Federal Court  Cour fédérale

Date: 20120308

Docket: T-1485-09

Citation: 2012 FC 297

Ottawa, Ontario, March 8, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

CHIEF LLOYD CHICOT SUING ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE KA'A'GEE TU FIRST NATION AND THE KA'A'GEE TU FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND PARAMOUNT RESOURCES LTD.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is a sequel to a decision issued on July 20, 2007 by my colleague, Justice Edmond Blanchard, in which he found that the Crown in right of Canada ("Canada" or "the Crown") had breached its duty to consult with the Ka'a'Gee Tu First Nation ("KTFN") before deciding to approve a project involving oil and gas development in the Northwest Territories of the Respondent Paramount Resources Ltd. ("Paramount"). As a result, Justice

Blanchard ordered the parties to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary, to accommodate those concerns.

[2] KTFN is now coming back to the Court, alleging that Canada has failed to act in accordance with the findings and direction of Justice Blanchard and has failed to engage in good faith consultations with them to address the impacts of the Extension Project. The resolution of this application, therefore, relies in part on a proper understanding of that prior decision as well as on the assessment of the conduct of the parties during the consultation process that followed that decision.

1. Facts

The Background to the First Decision and the Regulatory Approval Process

[3] There is no need to repeat the facts leading to the decision of Justice Blanchard. They are aptly summarized in his decision, *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at paras 2-88, 315 FTR 178 [*Chicot #1*]. I shall therefore only recapitulate the most salient part of that background, to the extent that it is necessary, for a better understanding of the issues arising in the present case.

[4] The KTFN is one of the twelve communities who identify themselves as members of the Deh Cho First Nations (the "Deh Cho") who descend from the South Slavey people of the Dene Nation. On November 1, 1990, a sub-band of the Fort Providence Band residing at Kakisa Lake formed a band that is known, since 1996, as the KTFN. Their traditional territory is located in the southwest region of the Northwest Territories and includes Tathlina Lake and surrounding lands, including the Cameron Hills, a low lying mountain that rises to the south of Tathlina Lake and

which forms part of the Tathlina Lake watershed (the "Cameron Hills Area"). The Band consists of approximately 55 people living at the Kakisa settlement; there are approximately 62 people on the KTFN Band list.

[5] Paramount is a Calgary-based company that has acquired a significant discovery licence in the Cameron Hills Area and by the year 2000, had begun intensive development of oil and gas resources. The development proceeded in phases and included drilling well sites to prove the resources, the construction of a pipeline and gathering system that was completed in 2002, and the development of large scale oil and gas production through the proposed drilling of up to fifty new well sites. This last phase, known as the "Extension Project", forms the focus of this proceeding and the consultation process at issue.

[6] As noted by Justice Blanchard and reasserted before this Court, the KTFN claim a deep spiritual and cultural connection, as well as an economic reliance, on the Cameron Hills. There is no dispute amongst the parties in this application, that the lands subject to Paramount's proposed development are also the lands over which the Applicants claim treaty rights and assert Aboriginal rights. The KTFN are a signatory to Treaty 11, signed June 27, 1921 which provides for the continuing protection of the KTFN's right to pursue the "usual vocations of hunting, trapping and fishing". Treaty 11 contains surrender and cession of land provisions, and further provides for the setting aside of reserve lands for the Deh Cho. However, no such lands were set aside, and the Deh Cho and Canada disagree as to the intent and legal effect of Treaty 11. Whereas Canada takes the position that Treaty 11 extinguished Aboriginal title to the asserted Deh Cho territory and that the only remaining issue to be resolved is with respect to the setting aside of reserve lands, the Deh Cho

understand the Treaty as a peace and friendship treaty, whereby Aboriginal title was not surrendered.

[7] Canada and Deh Cho (including the KTFN), along with the Government of the Northwest Territories, have agreed in 1998 to seek respectful resolution of the unresolved land question through a modern comprehensive claim negotiation process known as the "Deh Cho Process". Although negotiations are ongoing, various agreements have been reached along the way, including the Interim Measures Agreement ("IMA"), which contemplates, among other things, collaborative land use planning, and the Interim Resource Development Agreement ("IRDA"), which establishes terms upon which Deh Cho and Canada will address, *inter alia*, future issuances of mineral rights in Deh Cho territory.

