IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blueberry River First Nations v. British Columbia (Natural Gas Development),* 2017 BCSC 540

Date: 20170331
Docket: S159673
Registry: Vancouver

Between:

Blueberry River First Nations

Petitioner

And

Minister of Natural Gas Development

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Petitioner:	M. Giltrow N. Hume
Counsel for the Respondent:	E. Christie A. Peacock
Place and Date of Trial/Hearing:	Vancouver, B.C. November 14-16, 2016
Place and Date of Judgment:	Vancouver, B.C. March 31, 2017

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Introduction

[1] The petitioner, Blueberry River First Nations ("BRFN"), applies pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 for an order setting aside the decision of the respondent Minister of Natural Gas Development (the "Minister") to enter into a Long Term Royalty Agreement ("LTRA"), dated May 20, 2015, with Progress Energy Canada Ltd. ("Progress Energy") and four other parties (the "Decision").

[2] BRFN alleges that the intent of the LTRA is to encourage and incentivize oil and gas development in areas of Northeast British Columbia that encompass its traditional territories and that the Decision is one that triggers the Crown's duty to consult. It is common ground that the Minister did not consult with BRFN about the LTRA and it is on this basis that BRFN seeks to set aside the Decision.

[3] The Minister submits that the LTRA is simply concerned with setting royalties payable to the Province for oil and gas production and does not deal with any development activities that may be undertaken by Progress Energy. As such, the Decision is not one that triggers the duty to consult.

Background

The Parties

[4] BRFN is a First Nation and a successor to an original signatory to Treaty No. 8, pursuant to which BRFN has Treaty rights which are protected by s. 35 of the *Constitution Act, 1982.*

[5] The Minister is responsible for administering the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361 ("*PNGA*") which governs the management of petroleum and natural gas resources in the Province. Pursuant to the *PNGA*, the Minister grants rights to explore for or produce these resources through tenures issued under the *PNGA* and related Regulations.

[6] While not a party to this proceeding, Progress Energy is one of five corporate entities that together operate a joint venture under the name North Montney Joint

Venture ("NMJV"). As described in the affidavit of Geoff Turner, the Director of Pricing, Tenure and Royalty Policy in the Ministry of Natural Gas Development, the NMJV exists for the primary purpose of supplying natural gas to the Pacific North West LNG facility ("PNW-LNG Facility") proposed for construction in close vicinity to Prince Rupert, B.C. The project proponent of the PNW-LNG Facility is the Pacific NorthWest LNG Limited Partnership, a principal partner of which is Progress Energy. The PNW-LNG project is referred to as an integrated project in that the owner of the LNG facility also produces the natural gas required to supply the facility.

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BRFN's Treaty 8 Rights

[7] Treaty 8 created reciprocal rights and obligations on the part of BRFN and the Crown. Generally speaking, under the Treaty, the First Nations signatories surrendered all rights to the identified lands in exchange for various commitments made by the Crown. The intent and effect of Treaty 8 is well described by the Supreme Court of Canada in *R. v. Badger*, [1996] 1 S.C.R. 771 at paras. 39-40 as follows:

> 39 Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap.…
>
> 40 Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered … saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".
>
> Second, the right could be limited by government regulations passed for conservation purposes.

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Regulatory Regime Governing Petroleum and Natural Gas Resources and the Payment of Royalties

[8] In most areas of B.C., the provincial Crown owns the subsurface petroleum and natural gas resources and it grants rights to explore for or produce these resources through tenures issued under the *PNGA*. That *Act* establishes mechanisms by which parties may obtain such tenures.

[9] Section 73 of the *PNGA* deals with royalties payable to the Crown in respect of petroleum and natural gas production in the province, and provides in part as follows:

> **73** (1) Royalties are reserved to the government on petroleum and natural gas produced from any location held under this Act.
>
> (2) The Lieutenant Governor in Council may prescribe the royalty that is payable to the government for petroleum and natural gas and, without limiting that power, the Lieutenant Governor in Council may make regulations respecting
>
> (a) royalties in different amounts for different classes of petroleum or natural gas,
>
> (b) the person or class of person required to pay the royalty,
>
> (c) the assessment and reassessment of royalty,
>
> (d) appeals from assessment or reassessment of royalty,
>
> (e) refunds of royalty,
>
> (f) exemptions from payment of royalty,
>
> (g) time limits and time periods related to royalties including assessments, reassessments, appeals, refunds or exemptions and including different time limits and time periods for different classes of persons,
>
> (h) the classification of petroleum or natural gas by any factors or characteristics including qualities, locations or dates of initial production, and
>
> (i) the calculation and payment of interest on overpayment of royalty.
>
> …

[10] As set out in s. 73(2), the amount of royalties payable may be set by regulation and in this regard, two regulations have been enacted: the *Net Profit Royalty Regulation*, B.C. Reg. 98/2008 and the *Royalty and Freehold Production Tax Regulation*, B.C. Reg. 495/92 (the "Royalty Regulation").

