the concerns raised by Environment and Climate Change Canada. The GIC noted NGTL's commitment to continue engaging with Aboriginal groups. It also took into account the Conditions developed by the Board to address Health Canada's concerns about noise associated with the Project and the effects of this noise on human health, the two-month extension granted by the Crown to provide for deeper consultation and an online questionnaire to determine the public's interest in the Project. Fifteen people answered that questionnaire and provided 47 responses, a majority of which were in favour of the Project.

[21] On December 7, 2016, Bigstone filed a notice of motion for leave to judicially review the OIC (AR, vol. 22 at 3880). Leave was granted by Justice Johanne Gauthier on January 19, 2017. On the same day, alleging risks to its Aboriginal and Treaty Rights, as well as threats to Caribou, Bigstone requested the NEB to "immediately issue a stop work order for the [Loop]" (AR, vol.

11 at 1890). On December 22, 2016, the NEB dismissed the request as it did not raise any new issues that had not been previously heard and considered (NR, vol. 3 at 877-878). On February 15, 2017, Bigstone filed a motion for an interlocutory injunction in this Court, but it was dismissed by Justice André Scott on March 17, 2017 (NR, vol. 3 at 880).

II. Issue

[22] The only substantive issue raised by this application is whether the Crown has adequately discharged its duty to consult and, if necessary, to accommodate Bigstone.

III. Analysis

A. *The legislative scheme*

[23] The legislative scheme for pipeline approvals set out by Parliament in the *NEB Act* has been aptly summarized in *Gitxaala Nation v. Canada*, 2016 FCA 187 at paragraphs 92 to 127, 485 N.R. 258 (*Gitxaala*). I will therefore refrain from engaging in the same exercise and will focus instead on the particulars of this case.

[24] In a nutshell, section 31 of the *NEB Act* requires a company that wishes to construct a section of a pipeline to apply to the Board to obtain a certificate. Once the Board determines that such a Project Application is complete and ready to proceed to assessment, it issues a Notice of Hearing and Application to Participate convening a public hearing to assess the Project; in the case at bar, this was done on May 29, 2015. On July 31, 2015, the Board issued Hearing Order GH-002-2015, followed by procedural updates, which established a public hearing process that

included a list of issues that the Board would consider during its assessment of the Project, and invited all Aboriginal interveners who wished to do so to inform the Board of their intent to provide oral traditional evidence (AR, vol. 2 at 231-279). The Board conducted its public hearing primarily through a written process which included two rounds of filing evidence, several rounds of IRs, letters of comment, and the submission of final arguments, concluding with NGTL's submission of a reply argument. The one oral component of the hearing was the collection of oral traditional evidence from Aboriginal interveners, which took place in October and November 2015 (NR, vol. 1 at 208).

[25] On June 1, 2016, the Board issued its report. Subsection 52(1) of the *NEB Act* provides that such a report must set out a recommendation as to whether the certificate should be issued, and if so, under what conditions. Subsection 52(2) lists the criteria upon which the Board must base its recommendation, which includes "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application" (*NEB Act* at para. 52(2)(e)). Since NGTL's proposed pipeline section loops for the Project collectively exceed 40 kilometers in length, the Project is a "designated project" under subsection 2(1) of the *CEAA* and requires an environmental assessment for which the Board is the responsible authority, in accordance with subsection 52(3) of the *NEB Act*.

[26] The Board found that the Project is, and will be, required by the present and future public convenience and necessity as requested by subsection 52(1). That conclusion reflected the Board's consideration not only of the criteria mentioned in subsection 52(2) of the *NEB Act* but also of the matters set out in sections 5 and 19 of the *CEAA*. The Board also set out 36

Conditions that it considered necessary or desirable in the public interest, should the Governor in Council direct the Board to issue a certificate to authorize the Project, as required by paragraph 52(1)(b) of the *NEB Act*. The Board was of the view that with these Conditions, the implementation of NGTL's environmental protection procedures and mitigation measures, the Project was not likely to cause significant adverse environmental effects. These Conditions had previously been shared with all participants in the hearing who were then invited to provide their comments.

[27] After the Board has submitted its report, the Governor in Council may, by order, direct the Board either to issue a certificate and to make it subject to the terms and conditions set out in the report, or to dismiss the application for a certificate (*NEB Act* at subsection 54(1)). Such an order must be made within three months after the Board's report, unless the Governor in Council extends that time limit pursuant to subsection 54(3) of the *NEB Act*. In the case at bar, the time limit was extended by two months, to November 1, 2016. The Governor in Council could also have asked the Board to reconsider its recommendation or any terms and conditions, or both (*NEB Act* at subsection 53(1)).