[8] Oil and gas development in the Mackenzie Valley is complex and involves several statutes and regulations engaging several administrative bodies. Construction and operation of a pipeline and gathering system occurs under the authority of the National Energy Board, pursuant to the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7, and the *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp.). Moreover, the *Mackenzie Valley Resource Management Act*, SC1998, c 25 [*MVRMA*] was enacted to establish a legislative scheme for an integrated system of management of land and water on public and private lands in the Northwest Territories. The *MVRMA* establishes the Land and Water Board and the Environmental Impact Review Board (the "Review Board") whose purpose is "to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians" (preamble

and s. 9.1). Input from the community and consultation is the cornerstone of this legislation and guides the processes carried out by the boards created under the *MVRMA*.

[9] A proponent of a development must apply to the Land and Water Board for a land use permit and water licence where the proposed activity is to be carried out in the unsettled claim areas within the Mackenzie Valley (*MVRMA*, s. 60). Section 60.1 of the *MVRMA* specifically requires that the Land and Water Board give consideration to "the well-being and way of life of the aboriginal peoples of Canada" in making its decisions. Pursuant to subsection 63(2) of the *MVRMA*, the Land and Water Board is required to notify affected communities and First Nations upon receipt of an application for a permit or licence.

[10] Part V of the *MVRMA* provides the legislative framework for the review process and environmental assessment process mandated by the *MVRMA*. One of the purposes of this part of the *MVRMA* is to "ensure that the concerns of aboriginal people and the general public are taken into account", with the process providing due consideration to the protection of the environment, the protection of the social, cultural, and economic well-being of residents and communities in the Mackenzie Valley and the "importance of conservation to the well-being and way of life of the aboriginal peoples…who use an area of the Mackenzie Valley" (ss. 114-115).

[11] Community consultation is integral to the processes undertaken by both the Land and Water Board and the Review Board. Section 3 of the *MVRMA* governs how this consultation is to be carried out:

Consultation	Consultation
3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised	3. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.
(a) by providing, to the party to be consulted,	
(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,	
(ii) a reasonable period for the party to prepare those views, and	
(iii) an opportunity to present those views to the party having the power or duty to consult; and	
(b) by considering, fully and impartially, any views so presented.	

[12] Moreover, both the Land and Water Board and the Review Board provide guidelines on how consultation is to be undertaken by developers when applications are made to the respective boards: see Mackenzie Valley Environmental Impact Review Board Environmental Impact Assessment Guidelines (March 2004) and Public Involvement Guidelines for Permit and License Applicants to the Mackenzie Valley Land and Water Board (October 2003).

[13] The *MVRMA* provides for a three stage review process: a preliminary screening, an environmental assessment and an environmental impact review. Developers must consider the mitigation of environmental impacts and consult with affected First Nations according to the Guidelines before submitting an application. Once the Land and Water Board is satisfied pre-application community consultation has taken place, it conducts a Preliminary Screening of the proposed development (s. 124 of the *MVRMA*). During the Preliminary Screening, information provided by the applicant, including consultation information, is used to determine whether the proposed development might have a significant effect on the environment or be cause for public concern, thus necessitating consideration by the Review Board through a more detailed assessment process than the Environmental Assessment. If development might have a significant adverse impact, then the Land and Water Board will refer the proposal to the Review Board for an environmental assessment under section 125 of the *MVRMA*. Otherwise, the application will proceed to the permitting phase.

[14] Once an environmental assessment has been triggered by a referral from the Land and Water Board, the Review Board reviews the Preliminary Screening and conducts an Environmental Assessment which involves an in-depth study of the proposed development for potential impacts on the environment. This process involves a number of steps, which are well described in section 3 of the Environmental Impact Assessment Guidelines.

[15] The Review Board will first determine the scope of the Environmental Assessment by identifying the Terms of Reference. Once they have been finalized, the developer proceeds to prepare what is known as the Developer's Assessment Report, which fully describes the

development, the environmental impacts (including the social, cultural and economic effects), the mitigation measures and summarizes the issues that arose from community consultations.