[11] According to Mr. Turner, over 95% of petroleum and natural gas royalties collected by the province are paid pursuant to the Royalty Regulation. Mr. Turner also deposes that:

> The Royalty Regulation also established a range of "royalty programs". These royalty programs alter the royalties charged under the Royalty Regulation based on a variety of factors, including: the date that a well was drilled, the date of production, the location of the well, the depth of the well, the productivity characteristics of the well, the composition of the substances produced from the well, and the construction of certain infrastructure projects. Royalty programs have been established over a number of years and are designed to maintain British Columbia's competitiveness as a jurisdiction for investment in petroleum and natural gas exploration and development.

[12] Mr. Turner deposes further that these royalty programs change from time to time, depending on provincial fiscal policy objectives.

[13] Alternatively, royalties may be established by agreement under ss. 78 or 78.1 of the *PNGA*, which provide:

> **78** Despite section 73 and the regulations under that section, the minister may make an agreement establishing the royalty to be paid to the government, and the method of calculating the royalty, on petroleum and natural gas produced from a unitized operation or as the result of a conservation plan or a special project under section 75 of the *Oil and Gas Activities Act*.
>
> **78.1** (1) Despite section 73 and the regulations made under that section and subject to subsection (2) of this section, the minister may, with the approval of the Lieutenant Governor in Council, enter, with a person, into an agreement establishing the royalty to be paid by the person to the government, and the method of calculating the royalty, on petroleum or natural gas produced from a specified location or class of locations.
>
> …

[14] A tenure obtained under the *PNGA* does not itself authorize or permit any exploration or extraction activities, nor does it accord the holder any surface rights to the area encompassed in the tenure. Pursuant to the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 ("*OGAA*"), all oil and gas activities are subject to regulation by the Oil and Gas Commission (the "OGC") pursuant to the terms of that *Act*. Oil and gas activities are defined in s. 1 of the *OGAA* to include:

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…

> (a) geophysical exploration,
>
> (b) the exploration for and development of petroleum, natural gas or both,
>
> (c) the production, gathering, processing, storage or disposal of petroleum, natural gas or both,
>
> (d) the operation or use of a storage reservoir,
>
> (e) the construction or operation of a pipeline,
>
> (f) the construction or maintenance of a prescribed road, and
>
> (g) the activities prescribed by regulation.

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[15] Section 21 of the *OGAA* stipulates that no person may carry out an oil and gas activity unless that person holds a permit authorizing the activity or is otherwise ordered to carry out the activity under an order issued pursuant to the *OGAA*. Section 24 sets out the application requirements for a permit, including the information required to be submitted in support of the application.

[16] The *Environmental Protection and Management Regulation*, B.C. Reg. 200/2010, enacted under the *OGAA*, establishes environmental protection measures that must be complied with when carrying out oil and gas activities pursuant to a permit issued under the *OGAA*.

[17] As part of its mandate to regulate oil and gas activities, the OCG is responsible for consultation with First Nations whose rights may be affected by the activities. In his affidavit sworn January 22, 2016, James O'Hanley, Deputy Commissioner of the OCG, describes the consultation process. He states at paras. 26 and 38:

> [26] In conjunction with reviewing applications by proponents for oil and gas activities the OGC is responsible to ensure fulfilment of the Province's duty to consult with First nations concerning oil and gas development and extraction activities. As part of the consultation process with First nations, the OGC assesses the potential impacts of an application on First nations' interests and endeavours to eliminate or mitigate any anticipated adverse impacts by working with the applicant to adjust the application and by imposing conditions upon a proponent, or by amending a permit.
>
> …

> [38] At the conclusion of the consultation process, including a review of any proposed changes to a proposed oil and gas activity, the First Nation Liaison Officer will provide information to the decision maker, including: First Nations' interests; potential adverse impacts to the exercise of treaty rights; whether mitigation should be required and methods by which such mitigation may occur including recommended permit conditions; and recommendations regarding the appropriateness of such measures in addressing the interests and preventing potential infringement of treaty rights. The decision to approve, deny, or modify an application is made by the statutory decision maker who considers First nations' concerns and the broader regulatory framework.

The LTRA

[18] The LTRA was executed by the Minister pursuant to s. 78.1 of the *PNGA*.

[19] The purpose of the LTRA is described in Recital C to the Agreement as follows:

> …the JV Parties and the Province with to enter into a long-term royalty agreement pursuant to Section 78.1 of the PNGA in order to provide the JV Parties with long-term certainty concerning the royalty rates applicable to Petroleum and Natural Gas that will be produced by or on behalf of the NMJV for the LNG Facility, which the Province expects will substantially increase the aggregate volume of Petroleum and Natural Gas within British Columbia.