[28] The Crown, through the MPMO, consulted Aboriginal groups on the NEB recommendation to understand the impacts of the Project that were not addressed in the NEB Report and Conditions, where those impacts could be mitigated and where they could not be mitigated, and how any outstanding impact could be accommodated. In the Crown Consultation and Accommodation Report released on October 14, 2016, the MPMO described the consultation process undertaken by the Crown with Aboriginal groups, reported the views of

Aboriginal groups on how the Crown's conduct may potentially impact their rights, explained the Crown's findings regarding the potential impact of the Crown's conduct on Section 35 Rights, and outlined accommodation measures proposed to address potential impact on Aboriginal rights. It concluded that the Conditions proposed by the NEB were responsive to, and appropriately accommodated, the concerns raised by Aboriginal groups.

[29] On October 28, 2016, the Governor in Council issued the Order directing, pursuant to paragraph 54(1)(a) of the *NEB Act*, the NEB to issue CPCN GC-126 to Nova in respect of the Project, subject to the Conditions set out in the NEB Report. It also decided, pursuant to subparagraph 31(1)(a)(i) of the *CEAA*, that, taking into account those Conditions, the Project is not likely to cause significant adverse environmental effects, and directed the NEB to issue a decision statement to that effect (*CEAA* at para. 31(1)(b)).

[30] It is that decision which is the subject of this application for judicial review. Under the legislative scheme put in place by the *NEB Act* and the *CEAA*, the Governor in Council is the only decision-maker. The NEB (and, to a lesser extent, the MPMO) gathers information, consults, analyzes, assesses and makes a recommendation. It does not exercise, either prior to or after the Order made by the Governor in Council, any independent or discretionary power. Accordingly, the Order in Council is the only focus of this application; Bigstone appropriately challenged the legal validity of that decision.

B. *Standard of review*

[31] There is broad agreement between the parties that the standard of review for a discretionary decision of the Governor in Council made under subsection 54(1) of the *NEB Act* is reasonableness. As stated by this Court in *Gitxaala* at paragraph 154, the GIC's discretionary decision to issue the Order in Council and to direct the NEB to issue a CPCN to Nova was "based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest". As such, the GIC is entitled to a very broad margin of appreciation. In the present case, it is beyond doubt that the decision of the GIC was based, as required by the *NEB Act*, on public policy and economic considerations that are diffuse in nature and call for a high level of deference.

[32] There is no need in the case at bar to determine the breadth of the range of acceptable and defensible outcomes on the facts and the law. I acknowledge that a majority of the Supreme Court rejected the notion that the reasonableness standard can be calibrated and therefore expanded or restricted on a sliding scale depending on the nature of the decision being reviewed (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paras. 18 and 73, [2016] 1 S.C.R. 770). It is sufficient to reiterate, as the highest court did in that case, that reasonableness "takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339) and must therefore "be assessed in the context of the particular type of decision-making involved and all relevant factors" (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 18, [2012] 1 S.C.R. 5). I leave it to others to determine how these two approaches (i.e. delineating at a conceptual level the margin of appreciation

afforded to an adjudicator or determining the reasonableness standard in light of the specific context under review) differ at a practical level.

[33] Be that as it may, the issue before this Court is not whether the Order is reasonable under administrative law principles, but rather whether the Crown fulfilled its constitutional duty to consult and accommodate. It is accepted by the parties that determinations pertaining to the existence, content and scope of the duty to consult, as well as to the seriousness of the Aboriginal or treaty claims and the impact of the infringement, are to be reviewed on a standard of correctness to the extent that they can be isolated from issues of fact. As the Supreme Court recognized in *Haida Nation v. B.C. (Minister of Forests)*, 2004 SCC 73 at paragraph 61, [2004] 3 S.C.R. 511 (*Haida*), such questions are no doubt of a legal nature but nevertheless suffused with and premised on an assessment of facts.

[34] Conversely, the adequacy of the consultation and the accommodation is reviewed on a standard of reasonableness as it is a mixed question of fact and law. It requires a combined legal and factual analysis of the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right (*Haida* at paras. 62-63). At that stage, the Court will focus on the process itself, not on the substantive outcome of the consultation and accommodation. As the Supreme Court stated in *Haida* at paragraph 62, "[p]erfect satisfaction is not required"; the duty to consult will be satisfied if the government made reasonable efforts to inform and consult. See also: *Gitxaala* at paragraphs 182-185; *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212 at paragraph 54, 379 N.R. 297; *Canada v. Long Plain First Nation*, 2015 FCA 177 at paragraph 133, 388 D.L.R. (4th) 209; *Yellowknives Dene First*

Nation v. Canada (Aboriginal Affairs and Northern Development), 2015 FCA 148 at paragraph 56, 474 N.R. 350; *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179 at paragraph 47, 474 N.R. 96, rev'd on other grounds 2017 SCC 40.