[16] After the Developer's Assessment Report is submitted to the Review Board, it is circulated to all parties, to the interveners, and to members of the public. A conformity check is done by the Review Board to ensure that the Developer's Assessment Report responds to the Terms of Reference.

[17] Once the Developer's Assessment Report is found to be in conformity with the Terms of Reference, it undergoes a detailed Technical Review. The participants are given opportunities to submit their views and present their evidence and facts to the Review Board. Questions arising from the Technical Review which require formal responses are issued by information requests, originating from various reviewers and interveners.

[18] The Review Board then determines whether a hearing is required on a case by case basis. Following any hearing, the Review Board decides whether to approve or reject the application, with or without mitigation measures, or submit the matter for an even more detailed Environmental Impact Review if the development is likely "to have any significant adverse impact on the environment or to be a cause of significant public concern" (*MVRMA*, s. 128).

[19] The Review Board's findings in this regard are disseminated to the developer, the National Energy Board (in some cases), the Minister of Indian and Northern Affairs Canada, ("INAC") (as the Department of Aboriginal Affairs and Northern Development Canada was then known), the

preliminary screener and the referral body. The Minister of INAC must then distribute it to every responsible minister (*MVRMA*, ss. 128(3), (4)).

[20] Upon consideration, the Ministers may (i) agree with the Environmental Assessment Report in its entirety; (ii) if a recommendation is made with mitigation measures, adopt the recommendation with the suggested mitigation measures; (iii) refer the Environmental Assessment back to the Review Board for further consideration; (iv) consult with the Review Board and adopt the recommendation with modifications made to the suggested mitigation measures; or (v) reject the recommendation and order an Environmental Impact Review (*MVRMA*, ss. 130(1)). This final process has become known as the "Consult to Modify" process and was at the heart of the initial judicial review.

[21] As previously mentioned, the development pursued by Paramount proceeded in three phases: the Drilling Project, the Gathering System and Pipeline Project, and the Extension Project. Paramount sought and received various permits and licences in relation to the Drilling Project in 2000 and 2001 after the Review Board conducted and issued an Environmental Assessment. The Review Board recommended that land use permits and water licences be issued on condition that the mitigating measures contained in Paramount's environmental report be respected. The Drilling Project was eventually allowed to proceed on this basis.

[22] In conjunction with the next phase of the Paramount development, the Gathering System and Pipeline Project, Paramount applied for land use permits and water licences pursuant to the *MVRMA* in April of 2001. An Environmental Assessment was conducted. The KTFN participated

in the entire Preliminary Screening and Environmental Assessment processes and provided Technical Reports and Information Requests. After the completion of the Environmental Assessment, the Ministers approved the development and the Land and Water Board accordingly issued the permit and licence. Justice Blanchard noted, however, that the Applicants protested the Ministers' decision to substantially modify recommendations 13, 15 and 16 and the deletion of recommendation 17 of the Review Board, and perceived that decision to be detrimental to their interests.

[23] In April of 2003, Paramount applied to the Land and Water Board to amend its various land use permits and water licences issued with respect to its initial project. This aspect of the development, which became known as the Extension Project, signalled the beginning of Paramount's production work in the Cameron Hills. To quote from the decision of Justice Blanchard at para 56:

> The project initially involved approval for 5 additional wells but would eventually also include the drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; the production of oil and gas for over 15-20 years; the excavation of 733 km of seismic lines; the construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

[24] After the Preliminary Screening, which included consultation with interested groups, the Land and Water Board referred the matter to the Review Board for an Environmental Assessment. Eight interested Aboriginal groups, including the KTFN, participated in the Environmental Assessment process, which followed the steps outlined earlier in these reasons.

[25] In its Report, the Review Board found that the evidence provided a "firm foundation" for the concerns expressed about the Cameron Hills, "particularly in relation to the possible effects of the proposed development on the traditional activities important to the KTFN…" (p. 14). Notwithstanding these observations, the Review Board concluded that with the implementation of the measures recommended in its Report and the commitments made by Paramount, "…the proposed development will not likely have a significant environmental impact or be cause for significant public concern and should proceed to the regulatory phase of approvals".

