IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Louis v. British Columbia (Energy, Mines and Petroleum Resources),* 2011 BCSC 1070

Date: 20110805
Docket: S103526
Registry: Vancouver

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Between:

Reginald Louis on his own behalf and on behalf of all the members of the Stellat'en First Nation and the Stellat'en First Nation

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Energy, Mines, and Petroleum Resources and the Chief Inspector of Mines and Thompson Creek Metals Company Inc.

Respondents

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. February 28, March 1-4, 2011
Place and Date of Judgment:	Vancouver, B.C. August 5, 2011

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I. INTRODUCTION

[1] Elected Chief Reginald Louis petitions this Court on his own behalf and on behalf of all members of the Stellat'en First Nation ["Stellat'en"]. They seek judicial review and a number of orders on the primary basis that the provincial Crown ["Crown"], namely the B.C. Ministry of Energy, Mines and Petroleum Resources ["MEMPR" or "the Ministry"], failed to adequately and meaningfully consult them and, if necessary, accommodate their concerns in relation to a mine located on land over which Stellat'en have asserted and continue to assert Aboriginal title and rights.

II. BACKGROUND

[2] Stellat'en, descendants of the Carrier or Dakelh peoples, have, since time immemorial, lived in the Upper Fraser River Watershed in North-Central B.C.

[3] They are "aboriginal peoples of Canada" within the meaning of s. 35(1) of *The Constitution Act, 1982* and an Indian Band under the *Indian Act*, R.S.C., 1985, c. I-5. There are approximately 430 registered members, at least half of which live on Stellat'en's main reserve called Stellaquo Reserve No. 1, which is situated at the confluence of the Stellaquo and Endako Rivers on Fraser Lake. Stellat'en has one other very small reserve at Binta Lake.

[4] Having filed a Statement of Intent with the B.C. Treaty Commission in or about 1994, they are participants in the B.C. treaty process as part of the Carrier Sekani Tribal Council, which is comprised of eight First Nations. Although at 'Stage Four' (negotiation of an agreement-in-principle) of this six-stage treaty process, the Council's present status is described as "not currently negotiating a treaty" in the B.C. Treaty Commission's 2010 Annual Report, at pp. 20 and 31-32.

[5] Stellat'en and the Province of B.C. entered into an Interim Measures Agreement ["IMA"] on July 15, 2003. I paraphrase its purposes as follows:

(a) to increase the Stellat'en's participation in the forest sector;

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> (b) to provide for the development of a specific consultation process regarding forest and range development within the traditional territory;
>
> (c) to offer some economic accommodation regarding potential Aboriginal rights and title raised by Stellat'en in relation to forest and range decisions;
>
> (d) to invite the Stellat'en to apply for a non-replaceable forest license for 150,000 cubic meters annually in the Prince George Timber Supply Area;
>
> (e) to bring stability to provincially authorized forest and range resource development on Crown lands within the Stellat'en's asserted territory by making it a condition that in consideration of the invitation to apply for a forest license, the Stellat'en will (a) not unlawfully interfere with timber harvesting activities within the traditional territory of the Ministry of Forests and any holder of an agreement entered into under the *Forest Act* granting a right to harvest Crown timber; and (b) not assert in legal proceedings that the license does not provide economic accommodation in respect of their Aboriginal interests with regard to forestry and range decisions made by the Ministry;
>
> (f) to further the Government's objective to offer other future economic benefits to the Stellat'en including revenue sharing and additional forest tenure opportunities, in order to provide interim workable accommodation for Aboriginal interests, with a view to concluding an agreement dealing with those matters within one year.

[6] Stellat'en and the Province of B.C. subsequently entered into a Forest and Range Agreement on October 3, 2005 [the "FRA"]. Its purposes are essentially those of the IMA. Economic benefits to Stellat'en (namely, the non-replaceable forest licence) are detailed. There is a revenue-sharing provision stipulating that the B.C. Government will pay Stellat'en approximately $190,970 annually. Certain conditions are attached to that provision. Consultation process relating to operational plans and administrative decisions is also outlined. With respect to "stability for land and resource use", s. 6.1 of the FRA stipulates:

> Stellat'en First Nation will respond immediately to any discussions initiated by the Government of British Columbia and will work co-operatively to assist in resolving any issues that may arise where acts of intentional interference by Stellat'en ... with provincially authorized activities related to forest and/or range resource development activities including timber harvesting or other forestry economic activities occur.

[7] The FRA terminates on the earliest of: five years from the date the FRA is executed; coming into effect of a treaty; the parties' mutual agreement; or date the Government cancels economic benefits under the FRA.

[8] Stellat'en asserts Aboriginal title over certain lands and exclusive right to use and occupy the lands, including mineral rights. The Endako Mine is situated on the land in question, specifically, within the traditional territory of Stellat'en and Nadleh Whut'en First Nation – a neighbouring band and fellow member of the Carrier Sekani Tribal Council; so, they both claim much of the same area. Stellat'en's Statement of Intent accepted by the Province for treaty negotiation includes the area of the Mine.

[9] The Endako Mine is located about 8.5 kilometres southwest of the village of Endako, 20 kilometres west of the town of Fraser Lake and 190 kilometres west of Prince George. It is served by Highway 16 running between Prince George and Prince Rupert. François Lake (to the south) serves as its main water source. It is an open-pit mine that extracts molybdenum – a mineral used to produce specialty steels. The Mine has been in nearly continuous operation since 1965, processing 28,000 tonnes of ore daily. In area, it covers some 1,414 hectares. The Endako Mine has been since its inception and continues to be a major employer for the Fraser Lake area and other nearby communities.

[10] One of the respondents, Thompson Creek Metal Company Inc. ["TCMC" or "the Company"], is 75% owner and operator of the Endako Mine. For convenience only, in these reasons, I refer to TCMC as if it were the sole owner and operator even though another company is involved in this joint venture.

[11] Certain facilities of the Endako Mine are located on fee simple land owned by TCMC. These facilities include the ore crusher and conveyor system, roaster, mill, administration office building, warehouse, machine and electrical shop. Certain other parts of the Mine are on Crown land in respect of which TCMC holds mining leases and mining claims. These parts include three pits, waste rock dumps, most of the access roads, tailings ponds and containment dams.

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[12] The Endako Mine, like all other mines in the Province, operates under various federal and provincial statutes, principally, the *Mines Act*, R.S.B.C. 1996, c. 293, and the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, and their accompanying regulations.

[13] TCMC holds a *Mines Act* permit called "the M-4 Permit", which grants it the right to mine and once issued neither expires nor is subject to any time limitations. The Endako Mine has been operating under this M-4 Permit since opening in 1965. A principal component of the M-4 Permit is the "Approving Work System and Reclamation Program"; on this topic, Loren Kelly, one of MEMPR's regional directors, deposed in his affidavit sworn December 16, 2010 as follows:

> 14. In order to obtain a *Mine Act* permit, section 10 requires an owner or other designated person to file a plan outlining the details of the proposed work and a program for the protection and reclamation of the land affected by the mine. The permit holder must apply and submit an updated reclamation plan for approval, by the Chief Inspector, at the end of its five year term. It is open to the permit holder to apply for amendments to a permit to allow for expansion of mining capacity or changes in the Mine Plan, at any time to reflect changes in operating requirements, mine development planning and to inform the Chief Inspector of operational changes that require notification by the *Mines Act* or *Health Safety and Reclamation Code of B.C.* [*HSRC*]. ...
>
> ...
>
> 44. The final stage of mine closure and reclamation is governed by Part 10 of the *HSRC*. A company is required to file a mine plan together with a reclamation program as a condition of obtaining a *Mine Act* permit. As part of the company's application for the permit, the company must provide a closure plan and operational reclamation plans for a five year term further to s. 10.1.4(6) of the *HSRC*. Generally, the responsibility to ensure that disturbed lands are returned to certain conditions after the cessation of mining is assigned to the companies conducting mining activities and not to other parties.
>
> 45. Typically, a company cannot predict the exact span of a mine's life. The economic and practical viability of the mine depends on numerous factors including the size of the orebody, costs of production (which is subject to variables such as inflation, technological innovation, costs of equipment, etc.) and market prices for the mineral in question.
>
> 46. A *Mines Act* permit does not expire. The statutory requirement for an updated reclamation plan every five years means that companies must renew that component of their *Mines Act* permits. The fact that the term of the reclamation plan is five years does not necessarily reflect the lifespan of the mine. An existing orebody may not be fully mined within five years and the fact that a closure plan is required does not mean that the mine will

> automatically close at the end of the five year term. The five year term is a statutory condition that has been imposed on reclamation planning through the *Mines Act* by the Legislature. [Emphases added]

[14] TCMC is thus statutorily mandated to file, at five year intervals, a closure plan setting out (among other things) the manner in which the land is to be returned to its natural state upon cessation of operations. In its 2002 plan, the Company projected closure of the Endako Mine by between 2011 and 2013. However, 2007 saw the market price for molybdenum rise and identification of lower grade ore in the existing orebody as economic for extraction. TCMC decided to change its closure plan.

[15] So, in 2008, TCMC sought approval to process the lower grade ore at a faster rate by building a larger more technologically advanced new mill less than 100 metres from the present (over 40 year old) mill with the intent of increasing the daily ore throughput to 55,000 tonnes and extending the end date of its operations to approximately 2025 (as per the Company's 2010 closure plan). The right to extract the lower grade ore has already been granted to TCMC pursuant to the M-4 Permit and mineral claims and leases.

[16] I note that even if TCMC opted not to undertake construction of a new mill, the old mill is due for significant repairs and upgrades if it is to remain in operation. Terry Own, project director for TCMC, deposed to this effect in his affidavit sworn January 13, 2011:

> 4. The construction of the New Mill was in large part driven by the need to deal with the state of the existing mill at the Endako Mine ... The Old Mill was built in the 1960's and employs 40 year old technology to process molybdenum ore. Many of its components are close to the end of their expected life span. If the Old Mill were to remain in operation, significant repairs and upgrades, at a cost of several hundred million dollars, would be required. These upgrades would require that the mill be shut down for at least 18 months and would not take full advantage of the technological improvements now available.
>
> 5. As a result, Thompson Creek instead opted to proceed with the construction of the New Mill. The New Mill is being constructed while the Old Mill remains in operation, avoiding the need for a shutdown, and will implement new technology that substantially increases the efficiency of the molybdenum milling process.

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[17] The proposed project enlarged the area occupied and disturbed from 1,414 to 1,653 hectares. New disturbance of 239 additional hectares is contained within TCMC's existing mineral leases and mineral claims. No new leases or claims are required to carry out the proposed expansion. The project will result in new net occupied area outside of permitted facilities of 106 hectares: 98 hectares of previously disturbed land for new waste rock dumps (which are to be located immediately adjacent to the existing waste rock dumps) and 8 hectares for new access roads. These two areas are also located within existing mineral leases and claims and are included within the 239 additional hectares of new disturbance.

[18] Save portions of the new access roads all of the 106 acres of expansion is contiguous with or adjacent to already permitted disturbed land. Future operations, therefore, will be confined within TCMC's existing mineral leases and claims and will not significantly expand the Mine's so-called 'footprint'.

[19] Among other things, the project will involve the merging of the three open pits to create one "super pit". This super pit will be situated within the permitted 'footprint' of the existing pits and related areas of prior disturbance, though disturbance of an additional 17 hectares will be required. However, no M-4 Permit amendment is required for the pit expansion, as all 'pit-related land' rests within the existing permit. Two of the three tailing ponds will be merged requiring an additional disturbance of 105 hectares; this area is located within the Mine's existing 'footprint' and authorized under the existing permit. The coarse ore stockpile and in-feed conveyor will be relocated to an area nearby the new mill; no amendment to the M-4 Permit is required. As well, the project requires a new truck and shovel fleet, additional water line and intake pumps, as well as upgrades to electrical transmission, natural gas distribution line and roaster facility.

[20] The new mill building, which will house a new crushing, grinding and flotation process, is being constructed adjacent to current facilities on disturbed land (previously used for storage buildings and as a scrap yard) held in fee simple by TCMC. An amendment to the M-4 Permit is required.

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[21] As of December 31, 2010, TCMC spent about $349 million on the new mill (this figure includes the amount committed through binding contracts); the total estimated cost is $498 million. Construction began in 2008 and is to end in or about late 2011. As at the time of the hearing, expansion was more than 50% complete.

[22] TCMC does not seek any new mineral rights. Rather, the permits it seeks relate to the method by which the mining operation is to continue. According to MEMPR representative Loren Kelly's affidavit sworn December 16, 2010, at paras. 25-26, the required MEMPR permits are as follows:

1. approval of the Notice of Work for mineral exploration;
2. approval of the Notice of Work for geo-technical testing;
3. amendment to M-4 Permit approving site preparation and earthworks;
4. amendment to M-4 Permit approving construction for mill and expansion;
5. amendment to M-4 Permit for modifications in tailings management; and
6. amendment to M-4 Permit approving work system (for increased throughput) and reclamation/closure plan.

And, the required 'non-MEMPR' permits are as follows:

7. timber harvesting authorization for 309 hectares from the Ministry of Forests;
8. timber harvesting authorization for 6.2 hectares from the Ministry of Forests;
9. *Water Act* permit for withdrawal rate increase from François Lake from the Ministry of Environment;
10. amendment to a federal *Explosives Act* licence for a change in location and change of supply contractor.

At the time of the hearing, items 1 to 4, 7 and 8 have been issued.

[23] On October 29, 2008, the Chief Inspector of Mines granted TCMC's application to amend its M-4 Permit allowing for construction of the new mill. The granting of this permit is the main Crown decision at issue in the petition before me.

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[24] I emphasize that Stellat'en's complaint on judicial review centres on item 4 – MEMPR's approval of the M-4 Permit amendment allowing the new mill construction. Their filed petition makes no claims for relief with respect to the non-MEMPR permits, nor did they make any specific submissions before me as to the non-MEMPR permits. Stellat'en refers to the non-MEMPR permits only in so far as to support their argument that Crown's improper incremental partial approach to consultation resulted in the parsing of segments of a higher strategic decision relating to the entirety of the expansion project. Specifics of this argument will become clearer later in these reasons.

[25] Stellat'en contends that expansion of Endako Mine involved a number of decisions (principally, the October 29, 2008 amendment of the M-4 Permit) that affect their Aboriginal rights and title interests thereby imposing on Crown a legal and constitutional duty to consult and accommodate. They say Crown did not fulfill its duties and, as a result (among other things), the amended M-4 Permit is invalid, decision to issue the amendment should be quashed, TCMC should be enjoined from further construction and the permit amendment process should be reopened to allow for consultation and, if necessary, accommodation. Crown and TCMC seek to have all relief sought by the petitioners dismissed.

III. THE TIMELINE & THE EVIDENCE

[26] In what follows I set out my findings of fact in a timeline-like fashion, that is, the facts are organized chronologically. There are three timelines – the first has to do with communications/correspondences between the MEMPR and Stellat'en; the second between non-MEMPR government agents and Stellat'en; the third between TCMC and Stellat'en. I have merged them together. Discussions of all three timelines are included to provide context to the main grievance (the M-4 Permit amendment allowing construction of the new mill). But, I reiterate that while Stellat'en's complaints relating to the non-MEMPR permits will be evident in my overview of the evidence, the petition makes no claims for relief with respect to the non-MEMPR permits, nor were specific submissions made regarding them.