[20] The key objective and effects of the LTRA are described by Mr. Turner in his affidavit as follows at paras. 35-38:

> 35. The LTRA provides long term certainty for royalty rates applicable to marketable gas and natural gas liquids that may be destined for the PNW_LNG project by establishing-in Schedule E of the LTRA-a LTRA royalty rate that applies to production that occurs in each year of the agreement. The LTRA also provides that this royalty rate will apply to a maximum 2.2 Bcf/d of marketable gas as calculated on an annual basis (i.e. the "Royalty Volume Cap"). this is approximately the volume of natural gas that would be required to supply the PNW-LNG project.
>
> 36. The royalty rate in the LTRA was calculated taking into consideration the rules for British Columbia's royalty program under the Royalty Regulation as they existed at the time that the LTRA was negotiated.
>
> 37. Natural gas production that is eligible for the royalty regime provided for in the LTRA must come from wells that are operated by the NMJV, or on behalf of the NMJV by a third party.

[21] The BRFN do not take issue with this summary of the LTRA.

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[22] The royalty rates established under the LTRA only apply within a specified geographic area, referred to as the "LTRA Area", which is described in Schedule "C" to the LTRA. Significant portions of the LTRA overlap with the traditional territories of the BRFN. According to Marvin Yahey, the BRFN Chief Councillor, approximately 77% of the LTRA lies within BRFN traditional territories.

[23] Pursuant to Article 3.1 of the LTRA, the majority of the provisions of the agreement, including the royalty rates, come into effect on the "Commencement Date" which is defined in Article 1.1(12) to mean the later of (i) January 1, 2016 and (ii) the "Project Certainty Date". Project Certainty Date is then defined in Article 1.1 (68) to mean the date that the province gives notice that the "Project Certainty Matters" have been satisfied.

[24] "Project Certainty Matters" are defined in Article 1.1(69) to include various steps such as: obtaining certificates and approvals under the *Canadian Environmental Assessment Act*, S.C. 2012, c. 19, s. 52 and the B.C. *Environmental Assessment Act,* S.B.C. 2002, c. 43 for the LNG Facility; issuance by the PNW-LNG Limited Partnership of a notice to proceed in respect of the material engineering; procurement and constructions contracts for the LNG Facility; and a positive investment decision by the PNW-LNG Limited Partnership committing it to proceed with the LNG Facility.

[25] All of the Project Certainty matters have not yet been satisfied and, as such, the Project Certainty Date has not occurred.

[26] The LTRA also contains provisions requiring the NMJV to maintain certain levels of capital spending. Article 7.1(1)(a) sets out the "Long-Term Infrastructure Condition" which requires the expenditure of $3 billion between January 1, 2014 and December 31, 2020 on eligible infrastructure including a dehydration facility, gas processing plant, gathering pipeline, roads, water treatment and handling facility and a water pipeline (see Schedule A to the LTRA).

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[27] Article 7.1(1)(b) sets out the "Ongoing Capital Condition" which requires the NMJV to spend an average of $1 billion per year (on a three year rolling average basis) on eligible capital expenditures as set out in Schedule B to the LTRA. The Ongoing Capital Condition applies until such time as the NMJV produces a specified volume of gas, defined in Article 7.1(1)(b).

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BRFN Concerns About Industrial Development in its Territory Generally and Under the LTRA

[28] At the heart of BRFN's judicial review application is the concern that industrial development in its traditional territory is significantly impeding the ability of its members to exercise their Treaty rights. Chief Councillor Marvin Yahey, in his affidavit sworn August 7, 2015, deposes in part as follows:

> 19. The cumulative impact of the Industrial Developments in the Territory has had a devastating effect on Blueberry members' ability to exercise our rights under Treaty No. 8 (the "Treaty Rights"). As a result of the Industrial Development and their impact on the land, water, air, plants and animals, the ability of Blueberry members to meaningfully exercise our Treaty Rights in the Territory has been severely impaired.
>
> …
>
> 24. Much of the land in the Territory in proximity to our main reserve has been transferred to private parties and fenced off, restricting our access, while much of the accessible lands in the Territory have been so impacted by the density of Industrial Developments that the water, plants and animals on which we have traditionally relied are either no longer here (in the case of bison), severely threatened (in the case of woodland caribou), scarce (moose), or do not appear to us to be safe to consume due to disease or contamination.
>
> …
>
> 26. As a result of the changes caused by the Industrial Developments, Blueberry members have been displaced from the preferred areas to practice our Treaty Rights and have been forced to go farther and farther from our homes to find areas within the Territory in which we are able to practice our Treaty Rights, which is not always possible for members due to the cost and physical demands of travel.

[29] Chief Councillor Yahey goes on to describe certain parts of the traditional territory that hold environmental, social or cultural values critical to the exercise of BRFN's Treaty rights. These areas include a number of registered traplines, an area

known as the "Dancing Grounds", Lily Lake and Pink Mountain (collectively, the "Critical Areas").