[26] Out of the 17 measures recommended in the Review Board's Environmental Assessment Report, the National Energy Board determined that 6 fell within its jurisdiction and undertook a parallel "consult to modify" process pursuant to the *MVRMA*. That process, and the National Energy Board's final recommendations, were not challenged by the KTFN.

[27] On November 17, 2004, the Minister of INAC, on behalf of the responsible ministers, initiated consultation with the Review Board pursuant to subparagraph 130(1)(b)(ii) of the *MVRMA* by sending it a letter proposing modifications to recommendations 7, 11, 12, 13, 15 and 16 with supporting rationale.

[28] On December 17, 2004, the KTFN provided a comprehensive response to the Minister of INAC, further to the Review Board's request for input with respect to the proposed modifications. The KTFN asserted that the consult to modify process breached the Crown's duty to consult. The KTFN took special issue with the modifications made by the Ministers to proposed mitigation

measures 15 and 16. These measures initially read as follow, in the Review Board Report dated June 1, 2004:

> R-15 The Review Board recommends that Paramount and the other parties to the unfinished Cameron Hills Wildlife and Resources harvesting Compensation Plan developed in response to measures 13 and 15 of EA01-005 [the Pipeline Project Report] complete the compensation plan. If a compensation plan cannot be completed by these parties within 90 days of the federal Minister's acceptance of this report, this matter will proceed to binding arbitration, pursuant to the *NWT Arbitration Act*. A letter signed by the parties indicating agreement to the compensation plan or in the case of arbitration, the arbitrator's decision must be filed with NEB and MVLWB prior to the commencement of Paramount's operations under land use permit MV2002A0046.
>
> R-16 The Review Board recommends that the GNWT develop a socio-economic agreement with Paramount in consultation with affected communities before operations proceed under the land use permit MV2002A0046. The socio-economic agreement is to address issues such as employment targets, educational and training opportunities for local residents and a detailed ongoing community consultation plan.

[29] From December 2004 to July 2005, the Review Board and the Ministers participated in the consult to modify process, from which the Applicants were excluded. On July 5, 2005, the Minister decided to give final approval to the Extension Project on the basis of mitigation measures that had been substantially altered and revised through the consult to modify process. Six of the 17 mitigation measures were modified by the Ministers. In particular, measure R-15 was modified such that Paramount was required to commit in writing to compensate affected parties for direct wildlife harvesting and resource harvesting losses, and to consider indirect losses on a case-by-case basis, instead of being required to establish a compensation plan to be enforced through binding arbitration. As for measure R-16, it was modified such that Paramount was not required to enter into a socio-economic agreement with the affected communities, as the Review Board had

recommended, but rather was to report annually on its performance in the provision of socio-economic benefits to affected communities. These modified measures read as follows:

> R-15 The Review Board recommends that Paramount commit, in a letter to the Parties to the Environmental Assessment, to compensate the Ka'a'Gee Tu First Nation and other affected Aboriginal groups for any direct wildlife harvesting and resource harvesting losses suffered as a result of project activities, and to consider indirect losses on a case-by-case basis.
>
> R-16 The Review Board recommends that Paramount report annually to the Government of the Northwest Territories and the other parties to the Environmental Assessment, documenting its performance in the provision of socio-economic benefits, such as employment and training opportunities for local residents, including a detailed ongoing community consultation plan describing the steps it has taken and will take to improve its performance in those areas. The Government of the Northwest Territories will review this report with Paramount in collaboration with the other Parties to the Environmental Assessment.

The First Decision

[30] On July 5, 2005, the KTFN sought judicial review of the Ministers' decision to modify the mitigation measures recommended by the Review Board, alleging that Canada had breached its constitutional and legal duty to consult with and accommodate the KTFN prior to approving the Extension Project. The parties in *Chicot #1* agreed the Crown owed a duty to consult the KTFN but there was no agreement regarding the scope and content of that duty.

[31] Relying on the principles articulated by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*], Justice Blanchard found that the question of whether the regulatory process at issue and its implementation discharge the Crown's duty to consult and accommodate in the circumstances, had to be examined on the

standard of reasonableness. On the other hand, questions concerning the existence and content of the duty were to be reviewed on the standard of correctness (see paras. 92-93).

