Federal Court  Cour fédérale

Date: 20151120

Docket: T-415-13

Citation: 2015 FC 1298

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 20, 2015

Present: The Honourable Mr. Justice Gascon

BETWEEN:

COUNCIL OF THE INNU OF EKUANITSHIT

and

SOCIÉTÉ DES ENTREPRISES INNUES D'EKUANITSHIT S.E.P. (2009)

Applicants

and

MINISTER OF FISHERIES AND OCEANS CANADA

and

MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES

and

HAMEL CONSTRUCTION INC.

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Council of the Innu of Ekuanitshit and the Société des entreprises Innues d'Ekuanitshit s.e.p. (2009) (collectively, the Innu of Ekuanitshit) presented an application for judicial review against decisions made by the Minister of Fisheries and Oceans Canada (the MFO) and the Minister of Public Works and Government Services (the MPWGS) (collectively, the federal ministers) regarding the reconstruction of Mingan wharf in the Gulf of St. Lawrence.

[2] On September 2009, a fire completely destroyed the wharf in place at the time in the village of Mingan, requiring its reconstruction. In order to proceed with the construction, the MFO made the decision to acquire the services to reconstruct the wharf through a public bid solicitation initiated in November 2012 by the MPWGS. In February 2013, the MPWGS awarded the contract to Hamel Construction Inc. (Hamel). The reconstruction of the wharf was completed in January 2014, before the spring 2014 fishing season.

[3] In their original notice of application filed in March 2013, the Innu of Ekuanitshit sought judicial review of the contract awarded for the reconstruction of the wharf by the MPWGS on February 5, 2013 and to have it set aside. Following the amendment of their notice of application in August 2013, the Innu of Ekuanitshit also challenged the previous decision of the MFO and the MPWGS to acquire services to reconstruct the wharf through a public bid solicitation and, alternatively, requested that the tender notice published by the MPWGS on November 30, 2012, be set aside.

[4] The Innu of Ekuanitshit attacked these decisions of the MFO and PWGSC by raising their unreasonableness and illegality. They claimed that by determining who would reconstruct the Mingan wharf, the federal ministers erred in submitting the contract to reconstruct a public bid solicitation and, in the same breath, setting aside the application of a Canadian Treasury Board Contracting Policy Notice entitled the *Procurement Strategy for Aboriginal Business* (the PSAB). Indeed, in this entire bid solicitation and contract award process, the Innu of Ekuanitshit alleged that the federal ministers did not apply the PSAB to the project to reconstruct the Mingan wharf. That was their main complaint against the decisions of the MFO and the MPWGS. Furthermore, the Innu of Ekuanitshit argued that, in their dealings leading to the award of the contract for the reconstruction of the wharf, the federal ministers had a duty to consult with and accommodate them (in the sense that this duty has been developed by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*) and its descendants), and that they did not fulfill this duty.

[5] According to the Innu of Ekuanitshit, this failure of the federal ministers to apply the PSAB to the project to reconstruct the Mingan wharf and to consult with them in the process of awarding contracts is sufficient to invalidate the decisions relating to the notice of bid solicitation and the contract awards.

[6] With respect to remedies, since the Mingan wharf has now already been reconstructed and the contract for its reconstruction is complete, the Innu of Ekuanitshit are no longer requesting the setting aside of the contract awarded to Hamel in February 2013 or the decision to initiate a public bid solicitation for it in November 2012. As their counsel confirmed at the

hearing before this Court, rather they seek to obtain declarations. They are of two types. First, the Innu of Ekuanitshit request from the Court a declaration that the reconstruction of Mingan wharf constituted a contract to provide goods or services submitted to the PSAB; also, by proceeding with a public bid solicitation outside the scope of the PSAB and by awarding the contract to reconstruct Mingan wharf to Hamel, the MFO and the MPWGS awarded the contract illegally and breached the PSAB. Second, the Innu of Ekuanitshit also requested a declaration that the federal ministers have not adequately fulfilled their duty to consult them on the elements of the project to reconstruct the wharf and seek to accommodate them before initiating the notice of bid solicitation and awarding the contract to Hamel. Finally, the Innu of Ekuanitshit requested that the costs be incurred by the federal ministers regardless of the issue of the case given the importance of the issues and public interest in the legal resolution of the case.

[7] On behalf of the federal ministers, the Attorney General of Canada (the AGC) argued that the fundamental purpose of this application is in fact the decision of the MFO and the MPWGS to initiate a public bid solicitation for the wharf reconstruction and set aside the PSAB. The AGC submitted that this decision must be reviewed on a standard of reasonableness and that this standard was met in this case. Furthermore, the AGC claimed that the challenge to this decision is late, that the Innu of Ekuanitshit do not have the required interest to seek a remedy and that the proceedings have become purely moot given the reconstruction of the wharf. Finally, the AGC argued that the federal ministers had no duty to consult or accommodate the Innu of Ekuanitshit in this case within the meaning of *Haida*. Therefore, the AGC requested that the Court dismiss the application, with costs.

[8] Initiated in March 2013, this application for judicial review today raises the following two questions:

- Did the federal ministers err in deciding not to apply the PSAB and to proceed by public bid solicitation in the process leading to the award of the contract to reconstruct the Mingan wharf to Hamel?

- Did the federal ministers have a duty (within the meaning of *Haida*) to consult and accommodate the Innu of Ekuanitshit in the process leading to the contract award to reconstruct the wharf?

[9] For the reasons that follow, the Court allows in part the application of the Innu of Ekuanitshit. First, the Court is of the view that the different preliminary questions raised by the AGC do not act as a bar to this application. Second, the Court finds that the decision of the federal ministers to set aside the PSAB and proceed with the contract award through a call for public tenders does not meet the standard of reasonableness, as the MFO and the MPWGS had not analyzed the tests established by the PSAB and did not have the evidence to conclude that the PSAB did not apply to the contract. However, the Court is of the view that the federal ministers did not, apart from the process provided by the PSAB, have a general duty to consult and accommodate the Innu of Ekuanitshit in this case, and that there was no violation in this regard in the conduct of this case.

II. Background

[10] Before dealing with the issues, it is important to establish the background of the application of the Innu of Ekuanitshit, particularly the facts surrounding the reconstruction of the wharf, the exact purpose of the remedy sought and the PSAB put in place by the federal government.

A. *The facts*

[11] Built by the Americans in 1942 (or in 1943 according to Jean-Charles Piétacho, the chief of the Innu of Ekuanitshit), the Mingan wharf is currently owned and supervised by the MFO. It is located on the north shore of the Gulf of St Lawrence bordering land belonging to the federal government. It is directly adjacent to the Ekuanitshit Aboriginal reserve and the village of Mingan. Although all the routes that give access to the wharf cross or run along the Ekuanitshit reserve, the wharf itself is not located on the reserve or surrounded by it.

[12] In September 2009, the wharf was destroyed by arson. In a letter written to the MFO at the time on September 21, 2009, Chief Piétacho stated that the fire was [TRANSLATION] "an enormous catastrophe for the region of Mingamie, for which commercial fishing has an important place in the economy". He described the wharf as the "lifeblood of the economy" and the most important infrastructure of the Ekuanitshit community and neighbouring communities. A little later in the fall of 2009, the MFO declared the wharf completely destroyed and had the remnants demolished.

[13] In the fall of 2009, steps were taken by the MFO to quickly build a temporary replacement wharf and to begin the process of rebuilding a permanent wharf. Preliminary discussions then took place between the representatives of the MFO and the Innu of Ekuanitshit.

[14] In the month of October 2009, according to one of the affiants of the federal ministers, Luc Boucher, the MFO reviewed the criteria of the PSAB in anticipation of the reconstruction of the wharf and in preparation of the work that had to be performed in the short term to construct a temporary replacement wharf. The MFO decided to immediately construct floating temporary wharfs so that they would be ready for the fishing season in April 2010. The contracts for the construction of temporary replacement wharfs were awarded by public bid solicitation. The temporary structures would stay in place for the fishing seasons 2010, 2011, 2012 and 2013.

[15] The MFO officers also then began to develop a long-term solution for the reconstruction of a permanent wharf, so as to meet the needs of the commercial fishing industry in the region. The solution contemplated specifically aims to meet the needs of the 13 commercial fishing vessels that, according to the MFO's data, regularly use the Mingan wharf.

[16] In June 2010, the MFO gave its preliminary approval of the project to reconstruct the Mingan fishing harbour. Then it was planned that the funding for the project would come from the major capital budget of the Small Craft Harbours (SCH), a national MFO program. In November 2010, the MFO completed its comparative analysis of the various options available for a new permanent wharf and then confirmed its decision to reconstruct the wharf in Mingan. The other options considered by the MFO at the time included the relocation of the vessels to

other harbours of the north shore, the construction of a new harbour in a neighbouring region and the installation of floating steel foundations.

[17] In November 2011, the MFO made the decision to proceed with the reconstruction of the permanent wharf by public bid solicitation. According to the testimony of Mr. Boucher, the MFO then informed the Innu of Ekuanitshit.

[18] In January and February 2012, discussions took place between the MFO and the Innu of Ekuanitshit on the project to reconstruct the wharf. Throughout 2012, the MFO also held several meetings with the Mingan Harbour Authority in which the various representatives of the Innu of Ekuanitshit participated and in which the MFO described the status of the project to reconstruct the wharf. In his affidavit, Yves Bernier, one of the affiants of the Innu of Ekuanitshit, indicated that the employees of the Société des Entreprises Innues d'Ekuanitshit s.e.p. (2009) (the SEIE), a local Aboriginal economic development corporation, participated on behalf of the community in several of these meetings. The SEIE has a general contractor's license from the Régie du bâtiment du Québec (the RBQ) and is 99% owned by the Société de gestion Ekuanitshinnuat inc., an incorporated company of Quebec.

[19] During these meetings, the representatives of the MFO or the MPWGS did not raise the issue of the PSAB. The evidence also shows that Mr. Boucher, the MFO employee responsible for the project to reconstruct the wharf, did not consult the federal government’s directives on consulting and accommodating Aboriginal peoples.

[20] In June 2012, SNC-Lavalin Inc. [SNC] was retained by the MPWGS, on behalf of the MFO, so as to analyze the environmental aspects of the Mingan wharf reconstruction project, in accordance with the requirements of the *Canadian Environmental Assessment Act (2002)*, SC 2002, c 19, art 52 (the CEAA). The final version of the project's environmental effects evaluation report would be produced by SNC in March 2013.

[21] In mid-October 2012, in the context of its study, SNC contacted the Innu of Ekuanitshit to ask them some questions on their concerns regarding the environmental effects of the reconstruction of Mingan wharf. In the start of November 2012, Mr. Bernier then sent two letters in this regard to the representative of SNC, setting out all of the grievances of the Innu of Ekuanitshit relating to the project.

[22] During a meeting held on October 22, 2012, the representatives of the Innu of Ekuanitshit asked the MFO regarding the possible participation of the Innu in the reconstruction project and the possibility that the contract to reconstruct the wharf be awarded by mutual agreement to the Innu. The MFO answered that awarding the "contract" by mutual agreement had not been considered, stated that the MFO intended to launch a public bid solicitation, informed the Innu of Ekuanitshit that this bid solicitation would be open to all and invited them to participate in the process.

[23] On November 13, 2012, the MFO approved the application for the final approval of the project to replace the Mingan wharf (at a cost of $7.4 million). The MPWGS published a notice of bid solicitation on November 30. In the meantime, between November 13 and the publication

of the notice of bid solicitation on November 30, Yves Rochette, MPWGS procurement specialist, wondered whether the PSAB applies to the project. Mr. Rochette verified with the MFO and confirmed that the PSAB did not apply.

[24] On December 4, 2012, Mr. Bernier of the SEIE and the Innu of Ekuanitshit were informed of the bid solicitation. Then they asked again if the option of a contract by mutual agreement could be considered by the federal ministers. The MFO answered that it launched a public bid solicitation that aimed to award the contract to the lowest bidder and reiterated that the possibility of entering into a contract by mutual agreement was not one of the avenues considered by the Department.

[25] At the close of the bid solicitation on December 18, 2012, five compliant bids were received by the MPWGS. In January 2013, the MPWGS awarded the reconstruction contract to Hamel for $6.8 million and the award notice was published on February 5, 2013. A year later, in January 2014, Hamel completed the reconstruction of the permanent Mingan wharf.

[26] The Innu of Ekuanitshit submitted their notice of application for judicial review before the Court on March 7, 2013.

B. ***The application des Innu of Ekuanitshit***

[27] Since more than two years have elapsed since the filing of the original notice of application of the Innu of Ekuanitshit and that the reconstruction of the Mingan wharf was completed in the meantime, the nature of the remedies sought by the Innu of Ekuanitshit has changed.

[28] In their notice of amended application of August 2013, the Innu of Ekuanitshit sought the following different remedies:

> [TRANSLATION]
>
> 1. A declaration that the ministers of Fisheries and Oceans Canada and Public Works and Government Services Canada …:
>
> > a. did not adequately fulfil their duty to consult the Innu of Ekuanitshit on the components of the project to reconstruct the Mingan wharf that might adversely affect their Aboriginal rights; and
> >
> > b. did not seek, in a spirit of conciliation, the accommodation measures required by the honour of the Crown;
>
> 2. A declaration that for the purposes of the Treasury Board's Contracting Policy Notices (CPM) 1996-2 and 1997-6 and of the Procurement Strategy for Aboriginal Business (PSAB) that these notices created:
>
> > a. the reconstruction of Mingan wharf constitutes construction subject to the federal procurement process, the cost of which exceeds $5,000;
> >
> > b. the Mingan wharf is part of a region composed of the Indian reserve of Ekuanitshit (Mingan) and where Aboriginal people form more than 80% of the population; or

c. the Innu of Ekuanitshit, alone or with the other members of the Innu Nation, form a group of people receiving goods and services constituted by the reconstruction of Mingan wharf and this group is composed of 100% Aboriginal people;

d. the reconstruction of Mingan wharf constitutes goods or services for which "Aboriginal populations are the primary recipients" and that are subject to the PSAB.