[27] In late 2007 and early 2008, representatives of TCMC (without direction from Crown) began communicating with Stellat'en as well as other stakeholders about the Company's intentions to expand the Mine. The petition record reveals at least two such instances of communication. On November 29, 2007, the Endako Mine Community Liaison Committee ["EMCLC"] held a meeting to provide preliminary information to the community about the expansion project.

[28] Barbara Riordan, TCMC's environmental superintendent responsible for EMCLC at the material time, deposed at para. 4 in her affidavit sworn January 7, 2011 that EMCLC was created by her predecessor in 1995 "at the request" of MEMPR "in order to provide a forum for members of the local community to ask questions and obtain information about the Mine". Specifically, she stated as follows at para. 5:

> I have reviewed the records at the Mine regarding the [Endako Mine Community] Liaison Committee and identified documents regarding the creation of the Liaison Committee and its activities prior to 1996. According to these documents, the creation of the Liaison Committee was announced through advertisements and articles in the local newspaper in early 1995 and interested members of the local community were invited to attend an initial introductory meeting if they wished to join the Liaison Committee.

[29] It is unclear whether Stellat'en ever formally became a member of EMCLC. What the evidence does reveal is that they were invited to at least some EMCLC meetings. An internal memo regarding the drafting of an invitation to the community (attached as exhibit A to Ms. Riordan's affidavit) states that "[t]he Stellaquo [refers to Stellat'en] First Nation Group should be contacted personally". Local newspaper articles and advertisements regarding the creation and first meeting of EMCLC specifically encouraged Aboriginal bands in the surrounding area to get involved.

[30] With respect to the November 29, 2007 EMCLC meeting, Ms. Riordan deposed as follows in her affidavit at para. 18:

> Gordon Clark, then General Manager of the Mine, and I attended this meeting and Mr. Clark gave a power-point presentation regarding the Mine Expansion Project. To the best of my recollection, I extended an invitation to the Stellat'en First Nation to attend the 2007 Liaison Committee meeting, but no one specifically representing the Stellat'en First Nation attended.

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[31] The minutes and PowerPoint presentation slides are exhibit H to her affidavit.

[32] According to Ms. Riordan, subsequent meetings in the new year were held by the Company in order to convey information about the expansion to the community:

> 19. In 2008, I and other representatives of the Mine gave presentations regarding the Mine Expansion Project to individual stakeholder groups. As a result, no meeting of the Liaison Committee was convened in 2008.
>
> 20. On January 17, 2008, I and other representatives of the Mine attended a Stellat'en Council Meeting at the Stellat'en First Nation Band office. The meeting was attended by Stellat'en [former] Chief, Mabel Louie, several Stellat'en councillors, Mr. Clark and Tony Thompson, Human Resources and Safety Superintendent for the Mine. The purpose of this meeting was to provide the Stellat'en First Nation with information about the proposed Mine Expansion Project. This meeting took place at the initiative of Thompson Creek, independent of any specific request by government.

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[33] On February 11, 2008, TCMC sent to MEMPR a Notice of Work for mineral exploration and geo-technical testing and later submitted to the Ministry a Notice of Work for mineral exploration dated March 7, 2008. On March 10, 2008, MEMPR advised Stellat'en and Nadleh Whut'en of the Notice of Work dated February 11th:

> Ministry staff is committed to considering First Nation concerns when making decisions that may affect asserted aboriginal interests. As the proposed work program has minimal impact because of existing disturbance, it is believed that only formal notification is required at this time. However, your comments on this program are welcome, and if necessary, comprehensive consultation can be undertaken.
>
> ... [TCMC] has been advised that the program falls within the asserted traditional territory of the Stellat'en ... We encourage our clients to discuss their work program with local communities and where possible utilize services that those communities can provide.

[34] On March 26, 2008, MEMPR advised Stellat'en and Nadleh Whut'en of TCMC's March 7th Notice of Work and requested "input from First Nations regarding potential impacts on aboriginal interests" by April 15th for consideration of "these interests prior to a decision being made regarding the issuance of a *Mine Act* permit".

[35] On April 4, 2008, the Ministry of Forests wrote to Stellat'en regarding an application for an Occupant Licence to Cut approximately 309 hectares of Crown

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timber to allow for expansion of the tailings facilities and waste rock dumps as well as northward and eastward expansion of the mill site. A representative for the Ministry of Forests enclosed documents for Stellat'en's review and stated that:

> If requested, Vanderhoof Forest District staff [which I assume is an agent of the Ministry of Forests] are available to meet with you to review the information and ensure that you have a fully informed understanding of the proposed activity and to obtain information regarding the scope and nature of your aboriginal interests and how these interests may be impacted by their proposed decision. I encourage you to bring forward any aboriginal interests information within the areas specific to this timber removal that may potentially be impacted by the proposed activities so that this information can be considered and where appropriate, addressed prior to a decision being made. An on-site visit to the area specific to this proposal can be accommodated if requested.
>
> It is currently the Ministry [of Forests]'s intent to make a decision on the remaining proposed timber removal after June 9, 2008.

[36] However, issuance of a Free Use Permit for the 6.2 hectare eastward expansion of the mill site (application for which was made by TCMC on March 31, 2008) would be subject to an expedited timeline; the representative explained as follows:

> ... it is essential to the Endako Mine to be able to proceed with the development of the 6.2 hectare section as soon as possible to support the commencement of their $373.6 million mill expansion project. Although this time frame does not meet the 60 day Response Period as set out within the Forest and Range Agreement ... I am considering approving their particular 6.2 hectare area no later than March [*sic* – should be April] 20, 2008, as it is essential to the ... substantial expansion project and the potential impacts to the economy of the local communities.

[37] On April 9, 2008, Stellat'en wrote back stating they have Aboriginal interests (though no specific interests were stated) in the project area and asked that issuance of any forestry-related permits or licences be deferred until the Province consulted them as to whether the expansion project should proceed:

> We confirm that the Stellat'en ... have aboriginal interests in the Project Area but cannot review Endako's Proposal or discuss the nature and scope of our interests without first consulting with the Province of BC on the proposal.
>
> ...
>
> We insist that consultation begin immediately, prior to the Province making any decisions that affect whether the project will go ahead.

[38] On April 15, 2008, then Chief Mabel Louie, on behalf of Stellat'en, wrote to MEMPR acknowledging receipt of the March 10th and 26th letters, confirming that they have interests in the subject area and the proposed activities will infringe Aboriginal title and rights (though, again, no specific concerns were stated) such that significant consultation would be required prior to permit issuance. She wrote:

> It would appear to us that both of these permits [for geo-technical testing and mineral exploration], as well as a license to cut permit application recently received from the Ministry of Forests, are part of an overall expansion project ... Our Band has not been consulted by the Crown on this project, nor have we ever been consulted and accommodated for the original mine, and the resources that have been removed from our territory.
>
> It seems unreasonable for the Crown to divide up its consultation into numerous specific sub-permits, when we have never been consulted upon whether the mine expansion should be allowed.
>
> ... Consultation must take place during the planning [of] the proposed activity before it is approved, and not just about the subsequent activities.
>
> We are prepared to enter into a consultation process with the Crown and ... [TCMC] to determine whether the proposed expansion may occur. However, it should not be assumed that it will be allowed to proceed.
>
> [Emphases added]

[39] In short, Stellat'en wished to immediately commence consultation to determine whether the proposed expansion could or could not take place, as well as whether they were consulted and, if necessary, accommodated at the time of the opening of the original mine, that is, back in 1965.

[40] The Ministry of Forests approved the 6.2 hectare Free Use Permit on April 3, 2008, although it was signed on the 23rd.

[41] On April 30, 2008, the Ministry of Forests confirmed receipt of Stellat'en's April 9th letter. It acknowledged its responsibility for considering Aboriginal interests impacted by timber removal, as opposed to those impacted by the mine expansion, which were being dealt with by MEMPR. With respect to the proposed Occupant Licence to Cut, the Ministry of Forests encouraged Stellat'en's active participation in the consultation process, stating that it "is interested in understanding the scope and nature of any specific ... interests that may potentially be impacted by this proposed

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OLTC in order that the information can be considered and where appropriate, addressed prior to a decision being made". However, it advised that the 6.2 hectare Free Use Permit was approved; the following explanation was provided:

> This decision was made in the absence of any known specific aboriginal interest. To re-iterate from the previous letter [of April 4, 2008], it was essential to Endako Mine to proceed with the development of the 6.2 ha section as soon as possible, in order to support the commencement of the $373.6 million expansion project. Although the 2 week response timeframe utilized did not meet the 60 [day] response period as set out in the current Forest and Range Agreement, the economic impact could have significantly affected the local communities, including the Stellat'en First Nation.

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[42] Contact information was included should Stellat'en wish to meet and/or send written comment regarding the Occupant Licence to Cut or other forestry activity.

[43] On the same day (April 30th), as a follow-up to its April 4, 2008 letter, a representative from the Ministry of Forests faxed a note to former Chief Mabel Louie reminding her to provide any comments Stellat'en might have regarding TCMC's request for timber removal to allow for expansion of the mine site by June 9, 2008.

[44] On May 14, 2008, Stellat'en confirmed receipt of the Ministry of Forests' April 30th letter. They reasoned that since activities related to the Mine expansion are undertaken by MEMPR and outside the mandate of the Ministry of Forests, consultation on forestry activities would be ancillary to the actual Mine expansion and should be addressed in coordination with MEMPR's consultation process. They reiterated that consultation on forestry activities would be unreasonable at this time because consultation on the Mine's expansion had not yet begun. Further, they asked for a suspension of the processing of any applications for forestry activity related to the proposed expansion, including the already issued Free Use Permit.

[45] On May 20, 2008, TCMC wrote to Chief Inspector of Mines "seeking the first amendment to our existing operating permits to allow an expanded mill construction". The Company said "we are hopeful that this first permit amendment can be processed as soon as possible", as "[a]n early start date will allow us to take full advantage of the 2008 summer construction season and lead to a 2010 mill start

up which is essential to capturing the benefits of this project ...”. Enclosed were “mill design engineering details” put together in a document entitled “Endako Mine Expansion Project Description”, which was prepared by Rescan Environmental Services Ltd. for TCMC.

[46] On May 26, 2008, as a further follow-up to its April 4, 2008 letter, the Ministry of Forests wrote to Stellat’en reminding them to bring forward any information on Aboriginal interests within the areas specific to TCMC’s request to remove 309 hectares of Crown timber that may potentially be impacted no later than June 9th.

[47] On May 28, 2008, a mines inspector invited (by way of email) various individuals on a distribution list, including a Stellat’en councillor, to attend MEMPR’s Northwest Mines Development Review Committee’s [“NWMDRC”] next monthly meeting scheduled for June 3, 2008 from 1 to 4:30 p.m. at MEMPR’s Smithers’ office to discuss (whether in-person or by tele-conference) the expansion project.

[48] The NWMDRC is created by MEMPR pursuant to s. 9 of the *Mines Act* to undertake environmental assessments of proposed mine projects and make recommendations to the Ministry regarding mine permit issuance.

[49] The next day, on May 29, 2008, MEMPR wrote to Stellat’en acknowledging their April 15, 2008 letter regarding the two Notices of Work for geo-technical testing and mineral exploration. It stated that matters not related to the expansion were being deferred to allow for consultation and that the project would be discussed at the NWMDRC June 3, 2008 meeting, to which Stellat’en will be formally invited (I note Stellat’en was already so invited by way of the May 28th email). Specifically, MEMPR informed Stellat’en that the Notice of Work for geo-technical testing has been approved as being “necessary for ... TCMC to go to the next step of submitting a Mine Expansion Application”; that “drilling is necessary to identify underground geologic structures that are suitable for the expansion of the mill facility, and it does not assume that the proper structures will be identified within the area immediately east of the present mill complex”; and that its approval will “in no way prejudice subsequent consultation ... or decision-making process regarding the subsequent

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Mine Expansion Application". Stellat'en was also informed that the Notice of Work for mineral exploration, specifically drilling at one of the pits "will be deferred until the broader consultation on the Mine Expansion Application begins", but drilling at one of the tailing ponds will go ahead as it is unrelated to the expansion. The MEMPR Inspector further stated as follows:

> Both Notices of Work (geotechnical and mineral exploration) will result in minimal overall ground disturbance, and ... TCMC has proven to be vigilant in levelling drill areas and replanting trees and/or vegetation where necessary.
>
> The proposed mine expansion will, however, create further ground disturbance during the life of the operation, and will be subject to review under the Northwest Mine Development Review Committee. Your First Nation will be formally invited as full participants in this process. The initial meeting for the Endako expansion is slated for June 03, 2008 ...

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[50] On May 30, 2008, MEMPR forwarded to Stellat'en the May 28th email invitation to the June 3rd NWMDRC meeting. And, on June 2, 2008, MEMPR sent a further email to individuals on the distribution list (which included Stellat'en) with instructions on how to access TCMC's presentation on "Rescan['s] ftp site" in preparation for the June 3rd NWMDRC meeting. The time and location of the meeting were also confirmed.

[51] On June 3, 2008, the NWMDRC met, during which TCMC gave a PowerPoint presentation regarding many aspects of the proposed expansion project.
No Stellat'en member attended.

[52] TCMC met with Stellat'en on June 8, 2008 at the band office and with Nadleh Whut'en on June 9, 2008 – during which "employment and business opportunities" were discussed. Chief Mabel Louie attended both meetings. As a follow-up, TCMC sent to Stellat'en a letter dated June 18, 2008, which can be found in Mr. Kelly's affidavit at exhibit BB. I reproduce highlights of that letter below:

> Thank you very much for hosting the meeting that we had with you and your staff within your traditional territory on June 8th. We also appreciate the fact that you attended the June 9th meeting ... so that we could share our information, ideas, and goals for moving forward with our consultation and Cooperation Agreement to everyone at the same time. We certainly welcomed the acknowledgment of support for the expansion project based on

> our ongoing efforts to formally solidify the terms of an agreement between ... [TCMC] and the Stellat'en First Nation.
>
> ... we will look forward to receiving the draft budget for initiating and completing the upcoming discussions required to complete the Cooperation Agreement. We expect that when we review the budget, it will be clear if you are expecting consultation to occur with your nation individually, or if discussions will occur together with the Nadleh Whut'en First Nation and Carrier Sekani Tribal Council.
>
> Attached ... is the information ... with respect to the upcoming Canadian Aboriginals Mineral Conference to be held in Saskatoon ... As I mentioned at the two meetings, we are looking forward to hosting a trip like this for key Stellat'en leaders.
>
> ... I am still working with the design and construction engineers on a list of employment and business opportunities ... as well as updating a final construction schedule, for your review.
>
> ... we will look forward to advancing the consultation and accommodation discussions towards a mutually beneficial arrangement in the near future. ...

[53] Loren Kelly, of MEMPR, deposed at para. 74 of his affidavit that no further comments regarding the Occupant Licence to Cut were received from Stellat'en by the Ministry of Forests. He also attached as exhibit T to his affidavit the Ministry of Forests' "consultation summary", wherein it claims on p. 5 that eight follow-up attempts (including telephone voice messages and the written correspondences briefly described above) to engage Stellat'en were met with no response and on p. 6 that "First Nations have not identified any potential infringements of aboriginal interests related to this decision within the response period".