[32] The Court then proceeded to evaluate KTFN's treaty rights and asserted Aboriginal rights and title claims, and ruled upon the scope and content of consultation required to discharge the Crown's consultation duty in respect of the Extension Project's approval. Mindful of the overarching principle that the duty to consult and accommodate will vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue, Justice Blanchard made a number of key findings.

[33] The existence of the Applicants' broad harvesting rights to hunt, trap and fish under Treaty 11 is not in dispute. With respect to the strength of KTFN's asserted Aboriginal title claim, however, Justice Blanchard found:

(a) The KTFN claim stewardship over the Cameron Hills. However, there is no consensus among the Aboriginal groups regarding the KTFN's stewardship, as several Aboriginal groups claim the Cameron Hills as part of their group's traditional territory (para. 7);

(b) The KTFN are part of the Deh Cho Process, which seeks to negotiate final agreements in respect of Aboriginal and Crown titles. The Crown's participation in the Deh Cho Process informs the Court's assessment of the strength of the KTFN's asserted claim (paras. 16, 103-104); and

(c) The argument that the KTFN's asserted claim for Aboriginal title is meritorious, is supported by the Crown's failure to set aside reserve lands for the KTFN's exclusive use, as required under Treaty 11, and by the acceptance of Cameron Hills lands into the comprehensive land claims process. These factors must be balanced against Treaty language which clearly supports an agreement to relinquish Aboriginal title (paras 105-107).

[34] As a result of these facts, Justice Blanchard was satisfied that the KTFN's claim raises a reasonably arguable case regarding asserted Aboriginal title over the Cameron Hills. He stated:

> 107. It is not for the Court, in the conduct of a judicial review application, to decide the Applicants' asserted claim. Such questions are best left to be dealt with in the context of a trial where the ethnographic, historical, and traditional evidence is comprehensively reviewed and considered. In the circumstances of this case, while it is difficult to quantify the strength of the Applicants' asserted claim, I am nevertheless satisfied that the claim raises a reasonably arguable case. This determination is based on a review of the record before me, the nature of the asserted claim, the language of Treaty 11, the Crown's breach of its Treaty obligation and the Crown's commitment to the comprehensive land claims process. In the circumstances, these factors serve to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the content of the duty been based exclusively on the interpretation of the Treaty rights in play.
>
> *Chicot #1*, above at para 107.

[35] With respect to the Extension Project's potential impact upon the KTFN's treaty rights and asserted Aboriginal title, *Chicot #1* found that the Extension Project will have a significant and lasting impact on the lands over which the KTFN asserts Aboriginal title and a significant impact on treaty harvesting rights to hunt, trap and fish (paras 14, 101-102, 112).

[36] The Attorney General of Canada, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*] argued that the Crown's duty lay at the lower end of the spectrum alluded to by Chief Justice McLachlin in *Haida*. Justice Blanchard disagreed, however, and found that the depth of consultation necessary to discharge the Crown's duty, to be greater than that found to be the case in *Mikisew Cree*. In his view, the contextual factors in this case militate in favour of a formal participation in the decision-making process.

[37] Justice Blanchard found that, up to the consult to modify stage, the Extension Project approval process was satisfactory and that the Applicants benefited from formal participation in the decision-making process (paras 118-119). The same could not be said of the consult to modify process, in his view, because the new proposals which resulted from that process were never submitted to the Applicants for any meaningful consultation (para 120). Justice Blanchard summed up his findings with respect to the duty to consult in the following paragraph:

> I find the Crown failed to discharge its duty to consult in the circumstances of this case. In sum, the consult to modify process allowed for fundamental changes to be made to important recommendations which were the result of an earlier consultative process involving the Applicants and other stakeholders. These changes were made without input from the Applicants. It cannot be said, therefore, that the consult to modify process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. At this stage the Applicants were essentially shut out of the process.
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> *Chicot #1*, above at para 124.