3. A declaration that the Société des entreprises Innues d'Ekuanitshit s.e.p. (2009) is an "Aboriginal business" within the meaning of the CPM 1996-2 and 1997-6 for the purposes of the PSAB that these notices were created;

Cancellation of the acts

4. The cancellation of the contract award by the Minister of Public Works and Government Services under reference number PW-$QCM-008-15052 because of its unreasonableness and illegality;

5. Alternatively

a. the cancellation of the notice of the bid solicitation entitled "Reconstruction of Mingan wharf", published on November 30, 2012 under reference number PW-$QCM-005-15052;

b. the extension of time under subs. 18.1(2) of the *Federal Courts Act* so as to allow applicants to challenge this act, if applicable, and

c. an order under section 302 of the *Federal Courts Rules* to allow this application to bear on more than one decision, if applicable;

Referral as directed

6. The referral of procurement established by the reconstruction of Mingan wharf back to the Minister of Fisheries and Oceans and the Minister of Public Works and Government Services, so that they may

a. consult, in accordance with s. 35 of the *Constitution Act, 1982*, the Innu of Ekuanitshit on the components of the project that may adversely

> affect their rights and seek accommodation measures as required by the honour of the Crown;
>
> b. determine whether for this project "*the nature of the work is such that it would not be in the public interest to solicit bids*" within the meaning of the *Government Contracts Regulations*, SOR/87/402, para. 6(c);
>
> c. determine whether Aboriginal suppliers are "capable of responding to the needs" for this project and, as required, they launch a bid solicitation "with qualified Aboriginal suppliers in accordance with the purpose of the PSAB" under the CPM 1996-2, para. 4 to 9, and the CPM 1997-6, para. 2.2.1;
>
> d. alternatively, prepare a bid solicitation to "request Aboriginal business sub-contracting plans" as permitted under the CPM 1997-6, para. 3.3.1.;
>
> *Prohibition*
>
> 7. A writ of prohibition against the Minister of Public Works and Government Services and the Minister of Fisheries and Oceans to prevent them from doing any act that would allow the execution by Hamel Construction Inc. of the contract awarded under reference number PW-$QCM-008-15052.

[29] In their memorandum of fact and law submitted in May 2014, however, the order required by the Innu of Ekuanitshit was more limited and required that this Court, in addition to any costs:

> [TRANSLATION]
>
> A. A declaration that the federal ministers have not adequately fulfilled their duty to consult and accommodate the Innu of Ekuanitshit before making the decision established by the award of the contract to reconstruct the Mingan wharf or, alternatively, the decision established by the notice of bid solicitation relating to the same project;
>
> B. A declaration that the reconstruction of Mingan wharf constituted goods or services subject to the PSAB and that the

> MPWGS awarded the contract illegally owing to its violation of the PSAB;
>
> C. Alternatively, if the contract award and its submission to a bid solicitation constituted more than one decision, an order under section 302 to enable this application to relate to more than one decision and the extension of time under para 18.1(2) of the FCA so as to challenge the bid solicitation.

[30] Then, during the hearing before this Court, counsel for the Innu of Ekuanitshit specified that the only remedies now sought were indeed declaratory in nature. The Innu of Ekuanitishit no longer require the cancellation of the contract award or the notice of bid solicitation launched for the reconstruction of Mingan wharf, the referral of the procurement to the MFO and the MPWGS, or the issue of a writ of prohibition against the federal ministers.

[31] That said, the dispute still relates to the two decisions relating to the reconstruction of Mingan wharf: first, the decision made in February 2013 by the MPWGS awarding to Hamel the contract requested by the MFO and, second, the decision made in November 2012 to make a bid solicitation to award this contract. The Innu of Ekuanitshit consider these two decisions as inseparable. In both cases, according to the Innu of Ekuanitshit, they contain no allusions to the PSAB (which was not applied to them) or to the duty to consult and accommodate and it is these violations by the federal ministers that are the basis of their application for judicial review and the declaratory relief that they seek.

C. *The PSAB*

[32] The PSAB was launched in 1996 by the federal government to help Aboriginal businesses bid on federal contracts (i.e. contracts with the federal government) and thus win more contracts with federal departments and agencies. It is an initiative of the Government of Canada that is administered by the Minister of Aboriginal Affairs and Northern Development Canada (the AANDC), but all federal departments and agencies are encouraged to participate in it.

[33] The PSAB is part of the Treasury Board Contracting Policies, which govern the awarding of contracts by the federal government and promote Aboriginal businesses in Canada. The Treasury Board Contracting Policy is established under subsection 7(1) of the *Financial Administration Act*, RSC 1985, c F-11 (the FAA). Therefore PSAB falls under the policies that govern the procurement of goods, services and construction by the contracting authorities responsible for contracting for the Government of Canada.

[34] Four policies were issued by the Treasury Board to create and govern the PSAB and to limit its application: the *Aboriginal Business Procurement Policy and Incentives - Contracting Policy Notice 1996-2* (the CPM 1996-2), adopted in March 1996; the *Aboriginal Business Procurement Policy Performance Objectives - (Contracting Policy Notice 1996-6)* (the CPM 1996-6), adopted in September 1996; the *Aboriginal Business Procurement Policy - Contracting Policy Notice 1996-10*; and the *Procurement Policy for Aboriginal Business: Guidelines for Buyers/Government Officials (Contracting Policy Notice 1997-6)* (the CPM 1997-6), adopted in August 1977. The PSAB applies to contracts awarded by the federal government as of April 1, 1996.

[35] The CPM 1996-2 of March 1996 lays the foundations of the PSAB. It sets out in article 1 that with the PSAB, the government approved a "program designed to increase Aboriginal business participation in supplying government procurement requirements". It added to article 2 that the government has accepted that "all departments and agencies shall initiate or participate in supplier development activities aimed specifically at Aboriginal businesses". Article 5 provides the following so that the PSAB qualifies as "mandatory setasides":

5. The new policy is broad in scope. The first phase, which becomes effective on April 1, 1996, requires all Contracting Authorities, where a procurement is valued in excess of $5,000, and for which Aboriginal populations are the primary recipients, to restrict this procurement to qualified Aboriginal suppliers where operational requirements, best value, prudence and probity, and sound contracting management can be assured. Contracts valued at less than $5,000 may also be set aside for qualified Aboriginal suppliers if it is practical to do so.	5. La nouvelle politique a une vaste portée. À partir du 1er avril 1996, date à laquelle entrera en vigueur la première phase du programme, lorsque la valeur d'une commande dépasse 5 000 dollars et que les biens ou services sont destinés principalement à des populations autochtones, toutes les autorités contractantes devront inviter à soumissionner uniquement des fournisseurs autochtones qualifiés, dans la mesure où sont satisfaits les exigences opérationnelles, et les critères relatifs à la meilleure valeur, à la prudence, à la probité et à la saine gestion des marchés. Les marchés d'une valeur inférieure à 5 000 dollars peuvent également être réservés aux fournisseurs autochtones pour des raisons pratiques.
…	[…]
Definitions	Définitions
…	[…]
"Aboriginal Business"	"Entreprise autochtone"

An Aboriginal business is an enterprise that is:

a. a sole proprietorship, limited company, cooperative, partnership, or notforprofit organization

- in which Aboriginal persons have majority ownership and control meaning at least 51 percent, and
- in which, in the case of a business enterprise with six or more fulltime employees, at least 33 percent of the fulltime employees are Aboriginal persons,

Or

a. a joint venture or consortium in which an Aboriginal business or Aboriginal businesses as defined in (a) have at least 51 percent ownership and control, and

b. which certifies in bid documentation that it meets the above eligibility criteria, agrees to comply with required Aboriginal content in the performance of the contract, and agrees to furnish required proof and comply with eligibility auditing provisions.

Une entreprise autochtone est :

a) une entreprise à propriétaire unique, une société à responsabilité limitée, une coopérative, une société en nom collectif ou une entité sans but lucratif :

- dans laquelle des autochtones détiennent le contrôle et une participation majoritaire, c'est à dire au moins 51 p. 100 des actions, et
- dans laquelle, s'il s'agit d'une entreprise commerciale de six employés à temps plein ou plus, au moins 33 p. 100 des employés à temps plein sont des autochtones;

Ou

a) une coentreprise ou un consortium dans lequel une ou plusieurs entreprises autochtones définies au paragraphe a) ci-dessus détiennent le contrôle et au moins 51 p. 100 des actions, et

b) qui, dans les documents de soumission, atteste répondre aux critères d'admissibilité ci-dessus, consent à respecter les critères relatifs à la teneur autochtone dans l'exécution du marché et qui accepte de fournir les preuves requises et de se conformer aux dispositions sur la vérification

	d'admissibilité.
…	[…]
"Aboriginal Population"	"Population autochtone"
Aboriginal Population means:	Population autochtone désigne:
a. an area, or community in which Aboriginal people make up at least 80 percent of the population;	a) une région ou une collectivité où les autochtones constituent au moins 80 p. 100 de la population;
b. a group of people for whom the procurement is aimed in which Aboriginal people make up at least 80 percent of the group.	b) un groupe de personnes destinataire d'un approvisionnement qui est formé d'autochtones dans une proportion d'au moins 80 p. 100.

[36] Therefore, under the terms of the CPM 1996-2, the PSAB is imperative when the conditions for a contract mandatorily set aside for Aboriginal people are fulfilled: it prescribes that the contracting authorities must invite only qualified Aboriginal suppliers to bid when the value of an procurement exceeds $5,000, where the goods or services for which "Aboriginal populations are the primary recipients", and that the operational requirements, best value, prudence and probity, and sound contracting management can be assured. Article 9 of the CPM 1996-2 also provides that, for other procurement projects, Aboriginal businesses should be encouraged to act as subcontractors.

[37] Therefore, the PSAB appears as a mandatory program for all departments and the CPM 1996-2 also establishes that the government expects that its departments preach by example in entering into contracts with qualified Aboriginal businesses. Under the terms of the CPM 1996-

2, a contracting authority subject to the PSAB must thereby determine whether a procurement project that it is considering must be set aside for Aboriginal businesses as part of the PSAB.

[38] The CPM 1996-6 specifies other requirements to be entitled to the PSAB. This second directive requires, in fact, that the Aboriginal bidder must be an Aboriginal business that meets the control requirements by Aboriginal people. This notice also provides subcontracting and certification requirements. Therefore, if a department determines that the PSAB applies, it is thus mandatory to determine whether Aboriginal suppliers are able to meet the procurement needs in question. The CPM 1996-6 reiterates that the PSAB is designed to increase Aboriginal business participation in government procurement through mandatory and selective set asides and supplier development activities.

[39] The CPM 1997-6 provides some guidelines and recalls that the federal government is determined to increase its contracts with Aboriginal businesses. Echoing the CPM 1996-2, it describes the mandatory setasides as those for which goods or services are "destined primarily for Aboriginal populations as defined in [the CPM 1996-2]" (para 2.6.1). The CPM 1997-6 also added, under incentives for Aboriginal suppliers, that subcontracting is "of further benefit to Aboriginal business" and that all departments and agencies awarding contracts are "encouraged to request Aboriginal business sub-contracting plans" (para 3.3.1).

[40] The CPM 1997-6 also indicates at para 4.6.1, that "[a]ll of the sole sourcing techniques may be employed for requirements identified as set-aside", in which case a single supplier may be solicited. Finally, it adds, at para 8.1.1, It is the responsibility of the contracting authority to

"decide if a procurement opportunity is to be set aside under (the PSAB), including initial determination of a mandatory requirement".

[41] Regarding the four Treasury Board Policies, the MPWGS also published a "Supply Manual" which includes the supply policy of the MPWGS and the references to the applicable legislation, regulations, and government and departmental policies. This manual includes section 9.40 relating to the PSAB, which also reproduced the different attributes of the PSAB. The Manual specifies at paragraph 9.40.1, with respect to mandatory setasides, that it is "mandatory to set aside a procurement under PSAB if an Aboriginal population is the primary recipient or end user of the goods or services being procured", in addition to other conditions described in the Manual.

[42] Therefore, the Court observed that there is consistency in the different policy statements and directives issued by the Treasury Board and the MPWGS regarding the PSAB. The following key elements arise:

- The purpose of the PSAB is to increase Aboriginal business participation in supplying federal government procurement requirements;
- The contracting authority must establish whether, for a given procurement, a mandatory setaside exists within the meaning of the PSAB;
- A mandatory setaside is one where a procurement is valued in excess of $5,000, where goods or services for which "Aboriginal populations are the primary recipients", and where operational requirements, best value, prudence and probity, and sound contracting management can be assured;

- An Aboriginal population is either "an area, or community in which Aboriginal people make up at least 80 percent of the population" or "a group of people for whom the procurement is aimed in which Aboriginal people make up at least 80 percent of the group";

- If the conditions for a mandatory setaside exist, the contracting authority must only solicit Aboriginal suppliers qualified to bid;

- The contracting authority is also prompted to consider and encourage Aboriginal business sub-contracting;

- The sole sourcing techniques may be employed for requirements identified as set aside for Aboriginal businesses.

[43] Under the application of the PSAB, businesses considered for a federal contract are qualified Aboriginal bidders. However, the *Government Contracts Regulations*, SOR/87-402 (the *Regulations*) nevertheless continues to apply, which means, for example, that contracting normally initiates a bid solicitation, that all qualified bidders have equal access to contracts offered and that the usual bid solicitation methods of the federal government still govern mandatory setasides under the PSAB. However, the *Regulations* provides, among other things that some procurements must be of such a nature that a bid solicitation would not serve the public interest in the circumstances (para 6(c)).

III. Preliminary matters

[44] The AGC and the Innu of Ekuanitshit raise various preliminary matters that are important to deal with before addressing the issues. They relate to the delay in submitting the application

for judicial review, the interest of the Innu of Ekuanitshit, the mootness of the remedies sought and the strike-out of a portion of the affidavit of Mr. Boucher.

A. ***Is the application late?***

[45] The AGC argued that, since the original notice of application of the Innu of Ekuanitshit concerned only the MPWGS's contract award to reconstruct the wharf but in reality, the remedy relates to the earlier MFO decision to initiate a bid solicitation, the dispute of this first decision is late and must be rejected. Indeed, the original notice of application contained no allegation of misconduct or illegality in the tendering process. According to the AGC, the Innu of Ekuanitshit filed their amended notice of application several months after the submission of their initial notice and after all the parties had filed their affidavits and despite the fact that they were aware of the MFO's decision to proceed by bid solicitation since at least November 2012. Furthermore, according to the AGC, the Court should not grant the Innu of Ekuanitshit an extension of time under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (the FCA) since the respondents have not met the requirements prescribed by case law to obtain such an extension of time (*Canada (Attorney General) v Larkman*, 2012 FCA 204 (*Larkman*) at para 61; *Canada (Attorney General) v Lacey*, 2008 FCA 242 (*Lacey*) at para 2).

[46] The Court does not share the AGC's position in this regard.

[47] The purpose of this dispute and the application for judicial review filed by the Innu of Ekuanitshit is the alleged failure of the federal ministers to apply the PSAB and comply with their duty to consult and accommodate in the process that led to the decisions to initiate a bid

solicitation for the project to reconstruct the wharf and award the contract to Hamel. The Innu of Ekuanitshit argued that, in this context, the contract award and its submission to a tendering process are an inseparable pair of decisions made by the federal ministers. The Court agrees with the Innu of Ekuanitshit on this point.