[30] Chief Councillor Yahey describes in some detail the oil and gas activity in the territory dating back to the 1950's and continuing today. He further describes the impacts of that activity on the ability of BRFN members to exercise their Treaty rights. For example, he states at para. 66 of his affidavit:

> In our experience, oil-and-gas activity interferes with Blueberry Treaty Rights by, among other things:
>
> (a) displacing the animals we hunt and trap, including caribou, moose, and various furbearing animals, from their critical habitats and the areas in which Blueberry members have always hunter;
>
> (b) exposing those animals to increased predation and mortality;
>
> (c) reducing water flow and water levels in our lakes, streams, and rivers, which harms fish, fish habitat, and the vegetation on which many animals rely;
>
> (d) contaminating the air and water, which makes animals such as caribou and moose sick and unsafe to eat; and
>
> (e) displacing Blueberry members from important areas they have always lived in and otherwise used, such as traplines and cabins, due to noise, pollution, and the declining animal populations.

[31] Chief Councillor Yahey attaches to his affidavits a number of studies that have addressed the cumulative impacts of industrial development in the Peace River region generally, and more specifically with respect to BRFN's Treaty rights.

[32] Chief Councillor Yahey also describes BRFN's concerns about the additional infrastructure and expanded oil and gas activity that may occur under the LTRA. He states at paras. 110-11 of his affidavit:

> 110. Blueberry is concerned that the new infrastructure and the expanded oil-and-gas activity under the LTRA would harm the lands, waters, animals, and other resources in the Territory just like other oil-and-gas activity does, including:
>
> (a) clearing trees and destroying other important vegetation, including through the use of herbicide;
>
> (b) fragmenting and disturbing critical animal habitat, including moose and caribou habitat;
>
> (c) using up and contaminating freshwater; and

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> (d) producing noise, dust, and other kinds of pollution that displace our members and make our animals sick and unsafe to eat.
>
> 111. Blueberry also is concerned that the new infrastructure and additional oil-and-gas activity under the LTRA would make the cumulative impacts from the Industrial Developments in our Territory even worse…Among other things, Blueberry is concerned that these expanded operations under the LTRA would combine with other Industrial Developments:
>
> (a) to destroy and displace us from important lands and waters for hunting, trapping, fishing, and gathering;
>
> (b) to destroy and displace us from areas of spiritual and cultural importance as well as traditional hunting camps;
>
> (c) to make game, particular moose and furbearers, even more scarce and even more sick;
>
> (d) to reduce the flow of freshwater in creeks and rivers;
>
> (e) to contaminate our lands, waters, and air with industrial chemicals, dust, and other materials;
>
> (f) to defrost more of our Territory; and
>
> (g) to increase the presence of people on the land for work and recreation.

[33] Chief Councillor Yahey goes on at para. 112 to describe how these impacts will further interfere with BRFN's members' exercise of their Treaty rights.

The Province's Consultation with BRFN about Petroleum and Natural Gas Development

[34] Between May 29, 2006 and March 31, 2014, the Province and BRFN entered into a number of agreements dealing with various matters relating to development activity within BRFN's traditional territory. This included an Economic Benefits Agreement, dated May 29, 2006, which provided for payments to BRFN in respect of oil and gas activity in the territory, and a Long Term Oil and Gas Agreement, dated January 15, 2007, which provided a framework for consultation in relation to tenure referrals and permit applications.

[35] In addition, as described above in para. 17, the OCG consults with BRFN and other First Nations concerning potential adverse impacts on Treaty and Aboriginal rights resulting for proposed oil and gas activity in their traditional territories.

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[36] On March 5, 2013, BRFN advised the Province, by way of a letter to the minister of Aboriginal Relations and Reconciliation, of its intention to terminate the Economic Benefits Agreement and the related agreements because of the Province's alleged failure to establish a framework for addressing the cumulative effects of industrial development in the traditional territory. The agreements were subsequently terminated effective April 1, 2014.

[37] According to Mr. O'Hanley, despite the termination of the agreements, the OCG has continued to consult BRFN about potential adverse impacts on their Treaty rights due to proposed oil and gas activity through the OCG's consultation processes.

Related Proceedings

[38] On March 3, 2015, BRFN filed a notice of civil claim in this Court naming the Province as defendant (*Yahey v. Her Majesty the Queen in Right of the Province of British Columbia*, BCSC Action No. S-151727, Vancouver Registry (the "Civil Action")). Generally speaking, BRFN alleges that the Province has authorized industrial development activities in its traditional territory, the cumulative effects of which have impaired the ability of BRFN to meaningfully exercise their Treaty rights.

[39] At para. 36 of the notice of civil claim, BRFN alleges:

> 36. The Plaintiffs' have made their concerns regarding the cumulative impacts of the Industrial Developments on the continued meaningful exercise of their Treaty Rights, and the resulting breach of the Treaty and infringement of their Treaty rights, known to the Defendant, but the Defendant has failed or refused to adequately address the impacts to and infringement of those rights.

[40] At para. 7 of the Legal Basis section of the notice of civil claim, it is alleged:

> 7. Further, or in the alternative, the Defendant has unlawfully caused adverse effects upon the Plaintiffs' Treaty Rights without having fulfilled the obligations required of the Defendant pursuant to the Treaty, the constitution and the legal doctrine of the honour of the Crown.