C. *The existence, content and scope of the duty to consult*

[35] In the case at bar, the Crown acknowledged that it had a duty to consult Bigstone, given that Bigstone had established Treaty Rights and that the potential impact of the Project on the rights and interests of Bigstone would be "moderate to high". On that basis, it assessed the extent of that duty at the "high end of the consultation spectrum" (AR, vol. 21 at 3664-3665). Therefore, no issue arises as to the existence or extent of the duty to consult. It is not in dispute either that deep consultation will normally require the opportunity to make submissions, formal participation in the decision-making process, and the provision of written reasons to show that Aboriginal concerns were considered and how they were factored into the decision (*Gitxaala* at para. 174).

[36] Nevertheless, Bigstone attempted to argue that the Crown made an error of law reviewable under the standard of correctness as it determined that the duty to consult excludes consultation on important *prima facie* stewardship rights related to Caribou. Bigstone claimed that this aspect of its Aboriginal and Treaty Rights was not addressed in the NEB Report, and that the CCAR and the MPMO consultations did not substantively respond to the evidence that it presented in that respect.

[37] First of all, the NEB Report does address Bigstone's concerns relating to Caribou habitat. At pages 140 and 141 of the NEB Report (AR, vol. 6 at 1001-1002), it specifically refers to Bigstone's (and other First Nations') concerns and measures that have been taken to restore Caribou habitat and populations. While the CCAR may not be as explicit, this is not sufficient in and of itself to conclude that the MPMO paid no attention to that issue; indeed, there may well be other reasons why no such mention is made in the CCAR, as I shall explain later in these reasons. In any event, I agree with Nova that Bigstone's complaint raises issues regarding the adequacy of the consultation, and not the extent or the depth of the consultation. Bigstone may well be unhappy with the sufficiency of the consultations, how they were conducted, their thoroughness and the responsiveness of the Crown's representatives, but there was certainly no ambiguity as to the necessity to consult, the scope of that duty and the nature and impact of Bigstone's Aboriginal and Treaty Rights.

[38] Accordingly, I will now deal with Bigstone's arguments going to the sufficiency and adequacy of the consultation, and assess them on a reasonableness standard.

D. *The sufficiency and adequacy of the consultation and accommodation*

(1) The Phase IV consultations were left too late

[39] Bigstone raised a number of issues with respect to the Phase IV consultation process. First, it claims that the Crown released the CCAR without its input, as a result of having provided a draft version to Bigstone only 18 days before it was finalized by the MPMO. However, a careful reading of the Record shows that Bigstone faced a short deadline not because the Crown rushed the process, but because Bigstone failed to act diligently. It is to be

remembered that the Crown contacted Bigstone by email on June 2, 2016, one day after the release of the NEB Report, to begin post-recommendation consultations and to inform it of funding availability. On June 16 and June 24, 2016, the Crown tried again to contact Bigstone to arrange a meeting (CCAR, AR, vol. 21 at 3665). Even though the Crown was unable to arrange such a meeting, Bigstone nevertheless sent its application for funding to the MPMO on June 24, 2016, which would tend to indicate that Bigstone had knowledge of the Crown's first attempt to meet on June 2, 2016. It is only on July 5, 2016, as a result of a further attempt by the Crown on that same day to set up a meeting, that Bigstone responded that it was "currently undergoing an organizational restructuring process" (AR, vol. 19 at 3293).

[40] In the following week the Crown tried to reach its original contact person with Bigstone without success, and then attempted to contact another individual identified by Bigstone as a contact person (AR, vol. 19 at 3295). Finally, on July 11 and 18, 2016, the Crown had to contact the firm that made the TLU Study for Bigstone to find out who was now in charge of participating in consultations (AR, vol. 19 at 3295 and 3340-3341). As a result of all these failed attempts to contact Bigstone, the first meeting occurred almost three months after the NEB Report was released, that is on August 25, 2016. At that meeting, the Crown gave a copy of a presentation about the Crown's consultations with respect to the Project. That presentation contained a timeline indicating that the Crown would seek input on the CCAR in September 2016 and that the GIC's decision would be made at the beginning of November (as a result of the GIC having extended the statutory time period to render its decision on the NEB's recommendation by two months).

[41] In its memorandum, Bigstone states that it requested a second meeting (which took place on September 1, 2016) because the first meeting was “rushed”. Yet it appears from an email sent to the MPMO by Bigstone’s representative that the meeting was rushed because of this representative (AR, vol. 19 at 3387). Moreover, that same representative left in the middle of the second meeting and was replaced by someone else, despite the fact that he was the one who had proposed the time and place of that meeting. This is clearly evidence that Bigstone was not seriously engaged in the process.

[42] It is true that the deadline given to Bigstone (and all other First Nations involved in the process) to comment on the draft CCAR was tight. The draft CCAR was shared on September 20, 2016, and the initial deadline for comments was September 26, 2016. Yet that deadline was twice extended, first to September 29, 2016, and then to October 11, 2016. Bigstone wrote to the MPMO on October 3, 2016 to advise that they would provide comments prior to the deadline, but did not in fact provide their comments before the CCAR was finalized on October 14, 2016.