[48] The decisions not to apply the PSAB and to initiate a public bid solicitation that ended in awarding the contract to reconstruct the wharf to Hamel can and must be considered as being part of the same decision for the purposes of this application for judicial review. Indeed, they are different sides of the same coin: when the MFO determined that it was not appropriate to apply the PSAB, it thus inevitably decided to proceed by public bid solicitation; conversely, by deciding to publish a bid solicitation and award the contract to Hamel, it is clear that the MFO and the MPWGS have, by necessary implication, excluded the PSAB application. Moreover, although the Court had to consider that the decision under review is truly the bid solicitation requested by the MFO and initiated by the MPWGS, the fact remains that the decision on the bid solicitation becomes final only once the contract is reached and awarded to a bidder. Furthermore, the *Regulations* provide at article 5 that the reaching of a contract by the federal government is directly linked to the initiation of a bid solicitation. Therefore, it was right for the Innu of Ekuanitshit to wait for the outcome of the process and the contract award before filing their notice of application; otherwise, the decision of the MFO and the MPWGS to initiate the bid solicitation would not have been a final decision (*MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2007 FC 955 at para 148).

[49] Furthermore, although it was considered that more than one decision is at issue in this file, the Court is of the view that this succession of decisions by the MFO and the MPWGS is part of a single conduct that may, in the circumstances, be the subject of a single order within the meaning of section 302 of the *Federal Courts Rules*, SOR/98-106. Indeed, the MFO's decision and that of the MPWGS are a single series of acts and they are "so closely linked as to be properly considered together". (*Shotclose v Stoney First Nation*, 2011 FC 750 (*Shotclose*) at para 64; *Canadian Assn. of the Deaf v Canada*, 2006 FC 971 at para 66).

[50] In addition, the Court noted *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 697 at para 104, cited by the Innu of Ekuanitshit, which states that the concept of "decisions" must not be strictly applied when there is a statutory authorization for a governmental initiative that directly affects the constitutional rights of the First Nations. This matter concerned the application of the duty to consult and accommodate the Crown (within the meaning of *Haida*), and the principle of broad and liberal interpretation that it sets out for the decisions that affect Aboriginal rights has since been largely followed by the courts. It supports an approach that the decisions at issue in this matter are seen as an inseparable whole for the purposes of the application for judicial review lodged by the Innu of Ekuanitshit.

[51] Finally, in any case, subsection 18.1(2) of the FCA confers on the Court discretion to award an extension of time imparted to submit an application for judicial review. Therefore, it is sufficient that the conditions established by *Larkman* and *Lacey* are met, that the applicant demonstrated a constant intention to pursue his application, that the application contemplated reflects some merit and raises defendable grounds for review, that the granting of an extension of

time will not cause harm to the respondent and that a reasonable explanation exists to justify the delay. The Court is of the view that these conditions are met in the circumstances and that, if required, it will be appropriate to exercise its discretion in granting the extension of time to allow the Innu of Ekuanitshit to dispute the notice of bid solicitation published on November 30, 2012 by the MPWGS.

[52] Indeed, the sources of this dispute, on one side, are the decision of the MFO and the MPWGS to set aside the PSAB and initiate a bid solicitation for the reconstruction of Mingan wharf, which led to a contract awarded to Hamel and, on another side, the failure of federal ministers to honour their duty to consult and accommodate throughout the process. The Court is satisfied, with respect to the evidence on file, that the Innu of Ekuanitshit have always had an ongoing intention to pursue their application for judicial review of these decisions, and that their application reflects some merit and a strong foundation. In addition, since the application no longer seeks to cancel Hamel's reconstruction contract or the prohibition of the work to reconstruct Mingan wharf, the Court considers that granting an extension of time does not cause harm to the federal ministers. Finally, the Innu of Ekuanitshit offered a reasonable explanation for the delay in submitting their application given the notice of bid solicitation, considering the common thread connecting the series of acts by the federal ministers resulting in awarding the contract to reconstruct the wharf. In addition, the Court considered that granting an extension of time is in the interest of justice (*Larkman* at para 62). The Court is of the view that the criteria of *Larkman* and *Lacey* to obtain an extension of time the deadline under subsection 18.1 of the FCA are met.

[53] For all these reasons, the Court found that the application of the Innu of Ekuanitshit is not late.

B. ***Do the applicants have the required interest?***

[54] The AGC also argue that the Innu of Ekuanitshit do not have the required interest to challenge the decision of the federal ministers initiate a bid solicitation and award the contract to Hamel, since they are not "directly affected by the matter in respect of which relief is sought" as required in section 18.1 of the FCA (*Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116). According to the AGC, the Innu of Ekuanitshit never sought the application of the PSAB and requested only awarding them a contract by mutual agreement. Moreover, after the initiation of the bid solicitation, the Innu of Ekuanitshit did not file their bid to attempt to obtain the contract to reconstruct the wharf, although other businesses succeeded in doing so with a very short notice period. Finally, the AGC submitted that the Innu of Ekuanitshit did not show that they had the ability to present an offer in accordance with the project and even less to reconstruct the Mingan wharf for a cost and within a reasonable time. On the contrary, according to the AGC, the available evidence shows that the SEIE did not have the required qualities to complete the reconstruction of the wharf, specializing only in the field of industrial construction related to hydro-electric projects, having no employees in Quebec and admitting in cross-examination that it wanted to undertake this project essentially as an educational experience ([TRANSLATION] "like teaching someone to walk", Mr. Bernier stated). The AGC added that the Innu of Ekuanitshit had also not shown that the SEIE is a qualified Aboriginal business within the meaning of the PSAB.

[55] The Court does not agree with the AGC's arguments and is satisfied that, for the following reasons, the Innu of Ekuanitshit are directly affected by the subject of the application and have a required sufficient interest to continue this judicial review.

[56] The Court recalls that the essence of the dispute at the source of this application for judicial review is the alleged failure of the federal ministers to apply the PSAB and comply with their duty to consult and accommodate the Aboriginal people in the process of awarding the contract to reconstruct the wharf to Hamel. In the view of the Innu of Ekuanitshit, that is what vitiates the decision of the federal ministers to proceed by bid solicitation to award the contract. It seems clear that both the potential application of the PSAB and the question of the duty to consult and accommodate in this provision directly affect the Innu of Ekuanitshit, since they would benefit directly on two fronts. Furthermore, although it is not necessarily certain that the SEIE would have obtained the contract to reconstruct the wharf even following a bid solicitation set aside for Aboriginal businesses, the Court is nevertheless of the view that it can reasonably be inferred that the SEIE allegedly had better chances in the context of the PSAB and that she was directly affected by the federal ministers' decision on the subject. Finally, although it is true that the Innu of Ekuanitshit had not provided the evidence that the SEIE is an "Aboriginal business" within the meaning of the PSAB, the Court noted that in his affidavit, Mr. Bernier noted that he took steps to enter the SEIE in the Aboriginal Business Directory of the Government of Canada and that to his knowledge, it meets all the criteria to be entered. Moreover, this indicates that the company could have been qualified as an "Aboriginal business" under the PSAB since the eligibility criteria for the Directory correspond closely to those of the PSAB. The Court also observed that the SEIE has a licence from the RBQ and noted that, again, according to

Mr. Bernier's testimony in his affidavit, the SEIE could have completed the project to reconstruct the wharf alone or by bringing together all the necessary sub-contractors.

[57] Furthermore, the Court also agrees with the argument of the Innu of Ekuanitshit that, in any event, they have a "public interest" in presenting an application for judicial review of the federal ministers' decision to award the contract to reconstruct the wharf and hold the bid solicitation on the ground that the MFO and the MPWGS allegedly had not respected their duty to consult and accommodate and had neglected to apply the PSAB. When a party raises a public interest, it is up to it to prove that it has such interest. To establish it, the application must convince the Court, on a balance of the evidence, that it meets the conditions of the public interest criterion, as they were developed by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (*Downtown Eastside*) at para 37.

[58] These criteria require that the application shows (1) that a serious justiciable issue is raised; (2) that there is a real stake or a genuine interest in it and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. By considering this third condition, the court must ask itself whether the action contemplated is an efficient use of judicial resources, if issues are suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality (*Downtown Eastside* at para 50). The Supreme Court also suggested several questions to be considered in this analysis. They include, among other things, knowing whether the applicant has the capacity to sue, if the case transcends

the interests of the parties that are the most directly affected by the legislative provisions or by the impugned measures, whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination and, finally, whether the potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account (*Downtown Eastside* at para 51). The factors listed must not be considered to be "items on a checklist or as technical requirements", but rather applied in a flexible and purposive manner to be weighed cumulatively, not individually, and in light of their purposes (*Downtown Eastside* at para 36).

[59] Considering the criteria and issues raised by the Innu of Ekuanitshit with respect to the application of the PSAB and the duty to consult on the project to reconstruct the Mingan wharf, the Court is satisfied that the Innu of Ekuanitshit also have the public interest required to initiate this application for judicial review.

[60] For all these reasons, the Court rejects the AGC's claims that the Innu of Ekuanitshit would not have had sufficient interest in this file.

C. *Is the application moot?*

[61] Finally, the AGC argued that the Court should decline to hear this application for judicial review because of its mootness. Indeed, Mingan wharf is now rebuilt and, since the Innu of Ekuanitshit did not request its demolition, the AGC argued that the issues are now purely moot

and without remedy (*Elkayam v Canada (Attorney General)*, 2004 FC 908 at paras 11-12; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (*Borowski*) at p 353).

[62] The Court does not agree and is satisfied that the application of the Innu of Ekuanitshit and the declaratory relief sought cannot be considered to be purely moot. The original application was clearly not since it sought to cancel the contract awarded to Hamel, in addition to the declarations for the PSAB application and the duty to consult and accommodate. Of course, the Innu of Ekuanitshit are now no longer seeking the cancellation of the contract awarded to Hamel or the solicitation notice as the reconstruction of Mingan wharf has been completed since the notice of application was filed. However, the application raises more important questions that the Court has the discretion to consider, such as the manner in which the PSAB application must be considered by the MFO and the MPWGS and the existence and scope of the Crown's duty to consult and accommodate the Innu of Ekuanitshit in the circumstances.

[63] The Innu of Ekuanitshit rely on the Supreme Court decision in *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (*Manitoba Metis*). This decision established that the courts may make declarations "whether or not any consequential relief is available" and that "[i]n some cases, declaratory relief may be the only way to give effect to the honour of the Crown" (*Manitoba Metis* at para 143). As the Supreme Court stated in this matter, a declaration is a limited remedy.

[64] Similarly, *Borowski* teaches that, even in the absence of live controversy, the Court may still decide to exercise its discretion to consider a moot question if the circumstances justify it.

This is the case if there is an adversarial context where the parties still have an interest in the outcome of the dispute. In this case, the Innu of Ekuanitshit argued that the basis of their application relates to the application of the PSAB and the scope of the federal government' duty to consult Aboriginal peoples. These are important issues that would otherwise tend "to evade review" (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 (*Doucet-Boudreau*) at para 20).

[65] As the hearing before this Court demonstrated, these questions are not abstract and may be subject to an adversarial context. In the circumstances, the Court is of the view that it should review these questions and make a declaration if the evidence justifies it, which would "will assist the parties to this action and others in similar circumstances, in their ongoing relationships" (*Doucet-Boudreau* at paras 19 and 22). It is recognized that the Court has the power to issue declarations even if they are not for the purpose of correcting a specific decision of a federal tribunal. In *Solosky v The Queen*, [1980] 1 SCR 821 (*Solosky*) at page 830, the Supreme Court indeed recognized that the declaration is "remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined". The Court has a broad discretionary power in relation to granting declaratory relief or not (*Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)*, 2014 FC 148 at para 65).

[66] In this case, the Court is satisfied that issues raised by the Innu of Ekuanitshit are real and not merely moot, that they have an identifiable interest in the declaratory relief and that the

federal ministers have a real interest in opposing and that remedy will have a utility (*Mohawks of the Bay of Quinte v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669 at paras 62-64). In this case, a declaratory order would have had some concrete effect in clarifying the scope of the PSAB and the duty to consult and their respective applications. It is in the interest of the two parties to clarify these issues. Finally, the Court observes that, in *Borowski* at p 353, the Supreme Court stated that, despite the principle that a court may decline to decide a case which raises merely a hypothetical or abstract question, court may decide to exercise its discretion not to apply it.

[67] In the circumstances, the Court finds and concludes, in exercising its discretion, that the application of the Innu of Ekuanitshit cannot be characterized as purely moot and deserves consideration.

D. *Should the Court strike part of Mr. Boucher's affidavit?*

[68] The Innu of Ekuanitshit argued that part of the affidavit of the MFO's representative, Mr. Boucher, (i.e. paragraph 65 and Exhibit LB-41) should be struck because it contains elements that were not before the MFO when the decision to set aside the PSAB and to proceed by bid solicitation was made by the federal ministers (*Mayne Pharma (Canada) Inc. v Aventis Pharma Inc.*, 2005 FCA 50). Indeed, it is well established that only the evidence submitted before a federal board, commission or other tribunal before it makes its decision may generally be considered by the Court conducting a judicial review of this decision. Therefore, an affidavit may be declared inadmissible when it contains facts that have not been submitted into evidence before the original decision-maker.

[69] Paragraph 65 and Exhibit LB-41 of Mr. Boucher's affidavit refers to the statistics of the use of Mingan wharf from 2008 to 2011, in terms of the number of Aboriginal and non-Aboriginal vessels, landings, quantity and catch values. The Exhibit consists of five pages, including a first page that summarizes the information and four others that provide raw data on the use of the wharf for each year from 2008 to 2011. The AGC admitted that the first page was prepared for the purposes of the dispute and was certainly not before the MFO at the time of considering the PSAB and deciding to award the contract to reconstruct the wharf by bid solicitation. However, the AGC argued that this page is simply a mathematical computation of the pages that follow, which adds no evidence and aims only to make the data easier to digest and understand. The other pages are statistical reports produced annually by the MFO and that already existed, at least at the MFO, when the decision was made to initiate a public bid solicitation for the reconstruction of Mingan wharf in November 2012.

[70] The Court does not share the opinion of the Innu of Ekuanitshit on this point and considers that paragraph 65 and Exhibit LB-41 of Mr. Boucher's affidavit may be admitted into evidence and do not have to be struck.

[71] It is indeed correct that the general rule is that no new evidence may be given during an application for judicial review. However, some exceptions exist and enable the Court to consider evidence that was allegedly not presented before the decision-maker. That is particularly the case when newly-submitted exhibits or information are general information likely to assist the Court, or even when documents or information are those that "could arguably have been before, or at least within the knowledge of" the decision-maker (*Ochapowace First Nation v Canada*

(Attorney General), 2007 FC 920 at paras 9 and 14). In *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 7, the Federal Court of Appeal, quoting Justice Stratas in *Assn. of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (*AUCC*), described these exceptions as likely to "facilitate … the role of the judicial review court without offending the role of the administrative decision-maker" (*AUCC* at para 20). The exceptions include in particular an affidavit that provides evidence that puts in context the impugned decision or to explain the process followed.