[41] The relief sought by BRFN includes declarations that the Province has infringed its Treaty rights and has breached fiduciary obligations owing to BRFN. In

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addition, BRFN seeks an interim and a permanent injunction restraining the Province from undertaking, causing or approving activities that infringe their Treaty rights.

[42] The Province filed a response to civil claim on April 24, 2015 and BRFN filed a reply on May 29, 2015. In its reply, BRFN alleges that the Province has not consulted with or accommodated it concerning the cumulative impacts of industrial activity on the exercise of BRFN Treaty rights.

[43] In July 2015, BRFN sought an interlocutory injunction in the Civil Action seeking to restrain the Province from proceeding with an auction of 15 Timber Sale Licences that would permit the logging of timber in specified areas, totalling 1,690 hectares, within BRFN's traditional territory.

[44] On July 27, 2015, Mr. Justice Smith dismissed the application, in part because the area encompassed by the Tree Sale Licences represents less than a tenth of one percent of BRFN's traditional territory and less than two-tenths of one percent of the area BRFN defines as critical. Given that BRFN's principal concern was with the cumulative effects of industrial development in its territory, Justice Smith was not satisfied that the licences in issue would materially increase those cumulative effects (*Yahey v. British Columbia*, 2015 BCSC 1302 at paras. 58 and 59).

[45] However, Justice Smith went on to say at para. 64:

> BRFN may be able to persuade the court that a more general and wide-ranging hold on industrial activity is needed to protect its treaty rights until trial. However, if the court is to consider such a far-reaching order, it should be on an application that frankly seeks that result and allows the court to fully appreciate the implications and effects of what it is being asked to do. The public interest will not be served by dealing with the matter of a piecemeal, project-by-project basis.

[46] Following Justice Smith's decision, on August 8, 2016, BRFN filed a notice of application seeking a much broader interlocutory injunction to restrain the Province from engaging in or permitting various activities in certain specified areas within the traditional territory, including permitting oil and gas activities under the *OGAA*,

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disposing of interests in land under the *PNGA* and making dispositions of interests in land for purposes related to oil and gas activities. BRFN's application was heard over five days from October 31 to November 4, 2016 by Madam Justice Burke, who is the assigned judicial management and trial judge in the Civil Action. That judgment is currently under reserve.

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Legal Framework: The Crown's Duty to Consult

[47] The issue of when the Crown's duty to consult is triggered has been addressed by the Supreme Court of Canada in a number of decisions. A concise summary of the test established by the Supreme Court can be found in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*] at para. 31, citing its earlier decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]:

> The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. … [Emphasis in *Rio Tinto.*]

[48] The Court went on at para. 51 to say, in reference to the three elements described above:

> This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

[49] The duty to consult in the context of a treaty, such as Treaty 8 in this case, was considered by the Supreme Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*] at para. 34:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only

> duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). …

[50] The central issue in this case concerns the third element identified in *Haida* and *Rio Tinto*: whether the Crown decision to enter into the LTRA could potentially adversely affect the BRFN's Treaty rights.

[51] This element of the consultation test was discussed by the Supreme Court in *Rio Tinto.* At paras. 43-44, the Court addressed the question of what type of government action triggers the duty to consult:

> [43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 (CanLII), [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (CanLII), [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 (CanLII), [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 (CanLII), [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20 (CanLII), 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206 (CanLII), 77 Alta. L.R. (4th) 203, at paras. 37-40.

[52] The Court went on at paras. 45-47 to consider the requirement that the Crown conduct must potentially adversely affect an Aboriginal right:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision

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> and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265 (CanLII), 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

The Parties' Positions

BRFN

[53] The BRFN submit that the Decision is a strategic, high-level decision that "sets the stage" for extensive oil and gas development in a defined geographic area that overlaps significantly with its traditional territories. Specifically, the BRFN submit that the intent and effect of the LTRA is to provide the NMJV with long-term certainty about royalty rates as well as incentives to promote that development.

[54] The BRFN cites a number of cases in which courts have found the duty to consult to be triggered by Crown decisions or actions which it says are analogous to the decision to enter into the LTRA. Some of the key cases relied on by the BRFN include the following:

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a) In *Haida*, the Supreme Court held that the duty to consult was triggered by a decision to replace and then transfer a tree farm licence that authorized the harvesting of timber on land over which the First Nation claimed aboriginal title, even though specific cutting permits were required before any timber could actually be harvested. Chief Justice McLachlin said at paras. 75-76:

> 75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).
>
> 76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

b) In *Gitxsan and other First Nations v. British Columbia (Minister of Forests),* 2002 BCSC 1701, Mr. Justice Tysoe (as he then was) held that a decision by the Minister to consent to a change of control of a forest company triggered the duty to consult with First Nations that claimed aboriginal title and rights over land covered by a tree farm licence and various forest licences held by the forest

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company. Justice Tysoe's principal reason for coming to this conclusion is set out at para. 82 of the decision:

> [82] I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly…

c) In *Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139, judicial review was sought of a decision of a representative of the Ministry of Forests approving six forest licence replacements on land covering portions of the First Nation's traditional territories. Madam Justice Neilson (as she then was) rejected the Crown argument that the decision did not require consultation because replacement did not give the licensees a right to cut timber, something that required additional cutting permits. Madam Justice Neilson said:

> [157] Turning to the assessment of the seriousness of the potential adverse effect of the FL replacements on Gitanyow's interests, objectively, the replacement of the FLs was a strategic administrative decision that represented the first step in permitting the continuing removal of a claimed resource in limited supply from Gitanyow traditional territory for the next 15 years…
>
> [158] These factors, however, do not appear to have played a significant role in Mr. Warner's assessment of the potential adverse effects of replacing the FLs. Instead, he stated that the replacement of the FLs was unlikely to affect Gitanyow's site specific potential aboriginal rights, as they would be accommodated through later operational decisions. As noted above, he did acknowledge that the replacement FLs could affect Gitanyow's claim of aboriginal title "assuming it exists". However, he viewed the effect of his decision on Gitanyow's interests as "minimal" since these interests would be addressed through other processes…
>
> [159] The Crown argues that this was a reasonable view, as the decision to replace the FLs did not give the licensees a right to cut timber. It says that operational decisions made later in the process,

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> such as the approval of FSPs and cutting permits, will have a more significant impact on how much timber will be cut.
>
> [160] I do not accept that these later operational steps significantly reduce the potential impact on Gitanyow's interests of the strategic decision to replace the FLs. A similar argument failed in ***Haida***. At paras. 75-76, the Court noted that the TFL replacement under consideration there did not itself authorize timber harvesting, which would be controlled by future operational steps. The Court nevertheless found that the Crown had a duty to consult and perhaps accommodate with respect to the decision to replace the TFL, as decisions made during strategic planning may have potentially serious impacts on aboriginal interests.
>
> …
>
> [186] … While consultation at the operational level is desirable, I am not satisfied that reliance on future discretionary decisions …can be viewed as reasonable accommodation for the decision to replace the FLs. That decision was the first step, and the only strategic step, in the process that would ultimately permit logging on Gitanyow traditional territory. The Supreme Court of Canada in ***Haida*** and ***Taku*** has made it clear that meaningful consultation and accommodation at the strategic level has an important role to play in achieving the ultimate constitutional goal of reconciliation, and should not be supplanted by delegation to operational levels.

d) In *Dene Tha' First Nation v. Canada (Minister of Environment),* 2006 FC 1354, aff'd 2008 FCA 20, the First Nation alleged that the federal government breached its duty to consult by excluding the First Nation from discussions and decisions regarding the design of regulatory and environmental assessment review processes related to the Mackenzie Gas Pipeline project, specifically the development of a "Cooperation Plan" for the coordination of the required processes. In concluding that the duty to consult had been triggered, Justice Phelan said at paras. 100 and 108-09:

> [100] Dealing with the third question first, the conduct contemplated here is the construction of the MGP. It is not, as the Crown attempted to argue, simply activities following the Cooperation Plan and the creation of the regulatory and environmental review processes. These processes, from the Cooperation Plan onwards, were set up with the intention of facilitating the construction of the MGP. It is a distortion to understand these processes as hermetically cut off from one another. The Cooperation Plan was not merely conceptual in nature. It was not, for example, some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be

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> exposed to the public. Rather, it was a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of MGP.
>
> …
>
> [108] The Cooperation Plan in my view is a form of "strategic planning". By itself it confers no rights, but it sets up the means by which a whole process will be managed. It is a process in which the rights of the Dene Tha' will be affected.
>
> [109] There can be no question that the Crown had, at the very least, constructive knowledge of the fact that the setting up of a Cooperation Plan to coordinate the environmental and regulatory processes was an integral step in the MGP, a project that the Crown admits has the potential to affect adversely the rights of the Dene Tha'.

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[55] The BRFN also rely on a number of cases in which the courts have emphasized the need to avoid a narrow or technical interpretation of the duty to consult and the importance of early and meaningful consultation with First Nations whenever government has within its power the ability to adversely affect the exercise of Aboriginal rights: *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320; *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204; *Ehattesaht First Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849; and *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345.

The Minister

[56] The Minister submits that the duty to consult has not been triggered because the Decision is not causally related to any potential adverse impacts to the BRFN's Treaty rights. The Minister submits further that adverse impacts, within the meaning of the test, are limited to impacts flowing from the specific Crown decision or conduct in issue, and do not encompass larger adverse impacts relating to the project as a whole. The Minister says that here, the LTRA does not approve or authorize any exploration or development activities; it simply establishes royalty rates payable on the satisfaction of certain conditions.