[43] In light of that sequence of events, Bigstone cannot seriously complain that it was not meaningfully consulted after the release of the NEB Report. Both sides had approximately four months to consult, but the first three months were lost as a result of Bigstone’s lack of engagement. On October 25, 2016, Chief Gordon T. Auger of Bigstone wrote to the MPMO expressing its “interest in becoming involved in the Federal consultation process for the 2017 NGTL System Expansion Project”, requesting an “immediate meeting” and recommending the MPMO to seek an extension of time, the failure of which would result in “the Crown’s failure to discharge its duty to consult”. The Chief finally insisted on the fact that “Bigstone is committed

to employing all avenues available under the law to ensure the Project does not move forward and adversely impact rights and titles or causes irreparable harm to Bigstone" (AR, vol. 7 at 1157-1159). After weeks of silence, unanswered emails and comments never provided by Bigstone despite its commitment to provide them, this letter is disingenuous and flies in the face of an objective and fair-minded appreciation of the parties' conduct. The request came way too late, and the Crown was justified in not agreeing to a time extension, especially given the fact that it had already granted a two-month extension.

(2) The funding provided was insufficient

[44] Second, Bigstone argues that the lack of funding prevented meaningful consultations at Phase IV. With all due respect, this argument is without merit. First, I note that Bigstone was awarded the maximum amount of $8,500 in funding to participate in post-hearing consultations. This was on top of the $27,000 provided to Bigstone by the NEB in participant funding (AR, vol. 14 at 2360) and of the approximately $225,000 provided by NGTL to fund Bigstone's engagement in the Project (AR, vol. 13 at 2313).

[45] Moreover, the Crown is under no obligation to provide funding. The two cases relied upon by counsel for Bigstone to support such a duty clearly do not go that far (*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 2214, [2007] 3 C.N.L.R. 221 (Ont. Sup. Ct.) (*Platinex*); *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20). At best, it will be but one factor to determine if the consultations were meaningful; or, as stated in *Platinex*, "[t]he issue of appropriate funding is essential to a fair and balanced consultation process" (at para. 27). In the case at bar, Bigstone

has not even attempted to show how the purported lack of funding impacted on its participation in the consultation process and how much additional funding would have been necessary. Indeed, Bigstone returned a signed Funding Agreement two months after its application had been approved, after having been reminded twice (on August 8 and September 20, 2016) that they had missed the deadline to do so (which was July 27, 2016) (AR, vol. 19 at 3344 and 3400).

(3) The consultations were not meaningful

[46] Bigstone also alleges that the Phase IV consultations were not effective or properly managed and claims that the meetings were an exchange of information only, did not respond to Bigstone's concerns, and did not provide Bigstone with a platform to engage in meaningful discussions on outstanding Project-specific issues. These submissions, however, are not substantiated and are not borne out by the Record.

[47] There is no doubt that the Crown had a duty to consult with Bigstone and other Indigenous groups impacted by the Project. That duty is grounded in the honour of the Crown, and arises every time the Crown has actual or constructive knowledge of the potential existence of Section 35 Rights and contemplates conduct that might adversely affect those rights (*Haida* at para. 35; *Gitxaala* at paras. 171-172). It is equally beyond dispute that the Governor in Council, when considering a pipeline project under the *NEB Act* that may impact Section 35 Rights, must ensure that the duty to consult has been fulfilled before it actually gives its approval for the issuance of a certificate by the NEB (*Gitxaala* at paras. 168 and 237).

[48] In the case at bar, Canada readily conceded that its duty to consult lay at the high end of the spectrum, since Bigstone had established Treaty Rights as a Treaty 8 signatory, the potential infringement of the Project is of high significance and the risk of non-compensable damage is high. In such circumstances, consultation might entail the opportunity for the potentially affected Indigenous groups to make submissions and participate in the decision-making process, as well as the provision of written reasons showing that Aboriginal concerns were taken into account and factored into the decision (*Haida* at para. 44; *Gitxaala* at para. 174).

[49] The duty to consult is not unlimited in scope and does not confer a veto power on any First Nation. As the Supreme Court stated in *Haida*, the Crown is not to be held to a standard of perfection; so long as reasonable effort to inform and consult has been made, the duty to consult will have been discharged (*Haida* at para. 62; *Gitxaala* at para. 184). On the basis of the Record before the Court, I am of the view that the consultation of Bigstone, viewed as a whole, was genuine and sufficient for the Crown to meet its duty even at its highest threshold.