[54] On June 12, 2008 (though curiously dated for reference on June 1st – nine days earlier than the June 9, 2008 deadline imposed for submissions of concerns), the Ministry of Forests issued the Occupant Licence to Cut authorizing removal of about 309 hectares of mature and immature Crown timber.

[55] On June 17, 2008, MEMPR emailed Stellat'en as a follow-up to the June 3rd NWMDRC meeting (which, as I have noted above, they did not attend) and provided instructions on how to access the Company's presentation website.

[56] On June 20, 2008, Stellat'en wrote to MEMPR acknowledging receipt of MEMPR's May 29, 2008 letter, requesting a formal invitation to NWMDRC meeting

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(although I note that by this time MEMPR had already invited them and the June 3rd meeting had taken place) and requesting financial and technical resources to enable their participation in the consultation process (referred to as capacity funding).

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[57] On the same day (June 20th), as a follow-up of the NWMDRC June 3rd meeting, MEMPR emailed Stellat'en and other First Nations and advised it was continuing "the consultation process over the Notices of Work and the Amendment to the *Mines Act* Permit" and attached a brief document entitled "Project Description for Endako" along with the two Notices of Work.

[58] On June 30, 2008, as a follow-up to its June 20th email, MEMPR advised Stellat'en that it was considering approval within the next week of the site preparation and earthworks portion of the M-4 Permit amendment, which would allow TCMC to begin clearing land for construction of the new mill, but would have limited impact due to the proposed clearing being a "small size" and on "a pre-existing cleared area" (Loren Kelly deposed at para. 86 of his affidavit that this area is also land held in fee simple by TCMC). MEMPR sought their comments on this part of the application before July 7th.

[59] On July 2, 2008, a mines inspector issued TCMC an amended permit to carry out a partial mineral exploration program detailed in its March 7th Notice of Work.

[60] On July 11, 2008, MEMPR granted TCMC the site preparation and earthworks portion of the application to amend the M-4 Permit.

[61] On that same day (July 11th), Stellat'en wrote to the Ministry in response to its June 30th letter stating they could neither determine (based on information thus far received) whether and how the expansion project should proceed nor comment on the site preparation and earthworks until "some reasonable consultation" and "much more detailed discussions around the existing mine" have occurred. They described the piecemeal after-the-fact consultation approach taken by the Crown on specific activities relating to the entirety of the expansion as insufficient. I note that no specific concerns were expressed. A meeting was sought for July 23rd in order

"to further discuss the Project and to define the proper consultation process, including but not limited to a formal engagement process, requirements for information sharing and terms for implementing a joint decision-making process".

[62] In response, on July 16, 2008, MEMPR emailed Stellat'en accepting a meeting on July 23rd as proposed and stating that notwithstanding the fact that the site preparation and earthworks had been approved an amendment to the permit could be made to accommodate should there be any concerns.

[63] I note that this same Ministry representative again forwarded (via email) information about the expansion including instructions on accessing TCMC's presentation website to Stellat'en two days earlier (that is, on July 14th).

[64] No specific concerns with respect to the site preparation and earthworks were subsequently raised by Stellat'en.

[65] On July 28, 2008, Stellat'en responded to TCMC's letter of June 18, 2008, setting out a budget of $90,400 for funding its participation in the negotiation of a cooperation/accommodation agreement with TCMC as discussed at the June 8th and 9th meetings. That letter can be found in environment director for TCMC Randy MacGillivray's affidavit sworn January 6, 2011, at exhibit N.

[66] The first in-person consultation meeting took place on July 30, 2008. It was originally scheduled for July 23rd; I assume (based on the materials before me) that this agreed upon date was changed to accommodate Loren Kelly's availability. In attendance were Nichole Prichard and Loren Kelly for MEMPR, former Chief Mabel Louie, band councillor Violet Kennedy, band manager Joe Patton and Stellat'en's counsel Greg McDade. Meeting notes (in brief summary form) were taken by Ms. Prichard and can be found in Mr. Kelly's affidavit at exhibit JJ. Counsel for Stellat'en is noted as having made the following paraphrased statements:

- ... one [fundamental problem] is that the mine is an existing mine and there wasn't any previous consultation. The mine hasn't gone through the necessary steps, but now because of these new permit requirements, there is a potential to reach accommodation.

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- These [preliminary] permits are felt to be a part of this whole process and they [the Stellat'en] don't feel like doing all these small steps for permitting being broken up.
- ... MEMPR [should] halt all permit issuance, advise TCM[C] to conclude a [impact] [b]enefits agreement. This will to ensure that TCM[C] are [*sic*] pressured to reach a[n] [impact] benefits agreement with Stellat'en. If the permits are [continuing to be] issued, TCM[C] will not have compelling reason to negotiate.
- Legally it seems that this project would be the same type of consultation as if it were a new mine. ... the Province needs to recognize that the money made from the project is from the minerals that are the First Nations.
- Stellat'en isn't ready to give the Province a list of their concerns. They want to have more time for a proper consultation process and there needs to be capacity funding to deal with the technical information. The three main things that need to occur are a timeline, continued communication and info sharing, and capacity funding.

[67] Mr. Kelly is noted to have stated (among other things) that information and capacity funding can be provided and that a protocol agreement can also be done but noted that the timelines are short. Then, in view of consulting with the Stellat'en on the total expansion and finding out their specific concerns, he went on to review with them information given at the NWMDRC June 3rd meeting.

[68] I note that on the evidence, the matter of capacity funding from the Crown and negotiation of a protocol agreement were not pursued; no explanation from either side was given to me.

[69] On August 6, 2008, TCMC responded to Stellat'en's July 28th letter accepting the $90,400 budget they proposed for negotiating with the Company a cooperation/ accommodation agreement. With respect to what became of these communications as between Stellat'en and TCMC, Mr. MacGillivray deposed as follows:

> 43. Pursuant to this funding agreement, Thompson Creek paid a total of $41,179 in respect of the Stellat'en ...'s expenses in relation to the negotiation of a cooperation/accommodation agreement ...
>
> 44. In addition, Thompson Creek paid a total of approximately $4,000 for four members of the Stellat'en ... to attend the 2008 Canadian Aboriginal Minerals Association Conference in Saskatoon ...

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> 45. Negotiations between the Stellat'en ... and Thompson Creek in regard to a possible Impact Benefit Agreement ["IBA"]... began in or about early August 2008. ...
>
> 46. The IBA Negotiations continued on and off until the spring of 2010. However, by April 2010, it became apparent that the IBA Negotiations had reached an impasse.

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[70] On August 21, 2008, as a follow-up to the July 30th meeting, Stellat'en wrote to MEMPR seeking capacity funding of about $40,000 for the purposes of negotiating a protocol agreement which would establish a consultation process.

[71] On September 10, 2008, Chief Inspector of Mines issued the remaining mineral exploration portions (namely drilling in certain areas) of TCMC's Notice of Work dated March 7, 2008.

[72] On September 19, 2008, Mr. Kelly, on behalf of MEMPR, wrote a letter to Stellat'en addressing the three main issues raised at the July 30, 2008 meeting (which is consistent with the statements he is noted by Ms. Prichard to have said):

> Past infringement
>
> ... I am not of the view that MEMPR is required to remedy any past infringements related to the original mine during the course of consultation on a proposed mine expansion permit. We understand that you are in the process of negotiating a treaty, which will ultimately resolve previous infringements. ...
>
> Consultative process
>
> ... *Haida* and *Taku River* have upheld that a range of consultation, from notification to deep consultation, is dependent on the significance of impacts occurring as a result of decisions made by the Crown and the strength of claim of the First Nation has on the area. These decisions also provide four broad principles ...
>
> 1. Both parties must demonstrate good faith;
> 2. The Crown must have the intention of substantively addressing Aboriginal concerns as they are raised;
> 3. The consultation must be meaningful, although there is no obligation to reach an agreement; and
> 4. First Nations must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the Crown from acting in cases where, despite meaningful consultation, agreement is not reached.

> ... To date we have not received any information from Stellat'en with respect to impacts that this project would have over asserted rights and title. ...
>
> ... To date, the Stellat'en First Nation has generally asserted aboriginal rights and title in the Project Area. Aside from title, no specific aboriginal rights have been identified, nor has any information been provided to MEMPR supporting the aboriginal rights/title claims. Stellat'en has also not expressed its views of what, if any, impacts of the proposed mine expansion may have on any claimed rights.
>
> Taking note of the proximity of the Project to the main village site, it appears that the Stellat'en ... have a *prima facie* claim to aboriginal rights and title to the area. It is uncertain how serious the impact of the mine expansion will be as the Stellat'en ... has not yet articulated what specific aboriginal rights activities would be impacted by the mine expansion, nor the extent of any such impacts. However, **we are prepared to assess that the scope of consultation will be significantly deeper than minimal consultation, and thus, the Province is willing to explore accommodation for potential impacts on those claims**. ... [Emphasis added]
>
> <u>Delay in permitting in order to negotiate an Impact Benefit Agreement</u>
>
> ... [TCMC] is not, and cannot be, legally bound to develop an impact benefits agreement. It would be inappropriate for British Columbia to withhold permitting in this manner. Such a position would, in our view, be inconsistent with consulting in good faith ...
>
> <u>Next Steps</u>
>
> ... I am again requesting that information on the specifics of Stellat'en ...'s asserted claims over the project area, and degree of impact on that claim associated with this project be provided to this office in order that full and complete decision making is able to occur, including having further discussions with Stellat'en as appropriate. I am also requesting that this information be provided within 21 calendar days of receipt of this letter.
>
> <u>Within this time period</u>, I would like to meet with you to discuss these issues and potential accommodation measures ... A staff member will contact you shortly to try to arrange a time to meet.
>
> ... if we do not receive any further information from you within this time period, MEMPR will be advancing a recommendation to the Chief Inspector of Mines for decision on this project, with consideration of currently available information.

[73] In short, Mr. Kelly stated that (1) past infringement is part of the treaty process and not part of consultation; (2) Crown could not withhold permits in order to compel TCMC to enter into an impact benefits agreement with Stellat’en; (3) he had not received information from Stellat’en as to the effect of expanding the Mine on their asserted rights; and (4) the Ministry, having assessed the scope of its duty to consult as deep, is willing to explore accommodation. To that end, Mr. Kelly sought

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specifics of the project's impact on Stellat'en's claims within 21 days. A document entitled "Proposed Endako Mine Expansion Project Information" was enclosed. Mr. Kelly also acknowledged receipt of Stellat'en August 21, 2008 letter regarding capacity funding for a protocol agreement; however, as noted earlier, this topic was not further pursued by either party.

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[74] On September 29, 2008, Stellat'en responded to Mr. Kelly's September 19, 2008 letter stating they are currently in the process of undertaking extensive study and required 90 days to provide their position on how their interests may be impacted by the project, but agreed to meet in the meantime for further discussion.

[75] No mention was made in the petition record or at the hearing as to whether Stellat'en ever completed their own study (as they had proposed to do) or whether they have (to date) reported any specific impacts of the expansion on their asserted Aboriginal rights and/or title interests. On the material before me, I must infer that as of yet Stellat'en has neither followed-up on the results of any study conducted on their own, nor provided their position on how their interests may specifically be affected by the project.

[76] The second in-person consultation meeting occurred on October 14, 2008. The parties' affidavits indicate that Stellat'en stated they had not received anything from the existing Mine and reasserted that they were not being accommodated; and that Mr. Kelly reiterated that past infringements are dealt with in treaty negotiations and then proposed that MEMPR proceed to authorize construction of the new mill but defer to a later date amending the M-4 Permit to allow for throughput tonnage increase. Mr. Kelly deposed at para. 96 that this proposal "is consistent with current practice for new mines where construction and operation are separated".

[77] On October 21, 2008, as a follow-up to the October 14th meeting, Mr. Kelly for MEMPR wrote to Stellat'en stating that their 90-day postponement request would cause "unreasonable delay" to TCMC and create "significant financial stress that will affect the overall project viability". The Ministry advised that it had, in the absence of information from Stellat'en identifying specific concerns, conducted its own

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preliminary research on the ethno-historic use of the subject land and the Carrier's subsistence practices. Based on that research, the Ministry "is prepared to make the working assumption that Stellat'en would claim aboriginal rights to carry out harvesting activities, such as hunting, fishing, trapping, and gathering, for various purposes, where such resources were available in the Project area". But, the research also indicates that "there are no known archaeological sites" and the archaeological potential for further sites "appears low" as the subject area contains "no known trails or primary waterways". He went on to state that any impacts of the expansion on Stellat'en's ability to engage in plant and animal resource harvesting activities within its claimed traditional territory can be avoided or minimized "through for example, developing appropriate permit conditions". The following approach for the permitting process was then proposed:

> 1. In order to address ... [TCMC's] immediate concern regarding the protection of project viability, I will recommend ... that a decision be made to approve **construction of the new milling facility only** by ... [October 24, 2008]. The milling facility will be constructed on fee simple land, owned by ... [TCMC], within the existing mine site, on an area that has undergone a high degree of previous disturbance. Thus, I am of the view that the potential impacts of this aspect of the Project on any aboriginal claims the Stellat'en may have in this area will be low, and that the corresponding scope of consultation has been met by the process to date ... [Emphasis in original]
>
> 2. To address potential impacts on asserted aboriginal rights and title, a second permit to allow re-location of the coarse ore stockpiles and in-feed conveyor will be delayed ... [to November 12, 2008]. During this time, MEMPR will consider any further input from Stellat'en ... Ministry of Environment, or ... [TCMC], and will consider all available environmental and ethnohistoric information in relation to the Project area. ... [This deferral later proved unnecessary as the activity at issue was already permitted so no new decision was needed.]
>
> 3. To allow the completion of the comprehensive study being conducted by Stellat'en ... and for the outcome of that study to inform final accommodation approaches, MEMPR proposes to withhold the final stage of permitting [allowing increased throughput] for the requested 90 days [to February 6, 2009]. ...

[78] In short, Crown's approach as outlined above included approval by October 24th of the construction of the new mill; deferral to November 12th of the relocation of the coarse ore stockpiles and in-feed conveyor (which later proved

unnecessary); and deferral to February 6, 2009 to allow increased throughput (approval of which still had not been made at the time of the hearing).

[79] On October 23, 2008, Stellat'en wrote to MEMPR advising that its October 21, 2008 letter "fails completely to deal with the fact of our aboriginal title" and "represents a unilateral approach to consultation"; that approval of the new mill construction by the 24th without any accommodation is "one more example of the Crown's determination to proceed ... without regard to our interests"; that the "'split the permitting process' offers little hope to Stellat'en"; that "any further permitting discussions are phoney pretence"; and that "you are leaving us with no alternative but litigation".

[80] As previously noted, on October 29, 2008, the Ministry granted the amendment to the M-4 Permit allowing construction of the new mill.

[81] On October 30, 2008, MEMPR wrote to Stellat'en acknowledging their letter of the 23rd, enclosed a copy of the granted amendment to the M-4 Permit, reiterated the need to balance societal and Aboriginal interests and stated that it was willing to meet as future permits would be delayed to allow for consultation.

[82] On January 6, 2009, TCMC wrote to MEMPR advising that to date the site preparation, earthworks and construction of the building foundations had been completed, but that "[d]ue to falling prices and poor molybdenum demand, the mill expansion has been postponed for at least one year". On January 22, 2009, TCMC advised its employees that there would be no operations for July 2009, a decrease in production and an accompanying workforce reduction. This memorandum to employees can be found at exhibit TT of Mr. Kelly's affidavit; it reads as follows:

> I am sure you are all aware of the financial crisis currently affecting the global economies. ... as a result of falling prices and poor molybdenum demand, our product inventory ... has been increasing.
>
> ... we are unable to justify the build up of additional inventory. As a result we will be shutting down the Endako operation for the month of July 2009 to reduce inventory and to complete repairs ...
>
> ...