[38] In the overall conclusion of his analysis, Justice Blanchard wrote:

> The Crown in right of Canada has failed to discharge its duty to consult and, if necessary, accommodate before making a final decision on the approval of the Extension Project. The Crown in

> right of Canada has a duty to consult with the KTFN in respect to modifications it proposes to bring to the recommendations of the Review Board pursuant to the Environmental Assessment Process concerning the Extension Project. Good faith consultation in the consult to modify stage of the process is required and while there is no duty to reach an agreement, such consultation may well lead to an obligation to accommodate the concerns of the KTFN. The extent and nature of accommodation, if any, can only be ascertained after meaningful consultation at this final stage of the process.
>
> *Chicot #1,* above at para 131.

[39] The Applicants had sought an order declaring that the decision was invalid and unlawful, quashing and setting aside the decision, as well as an order restraining the Ministers and Paramount from taking any further steps in relation to the approval of the Extension Project pending further order of the Court. Justice Blanchard, however, did not go that far and was satisfied that the proper relief, in the circumstances, was a declaration that Canada had breached its duty to consult and accommodate, which was one of the other remedies sought by the Applicants. As a consequence, he ordered the following:

> In accordance with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The process is to be conducted with the aim of reconciliation in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida* and *Taku.*

[40] As a result of the Court's decision not to quash the Crown's decision, it appears that any further integration of the KTFN's concerns and interests had to be developed outside of the Crown's decision to approve the Extension Project with the modified mitigation measures. No appeal was taken from that decision.

The Court Ordered Consultation Process

[41] The KTFN, Canada and Paramount engaged in a consultation process pursuant to Justice Blanchard's Order. That process began in August of 2007 and concluded in June of 2009, with the issuance by Canada of written reasons for concluding consultation dated August 7, 2009. The consultation is well documented, as all parties agreed that it was to be on the record.

[42] The consultation process was extensive. It lasted for almost two years, during which period 16 formal consultation meetings were held, either in person or by teleconference, with formal agendas and the recording of approved minutes. Extensive correspondence was also exchanged. No further water or land use permits or licences were issued to Paramount resulting from the Environmental Assessment made by the Review Board during that period.

[43] At the initial consultation meeting held on August 30, 2007 in Yellowknife, Northwest Territories, the KTFN identified three preliminary matters requiring resolution before substantive discussions could begin: a) a satisfactory consultation framework protocol; b) funding to participate in the consultation process; and c) a proper traditional land use study.

[44] Prior to the first meeting, Canada prepared a consultation framework protocol to guide the process. The KTFN were not satisfied with Canada's document and proposed a revised consultation protocol. From these revisions, it became clear that Canada and the KTFN had a very different understanding as to the scope of *Chicot #1*. Negotiations aimed at developing a consultation protocol dominated the process for the next three months, and was the subject of three meetings and one teleconference. On November 27, 2007, Canada and the KTFN agreed to a

Consultation Framework Protocol, and at the fifth consultation meeting on November 29, 2007, the Protocol was confirmed. However, Paramount objected to that Protocol because, in its view, it did not reflect the direction of *Chicot #1*.

[45] The KTFN requested funding to allow them to adequately prepare and participate in the consultation process. Canada agreed and provided the KTFN with $88,394.00 for travel and expenses for two representatives of the KTFN and their legal counsel. Canada also agreed to pay for the KTFN's legal fees during the entire consultation process.

[46] As for traditional knowledge and land use, Canada was asked to fund such a study because the KTFN viewed the assembling, sharing and assessing traditional knowledge as an essential first step to understanding their concerns. At first, Canada was reluctant due to the fact that information on traditional practices was already available from other sources. Nevertheless, Canada finally accepted the KTFN's viewpoint that the traditional knowledge study was a key component of the Court ordered consultations and agreed to provide funding. While the proposal for this study was broader than Canada considered necessary, the KTFN consultant insisted that a holistic approach was required. Accordingly, Canada funded the traditional knowledge study as proposed for $70,840.00.