[72] In this case, the Court is satisfied that the statistical reports from 2008 to 2011 that compose Exhibit LB-41 already existed, at least at the MFO, when the decision to initiate a public bid solicitation for the reconstruction of Mingan wharf was made in November 2012 and that they were produced prior to the decision of the MFO in this respect. Therefore, they are documents and information that were or could have well been in the possession of the MFO at the time of his decision and that the MFO and that the MPWGS could have understood or have had knowledge of. Furthermore, no one disputes its relevance in the determination of the application of the PSAB to the project to reconstruct the wharf. Moreover, even assuming that the content of paragraph 65 and Exhibit LB-41 were not part of the MFO file, the Court is of the view that they can be considered for the purposes of this application for judicial review under the exception relating to the information explaining the decision-making process.

[73] Moreover, the Court added that a decision like that giving rise to this judicial review, i.e. the decision of the federal ministers to set aside the PSAB, initiate a public bid solicitation and award the contract for the services of reconstructing the wharf, is not a judicial or quasi-judicial

decision made by a body required to have a similar case to that of an administrative tribunal or a court of record. Therefore, what constitutes the documents that were before such a decision-maker or could have been considered by it when it made the impugned decision is harder to determine.

[74] The Court also noted that paragraph 65 and Exhibit LB-41 were the subject of numerous questions in the cross-examination of Mr. Boucher and that the Innu of Ekuanitshit had even submitted a supplementary affidavit of Guy Vigneault to reply in a detailed manner. The content of this paragraph and Exhibit LB-41 are incidentally a central element of this dispute relating to the application of the PSAB to the award of the contract to reconstruct the wharf. Therefore, the Innu of Ekuanitshit are quite badly placed to request that it be struck, as they replied extensively in their submissions.

[75] For all these reasons, the Court finds that it is not appropriate to exercise its discretion and strike paragraph 65 and Exhibit LB-41 of Mr. Boucher's affidavit. Having said that, it does not mean that the Court confers on them any probative value with respect to the substantive issue that is the subject of the application for judicial review (and that will be discussed below). The Court will give this evidence the appropriate weight in the analysis of the decision to set aside the PSAB, but it is not appropriate to grant the motion to strike of the Innu of Ekuanitshit.

IV. Analysis

A. *Did the federal ministers err in deciding not to apply the PSAB and to proceed by public bid solicitation in the process leading to awarding the contract to reconstruct the Mingan wharf to Hamel?*

[76] First, the Innu of Ekuanitshit seek a statement to the effect that the MFO and the MPWGS erred in deciding not to apply the PSAB and by initiating a public bid solicitation to award the contract to reconstruct the wharf to Hamel. It is on this element that their counsel focused during the hearing before this Court. According to the Innu of Ekuanitshit, the reconstruction of Mingan wharf constituted goods or services subject to the PSAB and the MPWGS awarded the contract illegally because of its breach of the PSAB. Indeed, according to the Innu of Ekuanitshit, it was the failure to apply the PSAB to the contract award process for the reconstruction of Mingan wharf that vitiates and renders unreasonable or illegal the decision of the MFO and the MPWGS to proceed by public bid solicitation and award the contract to Hamel. Neither the MFO nor the MPWGS noted the possibility of the application of the PSAB to the project.

[77] The Court observed that, in its notice of application, the Innu of Ekuanitshit requested relatively specific conclusions regarding the PSAB. In particular, they sought a declaration to the effect that (1) the reconstruction of Mingan wharf constitutes construction subject to the federal procurement process, the cost of which exceeds $5,000; (2) the Mingan wharf is part of an area composed of the Indian reserve of Ekuanitshit (Mingan) where Aboriginal peoples form more than 80% of the population, where the Innu of Ekuanitshit form a group of persons who are recipients of goods and services established by the reconstruction of Mingan wharf and 100% composed of Aboriginal peoples; and (3) therefore, the reconstruction of Mingan wharf is goods or services for which "Aboriginal populations are the primary recipients" and are subject to the PSAB. In addition, they requested a declaration that the SEIE is an "Aboriginal business" within

the meaning of the CPM 1996-2 and 1997-6 and for the purposes of the PSAB that these notices created.

[78] In their memorandum of fact and law, while the remedy sought with respect to the PSAB was much more modest, limited to a declaration that the reconstruction of Mingan wharf constituted goods or services subject to the PSAB and that the MPWGS awarded the contract illegally because of its breach of the PSAB. Then, during the hearing before this Court and in light of the limits of the evidence available, counsel for the Innu of Ekuanitshit recognized that, as part of this application for judicial review, the Court would find it difficult to substitute itself for the federal ministers and issue specific declaratory orders on the application of the PSAB to the contract to reconstruct the wharf even if it found that the federal ministers' decision to set aside the PSAB was erroneous in this case.

(1) What is the applicable standard of review?

[79] The first question to determine is the standard of review applicable to this first part of the application for judicial review.

[80] The Innu of Ekuanitshit argued that the applicable standard of review is that of correctness, relying in particular on *Assh v Canada (Attorney General)*, 2006 FCA 358 at para 40. In their view, this standard applies to "questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise" of the decision-maker (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 18). Moreover, according to the Innu, that is the case for the interpretation and

application of the PSAB. The Innu of Ekuanitshit argued that the interpretation of the scope of the Treasury Board directives such as the CPM 1996-2 and 1997-6 and the PSAB is a question of law and interpretation of the laws regarding which neither the MFO nor the MPWGS have a greater expertise than the Court. Therefore, their decision on the application of the PSAB should not be owed deference and be reviewed on a standard of correctness (*David Suzuki Foundation v Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40 at paras 101-105; *Sheldon Inwentash and Lynn Factor Charitable Foundation v Canada*, 2012 FCA 136 at paras 18-23).

[81] The Court does not agree and is rather of the view that the standard of reasonableness must apply in this case.

[82] The Innu of Ekuanitshit argued that the federal ministers erred in their decision to proceed by bid solicitation and to award the contract to reconstruct the wharf to Hamel because of their failure to apply the PSAB to the facts at issue. In this context, the interpretation and application of the PSAB by the federal ministers constitute a question of mixed fact and law that requires a factual analysis and the consideration of numerous factors. Indeed, the PSAB itself alludes to the complexity of this decision, noting that a bid solicitation limited to Aboriginal peoples may take place only where the goods for which "Aboriginal populations are the primary recipients" and only "where operational requirements, best value, prudence and probity, and sound contracting management can be assured" (the CPM 1996-2, art. 5). Therefore, the application of the PSAB in this case depends on a largely factual appreciation including the review of the objectives of the reconstruction project and the intended users of the wharf. This type of decision requires relying on the standard of reasonableness.

[83] Furthermore, although this is not a home statute of the MFO or the MPWGS, the PSAB is part of the current application directives with which the federal ministers must regularly deal in contract awards by the federal government; in this regard, it is appropriate to give them some deference in their interpretation. Moreover, the evidence indicates that the MFO has extensive experience in the application of the PSAB, in particular committing to allocate 5% of its procurement budget for contracts involving Aboriginal peoples and entering into contracts with Aboriginal businesses of nearly $28 million in 2009 and $11 million in 2010.

[84] In *Simon v Canada (Attorney General)*, 2013 FC 1117 (*Simon*), the Court found that a Treasury Board Policy was an "exercise of [its] legal authority" with respect to the financial management of funds and imposed a "constraint on the Minister's authority to spend such funds" (*Simon* at paras 35 and 38). In this matter, as there is no legislation expressly governing income assistance for First Nations, the Court had determined that the Treasury Board directive and policy in this respect expresses "Parliament's purpose or goal in providing funds for income assistance on reserves" and therefore constitutes "a kind of legislative decision-making that binds the Minister's discretion over the expenditure of funds authorized for that purpose" (*Simon* at para 38). The Court had therefore decided that the appropriate standard with respect to such a decision is that of reasonableness since, as indicated in *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*) at para 54, "where the tribunal is interpreting its own statute or statutes closely related to its function with which it will have particular familiarity then the standard is normally that of reasonableness" (*Simon* at para 37). The Federal Court of Appeal confirmed everything in *Canada (Attorney General) v Simon*, 2015 FCA 18 at para 59, citing in particular the Supreme

Court in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45-47.

[85] Similar to the situation in *Simon*, the Court is of the view that the standard of reasonableness must apply to the first issue, because the Court must consider how the MFO and the MPWGS have interpreted and applied the criteria applicable for the PSAB, a directive regarding which they have an undeniable expertise.

[86] The AGC also argued that in any case, the PSAB is only an administrative directive that cannot be the subject of judicial punishment within an application for judicial review before this Court. According to the AGC, the Government of Canada encourages its departments to adopt the PSAB but it does not require them to do so. Furthermore, even if it were "mandatory," the PSAB is an internal policy that is not legally binding. Although a federal board, commission or other tribunal may be required to consider the administrative directives issued by a department or the government, such internal policies are not legally binding and constitute at best interpretive tools (*Spencer v Canada (Attorney General)*, 2010 FC 33 (*Spencer*) at para 27; *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 (*Leahy*) at para 92).

[87] However, several decisions have established that a directive may have force of law and be subject to measures as part of a judicial review proceeding. Moreover, in *Endicott v Canada (Treasury Board)*, 2005 FC 253 (*Endicott*) at para 11, the Court found that the issue of whether the Treasury Board directives create rights recognized by the law that may be subject to judicial review if an authority has not complied to them depends on the intention and context in which the directive

was published. And in *Simon*, the Court found that the Treasury Board Policy exercises its legal authority with respect to the financial management of funds (in application of the FAA) and imposed a limit on the Minister's authority to spend such funds. Moreover, the Federal Court of Appeal determined that the Minister did not have the discretion to apply the Treasury Board policies and directives in this file and that the documents expressed the objective or intention of Parliament in this case.

[88] Therefore, when a plan prescribed by a directive is very precise, leaves no discretion and confers a benefit, it may be considered to be legally binding (*Endicott* at para 11; *Kagimbi v Canada (Attorney General)*, 2014 FC 400 (*Kagimbi*) at paras 38-39). In this case, the Treasury Board directives and the PSAB establish a series of conditions and standards that departments must consider in awarding their procurement contracts and lay down a rule stipulating that contracts become "mandatory setasides" for Aboriginal businesses when the conditions of the PSAB are fulfilled.

[89] The Federal Court of Appeal also indicated that the failure to apply a directive may have the effect of making the decision of a decision-maker unreasonable (*Tobin v Canada (Attorney General)*, 2009 FCA 254 at para 52). In *Leahy* (at para 92), the Court had also stated that although the Treasury Board Policies are sometimes not binding, they may be used to help in interpreting a decision. Finally, in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court had stated that the "guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred" on a decision-maker and that "the fact that

this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power" (at para 72).

[90] In this case, the Innu of Ekuanitshit were not seeking a declaration that the PSAB is invalid or illegal but rather claim that the failure of the MFO and the MPWGS to apply it to the project to reconstruct the Mingan wharf and their interpretation of its components are erroneous. Therefore, the Court is of the view that the standard of reasonableness applies in this case and may be used to determine whether the interpretation and the application of the PSAB by the federal ministers in the circumstances may be maintained.

[91] When the standard of reasonableness applies, the Court must show deference to the decision-maker if its determination falls within the "the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). As stated by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (*Khosa*) at para 59, "[t]here might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." The application of the criterion of the reasonableness also encompasses a quality requirement that applies to those reasons and to the outcome of the decision-making process (*Montréal (City) v Montreal Port Authority*, 2012 SCC 14 (*Montréal*) at para 37-38).

[92] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. The reasons for a decision are considered

reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Dunsmuir* at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (*Newfoundland Nurses*) at para 16). In this context, the Court must show deference to the tribunal's decision and cannot substitute its own reasons. However, it may, if it find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland Nurses* at para 15).

(2) Was the decision to set aside the PSAB reasonable?

[93] The Innu of Ekuanitshit admitted that they did not invoke of their own motion the issue of the PSAB application during their discussions with the MFO and the MPWGS. However, they claimed that it was up to the federal ministers to do it since under the CPM 1996-2 and 1997-6 of the Treasury Board, the contracting authorities are required to establish and determine whether the PSAB applies to a procurement.

[94] For the reasons that follow, the Court is of the view that in light of the evidence on the record, the decision of the contracting authorities to set aside the PSAB in this case and therefore proceeded with the contract award by public bid solicitation was not reasonable for two reasons. First, it appears that the federal ministers had not adequately considered the PSAB and its components in their decision to proceed by bid solicitation to award the contract to reconstruct the wharf. Second, even assuming that the federal ministers would have effectively considered the PSAB, data and information that they had on hand could not allow them to reasonably conclude that the PSAB did not apply in this case.

(a) ***The requirements of the PSAB***

[95] It is important to recall what the PSAB sets out regarding contracts that are mandatory to set aside for Aboriginal businesses. First, it is up to the contracting authority to determine whether the PSAB applies to this procurement. It is mandatory to do so. The PSAB then declared that, so that contracts can be mandatorily set aside for Aboriginal businesses, "Aboriginal populations [must be] the primary recipients" of goods or services. An Aboriginal population is itself defined by the PSAB as meaning (a) an area, or community in which Aboriginal people make up at least 80 percent of the population, or (b) a group of people for whom the procurement is aimed in which Aboriginal people make up at least 80 percent of the group. Therefore, it is in view of these elements, clearly set out in the CPM 1996-2 and 1997-6 of the Treasury Board, that the federal ministers should determine whether the PSAB applied to the contract to reconstruct Mingan wharf. These elements are at the very heart of what defines the scope and application of the PSAB. Incidentally, the Court noted that they are systematically repeated in the various policy statements and directives of the Treasury Board and the MPWGS.

[96] There are no precedents that deal with the interpretation and application of the PSAB and specifically the meaning and scope of the terms of "Aboriginal populations are the primary recipients" (and the resulting criterion of 80%) contained in the PSAB.

[97] The Innu of Ekuanitshit argued that under the terms of the Treasury Board Policies, the application of the PSAB in fact requires the contracting authority to consider two separate requirements. First, it must determine for which population are "the primary recipients" of the

goods or services at issue in the procurement. The word "primary" is not defined in the PSAB or the Treasury Board documents. However, according to the Innu, its plain and ordinary meaning would mean 50% or more. Second, the contracting authority must further determine whether the primary recipients are an "Aboriginal population" within the meaning of the PSAB, i.e. an area or a community composed of at least 80% Aboriginal peoples or a population that is the recipient of the procurement should be formed of at least 80% Aboriginal peoples. This second criterion provides two alternatives that both refer to a notion of people and individuals, rather than goods or supplies. First, there is a geographic criterion related to the area or community or, second, a criterion related more directly to people (i.e. a group of people receiving the procurement). It is sufficient to meet either one with respect to the concept of "Aboriginal population".

[98] The AGC submitted that the expression "Aboriginal populations are the primary recipients" must rather be read as a whole and at the outset appeals the reaching of the threshold of 80%. Therefore, according to the AGC, a good or service must be aimed at a population composed of 80% Aboriginal peoples so that it may fall within the cut of mandatory setasides under the PSAB.