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> In addition to the one month shutdown, we will be reducing our annual Sulphide and Oxide production, which includes a reduction in the workforce.

[83] On February 12, 2009, the annual EMCLC meeting was held to provide an update on the Mine's operations and present information on the compliance status with Environment Canada regulations and Ministry of Environment permits. A MEMPR representative and a member of Stellat'en attended this meeting.

[84] On March 23, 2009, the Integrated Land Management Bureau ["ILMB"] of the Ministry of Agriculture and Lands wrote to Stellat'en notifying that TCMC sought to replace or renew for 10 years its existing tenure (expiring August 4, 2009) for quarrying, digging or removing sand and gravel and uses ancillary to quarrying (such as sorting, crushing, stockpiling and washing of materials) located in Lot 648, Range 5, Coast District. The land officer provided information for the purpose of consultation to ensure Aboriginal interests are incorporated into ILMB's decision-making in the replacement/renewal of the tenure and sought specific and readily-available information from the Stellat'en by May 7, 2009 regarding activities carried out in the subject area, whether and how those activities may be affected by the application and any proposals for avoiding, mitigating or accommodating their concerns. Mr. Kelly deposed at para. 110 of his affidavit that to the best of his knowledge Stellat'en did not provide any information in response to ILMB's request.

[85] On May 25, 2009, the Stellat'en wrote to MEMPR regarding the March 23rd letter from ILMB and sought meaningful consultation before any further permitting. Then Chief Mabel Louie stated (among other things): "we are opposed to participating in a secondary process which attempts to denigrate our aboriginal rights and title interests by incrementally permitting and tenuring such development without adequately consulting us".

[86] In or about August 2009, TCMC resumed construction of the new mill.

[87] On August 31, 2009, MEMPR responded to Chief Mabel Louie explaining that the quarry is ancillary to operation of the Mine so "the 2009 tenure renewal is not related to the proposed expansion". Though not anticipating that the tenure renewal

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process will impact Stellat'en's interests, the Ministry said it "remain[s] ready and willing to discuss any comments you may have regarding this [matter]". The representative also advised that the expansion project is again becoming a priority and that the Ministry would like to re-engage with Stellat'en in consultation.

[88] On September 9, 2009, MEMPR emailed Stellat'en advising that it wished to meet to discuss the quarry tenures and expansion of the Endako Mine, including possible next steps and potential revenue sharing opportunities.

[89] On September 15, 2009, Stellat'en accepted the Ministry's invitation to meet. In so doing, Stellat'en referred to *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, 89 B.C.L.R. (4th) 273, for the proposition that "Crown's duty to consult and accommodate is triggered even where its decision or action results in no new impacts", which means that "Crown must consult and, where appropriate, accommodate, for new decisions regarding any existing projects and activities, which perpetuate historic and ongoing infringements".

[90] The third in-person consultation meeting occurred on September 23, 2009 at Stellat'en's band office. In attendance for Stellat'en were councillor Robert Michell, councillor Violet Kennedy, band manager Joe Patton, natural resource director Eddison Lee-Johnson, legal counsel Gregory McDade (by telephone) and legal counsel Angeline Nyce (by telephone); for MEMPR were Loren Kelly and Simon Bendall; for ILMB were Geoff Recknell and Leah Sheffield. Mr. Kelly deposed at para. 113 that MEMPR provided an update on the expansion project and that "in a wholly separate portion of the meeting", ILMB discussed revenue-sharing through an Economic Community Development Agreement ["ECDA"]. MEMPR's short two-page written summary and PowerPoint presentation slides are consistent with the meeting having been broken down into these two topics and these two groups of presenters, although the meeting notes seem to indicate a less than clear division of labour.

[91] Notes of the meeting are found in band councillor Robert Michell's affidavit sworn January 27, 2011, at exhibit B. There is a dispute as to the completeness of these notes. Notwithstanding, they reveal a polarization of the parties' positions with

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respect to past infringements. The attendees are noted to have made the following statements or statements to the following effect:

> **Mr. McDade:** ... regarding the existing facilities, when we broke off discussions in 2008 [that is, prior to the 2009 suspension], the Ministry had no mandate or duty to deal with existing facilities. In the spring of 2009, the Court of Appeal passed its decision on *Alcan* [2009 BCCA 67], which said that you can't give any new permits without talking about existing facilities. So, we can't allow consultation on the expansion if you allow the mill construction to proceed without completing consultation.
>
> **Mr. Kelly:** ... Regarding your view on the existing facilities and the new mill, *Alcan* was a specific case, and I'm not sure it's relevant to this situation.
>
> **Mr. McDade:** In that case, we'll be applying for a Judicial Review, because we have very different opinions on the existing mine and facilities, and we haven't been consulted.
>
> **Mr. Kelly:** Even though we have different opinions, we're not shutting the door on consulting on the existing mine. We will consult, but will not withhold permits.
>
> ...
>
> **Mr. Kelly:** [The next permit is] [a]mending the tonnage through-put from 28,000 tons to 50-60,000 tons. This requires a one-line change in the existing operating permit.
>
> **Councillor Michell:** We disagree with your comment that a one-line change is insignificant. ... We have seen an increase in production and increased smoke coming out of the stack, and we physically see the end result of it. Regarding your comment that you will not withhold permits, why did we meet here today? What's the purpose? ...
>
> **Mr. Kelly:** We want to know what needs to be done. The company has designed operations to stay in compliance with site-specific water quality and air emissions. The only authority required is for the expansion. There will be no additional land. The mill will change its physical structure which will improve its operation and increase tonnage through-put. I understand the company has entered into discussions regarding an Impact Benefits Agreement, although you may be on different ends of that discussion. The company has made an offer to your neighbours [I assume Nadleh Whut'en] and is willing to share profits. And, we can offer economic development revenue sharing with the Band and continue this dialogue. At the last meeting we had [I assume on October 14, 2008] we didn't have the mandate to share revenue, but recently, we have identified with Cabinet to share revenue on Endako. We seem to have two different minds of whether permit issuance is required to enter into revenue sharing arrangements. When we met last, you asked and we told you we would not withhold permits to allow the IBA with the company.
>
> ...

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> **Mr. Kelly:** ... Whether there is a direct tie to emission rates and cancer in the community, I don't know. The company continues to monitor water quality and air emissions and the company is in compliance. ...
>
> **Councillor Kennedy:** There have been many affects on health in the community. ...
>
> **Mr. Recknell:** ... I do know that the company has been operating within the standards that are set. With a new mill, it's very possible that it might change the environmental effects and change the emissions outputs.
>
> ...
>
> **Mr. McDade:** It's apparent that the Province is not here to consult about existing permits or new permits. We understand that you have the ECDA in your toolkit and want to talk about it. Since we have different points of views about the consultation obligation, there's no point carrying on talking about consultation on the permits. What we can do here, is to hear what the Province wants to table about – the ECDA.
>
> ...
>
> **Mr. Kelly:** We don't have to have a definitive process and agree that permits have to stop until Stellat'en's concerns are addressed. I don't believe that we have to continue our dialogue on process and stop permitting in order to agree on revenue sharing. It can be a parallel process. ...

[92] In short, Stellat'en took the view that no expansion could proceed without completing consultation, but there was no point in carrying on that process, as consultation had not been meaningful and, therefore, they would pursue litigation. Mr. Recknell then gave a PowerPoint presentation on the Crown's revenue-sharing proposal and the remainder of the parties' discussions were centered on the ECDA.

[93] I divert from the timeline to provide a brief background to the ECDA policy. On November 25, 2005, the Province, federal government and B.C. Assembly of First Nations, First Nations Summit and Union of B.C. Indian Chiefs signed the *Transformative Change Accord* for the purposes of (1) closing the socio-economic gap between First Nations and other British Columbians; (2) reconciling Aboriginal rights and title interests with those of the Crown; and (3) establishing a new relationship based upon mutual respect and recognition. In pursuit of those goals, the Province and First Nations of B.C. have (among other things) agreed in *The New Relationship* 'vision statement' "to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing". And, as per that agreement, the Province has endeavoured to establish with

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Aboriginal peoples mutually acceptable arrangements for resource revenue-sharing and other benefits arising from project development within their asserted traditional territories, *vis-á-vis* ECDAs. This endeavour is known as the ECDA policy.

[94] In this case, certain strings were attached to the ECDA proposed by Crown to Stellat'en: (1) the ECDA is to be independent from but parallel to Crown's consultation and accommodation obligations; (2) Stellat'en is to accept the ECDA as fulfilling Crown's duties to consult and accommodate; (3) the ECDA will recognize only mineral-tax revenue arising directly from expanded production (that is, from the tonnage increase of 28,000 to 55,000) not the overall production; and (4) economic benefits flowing therefrom would be equally split with other First Nations regardless of the strength of Stellat'en's Aboriginal claims (that is, the ECDA is not to be based on a 'strength of claim' assessment). The characterization of these 'strings' is in contention. By way of one example, Robert Michell deposed in his affidavit sworn January 27, 2011 at para. 45 that "my understanding of the Province's [ECDA] program is that it is available to us only if we acknowledge that it satisfies the Province's obligations for consultation and accommodation in respect of the Project". In response, Geoff Recknell of the ILMB deposed to the opposite effect in his affidavit #2 sworn February 14, 2011 as follows:

> 12. In further response to paragraph 45 of the Michell Affidavit, an ECDA contains a "*quid pro quo*" term by which a First Nation acknowledges that acceptance of the ECDA's terms satisfies the Province's obligations to consult and accommodate. However, this does not mean that the Province would approve future permits if adequate consultation and accommodation had not occurred through the parallel process. An ECDA would include a process to ensure that consultation and, if appropriate, accommodation, would occur prior to the issuance of future permits or amendments to existing permits.
>
> 13. In further response to paragraph 45 of the Michell Affidavit, the revenue sharing program is based on the goals set out in the New Relationship and Transformation Change Accord, and thus the Province needs assurance that it is in partnership with the First Nation. For example, the Province does not want to create a situation where revenue is being shared between the Province and a First Nation, and the First Nation is suing the Province.

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[95] On September 21, 2009, MEMPR invited (by way of email) various individuals, including Joe Patton of Stellat'en to a NWMDRC meeting with TCMC on October 2, 2009 from 9:30 a.m. to 12:30 p.m. in Smithers regarding the five-year closure plan amendment.

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[96] On October 1, 2009, MEMPR emailed materials for this upcoming meeting to various individuals including two members of Stellat'en and provided tele-conference call-in information for those unable to attend in-person.

[97] NWMDRC met in Smithers on October 2, 2009; Stellat'en neither attended nor called-in. The draft meeting notes indicate that three members of Nadleh Whut'en attended. Further, according to Mr. Kelly at para. 120 of his affidavit, it was noted, at the meeting, that the quarry tenures were no longer required.

[98] On November 19, 2009, as a follow-up to the third in-person consultation meeting on September 23rd, Mr. Recknell for ILMB wrote to Stellat'en regarding revenue-sharing and noted there had been no response as to their level of interest. The letter lists the key elements of Crown's proposed approach:

- an interest in sharing in a portion of the rent (mineral tax received) by the Province that can be attributed to the mine expansion;
- revenues received by the Stellat'en ... would be used to help achieve the priority community economic and social development objectives, reflecting the goals of the Transformative Change Accord;
- provincial revenue sharing is intended as a separate agreement from any agreements (e.g. Impact Benefit Agreement) developed between the mining company and the Stellat'en ...;
- the Province views an Impact Benefit Agreement as a contract between ... Thompson Creek Metals ... and the Stellat'en ... where each party is able to bring forward their interests and negotiate the best outcome. The Province does not have a direct role in these negotiations;
- capacity funding is made available from the Province to support the Stellat'en ... during the development of an agreement, should the Stellat'en ... indicate an interest in negotiating a revenue sharing arrangement; and
- the opportunity to negotiate revenue sharing arrangements on Endako Mine expansion is time bound and targeted for conclusion by the summer of 2010.

[99] On February 19, 2010, Barbara Riordan (chair of EMCLC) emailed Stellat'en asking if they would send a member to the upcoming 2010 EMCLC meeting and seeking to coordinate an acceptable date. On March 16, 2010, the EMCLC met; no one attended on behalf of Stellat'en.

[100] On July 22, 2010, MEMPR emailed various individuals including Stellat'en's natural resource director advising that TCMC had submitted on July 12th to the Ministry of Environment an application for increased water withdrawal from François Lake to support increased production capacity of the new mill. TCMC holds two water licences that authorize a total intake of 15,671 m^3 per day; the application sought an additional 11,955 m^3 per day, thereby bringing the daily total withdrawal to 27,626 m^3. Enclosed were "supporting studies for the Stellako River". With respect to this document, the MEMPR representative stated:

> The Stellako studies [which TCMC submitted to the Ministry of Environment on July 12, 2010] are in response to comments made by Nadleh [Whut'en] during the NWMDRC meeting in Oct 2009 regarding the Endako Mine Closure Plan update. Nadleh [Whut'en] were concerned about what impacts the additional water intake would have on the Stellako River sockeye salmon habitat, and these potential impacts were addressed in the Water License Application document [which was attached to this email message, along with a summary of the application].

[101] He also advised that a NWMDRC meeting would be convened in the fall of 2010 to discuss this application and to provide an update on the expansion project.

[102] On July 14, 2010, TCMC emailed Stellat'en proposing a meeting to review the water licence application; another email was sent on July 29th. Stellat'en has (to date) not responded.

[103] On August 12, 2010, TCMC hosted a group of First Nation visitors including members of Stellat'en on a tour of the Mine, during which hard copies of its water licence application and water development plan were distributed.

[104] On September 23, 2010, TCMC received a letter from Stellat'en seeking financial assistance in the amount of $784 for review of the water licence application; and, on October 4, 2010, TCMC made out a cheque for that sum.

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[105] On October 8, 2010, TCMC submitted to MEMPR its application to amend the M-4 Permit approving the work system (for increased daily ore tonnage) and its 2010 reclamation/closure plan.

[106] On October 18, 2010, Stellat'en wrote to the Ministry of Environment and MEMPR objecting to the granting of TCMC's water licence application. Present Chief Louis made the following assertions:

> ... We consider it necessary that there be further, independent ([that is,] not provided by [the] applicant [TCMC]) scientific examination of the true environmental impacts of the withdrawal of such a significant amount of water from Francois Lake.
>
> ... The Endako Mine as it currently exists already negatively impacts our ability to use our territory as we once could. The proposed expansion will have serious detrimental impacts on our ability to exercise our aboriginal rights in our territory.
>
> Stellat'en must be adequately consulted regarding its interests, rights and concerns with respect to the impact of the proposed water licence. That consultation must be conducted in a way that considers the whole impact of the expansion of the mine for the life on the mine on our asserted aboriginal rights and title interests. ...consultation with the Stellat'en ... about the ... expansion cannot be conducted in an isolated, piecemeal fashion. To date, the Stellat'en ... has not been adequately consulted with respect to the expansion ... as a whole. As a result, the Stellat'en ... has filed a petition in the British Columbia Supreme Court seeking judicial review ...
>
> ... we consider that the issuance of the new licence to Endako will prejudice our rights with respect to the water and fish resources in Francois Lake and Stellako River. The licence will alter fish habitat, water levels and our ability to use and make decisions regarding our territory and resources. ...