[47] As previously mentioned, Canada and the KTFN had different views on the correct scope of the consultations in the course of negotiating the Consultation Protocol Framework. At the initial meeting, the KTFN informed Canada that the process should not focus on the modified mitigation measures but on appropriate outcomes. The KTFN asserted a strong arguable case for Aboriginal

title that required economic accommodation. The KTFN maintained that economic accommodation was required and that consultation was to address infringement of the KTFN's rights. In other words, the KTFN was of the view that the subject matter of the consultations was the Ministers' final decision to approve the Extension Project. Accordingly, the proper question for consultation for the KTFN was not the impacts of the modified mitigation measures, but rather what measures are required to be included in the final decision approving the Extension Project to address and accommodate for impacts on the KTFN's asserted Aboriginal rights, including Aboriginal title.

[48] On the other hand, it was Canada's understanding that *Chicot #1* ordered the parties to consult regarding potential adverse impacts on treaty rights and potential Aboriginal rights arising from the consult to modify process. Canada distinguished between the impacts to the KTFN from the modifications to the Review Board's mitigation measures, which it was prepared to address through the Court ordered consultation, and impacts to the KTFN's asserted Aboriginal title from the Extension Project. Issues concerning Aboriginal title were, in Canada's view, outside the consultation process and better addressed elsewhere, essentially through the Deh Cho Process.

[49] The KTFN and Canada eventually reached an agreement whereby the broader issues relating to impacts of the Extension Project as a whole on the KTFN's asserted Aboriginal rights, including title, would be addressed. The purpose of the Protocol is set out in the following terms:

> The purpose of this Protocol is to establish a process for implementing the Court's Order that Canada and the Ka'a'Gee Tu engage in meaningful consultation to take into account the Ka'a'Gee Tu's concerns, and if appropriate, accommodate those concerns, regarding adverse impacts, including potential infringements, of the Extension Project on the Ka'a'Gee Tu's established treaty rights and asserted aboriginal rights, including aboriginal title.

[50] As per the Consultation Framework Protocol, the KTFN agreed to provide a written statement of their concerns regarding the modified mitigation measures. The KTFN also agreed to identify their concerns about the adverse impacts of the Extension Project, including potential right infringements, on the KTFN's potential and established treaty rights and Aboriginal rights, including Aboriginal title. It was agreed that the Government of the Northwest Territories and Paramount would be able to participate in the discussion.

[51] It will be one of the Applicants' arguments that Canada was guilty of misrepresentation in agreeing to address issues relating to the impacts of the Extension Project as a whole on KTFN's asserted Aboriginal rights, because it never had any intention to consult about those broader issues. More will be said about this claim later on in these reasons.

[52] Once the consultation protocol was agreed to, the parties entered the information sharing stage of the consultation process. The KTFN provided an initial written statement of concerns about the modified mitigation measures on November 27, 2007. This statement essentially referred to the KTFN's letters dated June 24 and December 17, 2004 to the Review Board and summarized the shortcomings of the modified mitigation measures identified in more detail in these two letters. The KTFN made it clear that it was providing this input as a gesture of good faith to Canada, and that further stages of consultation to identify, assess and accommodate impacts of the Extension Project to the KTFN's treaty rights and Aboriginal title would be required. The KTFN advised that the modified mitigation measures were fundamentally deficient, as they arose from a decision-making process that denied the KTFN input and resulted in measures that lack any intention or

means to accommodate for the inescapable economic component of the KTFN's Aboriginal title and treaty rights.

[53] These comments were discussed two days later, on November 29, 2007 at a meeting held at Yellowknife. The minutes of that meeting make it very clear that KTFN was more interested in discussing the infringements of the KTFN's rights, if only because they were of the view that there is no statutory means for the Ministers to re-open their decision.

[54] In response to the KTFN's November 27, 2007 presentation, Canada made a request on January 11, 2008 for detailed information concerning, *inter alia*: (i) the exact area to which the KTFN is referring as the Cameron Hills; (ii) the specific Aboriginal and treaty rights which the KTFN is asserting within this area; (iii) whether the KTFN is claiming exclusive rights to this area; (iv) the KTFN's views of the claims and asserted rights of other First Nations and Aboriginal groups to this area; and (v) the specific sum the KTFN seek in recognition of the economic component of its asserted title. The KTFN answered these questions by letter dated January 22, 2007 and reminded Canada that many of the issues it sought clarification on had already been addressed in *Chicot #1*. The KTFN also provided Canada with copies of the August 1996 and December 2007 Dene Nation Resolutions affirming the KTFN's role as the main traditional land users, caretakers and managers of their traditional area, which includes Cameron Hills.