(a) *The GIC unlawfully relied on the NEB Process*

[50] First, the Governor in Council was entitled to rely on the NEB process to fulfill, at least in part, its duty to consult. As acknowledged by the applicant itself, the Crown could delegate the procedural aspects of the consultation to the NEB and rely on the regulatory process to either partially or completely fulfil this duty. Of course, the Crown must take further measures to meet its duty where the regulatory process does not achieve adequate consultation or accommodation (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 22, [2017] 1 S.C.R. 1069 (*Clyde River*)). As the Supreme Court stated in that case:

> This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments. Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered.
>
> (references omitted)
>
> See also: *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at paragraph 44, [2017] 1 S.C.R. 1099 (*Chippewas*); *Haida* at paragraph 53; *Gitxaala* at paragraph 178.

[51] Canada notified Bigstone early on that it intended to rely on the NEB process in partial fulfillment of its duty to consult. In the *Project Agreement for the 2017 NGTL System Expansion Project in Alberta*, which was signed in September 2015, Canada made it clear that it would rely, to the extent possible, on the NEB process to discharge any duty to consult for the Project (AR, vol. 15 at 2556). On February 15, 2015, the Director General of Operations for the MPMO, Mr. Jim Clarke, wrote to Bigstone Chief Gordon T. Auger to inform Bigstone of Canada's plans for consultation:

> For the proposed 2017 NGTL System Expansion, the Crown will rely on the National Energy Board's (NEB) public hearing process, to the extent possible, to fulfil its duty to consult. Accordingly, this process will be used to identify, consider and address the potential adverse impacts of the proposed project on Aboriginal and treaty rights. The process provides an open, comprehensive and participatory venue for Aboriginal groups and other affected parties to express their concerns and interests related to a proposed project.
>
> …
>
> The Government of Canada encourages all Aboriginal groups whose established or asserted rights could be impacted by the project to apply to the NEB to participate in the public hearing process.
>
> AR, volume 17 at 2916-2917.

[52] It was reasonable for the Crown to rely on that process to consult with Bigstone and other affected Aboriginal groups. The case law is clear that existing regulatory processes are reasonable and a practical means of undertaking consultation, and Aboriginal groups have a responsibility to make use of such processes if they wish to voice their concerns (*Clyde River* at para. 22; *Chippewas* at para. 44; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74 at para. 40, [2004] 3 S.C.R. 550 (*Taku River*); *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para. 39, [2010] 3 S.C.R. 103; *Gitxaala* at paras. 175-176). A review of the Record establishes that the NEB process was structured to encourage significant and meaningful Aboriginal consultation. Bigstone was indeed provided with ample information about the Project, was provided with participant funding to assist in its involvement in the Crown consultations, and was substantially involved in the hearing process. As an intervener, it filed its Interim and Final TLU Studies, as well as a Caribou Technical Review. It also submitted two rounds of IRs, filed written motions, transmitted traditional oral evidence and submitted a final argument. It is clear that Bigstone was provided ample opportunity to express its concerns about the Project and to discuss possible ways in which its concerns might be addressed.

[53] It is apparent from the numerous accommodation measures imposed on NGTL through the Conditions that the NEB seriously considered Bigstone's rights and concerns. In particular, Bigstone requested confirmation from NGTL that an accident response plan would be submitted and asked NGTL to commit to providing regular updates on the status of the plan. Having considered NGTL's proposed measures to address emergency preparedness, the Board found them appropriate and imposed Conditions in that respect (NEB Report at 44; AR, vol. 6 at 905).

Bigstone was also concerned by the potential contamination of traditional foods, medicine and agricultural crops, the loss of habitat and potential cumulative environmental effects of the Project. The Board considered those submissions and those of other First Nations, and came to the conclusion that the effects of the Project on traditional land use would not likely be significant and would be appropriately mitigated with the implementation of NGTL's commitments, proposed mitigation measures and fulfillment of regulatory requirements, and the Conditions imposed on the Project by the Board (NEB Report at 74 and 83-84; AR, vol. 18 at 935 and 944-945).

[54] Bigstone's main preoccupation appears to be with the Project's potential impact on Caribou and Caribou habitat. Bigstone, as well as other Aboriginal groups, expressed concerns with NGTL's preliminary Caribou Habitat Restoration and Offset Measures Plan for the Project, and the cumulative effects on Caribou. The Board addressed these issues at length in its Report (see NEB Report at 129-143; AR, vol. 18 at 3190-3204), and came up with seven Conditions (Conditions # 6, 7, 18, 31-34) in regard to habitat restoration, offset measures, monitoring, reporting and cumulative impacts, in addition to NGTL's own commitments to implementing best practice mitigation measures.

(b) *The Conditions constitute an unlawful delegation of the duty to consult to the NEB*

[55] In its memorandum of fact and law, Bigstone alleges that many of the Conditions set out by the NEB are prospective and contemplate future consultation, and thereby constitute an unlawful delegation of the duty to consult to the NEB. Relying on *Gitxaala* at paragraph 237, it

argues that the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the NEB.