[107] On October 19, 2010, the NWMDRC met in Smithers to discuss the water licence application. Three members of the Nadleh Whut'en were in attendance; Joe Patton of the Stellat'en attended.

[108] On November 19, 2010, the NWMDRC met again regarding the water licence application; three members of the Nadleh Whut'en were in attendance; although invited, Stellat'en did not attend. Notes of these two meetings can be found in Mr. Michell's affidavit, at exhibits C and D respectively.

[109] On January 20, 2011, the MEMPR sent a letter (via email) to the NWMDRC's distribution list (including Stellat'en) recommending approval of the water licence.

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The letter details the studies and meetings that had been taking place up until that point in time.

[110] On April 9, 2010, following suspension of negotiations of an impact benefits agreement between TCMC and Stellat'en, TCMC wrote to Stellat'en confirming the Company's continued interest in reaching an agreement and enclosing its proposed terms. That letter can be found in Mr. MacGillivray's affidavit at exhibit P.

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[111] Mr. Kelly deposed in his affidavit at para. 127 that no decision has been made to grant the application to amend M-4 approving the closure plan and that consultation with Stellat'en is ongoing.

[112] The petition in this matter was filed in Supreme Court at the Vancouver Registry on May 18, 2010; but, the hearing did not begin until February 28, 2011.

[113] I note that Stellat'en filed the petition some 19 months after the October 29, 2008 issuance of the M-4 Permit.

IV. PARTIES' POSITIONS

[114] I briefly summarize the positions of the three main parties involved below.

A. STELLAT'EN

[115] Stellat'en seek some 12 orders from this Court – namely a declaration that Crown owes them a duty to consult and if necessary accommodate with respect to "the whole impact of the mining operations for the life of the Mine" prior to issuing the M-4 permit amendment allowing the new mill construction, which has not to date been met; a declaration that permits and/or tenures held by TCMC relating to the expansion project are invalid; an injunction prohibiting further construction until meaningful adequate consultation and if necessary accommodation is conducted and completion of a lawful and proper permitting process; an order quashing the Chief Inspector's decision to issue the amendment; an order in the nature of *mandamus* directing the Minister and Chief Inspector of Mines to fulfill Crown's duty to consult and if necessary accommodate.

[116] Stellat'en's general position can be found at para. 84 of its submissions:

> Broadly speaking, the Petitioners submit that the Province's approach to consultation in this case was contrary to legal principles, in that the Province's decision-making processes have never provided a mechanism to address the significance of the impact from [the] Expansion Project on Stellat'en's aboriginal rights and title; and as a result has not made that impact the subject of prior consultation nor accommodation. Rather, the Province has:
>
> a) Failed to provide a mechanism for consultation or accommodation prior to the real strategic decision regarding whether the Project should proceed; [the 'Improper Incremental Approach']
>
> b) Approached consultation for specific impacts of specific authorizations in an isolated one-at-a-time manner which unreasonably constrained consultation to those specific, non-contextualized impacts, and deferring meaningful consultation on the whole of the project until it is too late; [the 'Improper Incremental Approach']
>
> c) Failed to recognize or consult at all with respect to the whole impacts of the Expansion Project; i.e. the impacts of the operation of the entire Endako Mine for its extra future years; by acknowledging a duty only to consider the 'new footprint'; and [Partial Assessment]
>
> d) Offering no accommodation of Stellat'en interests; neither being willing to adapt significant decisions; nor offering economic accommodation reflective of the real impact of the Expansion Project on Stellat'en's interests (only offering revenue-sharing based on an unreasonable assessment of increased production levels and sharing based upon non-title First Nations). [Failure of Accommodation]

[117] With respect to the past infringements issue, Stellat'en held on to its position from the onset of consultations with MEMPR until the filing of the petition. They adamantly demanded that past infringements be included in the consultation process triggered by TCMC's project. However, that position was changed or, at least, tweaked by February 2011. At para. 66 of the argument, counsel submitted that Stellat'en "does not seek in this proceeding to address impacts from past mining", rather "what is at issue is the consequences of the permits allowing the rebuilding, expansion and extension of the mine-life of the [M]ine going forward". Those permits lengthen and add to the Mine's harmful effect on Stellat'en territory and way of life. Accordingly, the petitioners object to the manner by which Crown

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artificially limited its assessment of impacts to only those new ones directly arising from the proposed project, without any consideration of the substantial impacts of the whole facility over the prolonged life of the Endako Mine.

[118] To this effect, in his affidavit sworn May 13, 2010, Chief Louis stated as follows:

> 32 The Endako Mine is located in the heart of our Traditional Territory and interferes with our use and ownership of the lands, water and resources. The Mine represents a fundamental alteration of our Territory. Tens of thousands of tonnes of resources are extracted and processed daily at the Mine.
>
> ...
>
> 37 The Expansion Project not only continues, but extends and augments the impact from the Endako Mine on our Traditional Territory and our way of life. As set out above, the Expansion Project will mean almost double the amount of resources extracted daily, will increase the area utilized, intensify the use of other areas, and extend the life of the Mine (and all its impacts) for at least 24 years.

[119] Citing *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 44, [2010] 2 SCR 650 [*Alcan* cited to SCC], they say the duty to consult is not confined to the subject matter of each individual government decision but encompasses "'strategic, higher-level decisions'" which lead to later impacts even if these decisions have no immediate impact on the land and resources. Accordingly, MEMPR erred in law by considering only isolated aspects of the subject matter and refusing to discuss wider effects of the expansion project of which the impugned decision is a part.

[120] In so far as Crown relies on *Alcan*, *supra* for the proposition that past breaches are outside the consultation process, Stellat'en distinguished that case on the basis that in the case before me, there are substantial new physical impacts as well as a major extension of the existing impacts for another 20 or more years.

[121] As to Crown's contention of a lack of causality, Stellat'en asserted that there is no question the mine amendments were government decisions having further impact on the use of the resource. In short, they stated, in their written argument,

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that by allowing the extraction of additional minerals, worth millions of dollars, Crown is adversely affecting the value of their Aboriginal rights and title for many more years to come.

[122] Stellat'en submitted that Crown's incremental partial method "unreasonably minimized the real impacts of the Expansion Project ... and precluded those impacts from being the subject of consultation and accommodation at all or until after it was too late to be meaningful". They asserted that Crown approached consultation for specific impacts of specific authorizations in an isolated one-at-a-time manner which unreasonably constrained consultation to those specific non-contextualized impacts and deferring meaningful consultation on the whole of the project until it is too late.

[123] Stellat'en argued that Crown cannot rely on future consultation (namely, with regards to amending the M-4 Permit for increased tonnage) to fulfill its *Haida* (*infra*) obligations. They stated that allowing the new mill to be built effectively guaranteed that the expansion would proceed on TCMC's terms. The Company had already commenced construction at a substantial investment. So, in their view, any future permitting decisions necessary to complete the project are all but certain. It will be too late and thus impossible for Stellat'en interests to be taken into account in future permitting decisions.

[124] Specifically, they submitted that meaningful consultation starts at the earliest stages of a proposed project and must include the possibility of change. Citing caselaw on pp. 15-16, they stated that the fact that TCMC will be applying for a later permit does not justify deferral of consultation to the last stage of the regulatory process, as (by that time) opportunity for compromise may be gone.

[125] They say that in this case, since 2008 and certainly by the time the new mill construction was authorized, both Crown and TCMC proceeded on the basis that the project would (from a permitting perspective) go ahead. MEMPR wrongfully deferred consultation on the whole of the project and accommodation of any kind to the last decision – that is, the M-4 Permit amendment in respect of increased throughput –

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while making real strategic decisions (namely, the decision to allow construction of the new mill) that effectively ensure the Mine's expansion will proceed.

[126] Stellat'en pointed to some examples of how consultation with them by the Province never contemplated whether the Endako Mine expansion project would go ahead or as to its scope. First, there was no purpose for approval of the 6.2 hectare Free Use Permit (which contravened the 60 day notice provision in the Forest and Range Agreement) other than to facilitate the construction of the new mill. Second, the Occupant Licence to Cut 309 hectares of Crown timber was approved on the assumption that the new mill will be built in the near future. Third, there was no other purpose to grant the site preparation and earthworks permit other than to assist TCMC in securing any further permits it needed pertaining to the new mill construction. They further stated that by the time of the first in-person consultation meeting on July 30, 2008, four permits (the two forestry-related licences, Notice of Work for geo-technical testing and site preparations/earthworks) were issued. The above are but some examples.

[127] Stellat'en alleged that Crown has not offered any form of non-economic accommodation because the inevitability of the expansion leaves no options available other than economic accommodation, which Crown has restricted to the ECDA. They stated that in proposing revenue-sharing based on an unreasonable assessment of increased production levels and based on an assumption of equality among rights and title interests of all relevant First Nation groups, the proposed ECDA is not reflective of the real impact of the expansion project. They submitted in their written argument that from August 2009 (when market conditions improved and TCMC resumed operations) onwards, Crown limited consultation to the ECDA. They asserted the ECDA policy was not developed through discussions with Stellat'en; rather, it is a unilateral instrument instituted by the government. Accordingly, they seek a declaration that Crown's ECDA policy does not meet the duty to consult and, if necessary, accommodate owed to Stellat'en in relation to the expansion and that the ECDA policy is otherwise arbitrary and unlawful.

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B. CROWN

[128] Crown stated that, in the circumstances, MEMPR acted reasonably in providing consultation opportunities and thereby discharged its duty.

[129] Crown asserted that the 'strength of claim' analysis conducted was not for the purpose of assessing the level of consultation necessary to meet a duty in respect of the decision to open the Endako Mine back in 1965, but rather to inform the process with respect to the expansion project and potential impact on Stellat'en arising from Crown's current decisions. Consultation failed due to Stellat'en taking the intractable position that they were entitled to address historical infringements. It submits that declarations sought by Stellat'en which have to do with the previous operation of the Endako Mine cannot be allowed.

[130] Crown argued that there is no causal link between the recent decisions made by the Ministry over the last few years and the potential adverse impact on Stellat'en's asserted rights and title interests. It stated that the petitioners are essentially arguing that (1) an extension sought by TCMC for the life of the Mine delays the time Stellat'en may reclaim the land and (2) continued depletion of the ore reserve would lessen the value of the land on return to Stellat'en. Both arguments, Crown submitted, go to the issue of historical infringements.

[131] In response to Stellat'en's contention that Crown adopted an improper incremental partial approach to the permitting process by unreasonably isolating discussions to 'one specific impact arising from one specific authorization' and thereby deferring meaningful consultation on the project's entirety until it is too late, Loren Kelly for the MEMPR deposed at para. 49 of his affidavit:

> In my experience, it is the usual course in the business of mining that a company will proceed with expansion plans by submitting applications for authorizations one at a time. This reflects the stage permitting process discussed above [whereby a mine is developed through four stages: (1) registration of claims, (2) exploration, (3) mining development and production and (4) mine closure and reclamation]. It is not necessarily known at the outset if an expansion will be economic or feasible. The approval of one application for an authorization or *Mines Act* permit amendment is not a

> guarantee that all the necessary authorizations or amendments will be approved. Each application is addressed on its individual merits.

[132] He adds that, in any case, Stellat'en was consulted on each of the authorizations thus far issued by the Province as well as on the overall impact of the expansion.

[133] In response to Stellat'en's contention that amendment of the M-4 Permit to allow for the new mill construction effectively guaranteed that the entirety of the project will proceed on TCMC's terms and that any future permitting decisions necessary to complete the expansion are all but certain particularly given the amount of resources the Company has invested, Mr. Kelly stated at para. 54:

> ... each of the above-mentioned authorizations is assessed on its individual merits. Approval of one does not lead inexorably to approval of another. In my experience, if a company determines to proceed with work approved under one permit before all of its required permits or amendments are approved, it is making an internal business decision to do so because MEMPR may not necessarily approve subsequent applications for other required permits.

[134] Crown stated that the decision to allow for construction of the new mill is not causally related to Stellat'en principal arguments. First, extending the life of the Mine is a decision of TCMC, which in turn is driven by several factors – namely, demand and market price for molybdenum and resultant decisions of the Company (not government). Second, the right to mine the area in question has already been granted, thus Stellat'en's contention that continued depletion will leave them with little or no mineral resource actually amounts to a historical grievance. Accordingly, Crown submitted that the alleged impacts are not the result of its recent decisions, though they may reflect potential pre-existing and/or ongoing infringements.

[135] Crown took the position that the project neither significantly expands the size of the Endako Mine nor materially changes its operation, rather, expansion will occur within the confines of TCMC's present mineral claims and leases on or adjacent to previously disturbed land. It says that TCMC holds the land on which the new mill is being constructed in fee simple, as well as a temporally unlimited right to mine and is

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simply carrying on its operations and making improvements within the existing boundaries. Crown submitted at para. 206 that the expansion project "will increase the area of occupied and disturbed land by 239 hectares, but of the 239 hectares, only 106 hectares, or approximately 8% of the total, is land not presently permitted". Accordingly, the expansion project should be more properly described as a "retooling", that is, making the mining and processing of the existing orebody more efficient and thus more profitable. Loren Kelly deposed to this effect:

> 30. ... the Expansion Project will not result in an increase in the overall size of the mine. All activity is occurring within the boundaries of existing mineral leases. Endako Mines has not discovered a new orebody and sought to expand their operations into new areas. Rather, Endako Mines has apparently determine that, with the aid of new equipment, upgraded processing and favourable developments in world ore prices, it may more profitably mine the existing lower grade ore in the existing orebody.
>
> 31. Based on my experience, the Expansion Project is not well characterized by the term "expansion". ...The project consists of replacement of the existing mill facilities (1960s) with new (2010) facilities. ...
>
> 32. All project elements occur within existing lands held in fee simple by TCM[C] (notably the milling facilities) or within existing land tenured areas (mining lease, mining claims, right-of-ways). The "expansion" is best characterized as a "re-tooling" that is procedural in nature and has been subject to consultation and attempts to consult with Stellat'en ... since 2007.

He similarly said at the September 23, 2009 meeting that "construction of the mill is like changing the engine in a truck – it's not going to change the general footprint of the mine, it's just an improvement of an existing facility" (meeting notes, p. 2).

[136] Crown emphasized that its position is reasonable since Stellat'en did not and have not specified the impact of the permitted activities, nor presented evidence of "major biophysical impacts to the land, resources and environment".

[137] As adverted to earlier, Stellat'en disagreed with use of the term "retooling"; they say that the project amounts to both an expansion (in terms of size) and extension (in terms of time length) because it will allow TCMC to extract and process molybdenum twice as much and will lengthen the life of the Mine thereby prolonging operations for an additional 15 years or even more.