[99] The Court considered that the approach used by the AGC is not a reasonable interpretation of the PSAB for two reasons. First, it discarded the word "primary". This interpretation would mean for all intents and purposes that the word "primary" used in the documents and directives of the Treasury Board and the MPWGS would be useless and should be ignored. If the intention had indeed been to limit the mandatory setasides of the procurements "that serve a primarily Aboriginal population (i.e., at least 80 per cent)", the Treasury Board

directives allegedly did not use "primary" in their wording and expressly stated it. Indeed, the approach suggested by the AGC means that "primary" should, to all intents and purposes, be considered to be equivalent to the concept of at least 80% of the content in the definition of "Aboriginal population". The Court does not agree. That is not what the CPM 1996-2 and 1997-6 say.

[100] Second, the Court recalls that the objective of the PSAB is to favour and develop the participation of Aboriginal businesses in the federal government's procurement process and increase the award of contracts to Aboriginal businesses. A liberal and generous approach to the scope and application of the PSAB must prevail, in harmony with this intent. In this regard, the Court noted the reference made by the Innu of Ekuanitshit in the leading case of the Supreme Court in *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, at p 99, where the Court established that the laws and treaties to which Indians are subjected must receive a broad and liberal interpretation and that any ambiguity must be in favour of the Aboriginal peoples to remedy their historical disadvantages in Canada. Moreover, an interpretation of the PSAB that would ignore the requirement "the primary recipients" and would rely on a single criterion establishing the threshold of 80% Aboriginal peoples would limit the scope of the PSAB, to the detriment of Aboriginal businesses. Such an interpretation is not consistent with the generous approach that must guide the application of the PSAB.

[101] Therefore, the Court is of the view that the PSAB requires that contracting authorities determine whether the two components of the definition contained in the PSAB are met to decide whether they are in the presence of a mandatory setaside for Aboriginal businesses. They must

first identify who the procurement "serve[s] primarily" and then determine whether these recipients form an "Aboriginal population" as defined in the CPM 1996-2. According to the Court, that is the only reasonable interpretation of the terms used in the PSAB synchronized with both the Treasury Board documents and the underlying intention of the government. All the words used in the Treasury Board Policies must have a meaning and the federal ministers thus, in their appreciation of the application of the PSAB to the reconstruction of Mingan wharf, had to consider for whom the goods or services at issue were "the primary recipients" and whether these recipients were an "Aboriginal population" within the meaning of the PSAB.

[102] The Court observed that the AANDC, which is responsible for the administration of the PSAB, still seems not to make a clear distinction between the concepts of "the primary recipients" and "Aboriginal population" in the popularization of the PSAB. Indeed, in its document entitled "PSAB: Procurement Strategy for Aboriginal Business – overview of the program", the AANDC speaks of mandatory setasides for Aboriginal businesses as being those whose goods, services or construction "that serve a primarily Aboriginal population". This document also described the contracts set aside for Aboriginal businesses under the PSAB as "contracts that serve a primarily Aboriginal population (i.e., at least 80 per cent)". During the hearing before the Court, counsel for the Innu of Ekuanitshit thus recognized that the dual dimension of "the primary recipients" and "Aboriginal populations" were not clear from this internal AANDC document.

[103] However, the Court noted that the dual requirement set out by the PSAB is not masked in all the documents on the record resulting from the AANDC. Indeed, in a presentation of the

AANDC on the PSAB and in a final report of March 2007 submitted to the AANDC on the summative evaluation of the PSAB (both submitted by the applicants), the mandatory setasides are indeed described as "destined primarily for Aboriginal populations" as defined in the PSAB, and adopt the language of the PSAB. In these circumstances, the Court gives little weight to the internal AANDC document, which does not even correctly quote the terminology used by the Treasury Board in its directives on the PSAB.

[104] That said, the Court does not need, to decide in this file, to determine what specific interpretation must prevail to limit the exact scope of each of the components "primary recipients" and "Aboriginal populations" used in the PSAB. Indeed, it is clear that it is not even a question that the federal ministers had considered in their decision. It is sufficient for the Court to note, so as to make a finding of the unreasonableness of the decision in this case, that the federal ministers did not seek to determine whether these two criteria expressly described in the Treasury Board directives were met in this case and they did not have available the data and information required to establish that the goods and services aimed at by the contract for the reconstruction of Mingan wharf were not that for which "Aboriginal populations are the primary recipients".

(b) *The analysis done of the PSAB for the contract to reconstruct the wharf*

[105] How did the federal ministers actually verify whether the PSAB applied to the contract to reconstruct the wharf?

[106] First, let us consider the MFO. It is clear from the evidence, and in particular from the cross-examination of Mr. Boucher, that it was in the fall of 2009 that the MFO actually considered the PSAB. However, it was then with respect to the award of the contracts for the replacement floating wharfs and not the contract for the permanent wharf that was to be eventually reconstructed. Indeed, its examination of the PSAB in 2009, the MFO conducted it only in the context of construction for the replacement floating wharfs and when the MFO was looking at the contracts for these temporary structures. Mr. Boucher admitted it in cross-examination. At that time, the MFO in no way considered the contract for the reconstruction of the permanent wharf that led to the bid solicitation and the contract award to Hamel.

[107] Furthermore, there is no evidence indicating that between the fall of 2009 and the decision to award the contract by bid solicitation in November 2012, the MFO had reconsidered the application of the PSAB to the reconstruction of the permanent wharf in Mingan and reconsidered the issue. Indeed, counsel for the AGC argued that the federal ministers did not need to do so because the analysis had already been done in 2009 and had simply been upheld. The affiant of the MFO, Mr. Boucher, admitted that his department had already made up its mind with respect to the Aboriginal use of Mingan wharf when the decision on the public bid solicitation was made for the reconstruction contract, because it had already come to a conclusion in this matter in 2009 relating to the replacement floating wharfs.

[108] The AGC argued that various internal documents that had preceded the decision to initiate the bid solicitation were available to the MFO and were used by the federal decision-maker. After analyzing the evidence, the Court noted that this was not the case. Indeed, there is

no evidence that the MFO had properly considered the PSAB in the decision leading to the tendering process for the reconstruction of Mingan wharf. Both in the preliminary approval application for the project of June 2010 and in the final approval document sent to the assistant deputy minister of the MFO in November 2012 (and which contained the motivations of the decision-maker for the final approval of the project to reconstruct the wharf), there was no note that the PSAB was purportedly seen by the MFO at any stage of the process.

[109] The establishment of the temporary replacement floating wharfs and the reconstruction of the new permanent wharf are two events and two separate construction contracts. No analysis of the PSAB was done by the MFO for the project to reconstruct the wharf, and to simply import the analysis done in the context of another contract is not, in the Court's view, a decision that can be considered reasonable.

[110] Moreover, this also means that, since the decision to set aside the PSAB was actually made in 2009 and was simply renewed without any analysis for the reconstruction of the permanent wharf, the statistical data relating to the years 2009, 2010 and 2011 (and to which Mr. Boucher refers in his affidavit) cannot have been considered by the MFO in its decision that allow it to set aside the PSAB with respect to awarding the contracts for the replacement floating wharfs. Indeed, this data produced by the MFO, even if it is presumed that they were in the hands of the MFO and would have been looked at for the purposes of the procurement, did not exist when the decision was made in 2009.

[111] Also, although Mr. Boucher stated that the MFO had concluded in the fall of 2009 that it was setting aside the PSAB, the Court also noted that the explanations in the file in support of this decision are extremely limited. Indeed, the MFO's decision in 2009 that the PSAB did not apply in the construction of the replacement floating wharfs did not have merit and relied on a very succinct analysis of the PSAB. In fact, Mr. Boucher is only referring to a single exchange of e-mails dated October 1, 2009 (Exhibit LB-40), to describe its alleged analysis of the PSAB. There is no other reference in the evidence. Moreover, this e-mail gives a rather cursory explanation, in barely a few lines, of an exchange on what is the [TRANSLATION] "Aboriginal procurement strategy" according to the MFO. A representative of the MFO specifies that the contracts set aside in an Aboriginal business concern contracts "serve a primarily Aboriginal population", without more details or elaboration.

[112] The Court is not persuaded that such evidence is sufficient to make reasonable the conclusion that the PSAB did not apply to the replacement floating wharfs. Indeed, not only is the consideration given by the MFO to the PSAB extremely cursory, but in wanting to oversimplify what the PSAB meant, the MFO in fact incorrectly described the PSAB and modified the scope. Instead of adopting the terms of the CPM 1996-2, i.e. contracts where "Aboriginal populations are the primary recipients", the MFO instead referred to contracts that "serve a primarily Aboriginal population". By thus shifting the word "primarily", the MFO ended up removing the reference to the concept of "primary recipients" in its evaluation. Therefore, it clearly did not analyze the two components required by the PSAB, i.e. the primary recipients for whom was the procurement of the replacement floating wharfs and whether these recipients matched the concept of Aboriginal population. Furthermore, the MFO modified the

concept of "Aboriginal population" to add the qualifier "primary". Consequently, the MFO had to determine whether the contract for the replacement floating wharfs were aimed at a population primarily composed of more than 80% Aboriginal peoples, which does not really make sense.

[113] According to the Court, this is not an interpretation and a reasonable application of the PSAB as set out in the CPM 1996-2 and 1997-6 of the Treasury Board. The MFO incorrectly identified the criteria that it had to consider in determining whether the PSAB applied to the installation of the replacement floating wharfs in the fall of 2009. In addition, the file does not help to know what information had actually been considered by the MFO in authorizing it to find that the goods or services did not "serve a primarily Aboriginal population", and that this test (even incorrect) was not met.

[114] In the absence of this evidence, and considering the erroneous criteria considered by the MFO, the Court is not persuaded that the MFO's decision, even in 2009, may be considered to be within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. To the contrary, it is an unreasonable decision.

[115] What about the MPWGS now? Indeed, the only evidence of consideration of the PSAB with respect to the contract award for the reconstruction of Mingan wharf in 2012 comes from an affiant of the MPWGS, Jean Rochette. In his affidavit, Mr. Rochette described the steps that he took in November 2012, following the application received from the MFO to proceed with the acquisition of the services for the reconstruction of Mingan wharf by public bid solicitation, to see whether the PSAB applied to this procurement. In support of his statement, Mr. Rochette

referred to an e-mail of November 15, 2012, that he sent to the senior project engineer at the MFO to inquire about the situation and verify everything. Moreover, the Exhibit to which the affidavit of Mr. Rochette refers consists of only one question on the use of the wharf. In his e-mail addressed to the MFO engineer, Mr. Rochette asked: [TRANSLATION] "Do the members of the reserve use the wharf?" And nothing more. To which the engineer answered: [TRANSLATION] "Yes, I think there are 1 or 2 Aboriginal fishermen".

[116] Mr. Rochette did not ask for other information. He also noted in his affidavit a map of the Mingan reserve obtained on November 21, 2012, but he could not even locate the wharf on it. In cross-examination, Mr. Rochette also recognized that this map did not play any role in his decision on the PSAB. Mr. Rochette noted in concluding in his affidavit that the MFO did not designate this contract as a setaside and that he himself [TRANSLATION] "also considers that there is no mandatory setaside for Aboriginal businesses".

[117] Therefore, it was only on the basis of the reply to the one question on the use of the wharf that Mr. Rochette found that the PSAB did not apply to the reconstruction project. Moreover, the Court again noted that the question asked by Mr. Rochette errs by omission and does not help explain the criteria that the federal ministers had to look at in making a finding as to the existence or non-existence of a mandatory setaside for Aboriginal businesses, within the PSAB. Neither the question nor the answer actually inform for whom the goods or services are "the primary recipients" and whether it relates to an "Aboriginal population". The fact of simply requesting or knowing whether the Innu of Ekuanitishit [TRANSLATION] "use the wharf" could certainly not establish whether they are the primary recipients of goods and services related to

the reconstruction of the wharf, nor help determine whether they are an Aboriginal population within the meaning of the PSAB.

[118] Mr. Rochette added in his affidavit that, [TRANSLATION] "recently", the engineer explained to him the meaning of her answer and indicated that, of the 11 or 12 vessels that use the wharf, there are a few vessels owned by Aboriginal peoples and that, among them, 1 or 2 vessels are operated by Aboriginal captains. However, the affidavit does not help determine whether Mr. Rochette had this piece of information in November 2012 when he stated that he had considered the application of the PSAB, or whether he simply learned about it when he signed his affidavit in April 2013.

[119] The Court is of the view that, in these circumstances, the decision of the MPWGS to set aside the PSAB based on such incomplete elements can also not fall within the range of possible, acceptable outcomes and does not constitute reasonableness. The MPWGS simply did not analyze the criteria set by the PSAB to identify whether the project to reconstruct the wharf was a mandatory setaside or not.

[120] Regardless of the perspective from which we view the steps taken by the federal ministers to set aside the PSAB, they all reflect a situation where their finding is unreasonable in the view of the Court.

[121] The Court observed that the Innu of Ekuanitshit, through Mr. Bernier and Chief Piétacho, have repeatedly expressed their concerns regarding the lack of involvement of the Innu in the

reconstruction contract award process and the reasons for which such a project was a unique economic opportunity for their community. According to Chief Piétacho, not only could participating in the reconstruction project have provided quality jobs for the Innu of Ekuanitshit during the construction, but also participating in the project and the resulting wharf would have been a source of pride for the community. However, according to Chief Piétacho and Mr. Bernier, there was no economic benefit for the Innu of Ekuanitshit, whether in terms of direct employment, subcontracting, security services or the supply of materials of any kind whatsoever.

[122] There was no doubt that Mingan wharf was on the border of Aboriginal land and that, the day after the fire in September 2009, the Innu of Ekuanitshit had expressed their concern and their interest in the reconstruction of the wharf. In such a context, it is clear that the federal ministers knew or should have known that the application of the PSAB to the project to reconstruct the Mingan wharf was something to carefully consider in the circumstances and that this issue was at least worth solid and serious consideration before they came to a conclusion. Moreover, the evidence shows that both the MFO and the MPWGS addressed the question in a casual and cavalier manner, not even taking the trouble to thoroughly consider the criteria established by the Treasury Board directives with respect to the PSAB.

[123] It is not up to the Court to determine whether, in accordance with an adequate analysis in respect of the applicable facts and directives, the contract to reconstruct the Mingan wharf was a mandatory setaside within the meaning of the PSAB. This is an exercise that is within the expertise of the federal ministers. But the Court found that in light of the steps taken by the MFO

and the MPWGS in this file, the decision to set aside the PSAB was not unreasonable since the federal ministers had neglected to consider the elements prescribed for determining whether the PSAB applied.

(c) *The data and information available*

[124] Moreover, even if we assumed that the MFO considered the requirements of the PSAB as part of the contract award for the reconstruction of the wharf, the evidence indicated that the data and information available to the MFO were limited and often inconsistent, and that it could not have reasonably been able to find that the PSAB did not apply in this case. In these circumstances, its decision to set aside the PSAB based on the information it had was also unreasonable for this reason.