[57] The Minister cites a number of cases in which the courts have found that the duty to consult was not triggered:

a) In *Rio Tinto*, the issue was whether the decision of the B.C. government to enter into an Energy Purchase Agreement (EPA) to purchase electricity from an existing hydroelectric generating facility on the Nechako River, which is located in the First Nation's traditional territories, triggered a duty to consult. The EPA was initially approved by the B.C. Utilities Commission, which held that there was no duty to consult because the EPA would not adversely affect any Aboriginal interest. That decision was ultimately upheld by the Supreme Court of Canada. Chief Justice McLachlin said at paras. 52-53:

> [52] The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.
>
> [53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration. [Emphasis in original.]

b) In *Hupacasath First Nation v. Canada (Minister of Foreign Affairs),* 2015 FCA 4, the First Nation argued that the duty to consult was triggered by a decision of the federal government to enter into a bilateral investment agreement with China on the basis that increased foreign investment under the agreement could potentially lead to increased development activity in its traditional territory. The Federal Court of Appeal however, concluded that such concerns

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were speculative and too remote to give rise to a duty to consult.

Mr. Justice Stratas said at para. 105:

> [105] Bearing in mind the aims the duty to consult is meant to fulfil, I cannot say that imposing a duty to consult in this case would further those aims at all. There is no apprehended, evidence-based potential or possible impact on Aboriginal rights. The imposition of a duty here is not necessary to preserve the future use of the resources claimed by Aboriginal peoples. Any adverse impact on rights stemming from the Agreement, if any, can be addressed later when they rise beyond the speculative and trigger the duty to consult. The appellants have failed to show that anything will be evasive of review before any harm is caused, if ever it is caused.

c) In *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources),* 2015 SKCA 31, the First Nation had rights pursuant to Treaty 10 to engage in traditional activities on land encompassed by the Treaty. The First Nation argued that the Crown was required to consult it in respect of the granting of exploration permits in respect of subsurface oil sands minerals located under Treaty 10 lands. The Saskatchewan Court of Appeal held that no adverse impacts resulted from the specific decision in issue in that the permits did not authorize any specific exploration or extraction activity. This activity was subject to a number of regulatory requirements. The Court said at para. 104:

> [104] The jurisprudence is clear: there is a meaningful threshold for triggering the duty to consult. To trigger it, actual foreseeable adverse impacts on an identifiable treaty or Aboriginal right or claim must flow from the impugned Crown conduct. While the test admits *possible* adverse impacts, there must be a direct link between the adverse impacts and the impugned Crown conduct. If adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult.

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Analysis

Standard of Review

[58] The Minister submits that the question of whether consultation with BRFN was required prior to entering into the LTRA is one of mixed fact and law and accordingly, the applicable standard of review is reasonableness.

[59] In *Haida*, the Supreme Court addressed the standard of review issues as follows at paras. 61 and 63:

> 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55 (CanLII). On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20 (CanLII); *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748.
>
> …
>
> 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[60] In *Rio Tinto*, the Court cited *Haida* in support of its conclusion that the standard of review applicable to the B.C. Utilities Commission's decision that the duty to consult was not triggered was reasonableness, because the question was one of mixed fact and law (at para. 78).

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[61] In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, the Supreme Court held that the existence of the duty to consult, as well as the adequacy of consultation, are questions of law subject to a correctness standard (at para. 48).

[62] At first glance, it seems difficult to reconcile these apparently diverging approaches. However, as I read the Supreme Court decisions, the Court is drawing a distinction between the proper application of the consultation test, which is a question of law reviewable on a correctness standard, and the determination of whether the test has been met in a particular case, which is a question of mixed fact and law reviewable on a reasonableness standard.

[63] This is the distinction drawn by Chief Justice McLachlin in *Rio Tinto*, where she stated at para. 93:

> [93] I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

[64] In the present case, I am satisfied that the Minister applied the correct legal test for determining whether the duty to consult arose and that the principal issue to be decided was whether the LTRA had the potential to adversely affect BRFN's Treaty rights. That issue involves questions of mixed fact and law. I would add that central to the determination of this issue is the proper interpretation of the LTRA, and the Supreme Court has made it clear that the interpretation of contractual documents involves mixed questions of fact and law (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50).

[65] I find therefore that the standard of review applicable to the Minister's decision to enter into the LTRA is reasonableness.

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Will the Decision Potentially Adversely Affect BRFN's Treaty Rights?

[66] As noted above, the central issue on this application concerns the third element of the test set out in *Haida*: whether the Decision is one that "might adversely affect" BRFN's Treaty rights (*Haida* at para. 35).

[67] I have referred in some detail above to the authorities relied on by both parties to illustrate the fact that the determination of this issue is very fact specific, and turns on the particular action or decision in issue and the resulting impacts.

[68] However, a number of key principles can be distilled from the cases:

a) the duty to consult must be interpreted and applied in a generous and purposive manner given that it is grounded in the honour of the Crown;

b) the duty is not confined to conduct that has an immediate, physical impact on land and resources but extends to conduct that may adversely affect Aboriginal claims and rights;

c) the duty may be triggered by strategic, high-level decisions that impact the management of the resource and the ability of First Nations to exercise their rights;

d) the claimant must show a causal relationship between the specific government conduct or decision in issue and the potential for adverse effects; and

e) the adverse effects must be appreciable; speculative effects will not suffice.