[138] Turning to the issue of the ECDA policy, in response to Chief Louis' allegations in his affidavit, Mr. Kelly deposed in his affidavit as follows:

> 114. ... it is patently untrue that after August, 2009, the Crown restricted its discussion with Stellat'en to a proposal to negotiate a mineral tax revenue-sharing agreement under the ECDA. ECDA discussions are separate from, and not part of, consultation arising out of Crown decision-making. At the September 23 meeting MEMPR discussed consultation on throughput, environmental impacts and other aspects of consultation. The portion of the meeting concerning the ECDA policy was separate and is not linked to consultation on the next stages of the Expansion Project.
>
> 115. ... I do not recall advising Stellat'en at the meeting that MEMPR was not present to carry out consultation, but only to present the revenue-sharing mandate. MEMPR has engaged Stellat'en in a process of continuous information sharing and I was at the meeting to share information regarding the Expansion Project. The ECDA policy is not administered by MEMPR and I would not have made any statement indicating that MEMPR was present only to address ECDA issues.
>
> 116. ... it is patently untrue that the Crown advised Stellat'en that there is no other policy or program apart from the ECDA available to accommodate Stellat'en. ... If Stellat'en enters into discussions and negotiations regarding an ECDA, it will be entirely voluntary and it will be open to Stellat'en to accept or decline an ECDA.
>
> 117. ... the ECDA policy is not linked to consultation, and where appropriate, accommodation ...

[139] On this basis, the Crown submitted that the ECDA proposal was not held out as an accommodation and therefore it was not appropriate for the Stellat'en to seek a declaration regarding the ECDA. The Crown further submitted that even if consultation imposed upon it a duty to accommodate that, in any event, it is not appropriate for the courts to direct any particular a form of accommodation, citing *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620 at para. 23, [2009] 1 C.N.L.R. 359.

C. TCMC

[140] As might be expected, TCMC's argument is very similar to Crown's. For the most part, overlapping arguments will not be repeated.

[141] The Company submitted that it applied for a number of government approvals pursuant to the regulatory regime governing mining in B.C. and only Crown's

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decision with respect to the M-4 Permit amendment allowing for the construction of the new mill is at issue.

[142] TCMC stated that it provided comprehensive information and engaged in consultation. Since 1995, the Company and its predecessors host an annual meeting through its Endako Mine Community Liaison Committee; albeit, Stellat'en did not attend until the February 12, 2009 meeting. On November 29, 2007, TCMC (*vis-à-vis* its EMCLC) provided preliminary information to the community and the Stellat'en were invited to that meeting. On January 17, 2008, TCMC (again *vis-à-vis* its EMCLC) provided preliminary information to Stellat'en regarding the proposed expansion project. It gave presentations at the June 3, 2008 and October 2, 2009 NWMDRC meetings but Stellat'en was not present.

[143] TCMC submitted that Stellat'en failed to participate in consultations by improperly basing its position on the old mill being an infringement of their Aboriginal title and rights. It submitted that the lower ore reserve to be targeted by the new mill for extraction is already covered by existing mineral leases and claims, thus the only concern before the provincial regulator is whether its plans are technically and environmentally sound. The Company acknowledged that government's role is to oversee its compliance with regulatory requirements namely environmental protection and reclamation of the land including water courses and safeguarding Aboriginal cultural heritage. But it noted that because the regulator cannot decide the life of the Mine as TCMC holds a permit that does not expire (provided statutory requirements are met) the Company is entitled to continue to mine.

[144] TCMC denied there being a causal connection between the M-4 Permit amendment and any new adverse impact on Stellat'en's claims. The Company pointed to *Alcan*, *supra*, which stands for the proposition that the duty to consult is triggered where a current government decision may cause novel adverse effects to the First Nation in question. TCMC reasoned that the new mill is situated within the existing site and that the only change would be an increased daily ore throughput.

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[145] It emphasized, in written submissions, that the initial closure plan was made simply in compliance with the regulatory requirement and that it (not the Crown) decided to submit a new plan. TCMC stated that the decision to change the shutdown date was its decision and that the role of the Crown is limited to assess that plan against the Province's regulatory regime. In any case, that point is moot given the nature of the Company's permit – namely, its indefinite duration.

[146] The Company stated that Stellat'en failed to identify any such specific novel adverse effects from Crown's decision to issue the 2008 permit, save historical claims. It asserted that Stellat'en merely sought to use the consultation process to pressure TCMC to enter into an impact benefits agreement or other revenue-sharing arrangement, contrary to established caselaw which provides that "[c]onsultation is not about bettering a First Nations' bargaining position *vis-à-vis* a third party proponent" (at para. 177). Nor have they indicated an interest in consulting or participating in the reclamation plans TCMC has now filed.

[147] TCMC stated that positive economic consequences will come about from the construction of the new mill. Terry Owen, project director of TCMC, deposed in his affidavit dated January 13, 2011 to this effect at para. 14:

> Construction of the New Mill requires the full-time work of up to approximately 500 people. Approximately 350 of these jobs are on the mine site, with the remainder consisting of off-site administrative and engineering positions. Workers on the project are generally living in the Village of Fraser Lake or at the camp that has been built for Thompson Creek through an agreement with the Nadleh [Whut'en] First Nation on Nadleh [Whut'en] First Nation reserve land located approximately 40 kilometres east of the Endako Mine.

[148] Additional employment may be created. Randy MacGillivray, environment director for TCMC, deposed in his affidavit dated January 6, 2011, at para. 28 that "more than 50 new positions have been or are expected to be created ... as a result of the Mine Expansion Project ... It is the policy of Thompson Creek to hire employees for the Mine ... from local communities whenever possible".

[149] Once completed, the new mill will bring about greater efficiency which is expected to increase throughput from 28,000 to 55,000 tonnes of ore per day.

Further, there is no evidence as to the new mill's impact on the health and safety of surrounding communities. TCMC says that the new mill will operate within existing emission standards and is in compliance with its environmental permits.

[150] TCMC urged this Court to find, among other things, that Crown properly exercised its supervisory authority in respect to the ongoing functioning of the Mine and reasonably consulted Stellat'en with respect to the M-4 Permit amendment and that Stellat'en's dissatisfaction with the consultation process "arises not from the inadequacy of the process, but from their refusal to accept the limitations of what the process entailed in the circumstances of this case" (at para. 182).

[151] In the alternative, TCMC further submitted that even if this Court finds that consultation fell short of the *Haida* (*infra*) standard, the Court should nonetheless refuse to make any orders that would be unfairly prejudicial to its economic interests, given that the Company is an innocent third party that has complied with the regulatory and legislative frameworks and was entitled to rely on the validity of permits issued by the Province and given that the new mill is now almost nearly built and as of December 31, 2010, $349 million has been spent.

V. DISCUSSION & ANALYSIS

[152] I begin by saying that the final resolution of Stellat'en's rights and title is being left to the treaty table or other legal proceedings. In that sense, judicial review is somewhat narrow. The purpose of consultation and accommodation is to protect unproven rights from irreversible harm as settlement negotiations are in progress. The constitutional duty to consult and, where necessary, accommodate is, thus, "a corollary" to the treaty claims process. The *dicta* of McLachlin C.J.C. in *Alcan*, *supra*, at para. 32 is apposite:

> The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20.

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[153] The honour of the Crown is the principle that “[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably”: *Haida*, *infra*, at para. 17.

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A. WAS THERE A DUTY WITH RESPECT TO PAST INFRINGEMENTS?

[154] A duty to consult and accommodate arises in every case where (1) Crown has knowledge, actual or constructive, of the potential existence of the Aboriginal title or right; (2) Crown contemplates conduct or proposes a decision; and (3) that conduct or decision may have an adverse impact on that Aboriginal claim: *Haida v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35, [2004] 3 S.C.R. 511 [*Haida* cited to SCC]; the companion case was *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku*].

[155] Crown concedes that the first two parts of the *Haida* test are met: MEMPR knew Stellat’en asserted Aboriginal interests over the subject area and had to decide whether to approve TCMC’s proposed expansion of the Endako Mine. Only the third step is at issue in this case.

[156] Consultation did not readily ‘get off the ground’ because Stellat’en insisted on discussing alleged past infringements of their asserted Aboriginal title and rights with respect to the opening of the original mine back in 1965 and its continuing operation since then. Indeed, the correspondence reveals that the gulf between the parties in 2008 and 2009 was a result, in large part, of Stellat’en’s position that the whole (that is, historic presence and use) of the Mine ought to be included in the process. Stellat’en held on to that view until the filing of their petition on May 18, 2010. On the other hand, MEMPR steadfastly maintained, from the outset, that prior breaches cannot be a part of the consultation process triggered by its present decision to grant or not grant TCMC’s sought-after permits.

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[157] Stellat'en's arguments on this issue were rendered moot. On October 28, 2010, the Supreme Court of Canada held in *Alcan*, *supra*, that while historical claims may give rise to (among other things) an award of damages, they are not the subject of judicial review. McLachlin C.J.C. (for the majority) held as follows:

> 45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> 46 … Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 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… 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"... 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. …
>
> 48 An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway…
>
> 49 The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation… a contemplated Crown action must put current claims and rights in jeopardy.
>
> 50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to

> settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.
>
> [Emphases added]

[158] In other words, the focus on judicial review is on the demonstration of causality between Crown's contemplated conduct or proposed decision and potential novel adverse impact on asserted Aboriginal title or rights.

[159] In applying the third part of the *Haida* test to the case before her, McLachlin C.J.C. provided the following analysis:

> 52 The respondent's [Carrier Sekani Tribal Council'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 [it being *Haida Nation*] grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration. [Emphasis added]
>
> 54 The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree – an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

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[160] In my view, Stellat'en's submission regarding past infringements is analogous to that made but later rejected in *Alcan*, *supra*.

[161] McLachlin C.J.C. further elaborated on this third step of the *Haida* test:

> 82 The third element – adverse impact on an Aboriginal claim or right caused by the Crown conduct – presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.
>
> 83 In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.
>
> 84 It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission.* The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.
>
> 85 What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable [*sic* – Crown's preliminary assessment should be reviewed on a standard of correctness] based on the evidence before the Commission on the rescoping inquiry.
>
> [Emphases added]

[162] Stellat'en's insistence that consultation on the proposed expansion project ought to involve discussion of alleged prior breaches relating to the Mine's inception

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in 1965 and its continuing operation is incompatible with the ruling in *Alcan*, *supra*, that past infringements are not revived by present government decisions. MEMPR correctly maintained that any failure to consult on the original Mine does not (in and of itself) constitute an adverse impact within the meaning of the legal test set out in *Haida*, *supra*. On that basis, Stellat'en's claims relating to historical breaches did not trigger the duty to consult on the part of Crown. I conclude that MEMPR was not obliged to consult on the historic presence and use of the Mine.

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B. DID CROWN CORRECTLY ASSESS SCOPE & CONTENT OF ITS DUTY?

[163] Unlike on the issue of past infringement discussed and disposed of above, the parties are in agreement that Crown had a duty to consult with respect to the proposed expansion of the Endako Mine. In other words, the three-part *Haida* triggering test is met, including the third leg: the present Crown decision to amend the M-4 Permit allowing construction of the new mill might adversely impact asserted Stellat'en rights and/or title. The next question is the scope and content of Crown's legal and constitutional duty.

[164] *Haida*, *supra*, at paras. 39 and 43-45, directs that the scope and content of the duty to consult and accommodate increases in proportion to the strength of the Aboriginal pre-proof claim and seriousness of potential adverse impacts of Crown's conduct or decision upon the yet unproven claim. As Jack Woodward in *Native Law* (Toronto, Ontario: Thomson Reuters Canada Limited, 1994), looseleaf 2010 update, vol. 1 [*Woodward*] at 5§1360 put it:

> The more substantiated the asserted aboriginal or treaty right which might be affected by the decision, the more onerous the Crown's duty to consult and, if appropriate, accommodate. Similarly, the more serious the potential harm to the s. 35 right from the proposed decision, the more onerous the duty to consult and, if appropriate, accommodate.

[165] Crown's preliminary assessment of the strength of the claim and consideration of the seriousness of the impact of the impugned conduct or decision on Aboriginal interests is to be reviewed on the standard of correctness. If Crown is correct in those respects, its conduct or decision thereafter will be reviewed on a

standard of reasonableness. I adopt the approach taken by Wedge J. in *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945 at paras. 89 (also at para. 630), [2011] B.C.J. No. 1343 (QL) [*Halalt*]:

> ... the Crown must correctly determine the extent or scope of its duty to consult, and must then engage in consultation that is adequate in the circumstances. The outcome of the consultation process (that is, the accommodation) must fall within the range of reasonable outcomes in the circumstances.

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[166] Thus, the question before me is: were MEMPR's preliminary assessment of the strength of Stellat'en's claims and consideration of the seriousness of potential adverse impacts of the permitting process on those claims correct?

1. Preliminary Assessment of the Strength of Stellat'en's Claims

[167] MEMPR was required to make a preliminary assessment of the strength of Stellat'en's asserted claims to Aboriginal title and rights in a timely and transparent way so that a proper determination of the scope and content of its duty can inform the permitting process. That assessment was pronounced in Mr. Kelly's letter of September 19, 2008, wherein he stated "we are prepared to assess that the scope of consultation will be significantly deeper than minimal consultation, and thus, the Province is willing to explore accommodation for potential impacts on those claims".

[168] Before the September 19, 2008 letter, Crown had acknowledged (at least implicitly) that Stellat'en has a *prima facie* case to support its claim of Aboriginal rights and title to the project area as a result of their historical connections to it. The fact that Stellat'en's traditional territory is subsumed within the land on which the Endako Mine is situated was never in dispute. In its letter of March 10, 2008, the MEMPR informed Stellat'en that the Company had filed a Notice of Work dated February 11, 2008 and that the Company "has been advised that the [proposed work] program falls within the asserted traditional territory of the Stellat'en".

[169] The parties accepted that Stellat'en's claims are relatively strong. The petition record does not disclose otherwise. MEMPR was willing to proceed on the basis that

"significantly deeper than minimal consultation" would be required in the permitting process triggered by TCMC's proposed expansion of the Mine.

[170] However, as attempts to consult were met with unresponsiveness and opposition, later correspondence reveals that MEMPR was beginning to temper the strength of Stellat'en's claim on at least two bases. In this respect, I note that the strength of claim assessment is preliminary and, so, Crown is entitled to revise its assessment as further information comes to light during consultation: *Haida*, *supra*, at para. 45.

[171] First, overlapping claims (that is, claims over the same area as that claimed by Stellat'en) made by Nadleh Whut'en undoubtedly affects the strength – namely, exclusivity – of Stellat'en's asserted title interests and rights. Exclusive possession (intention and capacity to control) at the time Crown asserted sovereignty is required to establish Aboriginal title: *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 70, [2005] 2 S.C.R. 220. At best, less intensive uses and less regular occupancy might give rise to certain Aboriginal rights (*ibid.*); alternatively, shared exclusivity (as seems to be the case with Stellat'en and Nadleh Whut'en) may result in joint title and/or some other sort of consensual arrangement: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 158, 66 B.C.L.R. (3d) 285. Therefore, the fact that Nadleh Whut'en asserts interest in the same subject area will very likely affect the strength of Stellat'en's case in support of its claim of Aboriginal title and rights.

[172] Second, the fact that the new mill is located on land held by TCMC in fee simple must carry some weight. The Ministry's position as evidenced in its letter of October 21, 2008 in relation to the fact that the Company has fee simple title is supported by caselaw (such as *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2005 BCSC 1712 at paras. 164 and 249, 51 B.C.L.R. (4th) 133) indicating the low likelihood of Stellat'en obtaining fee simple title through treaty negotiations or other legal avenues.

[173] In my view, MEMPR was correct in making these two observations.