[56] This objection is easily dealt with. The *NEB Act* makes it clear that the role of the Board is not merely to assess pipeline projects and issue orders or certificates to construct and operate such projects, but also to oversee and supervise their construction, operation and abandonment. This is a dynamic process that is not frozen in time. Indeed, the Board plays an ongoing regulatory role with respect to federally-regulated pipeline infrastructure, ensuring compliance and enforcing safety and environmental protection measures (see, for example, sections 13, 21, 48, 49, 51.1 and 136 of the *NEB Act*). The fact that the NEB may impose conditions requiring the proponent to submit further information for the NEB review or approval at a later stage, therefore, does not detract from the requirement that it be satisfied in the first place that it has sufficient information at the end of the hearing to issue a recommendation with terms and conditions to which the certificate should be subject.

[57] The same is true with respect to environmental assessments. Given the ongoing and dynamic nature of large projects and the early phase of the process at which such assessments are made, it is obviously reasonable to recommend further studies, in order to gather more information. This possibility is indeed contemplated by paragraph 29(1)(b) of the *CEAA*, according to which the responsible authority carrying out an environmental assessment of a designated project requiring the issuance of a certificate pursuant to section 54 of the *NEB Act* is explicitly empowered to make recommendations with respect to the follow-up program that is to

be implemented for that project. Commenting on a similar provision in the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 at section 38, this Court stated:

> Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages…and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.
>
> *Alberta Wilderness Assn v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th) 177 at paragraph 14, 201 N.R. 336 (F.C.A.).

[58] Obviously, the responsible authority for the purposes of the *CEAA*, must have sufficient information to make a recommendation with respect to the designated project, taking into account the implementation of any mitigation measures that it may set out in its report. Ultimately, however, the decision is made by the Governor in Council under section 54 of the *NEB Act* and subsection 31(1) of the *CEAA*, and it is for that body to determine whether it has sufficient information to assess whether the project is in the public interest and whether or not it is likely to cause significant adverse environmental effects and whether these effects can be justified.

[59] I am therefore of the view that the Conditions found in the NEB Report do not amount to an impermissible and unlawful delegation of the duty to consult. The Governor in Council was entitled to rely on an existing regulatory and environmental assessment process to fulfil its duty, and came to its own conclusion on the basis of the evidence, recommendation and proposed

mitigation measures that were put to it, including the information derived from the Phase IV consultations. Moreover, 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. As the Supreme Court recognized in *Taku River* at paragraph 45, project approval is "simply one stage in the process by which a development moves forward" (see also *Gitxaala* at para. 177). It is to be expected that the Crown will be responsive to outstanding or fresh First Nation concerns throughout the life of the project.

(c) *The meetings with the Crown amounted to an exchange of information rather than meaningful consultation and Bigstone's concerns were not appropriately dealt with*

[60] Bigstone also argued that the consultations which took place after the release of the NEB Report were not meaningful because the meetings were an exchange of information only, did not respond to Bigstone's concerns, and did not provide a platform to engage in real discussions on unresolved issues. Bigstone has not provided any particulars to support those allegations, and the Record does not bear them out.

[61] According to the MPMO's records of the two meetings that took place between the representatives of Canada and Bigstone, the Crown clearly appears to have been open to suggestions of accommodation and mitigation measures. The main concerns and issues raised by Bigstone were explicitly identified, yet Bigstone failed to propose any possible accommodation or mitigation measures to alleviate its apprehensions.

[62] Bigstone also alleges that the MPMO did not facilitate a meeting amongst Environment Canada or Natural Resources Canada and its representatives. Once again, it would appear that if such a meeting did not take place, it is because Bigstone never requested it. In a letter sent to Bigstone and all other First Nations on June 2, 2016 (the day after the NEB Report was released), the MPMO Director of Operations suggested that representatives of other federal departments be invited to participate in future meetings, "depending on the topics you identify for discussion" (AR, vol. 19 at 3266). Bigstone never took that offer up. It should also be noted that the MPMO is part of Natural Resources Canada.

[63] Bigstone further complains that the Bigstone Annex contains an incomplete list of its concerns and does not demonstrate how its scientific data and Indigenous knowledge was incorporated into decision-making processes. This argument can easily be rebutted. As previously mentioned at paragraph 17 of these reasons, the MPMO wrote to Bigstone and provided a copy of the draft CCAR and draft Bigstone Annex for its review and comments on September 20, 2016; despite being given two extensions of time, Bigstone failed to respond. Moreover, there is no evidence that Bigstone specifically raised the issue of the Project's potential impact on Caribou at either meeting, which it now claims is of major concern. When combined with the fact that Bigstone was far from responsive to the Crown's requests for meetings and eventually met for the first time almost three months after having been contacted by the Crown, one is drawn to the inescapable conclusion that Bigstone did not live up to its part of the bargain. As the Supreme Court stated in *Haida* at paragraph 42, "good faith on both sides is required".