[69] In determining whether the duty to consult has been triggered in a particular case, it is useful to also consider what such consultation might look like. This analysis is also very fact specific. As held by the Supreme Court in *Haida*, at para. 37, the content of the duty varies with the circumstances. The Court went on to say at para. 39 that the content or scope of the duty to consult "is proportionate to a

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preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed".

[70] The Supreme Court's approach to determining the scope of the duty to consult underscores why more than mere speculative adverse impacts are required in order to trigger the duty. Without a clear understanding of the actual, appreciable impacts on a First Nation's rights, it is not possible to engage in meaningful consultation or to develop appropriate accommodations.

[71] Applying the above principles to the facts of the case at bar, I find that the Minister's decision to enter into the LTRA is not one that triggered the Crown's duty to consult. I come to this conclusion for the following reasons.

[72] It is apparent from the evidence advanced by BRFN that it has a legitimate and long-standing concern about the cumulative impacts of past and ongoing industrial development activities in its traditional territories. However, the duty to consult is confined to addressing the adverse impacts resulting from the specific Crown decision or action under consideration (*Rio Tinto* at para. 53).

[73] Here, there is no causal relationship between the Decision and any adverse impacts that might arise, in that the LTRA does not authorize any development activity within the LTRA Area nor does it commit NMJV to engage in any activity. Thus there are no adverse impacts resulting directly from the Decision that would interfere with BRFN's ability to exercise their Treaty rights.

[74] Moreover, the nature of any impacts that might result from future activities undertaken by NMJV is speculative, as acknowledged by BRFN in its written submission where it states at para. 39:

> Blueberry River First Nation does not know where in the LTRA Area those wells will be drilled and the other facilities will be located, since Progress Energy has not provided a long-term development plan…

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[75] As set out above, given the speculative nature of the potential impacts, it is not possible to determine at this stage what the scope or content of any consultation would be.

[76] In my respectful view, the Decision is not the type of strategic or high-level decision that has been found in other cases to trigger the duty to consult. There is no structural change in the management of the resource in that any future decisions concerning actual exploration or development activity will still be subject to the regulatory requirements established under the *OGAA*. The establishment of royalty rates under the LTRA in no way limits or impedes the Crown's ability to manage the oil and gas resources in a way that respects BRFN's rights and permits it to fulfill its constitutional obligations.

[77] Similarly, the Decision does not involve the Crown engaging in strategic decision-making or planning with respect to possible exploration or development activities nor does it affect the applicable regulatory processes. It does put in place certain conditions which may well influence strategic decisions made by NMJV, but those are the decisions of NMJV and not the Crown.

[78] For all of these reasons, I find that the Minister's decision to enter into the LTRA without consulting BRFN or other First Nations is reasonable, and I would not interfere with that decision.

[79] I would also deny BRFN's application on the bases that the issues and arguments raised on this judicial review application are largely duplicative of the issues and arguments advanced in the Civil Action.

[80] The existence of an alternative and more suitable forum or mechanism has long been recognized as a discretionary bar to judicial review. In *Strickland v. Canada (Attorney General)*, 2015 SCC 37 Justice Cromwell affirmed the proposition that judicial review may be refused if an adequate alternative remedy or forum is available. At para. 42 he looked to a number of previous cases in setting out a list of

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considerations that are relevant in deciding whether or not judicial review should be refused:

> These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61, [2011] 2 F.C.R. 332 (F.C.A.), at para. 31; Mullan, at pp. 430-31; Brown and Evans, at topics 3:2110 and 3:2330; *Harelkin*, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3:2100 (emphasis added).

[81] Several of these factors weigh against granting the relief sought by way of judicial review in this case, most notably the availability of "adequate and effective recourse" in another forum in which litigation is already taking place.

[82] As described above, the Civil Action is ongoing and involves allegations that the Province has authorized industrial development in BRFN's traditional territories, the cumulative impacts of which have impaired the ability of BRFN to exercise its Treaty rights. BRFN has also alleged a failure on the part of the Crown to fulfill its constitutional obligation to consult and it has sought an injunction restraining the Province from undertaking or approving any further industrial activities that infringe their Treaty rights, including activities that it alleges will result from the Decision in issue here.

[83] Given the comprehensive nature of the claims advanced in the Civil Action, I do not accept that the issues raised by BRFN here are separate and discrete and amenable to determination in a separate judicial review proceeding.

[84] Underlying both proceedings is BRFN's concern about the cumulative impacts of industrial development in their traditional territories and the absence of an overall planning mechanism to ensure the protection of their Treaty rights. That concern is best addressed through the Civil Action.

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[85] In the circumstances of this case, I would exercise my discretion and decline the application for judicial review.

Conclusion

[86] The petition is therefore dismissed.

"Skolrood J."

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