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[174] In short, Crown's preliminary assessment that Stellat'en had a *prima facie* case the strength of which is tempered somewhat by overlapping Aboriginal claims and existence of fee simple title was correct.

2. Consideration of Seriousness of Potential Adverse Impacts

[175] Stellat'en listed some eight major concerns at para. 40 of its submissions. They argue that Crown's "only response to these concerns was to minimize them or suggest they were not legitimate". For the reasons that follow, I do not accept that argument. Rather, I accept as correct Crown's consideration that potential adverse impacts arising from MEMPR's decision to amend the M-4 Permit would be low in terms of seriousness. In my view, MEMPR fared well at this step of the *Haida* test, given Stellat'en's failure to articulate, with any specificity, the nature of its asserted title and rights.

i. Loss of Right to Extract Additional Minerals

[176] Stellat'en alleged that the expansion project would result in the loss of minerals and loss of future revenue and land values.

[177] The evidence before me is that the impugned mining rights were granted to TCMC in or about 1965 and that its M-4 Permit does not expire and is not subject to any time limitations. The Company's right to mine the orebody pre-exists any of Crown's decisions now being challenged by the petitioners. And, none of the presently impugned Crown decisions affected or will affect that pre-existing and continuing right to mine held by TCMC.

[178] The Company, therefore, is not applying for any new mineral rights or renewal of its right to mine. Rather, it "seeks authorization and amendments to implement a technological advancement to continue the existence of the mine, not to renew it" (Crown's written submissions, at para. 112). Furthermore, the proposed expansion does not require new mineral leases or mineral claims. This is because "construction of a new mill is related to technical efficiencies and rate of production, not the extraction of minerals from a new orebody" (*supra*, at para. 113).

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[179] I further accept Crown's argument at para. 105 of its submissions:

> At best, the right to mine can only be considered a potential past infringement that does not trigger a duty of consultation. The Province is not making any decision with respect to TCM[C]'s right to extract minerals from an already permitted orebody. The decisions before the Province are only decisions with respect to the method and means by which TCM[C] will exercise its pre-existing entitlement to the minerals.

ii. Prolonged Loss & More Extensive Damage

[180] Stellat'en stated at para. 3 of their petition that "But for the Expansion Project and the [M-4] Permit Amendment, the Mine was scheduled to close in 2013, and the lands reclaimed". They argued that the impugned Crown decisions extend their loss of Aboriginal title and use of lands pursuant to their Aboriginal rights for at least another decade. Stellat'en said that by virtue of allowing the new mill construction, additional mineral rights and future revenue are lost; as well, they will eventually be left with land of diminished value.

[181] Stellat'en's complaint is based on a mistaken assumption that the Mine would definitely close sometime between 2011 and 2013 and that land would be reclaimed at that time. I characterize that assumption as incorrect because it ignores the fact that TCMC has the right to revise its closure plan at five-year intervals. I accept that the projected closure date is made in relation to the reclamation plan; but what the petitioners fail to recognize is that the projected closure date is not at all a firm date of closure.

[182] I accept Crown's position at para. 109 of its written submissions that:

> The question of the length of life of the mine is not a question before the decision maker in any of the authorizations or amendments at issue in this case. At no time was a Provincial decision maker required to determine whether or not the lifespan of the Endako Mine should be lengthened or shortened.

[183] I reiterate that the initial proposed shutdown date of 2011 to 2013 was postponed at the behest of TCMC (not Crown) based on a business decision driven by a myriad of variable factors, including the demand for and price of molybdenum, ore reserves identified as economic to mine, processing costs, production rate and

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overall world market conditions. Thus, any decision to shut down operations and close the Mine would be one made by TCMC and would not arise as a statutory or regulatory requirement.

[184] In addition, approving the application to build a new mill does not, by itself, mean that mining operations will continue for a longer period of time, nor does the Company's now projected closure date of 2025 necessarily mean that mining will cease at that time. Continued operations may be for a shorter or longer period so long as TCMC abides by the applicable statutory regulations and MEMPR acts in accordance with its legislative powers as well as constitutional duties.

[185] Stellat'en's argument on this point also ignores the fact that the Company could have continued mining at the current production daily rate of 28,000 tonnes of ore for 25 years, if prohibited from mining at the proposed production daily rate of 55,000 tonnes of ore for 13 years that the new mill is being built to allow. As Crown put it at para. 129 "The new mill has the capability of increasing the rate of extraction, but the impact of an increased rate is ultimately no different than the impact of the previous rate with one exception: the mine will have a shorter operational life with an increased rate".

[186] To emphasize, the 28,000 tonnes of ore per day production rate is already permitted, so nothing prevents TCMC from continuing to mine the existing orebody at this rate for a longer period of time (so long as a closure/reclamation plan is properly filed, the legislative requirements are met and Crown's constitutional duties are satisfied). Again (aside from any alleged failure on the part of the Province in consulting with Stellat'en at the time the Mine opened in 1965), I fail to see what novel potential adverse impacts may arise if the Company were to pursue either option.

[187] I dismiss this argument concerning extension of the Mine's life and further mineral extraction. In reality, Stellat'en's complaint lies in historical claims against the very existence of the Mine itself. The right to mine has been granted; so, Stellat'en's remedy lies at the treaty table or through court action.

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iii. Health & Safety Effects

[188] Stellat'en complained that the Mine's expansion will have an adverse impact on the health and safety of local people, including increased cancer rates in the community.

[189] The respondents have asserted, at least on a few occasions, that TCMC is in compliance with its permits relating to health safety.

[190] I also note that as at the time of the hearing, Stellat'en has not tendered any evidence to the parties or to the court in support of this complaint.

iv. Pollution & Decreased Water Quality

[191] Stellat'en complained that the project will result in pollution and that increased withdrawal from François Lake will affect water quality.

[192] Regarding the complaint about pollution, the respondents have maintained (throughout the consultation process and during the hearing) that TCMC is in compliance with environmental regulations. For example, Mr. Kelly deposed in his affidavit as follows:

> 19. With respect to emissions and mine discharges the Endako Mine is subject to the reporting and performance requirements of the provisions of the federal *Metal Mine Effluent Regulation*, SOR/2002-222 promulgated under the *Fisheries Act*. As well, the Endako Mine is subject to the provisions of the Provincial *Environmental Management Act* and operates under three permits issued by the Ministry of Environment:
>
> (a) Effluent Permit:
>
> (i) Regulates water discharging from tailings seepage ponds and open pits;
>
> (ii) Water quality monitored and reported monthly;
>
> (b) Air Permit:
>
> (i) Regulates SO4 and particulate concentrations in gas discharging from the roaster;
>
> (ii) Air emissions monitored semi-annually;
>
> (c) Refuse Permit:
>
> (i) Regulates landfill site and burn pile.

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> 20. The Endako Mine is currently in full compliance with the terms and limits prescribed by the three *Environmental Management Act* permits.

[193] With respect to the complaint about water quality, I reproduce below some selected portions of the Company's June 2010 "Water Licence Application – Water Development Plan":

> **8.2 WATER QUALITY**
>
> The existing intake in Francois Lake is located about 177 m offshore. The screened intake is at an elevation of 705.31 m ... about 3 m off the bottom of the lake and 3 m below the surface of the lake at extreme low water. Given the small volume of water to be withdrawn (relative to total lake volume), no changes to lake water quality (including temperature) are anticipated.
>
> **8.3 INSTREAM REQUIREMENTS AND FISH RESOURCES**
>
> ...
>
> Sockeye salmon and rainbow trout, and the habitat they depend on, are the most highly valued species in the Stellako River to commercial, recreational, tourism and Aboriginal fisheries. Consequently, potential changes in habitat suitability from altered flows at low flow period will be a concern to regulatory agencies (DFO, MOE) and First Nations. ...
>
> ...
>
> ... the proposed withdrawal increases for mill expansion will have very minor effect on the Stellako River water elevation, the weighted usable width (using depth criteria) for rearing rainbow trout and spawning sockeye salmon, as well as wetted width, wetted perimeter, and average water depth. These changes are very small compared to the range in natural flows throughout the winter low flow and sockeye spawning period, which have a much greater influence on the productive capacity of fish habitat in the Stellako River.
>
> ... the very minor changes in habitat suitability for rearing rainbow trout and spawning sockeye salmon represent a very low risk of negative impact to fish and fish habitat within the Stellako River.
>
> **8.4 AFFECTED WATER USERS**
>
> ...
>
> Assuming all water license holders draw their maximum allotment, total annual water demand from Francois Lake represents 0.028% of the total lake volume. The proposed additional Endako withdrawal would increase that to 0.047%. Current water demand from Francois Lake and the Stellako River represents 1.0% of the average annual flow, and 4.0% of the average annual low flow through the Stellako River. The proposed additional Endako withdrawal would increase that to 1.7% of the annual flow and 6.1% of the low flow. Based on these small percentages, use of water by existing water licence holders would not be affected.

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> **10. SAFETY ASPECTS**
>
> ... Table 10-1 lists the potential types of water works failures and the indicated response. Note for all failure modes the probability of occurrence is rated as very unlikely.

[194] A myriad of numeric tables and descriptions of the scientific methods used in obtaining the results are provided. The conclusion (among others) simply is that "there is ample water available within the Francois Lake system" so "withdrawal of the requested water volume will not affect use of water by existing water licence holders or the quality of fish habitat downstream in the Stellako River" (at p. 26; see also p. 4-1, which is also labelled as p. 459).

[195] On January 20, 2011, MEMPR emailed Stellat'en providing an update on and follow-up to NWMDRC's review of the water license application (exhibit E of Robert Michell's reply affidavit). Among other things, the representative summarized Rescan's 2010 "Water Licence Application – Water Development Plan" as follows:

> ... detectable changes to Francois Lake levels, or exposure of littoral areas from drawdown were not expected ...
>
> ... the proposed additional water withdrawal from Francois Lake would have negligible effects on water levels and hydraulic geometry in the Stellako River ...
>
> ... very minor changes in habitat suitability for rearing rainbow trout and spawning sockeye salmon represented a very low risk of negative impacts to fish and fish habitat within the Stellako River ...
>
> ...
>
> Nadleh Whut'en ... and Stellat'en ... raised questions about the fish and fish habitat in the Stellako River. These were addressed by discussions with the Rescan, Endako officials and the Government officials. The discussion and accommodations were focussed on the presentation that the proposed withdrawal would have negligible to no measurable effects to the Stellako River and therefore would not affect the fish or fish habitat within the Stellako River. This was to be confirmed by DFO [Department of Fisheries and Oceans] at or prior to the next meeting.
>
> A proposed accommodation was also to include a "low level cut off" for the license. This is a flow level within the Stellako River that, if reached, would trigger the Endako Mine to stop drawing water from Francois Lake. This was to ensure that in circumstances where the water levels were naturally getting low enough to start affecting fish or fish habitat in the Stellako River, the water withdrawals for the Endako Mine would not add to this effect.

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[196] Robert Michell at para. 64 of his reply affidavit sworn January 27, 2011, contended that the "'proposed accommodation'" of a "'low level cut off'" is not responsive to Stellat'en's concerns as it appears that this proposed accommodation merely "refer[s] to a requirement that the DFO imposed in exercise of its own mandate to protect fish habitat". Even if that is true, it remains unclear whether or not that DFO requirement, if imposed, is sufficient to address the concern of Stellat'en.

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[197] There have been no other follow-up comments from either Crown or Stellat'en as to the impact of the expansion on François Lake, on any tributary rivers, or on plant, fish and animal habitats.

[198] On this topic, I find the comment from *Woodward*, *supra*, at 5§1640 adept:

> ... the courts will avoid passing judgment on scientific controversies. If the Crown and the aboriginal group disagree about the potential environmental impacts of a proposed activity, they should not expect a court to take sides with either of them in a judicial review. [Footnote 190: *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para. 34, 39 B.C.L.R. (4th) 263] That being said, the extent to which one party's position about environmental impacts is supported by the record will presumably influence the court's views as to the reasonableness of that party's position in the consultation process.

[199] Here, the position of the respondents as to water quality and pollution is well supported by the materials filed with the Court, while the position of the petitioners remains vague. However, I do note that Aboriginal groups often lack the resources necessary to conduct their own studies or even to review the information proffered by government. But in this case, Stellat'en was given $784 on October 4, 2010 for the purposes of reviewing the water licence application, albeit that modest sum was provided by a third party (TCMC). In any event, setting aside any consideration of third party funding, I do not think that it would have taken much for Stellat'en to voice its concerns with a bit more specificity than it otherwise had voiced during the time in question and during the hearing. All I was given were complaints of a very general nature.

[200] With these observations in mind, I conclude that Crown correctly determined the scope and content of its duty to consult Stellat'en.

C. WERE CROWN'S CONSULTATION EFFORTS REASONABLE?

[201] The next question is whether Crown's process for consultation with Stellat'en in relation to the M-4 Permit amendment was adequate in the circumstances. That is, was the duty reasonably met?

[202] The standard of review at this stage is reasonableness. Accordingly, I need not decide whether the process of consultation in this case unfolded perfectly or whether the most appropriate or ideal accommodation was offered to Stellat'en: *Woodward*, *supra*, at 5§1630.

[203] I further note that accommodation arises out of and is the result of consultation: *Haida*, *supra*, at para. 47:

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

[204] The Court's focus is not on the outcome but on the process of consultation and accommodation and whether that process was a meaningful one: *Haida*, *supra*, at para. 63. There is no duty to agree; rather, the commitment is to make good faith efforts to understand each other's concerns and move to address them: *ibid.*, at paras. 42 and 49.

[205] I am satisfied that MEMPR's dealings with Stellat'en during the relevant time maintained the honour of the Crown in a manner consistent with that described in *Haida*, *supra*. In my view, MEMPR conducted itself properly in balancing competing societal and Aboriginal interests. I conclude that Crown adequately fulfilled its constitutional duty to consult. I also conclude that given Stellat'en's conduct, the outcome of consultation in this case fell within the range of reasonable outcomes.

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[206] On notice of TCMC's project, Crown moved quickly (if not instantaneously) to recognize Aboriginal rights and title interests in the subject area. As I said above, there was no doubt (at any time) on the part of Crown that Stellat'en asserted claims with respect to the land on which the Endako Mine is situated.

[207] MEMPR initiated the consultation process very early in its decision-making process, specifically, on receipt of the Company's Notices of Work. I do not agree that the duty of consultation was "postponed to the last and final point in a series of decisions": *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at para. 74, 34 B.C.L.R. (4th) 280. From the outset, MEMPR engaged directly with Stellat'en.

[208] Crown continually and openly shared information (as it was being gathered) to Stellat'en. It provided, in a timely manner, all necessary documents to assist members in understanding the nature of the proposed project and its possible impacts on any of their asserted s. 35 rights.

[209] Crown consulted with or offered to consult Stellat'en on each of the authorizations or amendments being aggrieved in this petition. I summarize the timeline of those efforts below.

1. re approval of the Notices of Work for mineral exploration and geo-technical testing:
   a. March 10, 2008, MEMPR notified Stellat'en that TCMC had applied for a Notice of Work for mineral exploration and geo-technical work dated February 11, 2008;
   b. March 26, 2008, MEMPR notified Stellat'en that TCMC had applied for a Notice of Work for mineral exploration dated March 7, 2008 and requested input regarding potential impacts on Aboriginal interests by April 15th;
   c. April 15, 2008, Stellat'en opposed the Notices of Work but did not voice any specific concerns other than the historical infringement issue;
   d. May 29, 2008, MEMPR informed Stellat'en that the Notice of Work for geo-technical testing had been approved but that its approval would not prejudice subsequent consultation or decision-making and that it will approve one aspect of but defer approval of another aspect of the mineral exploration program;

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e. July 2, 2008, MEMPR approved a partial program of the Notice of Work for mineral exploration;

f. September 10, 2008, MEMPR approved the remaining part of the Notice of Work for mineral exploration.