(4) The reasons provided are inadequate

[64] Bigstone then argues that from the reasons set out in the OIC, the Explanatory Note, and the CCAR, one cannot tell whether its Aboriginal and Treaty Rights were considered and how they influenced the OIC. The OIC is the only evidence before this Court (an important part of the Record showing what formed the basis of the GIC decision is not before this Court as it is subject to the Cabinet confidence privilege under section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5), and it does not include all of the concerns that Bigstone raised either during or following the NEB hearing with Canada. As for the Explanatory Note, it is not an "impact assessment of the rights at stake" and of possible accommodation, but rather in Bigstone's view, a mere summary of the process up until the date of the GIC decision. The CCAR, in turn, cannot demonstrate that the GIC had proper regard and appreciation of the Aboriginal and Treaty Rights at stake since it was drafted by the MPMO and is only capable of addressing issues up to the point of the GIC's decision.

[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] 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.

[66] The OIC that is the subject of this application for judicial review does not suffer from the same deficiency as the OIC that was challenged in *Gitxaala*. In that case, this Court found that the OIC was lacking, in that it contained only a single recital on the duty to consult, merely stating that a process of consultation was pursued. Here, the OIC clearly takes a position and expresses the view that Canada has fulfilled its duty. The fourth "whereas" clause reads as follows:

> Whereas the Governor in Council, having considered Aboriginal concerns and interests identified in the Crown Consultation and Accommodation Report, 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.
>
> AR, volume 1 at 16.

[67] This statement leaves no room for ambiguity: it is clear that the GIC considered its obligation to consult and, if necessary, to accommodate, and that it is of the view that it has fulfilled that obligation. The Explanatory Note, although not part of the Order, expands on this preliminary clause. It states that the Crown relied on the NEB review process and its own consultative activities to discharge its duty to consult. It then goes on to say:

> To evaluate the adequacy of the Crown's consultation, including accommodation, NRCan drafted a Crown Consultation and Accommodation Report (CCAR). The CCAR includes an analysis of issues raised, proposed mitigation measures, the NEB response and NEB conditions. The CCAR documents the Crown's consultation process with Indigenous groups, issues raised, potential impacts on Aboriginal rights, and accommodation measures.
>
> AR, volume 21 at 3742.

[68] As a result, it cannot be said, as in *Gitxaala*, that there is no indication the GIC has received any information about the consultation process. The Explanatory Note summarizes the consultation process, the concerns expressed by the Aboriginal groups who participated in the NEB process and the conclusions of the Board, and the consultation that took place in the post-NEB Report phase.

[69] Nor can it be said, as in *Gitxaala* at paragraph 317, that the CCAR "did not determine anything about Aboriginal rights or title and gave no explanation on how those non-assessed rights affected, if at all, its decision that the Project would not significantly adversely affect the interests of Aboriginal groups that use lands, waters or resources in the Project area". A careful reading of that report shows that the Crown 1) explained its strength of claim and depth of consultation analysis in respect of each of the Aboriginal groups potentially affected by the Project, including Bigstone; 2) identified and assessed evidence of the Aboriginal perspective on their main concerns; 3) considered the Aboriginal evidence presented in the NEB process as well as other evidence presented after the NEB process; and 4) addressed each of the concerns raised by Aboriginal groups and discussed how those concerns impacted the Crown's decisions on 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."

[71] In *Gitxaala*, this Court concluded its analysis of the requirement to give reasons with the following paragraph:

> Had the Phase IV consultation process been adequate, had the reasons given by Canada's officials during the consultation process been adequate and had the Order in Council referred to and adopted, even generically, that process and the reasons given in it, the reasons requirement might have been met. …
>
> *Gitxaala* at paragraph 324.

There is absolutely no doubt in my mind that in the case at bar, all of these requirements have been met.

(5) The Crown did not accommodate Bigstone's concerns

[72] Bigstone's final argument is that the Crown failed to adequately accommodate its concerns. Its concerns related to the impacts of the Project on Caribou and Caribou habitat, and on traditional land and resources use. Relying on its Interim TLU Study that was filed with the Board, Bigstone claims that they requested the following accommodation measures:

> (a) further engagement with Bigstone to assess impacts and develop accommodation measures; (b) implementation of Indigenous knowledge in the development of monitoring and reclamation plans and programs; (c) agreement to conduct further studies and assessments; (d) support of a Company liaison employed by Bigstone; (e) development and implementation of a community-based monitoring program; (f) formation of a multi-stakeholder working group focussed on restoring Boreal Caribou; and (g) development of management strategies that minimize potential for impacts to wildlife and Harvest Rights.
>
> Applicant's revised memorandum of fact and law at paragraph 80. See also AR, volume 4 at 685-688.