[125] The key data that was or could have been available to the federal ministers is found in the affidavit of Mr. Boucher and in Exhibit LB-41, which the Innu of Ekuanitshit are requesting be struck. It related to the number of vessels, the harvest value, the number of landings and the harvest volume. In his affidavit, Mr. Boucher indeed stated at paragraph 65 that the [TRANSLATION] "data for the years 2008 to 2011 show that the percentage of Aboriginal users does not exceed the threshold of 80% and that the data be analyzed in terms of volume of landed catch (49% on average), the value of these harvests (53% on average), the number of landings (58% on average) or the number of vessels (40% on average)."

[126] However, the data on the number of vessels was contradicted by other elements of the file also originating from the MFO. A statement issued by a representative of the MFO (the engineer

who answered Mr. Rochette) and made the day before the bid solicitation stated that there was apparently only 1 or 2 Aboriginal vessels at Mingan wharf. Furthermore, both the preliminary approval of June 2010 and the final approval documents of October and November 2012 contained statements made by the same MFO that a little more than a third of the vessels making landings at Mingan wharf belonged to Aboriginal band councils. In addition, the comparative analysis of the options prepared by the SCH in November 2010 indicated that [TRANSLATION] "close to half of the vessels are Aboriginal", a statement that the final approval document for the project of October 2012 also repeated in its discussion options for the reconstruction of the wharf.

[127] These statistics require two comments. First, two of the data listed by Mr. Boucher, i.e. the value of harvests (53%) and the number of landings (58%) of "Aboriginal users", exceeded the threshold of 50%, while a third, the volume of landed catch, is at 49%. With respect to the first criterion of services for "the primary recipients" Aboriginal populations, suggests that the PSAB's requirement in this regard had possibly been met. Second, with respect to the number of vessels considered to be Aboriginal, the available data from the MFO goes from a third to nearly half of the vessels that visit Mingan wharf. In light of these statistics, the Court is not persuaded that the information existed to allow the MFO to reasonably conclude that Aboriginal users were not "the primary recipients" of services for the reconstruction of Mingan wharf and thus to set aside the first criterion established by the Treasury Board directives.

[128] The AGC argued that regarding this first criterion of "the primary recipients", a 2006 census shows that the population of the region of Minganie-Basse-Côte-Nord where Mingan

wharf is located is composed of 73.3% non-Aboriginal peoples and 26.6% Aboriginal peoples. However, not only is there no indication in the file that the MFO or the MPWGS had considered this information in its decision, but nothing indicates either that this population is "the primary recipients" of services to reconstruct the wharf, versus for example the Innu of Ekuanitshit reserve.

[129] Furthermore, the data to which Mr. Boucher and the MFO referred concerned statistics on the *use* of Mingan wharf rather than on the *users* of the infrastructure. Indeed, they are referring to the number of vessels, the value of harvests, the number of landings and the volume of catch. Moreover, the second criterion for determining whether the PSAB applies to a procurement is obliged to consider the concept of *population* and thus requires establishing whether there is an "Aboriginal population", i.e. an area, or community in which Aboriginal people make up at least 80 percent of the population or a group of people for whom the procurement is aimed in which Aboriginal people make up at least 80 percent of the group. In both cases, the PSAB specifically refers to an appreciation based on the Aboriginal population and thus refers to a concept of individuals and persons involved. Moreover, the numbers from Mr. Boucher and the MFO only refer to the harvests, landings and vessels, each being a way to use the wharf rather than an individual who uses it. Therefore, none of the data in the file discusses whether the primary recipients of Mingan wharf are an Aboriginal population.

[130] Although the Court accepts that the number of vessels and the other measures of Mingan wharf's harbour activity are relevant to the analysis and play an important role because of the business focus of the wharf, it remains that the PSAB makes specific reference to a criteria of

population and individuals. Therefore, the federal ministers had to consider and look at user data to assess the second criterion and determine whether or not the PSAB applied. That is what the Treasury Board directives prescribed.

[131] The AGC argued that the data on the use of the wharf are in fact a good approximation of the user data, and that the MFO could reasonably use the first to estimate the second. The Court does not share this position, which it judges to be speculative. The Court is rather of the view that it was not reasonable to consider the data on the use of the wharf as an equivalent and interchangeable measure to determine whether there is an "Aboriginal population" within the meaning of the PSAB, and to presume that there could have been a match between the numbers of use and the impact in terms of the number of persons. Indeed, if for example the Aboriginal vessel used more manpower or were less automated, the data on use would hide a higher number of individual Aboriginal peoples involved in the fishery activities dependent on the wharf.

[132] The federal ministers did not establish the link between the number of vessels, the harvest volume or the number of landings and the number of people affected by the services of Mingan wharf. Therefore, the Court is not satisfied, without other evidence or data in this respect, that the federal ministers could reasonably infer information on the number of vessels, volume and value of harvests or the number of landings, that this reflected the reality of the number of persons for whom the services to reconstruct Mingan wharf are aimed. Therefore, the information on the file would not help determine whether the primary recipients of Mingan wharf were or were not an "Aboriginal population" within the meaning of the PSAB.

[133] On this topic, the Court noted that the evidence submitted in this application for judicial review also indicates that, according to the testimony of the Innu of Ekuanitshit and, in particular, of Mr. Bernier, the vessels belonging to Innu users allegedly account for the majority of commercial fishing days and the majority of crew members on commercial vessel. Making up the majority of users of the wharf, this population would therefore be the primary recipient of the Mingan wharf, regardless of how this majority is measured. The supplementary affidavit of Mr. Vigneault also indicated that the volume and the value of the harvests may be deceptive indicators for measuring the use of the Mingan wharf because of the different ways that they process the species (for example, scaling on the vessel or not). Furthermore, the sheer number of users who own vessels would also be deceptive because Aboriginal license holders use the same vessel for several species, which is the opposite of non-Aboriginal vessels that use one vessel for each species. Therefore, Aboriginal vessels go out to sea for much longer than those of the other users, with the result that the vessel of Aboriginal users account for more fishing days and crew members even if they are not the majority of ships.

[134] Therefore, the data revealed during the application for judicial review confirms that, if an adequate analysis of the users of Mingan wharf had been conducted, the MFO and the MPWGS could not have reasonably set aside the application of the PSAB.

[135] However, the Court did not accept the argument of the Innu of Ekuanitshit that the calculation of the Aboriginal use of the Mingan wharf was erroneous because it excludes all the non-commercial users. The Innu of Ekuanitshit are confusing here the Mingan harbour and the Mingan wharf. The harbour refers to the entire Mingan harbour area while the wharf concerns a

very specific infrastructure for the commercial fishing industry. The evidence on the record shows that the non-commercial Aboriginal users are present at the Mingan harbour but that they do not use the Mingan wharf, which is the only subject of the reconstruction contract awarded by the federal ministers. The non-commercial activities of the Innu of Ekuanitshit at Mingan harbour, such as excursions to the Mingan islands or family departures to go hunting migratory birds in the Mingan archipelago, in fact leave from Mingan harbour and not from the wharf itself. They come from the floating wharfs of Parks Canada located to the west of the commercial wharf. Although Mingan harbour is indeed both a fishing and recreation harbour (thus designated by the SCH), the wharf itself is only used for commercial fishing. Therefore, the federal ministers rightly did not (and did not have to) consider the non-commercial use of Mingan harbour by the Innu of Ekuanitshit in their appreciation of the application of the PSAB to the project to reconstruct the wharf.

(3) Conclusion

[136] Considering all these elements, the Court found that it was not reasonable to simply recycle the analysis that was apparently done for the temporary replacement floating wharfs and to assume, *ex post facto*, that what had been done for these temporary structures would also be best for the reconstruction of Mingan wharf. Therefore, the Court is of the view that with respect to the evidence in the record, the decision to set aside the application of the PSAB was made without taking into account the criteria expressly prescribed by the PSAB and relied on incomplete and inconsistent evidence that did not help reasonably conclude that the PSAB did not apply in this case.

[137] Therefore, the decision of the MFO and the MPWGS does not fall within the range of possible, acceptable outcomes in the circumstances and is not reasonable. Furthermore, the absence of reasons explaining this decision to set aside the PSAB, which removes the transparency and intelligibility required to justify it. Thus, the decision and explanations given do not meet, in any case, the standard of reasonableness (*Dunsmuir* at para 54; *Montréal* at paras 37-38). Although the standard of reasonableness requires deference with respect to the decision made, it still requires that the decision be based on the file. In this case, the Court cannot identify on which basis the federal ministers could have reasonably decided that the PSAB was not applicable.

[138] During the hearing, counsel for the Innu of Ekuanitshit agreed that it is not up to the Court, in an application for judicial review such as this, to substitute its opinion for that of federal ministers and decide in their place whether the PSAB indeed should have applied in light of the facts that were allegedly submitted into evidence. That was the area of expertise of the decision-maker. Therefore, the Court is not able to determine, based on the evidence that was before the federal ministers and that is before it now, whether the PSAB should have applied to the reconstruction of the wharf or whether the application of the PSAB allegedly allowed the Innu of Ekuanitshit to obtain the accommodation they sought. The Court can only note that an adequate consideration of the PSAB may have led to a different result with respect to the process of awarding the contract for the reconstruction of Mingan wharf.

[139] *Newfoundland Nurses* established that, where readily apparent, evidentiary lacunae may be filled in when supported by the evidence, and logical inferences, implicit to the result but not

expressly drawn by the decision-maker. However, as the Court expressed in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, *Newfoundland Nurses* does not authorize the Court

> to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[140] Therefore, it is not up to the Court, in this judicial review, to define the dots on the page when they do not even appear clearly in the file. Deference means that the Court must sometimes refer the matter back to the decision-maker to give it the opportunity to establish and give its own reasons for its decision (*Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paras 28-29). In this case, the Court must therefore limit itself to stating that, in its view, the federal ministers' decision on the PSAB is not reasonable since the federal ministers did not analyze the criteria that the PSAB imposed on them to consider and that the information required for determining whether the PSAB applied or not were inadequate. Of course, as the Innu of Ekuanitshit point out, one consideration that allegedly led to the application of the PSAB could have made possible a wide range of options, including that of the accommodation sought by the community and the award of a contract by mutual agreement. But it is not the role of the Court to determine in this case what option might have been available.

[141] In these circumstances, the Court is of the view that it does not have to issue the specific orders sought by the Innu of Ekuanitshit in their original notice of application and to issue a declaration that would determine whether the project to reconstruct the Mingan wharf does or does not constitute goods or services for which "Aboriginal populations are the primary recipients" and is subject to the PSAB. Furthermore, since the Innu of Ekuanitshit no longer seek the cancellation of the solicitation notice or the contract to reconstruct Mingan wharf, in the circumstances, the Court does not have to make conclusions on these aspects of their application for judicial review or refer the file back to the federal ministers so that they may reconsider the question of the application of the PSAB to the procurement at issue.

B. *Did the federal ministers have a Haida duty to consult and accommodate the Innu of Ekuanitshit as part of the process leading to the contract award to reconstruct the wharf?*

[142] The Innu of Ekuanitshit also argued that the federal ministers had failed, in addition to the more specific context of the PSAB, in their duty to consult and accommodate Aboriginal peoples, which is generally the responsibility of the Crown and the federal government. More specifically, in their notice of amended application, the Innu of Ekuanitshit expressly sought the following remedies:

> [TRANSLATION]
>
> 1. A declaration that the ministers of Fisheries and Oceans Canada and Public Works and Government Services Canada … :
>
> > a. did not adequately fulfil their duty to consult the Innu of Ekuanitshit on the components of the project to reconstruct the Mingan wharf that might adversely affect their Aboriginal rights; and

> b. did not seek, in a spirit of conciliation, the accommodation measures required by the honour of the Crown;
>
> …
>
> 6. The referral of procurement established by the reconstruction of Mingan wharf back to the Minister of Fisheries and Oceans and the Minister of Public Works and Government Services, that they may
>
> > a. consult, in accordance with s. 35 of the Constitution Act, 1982, the Innu of Ekuanitshit on the components of the project that may adversely affect their rights and seek accommodation measures as required by the honour of the Crown.

[143] Therefore, this component of application for judicial review refers to the Crown's duty to consult and accommodate as set out by the Supreme Court of Canada in *Haida* and the case law that followed it. Certainly, in their memorandum of fact and law, the Innu of Ekuanitshit referred more succinctly and generally to a statement that the federal ministers had not properly fulfilled [TRANSLATION] "their duty to consult and accommodate the Innu of Ekuanitshit" before making the decision established by the contract award for the reconstruction of Mingan wharf or by the solicitation notice. However, there is no doubt that this language also refers to the duty to consult and accommodate as developed by the Supreme Court on the question.

(1) What is the applicable standard of review?

[144] The first question to determine is again once the applicable standard of review to this second part of the application for judicial review of the Innu of Ekuanitshit.

[145] The standard of review that governs matters where "the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution" was the subject of a first analysis in *Haida* (at para 60). The consensus in the case law is that a question relating to the existence or content of the duty to consult or accommodate is a legal question that requires the standard of correctness (*Haida* at para 61; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 (*Rio Tinto*) at paras 63-65; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (*Beckman*) at para 48; *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 (*Ekuanitshit FCA*) at para 82; *Long Plain First Nation v. Canada*, 2012 FC 1474 (*Long Plain*) at paras 63-64). Similarly, the determination of the scope of this duty is also reviewable on a standard of correctness, i.e. a good understanding of the seriousness of the claim or impact of the infringement (*Haida* at para 63; *Long Plain* at paras 63-64).

[146] However, to decide whether, by its efforts, the Crown fulfilled its duty to consult in a particular situation, the facts in the case must be assessed in light of the content of the duty. Therefore, the standard of review applicable to the satisfaction or adequacy of the duty to consult and accommodate and whether the Crown fulfilled its duty is that of reasonableness, since this decision is a question of mixed fact and law (*Haida* at para 63; *Rio Tinto* at para 64; *Long Plain* at para 65; *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2013 FC 418 (*Ekuanitshit*) at paras 96-98).

(2) What is the content of the duty to consult and accommodate?

[147] The Supreme Court of Canada set out the framework and the background of the duty to consult and accommodate in *Haida*, *Rio Tinto* and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (*Mikisew*). Therefore, the Supreme Court held that the Crown has a duty to consult and, where appropriate, accommodate, when it contemplates conduct likely to have adverse effects on Aboriginal or treaty rights, established or potential, of Aboriginal peoples in Canada. The highest court in the country established that this duty arises from the honour of the Crown and from the special relationship between the Crown and Aboriginal peoples. This duty to consult is based on judicial interpretation of the obligations of the Crown in the context of existing Aboriginal and treaty rights, as recognized and affirmed in section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c 11 (*Constitution Act, 1982*).