2. re amendment to M-4 Permit approving site preparation and earthworks:

   a. June 30, 2008, MEMPR notified Stellat'en that it was considering approval within the next week of the site preparation and earthworks portion;

   b. July 11, 2008, MEMPR granted this portion of the M-4 Permit amendment;

   c. July 11, 2008, Stellat'en stated that it could not comment on the site preparation and earthworks; and

   d. July 16, 2008, MEMPR confirmed that the site preparation and earthworks have been approved but stated that the permit may be changed to accommodate any concerns.

3. re amendment to M-4 Permit approving construction for mill and expansion:

   a. October 14, 2008, MEMPR met with Stellat'en proposing that it proceed to authorize construction of the new mill;

   b. October 21, 2008, MEMPR notified Stellat'en that a decision regarding whether to approve construction of the new mill will be made by the 24th;

   c. October 23, 2008, Stellat'en opposed the proposed plan of action; and

   d. October 29, 2008, MEMPR approved construction of the new mill.

[210] The petition record discloses no evidence as to consultation relating to amending the M-4 Permit for modifications in tailings management. And, approval of an amendment to the M-4 Permit approving work system (for increased throughput) and reclamation/closure plan has been deferred; no decision was made as of the date of the hearing.

[211] I do not doubt that momentum for the project was created by allowing, for example, geo-technical testing and mineral exploration to proceed; but, I also accept Loren Kelly's evidence at para. 54 of his affidavit that approval of one aspect of the project at one stage does not inexorably lead to approval of other aspects at the

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later stages. I add that preliminary decisions made in this case did not preclude further consultation and accommodation attempts.

[212] The timing of the above summarized permitting process was quicker than Stellat'en preferred and perhaps less than ideal. But Stellat'en knew that TCMC proposed to build a new mill very early on in the consultation process, if not before. They have not from that point onwards voiced any particular concerns.

[213] Three so-called 'in-person' consultation meetings were held between MEMPR and Stellat'en: July 30, 2008, October 14, 2008 and September 23, 2009.

[214] Additionally, the expansion project was and is being reviewed through the NWMDRC – a regional advisory body created by MEMPR pursuant to s. 9 of the *Mines Act* for the purposes of evaluating applications for mine approvals and reclamation permits. Stellat'en was invited to NWMDRC meetings during the time in question. Stellat'en did not attend the June 3, 2008 NWMDRC meeting. MEMPR followed-up by forwarding information presented at that meeting on June 17, 2008. The NWMDRC met on October 2, 2009; but, no member of Stellat'en attended. Joe Patton attended the October 19, 2010 NWMDRC meeting regarding the water licence application; but, Stellat'en did not attend the meeting on November 19, 2010.

[215] They were given opportunities to respond to the information MEMPR relied on in basing its assessment of the strength of their asserted interests and seriousness of potential adverse impacts on their claim. They were repeatedly urged to make submissions and express specific concerns for consideration by Crown. MEMPR vigorously sought to solicit from Stellat'en members their particular contentions with the project. That solicitation yielded little in the way of any helpful information.

[216] Representatives of MEMPR listened to their concerns and responded to them. Mr. Kelly's letter of September 19, 2008 in response to complaints raised at the July 30, 2008 meeting is one example. Crown responded to Stellat'en's objection to the earthworks and site preparation permit approval by stating that it was willing to make an amendment to accommodate any concerns. By all indications, MEMPR

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was ready to alter its proposed course of action based on what it heard from Stellat'en.

[217] Indeed, some of the requests made by Stellat'en were demonstrably integrated into Crown's proposed plan of action. Postponements were granted. For instance, Stellat'en indicated it was not ready to consult on the expansion on April 15, 2008; so, MEMPR deferred aspects of the Notice of Work decisions relating to the project. By way of another example, Stellat'en indicated on September 29, 2008 that it required three more months to detail their specific concerns; so, MEMPR deferred its decision on the M-4 Permit amendment allowing increased throughput.

[218] Stellat'en was given explanations as to why and how MEMPR made certain decisions. Those offered explanations show that Stellat'en's concerns were taken into account; they also show how those concerns impacted MEMPR's decisions.

[219] After months of attempting to ascertain Stellat'en's specific concerns, MEMPR conducted its own ethno-historic research in order to better understand what Aboriginal interests might be at stake in the subject area and how the proposed project might adversely impact those interests. Mr. Kelly's letter of October 21, 2008 provided the result of that research, which is that little to no particular negative effects would result from expansion of the Mine. Notwithstanding that conclusion, he went on to defer certain other decisions so as to provide Stellat'en with time and opportunity to bring forward their specific concerns arising from the activities contemplated by the Mine's expansion.

[220] Crown persisted in the consultation process despite Stellat'en's repeated failure to provide input on specific impacts arising from the proposed expansion.

1. Reciprocal Duties

[221] I accept Crown's argument at paras. 40-42 of its written submissions that there is a 'reciprocal duty' on Stellat'en to engage in the consultation process in good faith.

[222] Specifically, they were duty-bound "to express their interests and concerns once they have had an opportunity to consider the information provided by Crown, and to consult in good faith by whatever means are available to them"; they "cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions": *Halfway*, *supra*, at para. 161; cited in *R. v. Douglas et al*, 2007 BCCA 265 at para. 39; see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 65, [2005] 3 S.C.R. 388 [*Mikisew*]; and *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at para. 42, [2009] 3 C.N.L.R. 36, citing *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212 at paras. 52-53, [2008] 3 C.N.L.R. 67.

[223] I also cite the following passages from *Woodward*, *supra*:

> 5§1900 Aboriginal groups must also engage in the consultation process in good faith. As a general rule, this means sharing relevant information and discussing the proposed decision or course of action with an open mind about the likely impact of the decision and the possible ways of accommodating their s. 35 rights. If an aboriginal group's only objective is to prevent a particular project from being approved, the courts will not normally consider this to be a good-faith effort, because the Supreme Court of Canada has emphasized that the consultation process generally does not give aboriginal groups a veto over Crown decision-making. [Footnotes omitted. They refer to *Haida*, *supra*, at para. 48 and *Mikisew*, *supra*, at paras. 65-66.]
>
> ...
>
> 5§1970 Aboriginal groups do not need to share their information with the Crown, but the extent to which they do so will be a large factor in determining the appropriate level of consultation. An aboriginal group that seeks deep consultation and accommodation measures should clearly articulate which rights it considers to be at stake, its basis for asserting those rights, and how it believes that the proposed decision or activity might affect those rights. The more information an aboriginal group can share, and the better it substantiates the existence of its claimed rights and the basis for its concerns about impacts on those rights, the greater the onus on the Crown to address those concerns in the decision-making process.

[224] In short, while a First Nation band may (for whatever reason) decide to take a hard-bargaining position, categorically object to a project and not share all relevant information in the consultation process, it risks entering into a situation where concerns arising from that information will not be taken into account in Crown's decision-making.

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[225] Here, as Crown submits at paras. 43 and 141 of its written argument, in only making broad “oppositional generalities” relating to the very existence of the Mine, Stellat’en failed to adequately respond to MEMPR’s numerous good faith attempts to ascertain their specific concerns arising from the proposed expansion. Stellat’en was given many opportunities by MEMPR and other provincial ministries involved to participate in the permitting process in a meaningful way (by, for example, reviewing the information shared, sending in their comments, making known their specific concerns, attending committee meetings), yet they continually failed to particularize their concerns other than objecting to the opening of the Mine back in 1965 and its continued operation. To date, Stellat’en have not communicated to Crown any concerns regarding particular impacts on their Aboriginal title interests and rights arising from expansion of the Endako Mine.

[226] Stellat’en’s correspondence – for example, the statement by former Chief Mabel Louie in her April 15, 2008 letter: “it should not be assumed that it [the proposed expansion] will be allowed to proceed” – seems to indicate that members were under the impression that they have a form of veto power over the Mine’s continued operation. They do not. The existing mineral leases and claims provide otherwise. And the caselaw (namely, *Haida*, *supra*, at para. 48) provide otherwise. What is required is a process of ‘give and take’.

[227] Government cannot be expected to fulfill its duty to consult in a vacuum. There must be, at the very least, some minimal willingness to cooperate from the other side. MEMPR cannot respond without hearing what the specific Aboriginal interests Stellat’en claim are at risk from the Mine’s expansion.

[228] I do not accept the contention that from the outset, MEMPR excluded from the consultation process any form of accommodation by merely giving Stellat’en an opportunity to ‘blow off steam’ and paying its members ‘lip service’. While the timing in approving some of the permits was expedited (sometimes as a result of factors outside Crown’s control), the evidence indicates that the Ministry was more than willing to change its intended course of action if so persuaded by Stellat’en’s specific

concerns. I am not convinced that Crown proceeded to do what it intended to do all along, or that any correspondences with Stellat'en by MEMPR and other ministries' agents were premised on the expansion going ahead.

2. Role of Third Party

[229] I note that Nadleh Whut'en, not Stellat'en, acquired the worksite camp located about 40 kilometres east of the Endako Mine that Terry Owen, project director of TCMC, speaks of in his affidavit (as noted above). And, the fact that Nadleh Whut'en was able to do so indicates economic benefits were obtainable by consultation with the Company. Additionally, the economic benefits of 500 additional people working on the construction of the new mill and the 50 employees that will be hired to work at the new mill (upon its completion) cannot easily be disregarded.

[230] The respondents urged me to consider the efforts of TCMC in assessing the reasonableness of Crown's execution of its duty to consult. They cite a number of cases in support of that argument.

[231] In my view, while there were and continues to be opportunities for TCMC's consultation and accommodation of First Nations' interests, which the Company seems to have embraced (at least initially), the Court is restricted by the caselaw to focusing on Crown's duties (as opposed to that of third parties, such as industry proponents). It is so constrained because Crown bears the ultimate responsibility for discharging its constitutional duty, such that the honour of the Crown cannot be delegated: *Haida*, *supra*, at para. 53.

[232] However, Crown may rely on its regulatory processes and on third parties executing procedural matters in fulfilling its duties under s. 35(1) of *The Constitution Act, 1982*: *Haida*, *supra*, at para. 53. In this respect, I note the comment of Binnie J. in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, wherein, citing *Taku*, *supra*, he stated at para. 39 that "participation in a forum created for other purposes may nevertheless satisfy the duty to consult if in substance an appropriate level of consultation is provided". Although it seems that

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the precise extent to which the Crown may delegate procedural aspects of the consultation process remains unclear: *Woodward*, *supra*, at 5§1800.

[233] Crown relies on (among others) *Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines)*, [1999] 3 C.N.L.R. 126, [1998] B.C.J. No. 2471 (QL) at para. 154 (S.C.), for the proposition that it can rely on the consultative activities of third parties. At para. 154, Taylor J. held that:

> ... a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also the consultations between First Nations people and Amoco [the resource developer in that case] that were known to the government to have occurred.

[234] I am wary of that proposition in light of a problem noted by Wedge J. in *Halalt*, *supra*, at para. 73. There, she cited Professor Dwight G. Newman in *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at p. 36:

> One danger of having different industry stakeholders involved in carrying out consultations is that it may become difficult for an Aboriginal community to identify when it is or is not engaged in discussions that amount to consultation for the purposes of the duty to consult. Various industry representatives may engage in discussions that might later be portrayed as part of a consultation process. This worry can be overcome by the government either carrying out all consultation itself or delegating its consultation roles quite explicitly where it does so.

[235] In any event, given my finding that Crown (alone) met its duty to consult, I need not make a determination with respect to the consultation and accommodation efforts undertaken by TCMC.

3. The Economic Community Development Agreement

[236] The process of consultation in this case did not give rise to a duty on Crown to accommodate. I make that conclusion because I am satisfied that as a result of Stellat'en's unresponsiveness to Crown's efforts to consult them and in light of the strength of Stellat'en's claims and seriousness of the potential infringement arising from the Mine's expansion, no duty to accommodate arose.

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[237] A comment on the ECDA is warranted, however.

[238] A hint of accommodation can be found in Crown's attempt to enter into an ECDA, which proposes to provide Stellat'en with a share in additional revenue flowing from increased throughput of 55,000 tonnes of ore per day. I say 'a hint' because, in my view, it is inconsistent and unreasonable for Crown to say on the one hand that negotiating an ECDA is unrelated to consultation and accommodation, yet on the other hand, to impose as a condition of entering into an ECDA a release by Stellat'en of any future claims with respect to Crown's *Haida* duties. I make this observation on the basis that such a release is, in fact, being proposed by Crown.

[239] The Crown stated, at para. 225 of its written submissions, that it requires assurances that it is in partnership with the Stellat'en and does not want to share revenues only to be sued while attempting to do so.

[240] I note that Crown's insistence of a so-called 'release' seems to be consistent with its position implicit in its Forest and Range Agreement with the Stellat'en. Section 9.3 of the FRA stipulates as follows:

> If, during the term of this Agreement, Stellat'en ... challenges ... an Administrative Decision and/or Operational Decision or an Operational Plan [each of these terms are defined in the FRA] or activities carried out pursuant to those decisions/plans, by way of legal proceedings ... on the basis that the economic benefits set out in Section 3.0, and the consultation processes set out in Sections 4.0 and 5.0 ... are not adequate or sufficient to:
>
> > 9.3.1 provide adequate consultation, to substantially address Stellat'en...'s concerns and to provide an interim workable accommodation in respect of any potential infringements of Stellat'en...'s Aboriginal Interests with regard to Administrative Decisions relating to forest and/or range resource development activities within the Traditional Territory, or
> >
> > 9.3.2 substantially address the economic component of Stellat'en First Nation's Aboriginal interests with regard to Operational Decisions relating to forest and/or range resource development activities within the Traditional Territory,
>
> then, without limiting any other remedies that may be available to the Government of British Columbia, the Government ... may suspend or cancel the economic benefits set out in Section 3.0.

[241] But in my view, accepting Stellat'en's complaints as true, Crown cannot simultaneously assert that consultation and ECDA are parallel processes but require acceptance of the terms as satisfying the Province's obligations to consult and accommodate. Such a proffered condition surely puts Stellat'en in a 'take it or leave it' situation and is not compatible with the honour of the Crown. If the ECDA negotiations and the process of consultation and accommodation are truly parallel, then there would seem to be no need to coerce Stellat'en into agreeing that the ECDA fulfills Crown's *Haida* duties. I raise this concern only in so far as it may be considered should Crown make any future attempts to accommodate.

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VI. CONCLUSION

[242] In the circumstances as put before me, Crown acted honourably in its efforts to consult Stellat'en on TCMC's proposed expansion of the Endako Mine. It correctly determined the scope of its duty to consult Stellat'en and then engaged in consultation that is adequate and reasonable in the circumstances. The Provincial Crown has discharged its duty to consult. No duty to accommodate arose from the consultation process.

[243] The petitioners' claims for relief are dismissed.

[244] The parties made no submissions as to costs. Costs may be spoken to.

"The Honourable Mr. Justice Crawford"