[73] Canada obviously had a duty not only to consult, but also to accommodate in order to substantially address Bigstone's legitimate concerns. As the Supreme Court stated in *Taku River* at paragraph 25, "[r]esponsiveness is a key requirement of both consultation and accommodation". In some cases, meaningful consultation may require the Crown to change its proposed course of action to address Aboriginal concerns and avoid irreparable harm or minimize the effects of infringement.

[74] Here, NGTL made a number of commitments to protect Caribou and Caribou habitat, including (1) developing a Caribou Habitat Restoration and Offset Measures Plan; (2) enabling construction to occur primarily in the winter season to avoid Caribou restricted activity periods; and (3) including, in addition to other measures for wildlife, further mitigation measures specifically for Caribou ranges. These commitments were recorded by the Board in its Report (AR, vol. 6 at 992-993), and are enforceable under Condition 5 (AR, vol. 6 at 1032); they are also referred to in the CCAR at page 34 (AR, vol. 21 at 3656).

[75] The Crown also specifically endorsed in the CCAR the seven Conditions proposed by the NEB to mitigate the direct impact on Caribou and Caribou habitat (see para. 54 of these reasons), and caused the Board to issue CPCN GC-126 subject to those Conditions. The Crown accepted that protecting the Caribou is of the utmost importance, given its status as threatened under the *Species at Risk Act*, S.C. 2002, c. 29, and concluded its analysis of this issue in the following way:

> The Crown is of the view that NEB Certificate Conditions 6, 7, 18, 31, 32, 33, and 34 will directly ensure that potential impacts to caribou and caribou habitat are minimized and mitigated. More specifically, NGTL is required to file and implement a Caribou Habitat Restoration Implementation Report, a Caribou

> Habitat Restoration and Offset Measures Monitoring Program, Caribou Monitoring Reports, and a Caribou Habitat Offset Measures Implementation Report. NGTL is also required to file construction progress reports which include how work on the Project will be avoided, where feasible, during the restricted times to reduce impacts to pregnant cows and their calves. Other commitments include mitigation measures specific to caribou ranges and continuing discussions with Alberta Environment and Parks on the identification of priority offset locations.
>
> Furthermore, in the event that restoration and offset activities by NGTL are not successful, the Minister of Environment and Climate Change could take further steps under the *Species at Risk Act* to protect critical habitat on provincial lands, including caribou habitat. A protection order, if approved, could halt development activities in the region while further conservation efforts are put in place.
>
> CCAR at 35-36; AR, volume 21 at 3657-3658.

[76] On the basis of the foregoing, combined with the fact that Bigstone did not proactively participate in the post-NEB consultation process, did not specifically raise the issue of the Project's potential impact on Caribou at either meeting with the MPMO, and did not avail itself of the opportunity to provide comments on the draft CCAR, I am of the view that Bigstone failed to establish that its concerns were not heard and accommodated. When viewed as a whole, the consultation process resulted in reasonable efforts to inform, consult and accommodate as required by the Crown's fiduciary obligations.

IV. Conclusion

[77] In light of the conclusion that I have reached, I need not comment on NGTL's further submissions that Bigstone's application for judicial review was filed for the ulterior motive of gaining leverage in its negotiations for contracting opportunities on the Project, and that in any event it is moot. Suffice it to say that the declarations sought by Bigstone about the Crown's alleged breaches of its duties were not moot, despite the construction of the Project on Bigstone's

traditional territory being completed, as the Project has a long life cycle and the declarations could have had an impact on future interactions and negotiations between the Crown and Aboriginal groups.

[78] I propose that the application be dismissed with costs. As the parties sought the right to make submissions in respect of the amount of such costs, I propose that should they be unable to agree on such amount, they be entitled to make submissions on the following basis. Within seven days of the issuance of these reasons, the respondents shall either advise the Court that they do not wish to make a submission on costs (in which case no separate judgment will be issued), or they shall serve and file a submission on costs not exceeding three pages, double-spaced. The submissions may include a request that costs be fixed as a lump sum inclusive of disbursements. Within seven days of service of the submissions, the applicant may submit a response of not more than three pages, double-spaced.

"Yves de Montigny"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	CALGARY, ALBERTA
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CONCURRED IN BY:	GAUTHIER J.A. NEAR J.A.
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APPEARANCES:

Kennedy Bear Robe Robin Dean Amyn Lalji	FOR THE APPLICANT
Olivia Dixon Sander Duncanson	FOR THE RESPONDENT NOVA GAS TRANSMISSION LTD.
Bruce Hughson Susan Eros	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
Mark Watton Jana Nicholson	FOR THE INTERVENER

SOLICITORS OF RECORD:

Miller Thomson LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Osler, Hoskin & Harcourt LLP Barristers and Solicitors Calgary, Alberta	FOR THE RESPONDENT NOVA GAS TRANSMISSION LTD.
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
National Energy Board Calgary, Alberta	FOR THE INTERVENER