[148] In the recent matter of *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 (*Hupacasath*), the Federal Court of Appeal aptly summarized, at paras 80-84, the background and the requirements of the duty to consult and accommodate. The Court identified in the following terms the applicable law with respect to what creates the duty to consult Aboriginal peoples and, as required, to consider their Aboriginal rights or titles claimed:

> [80] … Having considered those submissions, I conclude that *Tsilhqot'in Nation* has not changed the law concerning when Canada's duty to consult is triggered. Indeed, it confirms that Rio Tinto, *Mikisew*, and *Haida*, all supra, still set out the correct law on this point: see *Tsilhqot'in Nation* at paragraphs 78, 80 and 89.
>
> [81] Of the three cases, Rio Tinto comes later and incorporates the earlier holdings in *Mikisew* and *Haida* concerning the duty to consult. In Rio Tinto, the Supreme Court set out specific elements that must be present to trigger the duty to consult. However, it also set out certain aims the duty is meant to fulfil. These aims are best kept front of mind when assessing whether the specific elements are present.

[82] The Supreme Court identified two aims the duty to consult is meant to further. First is "the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests": *Rio Tinto*, supra at paragraph 50. Second is the need to "recognize that actions affecting unproven Aboriginal title or rights or Agreement rights can have irreversible [adverse] effects that are not in keeping with the honour of the Crown": *Rio Tinto*, supra at paragraph 46.

[83] This last-mentioned idea -- that the duty is aimed at preventing a present, real possibility of harm caused by dishonourable conduct that cannot be addressed later -- is key:

> ... The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of [Agreement] negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.
>
> (*Haida*, supra, at paragraph 27.)

[84] Given those aims, the Supreme Court in Rio Tinto, supra at paragraphs 40-50 has told us three elements must be present for the duty to consult to be triggered:

> - a "real or constructive knowledge of [an Aboriginal] claim to the resource or land to which it attaches" (at paragraph 40);
>
> - "Crown conduct or a Crown decision that engages a potential Aboriginal right," meaning conduct even at the level of "strategic, higher level decisions" (at paragraph 44) that "may adversely impact on the claim or right in question" (at paragraph 42) or

> create a "potential for adverse impact" (at paragraph 44);
>
> - a "possibility that the Crown conduct may affect the Aboriginal claim or right" in the sense of "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (at paragraph 45).

[149] Therefore, the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (*Haida* at para 35). In *Rio Tinto*, the Supreme Court specified that this duty requires three elements to take shape: "(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right, (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right" (*Rio Tinto* at para 31).

[150] The duty that the Government of Canada has to consult Aboriginal peoples and accommodate their interests in some circumstances relies on the honour of the Crown (*Haida* at paras 16 and 20), which exist "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties". This principle of the honour of the Crown must be understood generously in order to reflect the underlying realities from which it stems (*Haida* at para 17) and the duty to consult must therefore be contemplated in a "generous" and "purposive" manner (*Rio Tinto* at para 43). This duty exists even if the Aboriginal rights and titles claimed are not specific enough. That said, in all cases, the duty to consult must still be connected to an Aboriginal right or claim. The objectives of the recognition of the duty to consult incidentally consist in protecting Aboriginal rights against any harm or

irreversible adverse effects and to preserve the future use of the resources claimed by Aboriginal peoples (*Hupacasath* at para 103).

[151] Moreover, it is not any Aboriginal rights that give rise to the duty to consult. The Aboriginal rights that are relevant to the purposes of the duty to consult are indeed those protected by paragraph 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. Paragraph 35(3) specifies that it is understood, for the purposes of this provision, that "treaty rights" include "rights that now exist by way of land claims agreements or may be so acquired". The Aboriginal titles refer to titles resulting from the occupation of lands by the Aboriginal peoples prior to the assertion of European sovereignty in Canada (*Ekuanitshit FCA* at para 84). The duty to consult aims to protect Aboriginal and treaty rights and further the goals of reconciliation between Aboriginal peoples and the Crown (*Rio Tinto* at para 34; *Manitoba Metis* at para 66).

[152] As the Court stated in *Simon*, case law does not, however, provide that the honour of the Crown and the duty to consult and accommodate is at stake in all dealings between the Government of Canada and its Aboriginal peoples, whenever the Crown takes an action that may indirectly impact Aboriginal peoples (*Simon* at para 119). The Courts, in *Haida* and in the decisions that followed, instead pointed out that the honour of the Crown arises only when there is a specific Aboriginal interest or right at stake and that Aboriginal peoples have succeeded in showing that Aboriginal or treaty rights existed that may be adversely affected by a decision or a measure by the Canadian governmental authorities. It is these rights, and only these rights, that are relevant.

[153] For example, in *Haida*, the Supreme Court had dedicated the duty to consult and accommodate, which falls on the Crown in managing the forests of Haida Gwaii, in the background of an unproven but credible statement that Haida Nation had put forward regarding an Aboriginal title that it holds on the land and their rights to harvest mature red cedars. The adverse effect was connected to the road passing through Aboriginal land. In *Misikew*, the matter dealt with the adverse effects of a road passing through a park on Aboriginal hunting and trapping activities. In *Hupacasath*, the various Aboriginal rights claimed had been expressly stated and detailed by the Aboriginal nation involved. They were related to the conservation, exploitation, management, protection and very specific use of fish, wildlife and other resources within the traditional territory of the Aboriginal nation. The Government of Canada had confirmed that it was aware that these Aboriginal rights had been put forward by the Aboriginal peoples during the negotiation of treaties and in the context of disputes, and it recognized that these rights originated in article 35 of the *Constitution Act, 1982*.

(3) Was there a duty to consult and accommodate in this case?

[154] The issue to be determined is thus whether these conditions for a duty de consult and accommodate exist in this case. There is no doubt that there is a measure contemplated by the Crown, i.e. the project to reconstruct the Mingan wharf. However, the question remains whether (1) the federal ministers had knowledge, either real or constructive, of a potential Aboriginal claim or right of the Innu of Ekuanitshit, and whether (2) there was potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[155] The Innu of Ekuanitshit argued that in this case, a duty to consult arose with respect to a project to reconstruct the Mingan wharf, since this project would adversely affect their Aboriginal rights, i.e. their rights relating to the land on which the wharf was located. Indeed, according to the Innu of Ekuanitshit, this land has always been occupied by them and plays an important role in their traditional use of the land. The Innu of Ekuanitshit stated that they had held an aboriginal title on this land, a claim that the Crown incidentally considered serious enough to accept it for the purposes of negotiating a treaty.

[156] The Court does not agree with the arguments of the Innu of Ekuanitshit on this question. Rather, the Court is of the view that, in the circumstances and for the reasons that follow, the evidence does not establish that the conditions existed to create a duty to consult within the meaning of *Haïda*. It is true that the application of policies or Treasury Board directives by a federal board, commission or other tribunal may give rise to the duty to consult and accommodate that the Crown owes to Aboriginal peoples (*Long Plain* at para 47, 55 and 66). But

the Aboriginal community must also be able to argue that it has an "arguable claim" that will be affected by the directive or the measure in question. And the Aboriginal community must also declare and demonstrate the existence of an adverse effect caused by the measure contemplated by the Aboriginal claim or right.

[157] That is not so in this case. The evidence shows that, contrary to most of the authorities and authorities cited by the Innu of Ekuanitshit, the federal ministers did not have knowledge, either real or constructive, of an Aboriginal claim or right of the Innu of Ekuanitshit as part of the project to reconstruct the Mingan wharf and that could be adversely affected by the conduct or measure contemplated by the Crown.

(a) *Absence of Aboriginal rights or titles identified*

[158] *Haida* and its descendence require, to open the door to the duty to consult and accommodate, situations where the claim relies on a "strong *prima facie* case" supporting the existence of an Aboriginal right or title and the seriousness of the potential adverse effects on the right or title and where "deep consultation, aimed at finding a satisfactory interim solution, may be required" (at paras 39, 43-45).

[159] Moreover, the Innu of Ekuanitshit did not argue, in their discussions with the federal ministers on the project to reconstruct the Mingan wharf or in the concerns that they expressed with respect to the project, the existence of such an Aboriginal right or title claimed within the meaning of jurisprudence. Moreover, the notice of application simply refers to their "Aboriginal rights" or their "rights", no more. Submissions were indeed made by the Innu of Ekuanitshit with

respect to the positive economic benefits and impacts that their participation in the project to reconstruct the wharf could generate. However, after reviewing the evidence, the Court found that these submissions never raised Aboriginal rights or a particular land claim related to the reconstruction project. The Court is of the view that the claims of the Innu of Ekuanitshit with respect to their participation in the project to reconstruct the wharf did not flow from potential Aboriginal claims or a treaty right under paragraph 35(1) of the *Constitution Act, 1982*.

[160] Therefore, the Court shares the position of the AGC that the Innu of Ekuanitshit have not produced sufficient and conclusive evidence to show which Aboriginal rights risked being affected by the decision of the federal ministers, since it simply affects the tendering process of a contract to reconstruct the wharf. A measure to obtain a contract for the reconstruction of an existing wharf does not concern, in itself, without supporting evidence, an Aboriginal right or land rights where the wharf is located.

[161] It is important to review the submissions made by the Innu of Ekuanitshit during their various discussions with the MFO and the MPWGS between the fire of September 2009 and the contract award to reconstruct the wharf in January 2013. These submissions began in September 2009 with the letter addressed to the MFO in place by Chief Piétacho and the MFO's promise to involve the Innu of Ekuanitshit in the process of awarding the contract. The Innu of Ekuanitshit, specifically through Mr. Bernier and Chief Piétacho, had then indicated several times, in particular at the end of 2012, that the project to reconstruct the wharf would be completed in the community of Ekuanitshit itself and that, in the minds of the Innu, the contractor had to be a

business belonging to the community, or at least that the members of the community had to be involved in the project.

[162] In his letter of September 21, 2009, to the MFO at the time, Chief Piétacho spoke of the wharf as the [TRANSLATION] "primary infrastructure of our development" in the commercial fishing sector and the fact that [TRANSLATION] "building our fisheries gives work to youth and is part of the tools made available to us to improve the social agenda of our Innu communities". At no time was there any reference to Aboriginal or land rights put in issue by the project to reconstruct the wharf. In the same way, the resolutions of the Conseil des Innu of Ekuanitshit of December 2009 speak of the importance to act quickly [TRANSLATION] "so as to reconstruct this infrastructure that is essential to the fishing industry in the region".

[163] The minutes of the meetings of October and December 2012 refer to the application that the Innu of Ekuanitshit made to the MFO to consider awarding the contract to construct the new wharf by mutual agreement, but without reference to Aboriginal rights or title affected by the project.

[164] The most specific and detailed evidence describing the [TRANSLATION] "concerns" of the Innu of Ekuanitshit with respect to the project to reconstruct the wharf are two e-mails dated November 6, 2012 addressed by Mr. Bernier to the representative of SNC as part of the environmental consultation led by SNC at the end of 2012. Thus, Mr. Bernier expressed the concerns of the Innu of Ekuanitshit with respect to the project to reconstruct the Mingan wharf:

> …
>
> [TRANSLATION]

Our concerns are with respect to the design and construction phase.

Design:

As a member of the Association portuaire de Mingan, we have actively participated in the establishment of the design of the new infrastructure with Fisheries and Oceans Canada. Unfortunately, the budgetary aspect has especially driven the work of the MFO in this respect. The user environment, the communities of Ekuanitshit, Longue-Pointe-de-Mingan, the commercial fisheries, Poséidon, pleasure craft users and Parks Canada have identified their concerns and needs being equipped with an adequate infrastructure and meeting the long term needs. But, again, the federal government heard only that the dollars were available for reconstruction. That is why there was a delay in the Project since the community attempted to convince the persons responsible at the MFO to take care of it long term and for all users.

Construction:

The wharf should have been built a little more to the west of the site of the old infrastructure because the pilings of this old infrastructure are still there. In the 60s or 70s, a boat allegedly lost several boxes at the site of the old wharf and around it. These boxes apparently contained archeological objects. Therefore, it would be relevant to know this history, to find out its accuracy and conduct appropriate surveys.

The community uses this area for the following activities:

- Walking (many families and many youth visit this area during good weather);

- Pleasure craft landing site for the period beginning in March and ending in October;

- Commercial fishing (Pêcheries Shipek s.e.c.);

- Tourist activities (also our Innu Cultural Centre was built nearby);

- Sport fishing activities;

- Religious activities (the church is nearby as well as the cemetery and external contemplation areas).

> In addition, the environmental aspect of the impact of the construction on marine species (noise, potential spills or others) concerns the community.
>
> Therefore, it seems very important to us to consider the measures that the MFO intends to take to assure the community that all the mitigation measures will be taken to diminish the impacts of the construction on activities and the protection of the marine area and the bank. Furthermore, measures were taken in case of archeological finds.
>
> In conclusion, we have asked that the community, through its construction companies, be the construction contractor. This Project will be achieved on Ekuanitshit land and in the community of Ekuanitshit itself. When construction projects are carried out on our land, many federal (AADNC, among others) and provincial (MTQ, among others) departments make contracting agreements with the community by mutual consent. This request was made to the MFO, who was not open to this idea, even if other departments are doing it. This is not acceptable for the community, who did not intend to let other external contractors perform work on our land that our businesses can do.
>
> We have the expertise to take the responsibility of contractor and it would be appropriate for us to provide assurance to our population that their concerns will be considered. I have attached the experience that our companies have had the past few years with respect to managing various construction projects.
>
> We hope that our concerns will be considered.
>
> Yours sincerely

[165] In a second e-mail addressed to the representative of SNC, again on November 6, 2012, Mr. Bernier added the following:

> …
>
> [TRANSLATION]
>
> Following my e-mail this morning regarding our concerns, I had not given much explanation on two points:
>
> The pilings of the old wharf: Will they be removed? Or will there be protective measures to ensure the safety of users?

> The activities of the Innu Cultural Centre: the Project provides, in the summer of 2013, activities on an exterior site along the bank to the west of the site of the new construction of the wharf. A secure perimeter must be planned during the construction as well as other measures to prevent disturbing activities and all the community's activities (walking, cultural, tourist and religious activities).
>
> It should be noted that this site along the bank was, before the community was created, the gathering place for families during the summer months. Now, these banks are still visited a great deal. The safety and the flexibility to freely exercise our activities must be considered.
>
> …

[166] Mr. Bernier also sent a copy of a part of these concerns to the office of the minister of Transport in December 2012, indicating that Mingan wharf [TRANSLATION] "is directly in the environment of the community that should have been considered in this project".

[167] The Court again noted that nowhere in these statements does it allude to existing Aboriginal rights or titles put in issue by the reconstruction project and that no worry or concern for Aboriginal rights or title would be adversely affected by the reconstruction project. Therefore, these are not sufficient concerns to create the duty to consult and accommodate that the Innu of Ekuanitshit claim.

[168] Even the affidavit signed by Chief Piétacho after awarding the contract and as part of this application for judicial review does not contain any evidence that could describe an Aboriginal right or a land claim that could have existed during the discussions with the federal ministers during the project to reconstruct the Mingan wharf. In his affidavit, Chief Piétacho noted in particular the following:

> [TRANSLATION]
>
> 7. Since the time of my father and time immemorial before that, the Innu have gone to the seaside to fish in the salmon rivers or to hunt seal. They used all of the seal: they ate the meat, they prepared clothing such as moccasins and mittens with the skin and they stocked the fat for the winter.
>
> …
>
> 10. The lands that currently form the reserve were transferred to the federal government by Quebec in 1963, including the land that surrounds Mingan wharf … .
>
> …
>
> 21. In the fall of 2012, an analytical biologist … employed by SNC-Lavalin contacted the Council of the Innu of Ekuanitshit by e-mail and telephone to ask some questions on the concerns of the Innu regarding the environmental effects of the reconstruction of Mingan wharf.
>
> 22. These contacts are not, in my mind, adequate consultation with the Innu of Ekuanitshit by the Government of Canada on the elements of the project to reconstruct the Mingan wharf, which will likely affect our rights.
>
> 23. Moreover, one of the accommodation measures that we allegedly required was an economic role in carrying out the project, but the representatives of the MPWGS did not address this aspect of the project.
>
> 24. I think it was an opportunity for us to be able to build the wharf and be proud of it because we could tell our children and grandchildren that we did this.

[169] In his reply to the written examination, Chief Piétacho also added this:

> [TRANSLATION]
>
> According to the elders with whom I have spoken, before the construction of the wharf, people tied their canoes to a floating space that was located at the same place where the old Mingan wharf was located before the fire. Indeed, the bank where the wharf was built had been used for a very long time as an important gathering place for the community, to meet with the hunters,

> fishermen and other members of the community returning from outside.

[170] Nowhere did Chief Piétacho specify which Aboriginal rights would be at issue or how the elements of the project to reconstruct the Mingan wharf would adversely affect these rights. Again, there was no explanation here regarding Aboriginal rights claimed by the Innu. A simple general statement that the project to reconstruct the Mingan wharf would likely [TRANSLATION] "affect our rights" is insufficient to meet the conditions giving rise to the duty to consult and accommodate within the meaning of *Haida*.

[171] As was the case in *Simon*, the Innu of Ekuanitshit did not succeed in showing that Aboriginal or treaty rights existed that could be adversely affected by the decision of the federal ministers. In this case, there is no future or possible effect supported by evidence on Aboriginal rights or Aboriginal titles claimed by the Innu of Ekuanitshit or on the future use of the resources claimed by Aboriginal peoples. Indeed, in this case, it was not the impact of the reconstruction project on the land or resources claimed by the Innu that was raised, it is the impact of the project itself on the economic participation of the Innu on the reconstruction of the wharf. No Aboriginal rights or title were raised, at stake or jeopardized in this context. The concerns relate to a potential construction contract.

[172] The mere fact that Mingan wharf is found on the land on which the Innu of Ekuanitshit state and claim an Aboriginal title and that the federal government had found the claim sufficiently serious enough to accept to the purposes of negotiating a treaty is not sufficient to trigger a duty to consult and accommodate within the meaning of *Haïda* specifically as part of a

bid solicitation for a reconstruction project. Similarly, the statement that the harbour (and not the wharf) is a location that the Innu have always visited and plays an important role in traditional use of the land does not create an Aboriginal right affected by the awarding of a contract for the reconstruction of the wharf.

[173] Furthermore, the fact that the Innu of Ekuanitshit had referred to the desired accommodation and had clearly expressed to the federal ministers the desire to have a contract by mutual agreement for the reconstruction of the wharf is not sufficient, of itself, to trigger a duty to consult, if the premises giving way to this consultation do not exist. There is no duty to accommodate independent and separate from the duty to consult; the duty to accommodate is rather the result of the duty to consult and the recognition of a breach of Aboriginal rights and titles claimed.

[174] The Innu of Ekuanitshit do not call into question the existence of the wharf or the role of the wharf for the Aboriginal community. They only raised their interest in participating in the economic benefits flowing from the contract to reconstruct the wharf itself. This is not a situation where Aboriginals oppose a project (for example, an industrial activity of the federal government in the forestry, mining or hydro-electric sectors) because of its potential negative impact on Aboriginal rights or on land claimed. Rather, it is a situation where concerns relate to the impact of the reconstruction project itself in terms of jobs and direct economic benefits for the Innu of Ekuanitshit, totally separate and independent from the Aboriginal rights or titles claimed.

[175] This does not mean that the complaints of the Innu of Ekuanitshit regarding the contract award process for the wharf reconstruction were unfounded, illegitimate and did not warrant being heard and taken into account by the federal ministers. This is what could and should have been done by the MFO and the MPWGS as part of applying the PSAB. However, this is not a situation where the Innu of Ekuanitshit have discharged their burden of establishing the existence of the conditions triggering a duty to consult and accommodate within the meaning of *Haida*. In this case, the issue of Aboriginal title was simply not directly raised by the Innu of Ekuanitshit. There is no evidence showing an interest that the Innu of Ekuanitshit could claim as part of the project to reconstruct the Mingan wharf or of an adverse effect that the project could have on any right claimed. Indeed, the concerns of the Innu of Ekuanitshit with respect to the project to reconstruct the Mingan wharf are unrelated to an Aboriginal right or title.

[176] The Court agrees with the Innu of Ekuanitshit that the duty to consult may exist even when broader economic interests, not only traditional Aboriginal rights, are at stake (*Ehattesaht First Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 [*Ehattesaht*] at para 61). The time when Aboriginal activities consisted only in hunting, fishing, trapping and selling artisanal products has passed. Aboriginal peoples' economic reality can no longer be reduced to only those traditional activities.

[177] However, precedents where these economic interests were taken into account to establish a duty to consult were established when these interests were closely related to an Aboriginal right or title or to an underlying territorial right (*Ehattesaht* at paras 59-62; *Da'naxda'xw/Awaetlala First Nation v British Columbia Hydro and Power Authority*, 2015

BCSC 16; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991). Thus, the economic aspects of land claimed and the economic use of land have been acknowledged as a situation that may trigger the duty to consult. In addition, the federal government's knowledge of the Aboriginal title claimed was generally never at issue in these matters and was admitted. For example, in *Ehattesaht*, an Aboriginal right to a part of the land on Vancouver Island was at issue and the government's conduct resulted in a lost economic opportunity with respect to stumpage fees from a part of this land. The Crown's knowledge about Aboriginal rights to the land involved was acknowledged and the conduct impacted the land and the resources to which the Aboriginal people were claiming an Aboriginal right.

[178] This situation is therefore quite different from the vast majority of cases where the duty to consult and accommodate was recognized by the courts, and where, more often than not, the federal government agreed, based on evidence and on the steps undertaken by the Aboriginal people, that the first component of *Haida* was met (*Rio Tinto*; *Mikisew*; *Long Plain*; *Ekuanitshit*; *Hupacasath*). Those cases dealt with the Crown's conduct directly related to the lands claimed by Aboriginal peoples concerned and to the resources found on those lands. In this matter, that is not the case.

[179] Extending the conditions that give rise to the duty to consult and accommodate Aboriginal people to a situation like the procurement project relative to the reconstruction of the Mingan wharf would mean that the duty to consult and accommodate exists in every form of interaction between Aboriginal peoples and the Crown regardless of whether Aboriginal rights or titles are at issue, and of whether the Aboriginal peoples have shown the existence of an adverse

effect on their rights. In the Court's view, this is not what is indicated by the case law on the subject.

(b) *Absence of adverse impact and causal link*

[180] With respect to Aboriginal rights, the duty to consult and accommodate also requires Aboriginal people to show the "adverse impact" on the Aboriginal rights relied on. That requirement to show the potential adverse impact on an Aboriginal right is the third condition to give rise to a duty to consult and accommodate. In *Rio Tinto*, at paras 45-50, the Supreme Court explains that the party seeking to show the existence of this factor must establish (1) that there is a potential significant adverse impact on (2) an Aboriginal right, which is (3) caused by the conduct or decision of the government. Again, the Court must take a generous, purposive approach to this issue (*Rio Tinto* at para 46).

[181] With respect to infringed Aboriginal rights, "Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right" (*Rio Tinto* at para 47), as long as the claim is credible. The prejudice must be on the future exercise of the right itself and does not extend to adverse impacts on the negotiating position of an Aboriginal group (*Rio Tinto* at paras 46, 50). Finally, it must be noted that, in terms of causality, it is necessary for the party claiming that a duty to consult exists to show causation between the federal government's conduct or decision and the significant adverse impact on the rights at issue.

[182] To rule on the potential that the contemplated conduct will have an adverse impact on the Aboriginal rights claimed and on the issue of whether that component of the duty to consult

criterion is met, it is crucial to determine "the degree to which conduct contemplated by the Crown would adversely affect" the Aboriginal rights claimed (*Mikisew* at para 34). Adverse impacts extend to any effect that may prejudice an Aboriginal claim or right, including high-level management decisions or structural changes to the resource's management even if these decisions have no immediate impact on lands and resources (*Rio Tinto* at para 47).

[183] For example, at paras 72-77 of *Haida*, the Supreme Court determined that there was a potential for long-term prejudice to the Aboriginal rights of the Haida Nation, specifically, to the right to harvest trees, caused by the transfer of a commercial logging licence. In *Mikisew*, at para 44, the Supreme Court found that a winter road construction project proposed by the Crown could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, caused by a decline in population, disruption of migration patterns and increased poaching. In *Beckman*, the Supreme Court noted that there were potential adverse impacts on the First Nation's right to practise subsistence hunting and fishing caused by a land grant within their traditional territory.

[184] Inversely, in *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212, at para 37, the Federal Court of Appeal confirmed that mere submissions regarding adverse impacts on the socioeconomic interests of an Aboriginal community, without supporting evidence, are not sufficient to trigger a duty to consult. In the same vein, mere speculative or unlikely impacts will not meet the criteria (*Hupacasath* at paras 89, 106; *Rio Tinto* at para 46).

[185] In this case, the evidence adduced by the Innu of Ekuanitshit does not show the existence of adverse impacts that the project to reconstruct the Mingan wharf could have on the Aboriginal

rights claimed by the Innu, and, even less so, that those impacts are significant and not speculative. Indeed, the record shows that the Innu of Ekuanitshit merely mentioned the words [TRANSLATION] "adverse impacts" in their submissions, but did not establish, by means of evidence on the record or in their discussions with the federal ministers, the existence of concrete and real adverse impacts on their traditional rights attributable to the project to reconstruct the Mingan wharf. In addition, the Innu of Ekuanitshit did not demonstrate the existence of the causal link required between the project to reconstruct the wharf and any potential adverse impacts on their Aboriginal rights or titles claimed.

[186] Chief Piétacho did not specify anywhere in his affidavit what [TRANSLATION] "impacts" the elements of the project to reconstruct the Mingan wharf are likely to have on the Aboriginal rights he is claiming. Indeed, the only adverse impacts mentioned by the Innu of Ekuanitshit are the loss of the economic opportunity to take part in the project to reconstruct the wharf caused by the decision of the MFO and MPWGS to issue the notice of public bid solicitation and to override the application of the PSAB. That is not an adverse impact related to an Aboriginal right or title.

[187] To reiterate, this does not mean that the Innu of Ekuanitshit had no legitimate concerns to argue with respect to their place in the process of awarding the contract for the reconstruction of the Mingan wharf or in the context of the federal ministers' decision on the application of the PSAB. However, that is not the type of adverse impact and causal link that gives rise to a general duty to consult and accommodate claimed by the Innu of Ekuanitshit and recognized by the courts.

(4) Conclusion

[188] The Court therefore finds that the circumstances of the contract for the reconstruction of the Mingan wharf did not give rise to a duty to consult or accommodate within the meaning of *Haida*, over and above the federal ministers' obligations under the PSAB and the Treasury Board directives. Neither the existence of Aboriginal rights or titles claimed nor the adverse impacts that the reconstruction project could have on those rights and titles were established by the Innu of Ekuanitshit. Accordingly, there is no need to determine whether the federal ministers have met a duty to consult and accommodate or whether their consultation was adequate in this case.

[189] That said, the Court notes that the federal ministers have acknowledged that the reconstruction of the wharf triggered a certain obligation to consult the Innu of Ekuanitshit on environmental matters, on the project's effects on them as an Aboriginal people, in accordance with paragraph 5(1)(*c*) of the CEAA. Moreover, SNC led a consultation regarding this as part of the CEAA, in which the Innu of Ekuanitshit took part. Nothing indicates or suggests that that consultation regarding the concerns about the environmental effects of the project to reconstruct the wharf was not adequate.

V. Conclusion

[190] For the reasons above, the Court is of the view that the federal ministers' decision to override the PSAB was unreasonable in the circumstances. The conclusion of the MFO and MPWGS in this regard does not have sufficient merit to be transparent and intelligible, and it does not fall within the range of possible, acceptable outcomes which are defensible in respect of

the facts and law. Accordingly, the Court will grant a declaration to that effect. However, the Court is of the view that, in this case, there was no duty to consult and accommodate the Innu of Ekuanitshit under the case law developed since *Haida*.

[191] The Innu of Ekuanitshit are claiming the costs of the application regardless of the outcome of the case and citing paragraph 400(3)(*h*) regarding matters of public interest. According to this rule, the Court may consider "whether the public interest in having the proceeding litigated justifies a particular award of costs". *Harris v Canada*, [2002] 2 FCR 484, states the criteria to be considered for awarding costs in such a situation. According to those criteria, a party would be able to use that provision when: (i) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; (ii) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically; (iii) the issues have not been previously determined by a court in a proceeding against the same defendant; (iv) the defendant has a clearly superior capacity to bear the costs of the proceeding; and (v) the plaintiff has not engaged in vexatious, frivolous or abusive conduct. The Court acknowledges that the criteria are met in this application.

[192] Given the general importance of the issues related to the implementation of the PSAB and the scope of the duty to consult and accommodate, and given the success of the Innu of Ekuanitshit in the main purpose of their application, the Court will order that the federal ministers jointly pay two-thirds of the applicants' costs, even though only part of the application is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the declaration is granted in the following terms:

1. The conclusion of the MFO and MPWGS that the reconstruction of the Mingan wharf was not goods or services subject to the PSAB is unreasonable in the circumstances because

    a. The MFO and the MPWGS did not analyze and determine who were the "primary recipients" of the goods or services related to the project to reconstruct the wharf and whether their primary recipients were "Aboriginal populations" as defined in the CPM 1996-2;

    b. The data and information that the MFO and the MPWGS had did not make it possible to reasonably conclude that these two requirements of the PSAB were not met in this case;

2. Other elements of the application are dismissed.

3. The applicants are entitled to two-thirds of their costs, payable jointly by the respondent federal ministers

"Denis Gascon"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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