[55] The KTFN made a request to Canada on January 22, 2008 for further information, including the royalties and revenues to be generated by the Extension Project and the specific steps Canada is taking to ensure the KTFN participation in project related benefits. Canada did not respond until

June 6, 2008. It refused to provide any information concerning royalties, as this information cannot be released without the express written permission of Paramount; as for a projection of future revenues, it stated that it would be difficult to calculate with any degree of accuracy, because of the many factors which influence year-to-year production. As for the KTFN's participation in project related benefits, Canada essentially relied on the Benefits Plan that was submitted by Paramount and approved by the Minister in March 2001, pursuant to the *Canada Oil and Gas Operations Act*.

[56] On April 24, 2008, the KTFN provided the parties with a further written statement of their interests and concerns regarding the Extension Project. In that statement and at that meeting, the KTFN summarized information regarding their use and occupation of the Cameron Hills area, and reiterated the findings of the Review Board and *Chicot #1* with respect to the risks created by Paramount's Extension Project for their population. It also identified five areas on which it sought consultation and accommodation:

(a) Environmental monitoring and mitigation program (in order to address a lack of baseline data against which to measure impacts and make sound management decisions and to build on existing monitoring programs)

(b) Information sharing protocol between the KTFN and Paramount (in order to address information sharing at the pre-application stage, provide for ongoing project updates, etc.)

(c) The KTFN traditional land use compensation fund (in order to address the potential impacts to traditional land use; to support the KTFN traditional land use activities via youth programs and taking elders out to Tathlina Lake)

(d) Compensation for lost resources (in essence, the KTFN sought to recover its litigation and associated costs)

(e) The KTFN participation in resource use benefits (which the KTFN state is "necessary to accommodate for infringements to economic component of Aboriginal title". The KTFN identified participation in resource development benefits through contracting and joint venture opportunities and resource revenue sharing as two areas to be discussed)

[57] Canada responded to that statement by way of a letter dated June 19, 2008. To address the KTFN's concerns, Canada proposed programming through four avenues. First, it proposed to work with the KTFN to design an integrated environmental monitoring program for the Cameron Hills. Second, it offered to initiate an annual Open House and to provide observation to the design and implementation of an information sharing protocol between the KTFN and Paramount. Third, it proposed to facilitate the process of the parties renewing the Cameron Hills Wildlife Harvesting Plan. Finally, it proposed that the KTFN present their views on local benefits flowing from Benefits Plans to staff from INAC's Northern Oil and Gas Directorate at a community meeting, for consideration while officials contemplate the planning of a wider benefits review.

[58] Of course, this last proposal falls far short of what the KTFN was asking for. Canada remained of the view that the KTFN was already able to benefit from resource use through the Interim Resource Development Agreement developed in the context of the Deh Cho Process, of which the KTFN is a member. Canada had also made it clear at the April 24, 2008 meeting that it

has to take into account assertions over the same area made by other First Nations, and that the place to address these assertions of title and rights that flow from it, is the Deh Cho Process.

[59] Over the course of the next few months, discussions took place with respect to the issues raised by the KTFN, and progress was made on some of these issues. I will now briefly summarize the result of these discussions with respect to the five areas of concern identified by the KTFN.

Environmental Monitoring and Mitigation Plan

[60] The KTFN identified concerns about the lack of baseline data for land, water and wildlife in their asserted traditional territory. Specifically, the KTFN's community members expressed concerns about the Extension Project's potential impacts on wildlife, land and water. Thus, KTFN sought a multi-year water and wildlife monitoring program with participation from the KTFN, INAC, the Government of the Northwest Territories and Paramount. The KTFN also sought a role in the design, implementation and monitoring of an environmental program to ensure that their traditional knowledge would be incorporated and that effects from the Extension Project were minimized.

[61] Existing information on the environmental conditions in the Cameron Hills was already available, including regular reports of Paramount from its mandated environmental activities, Government of the Northwest Territories environmental initiative, the wildlife monitoring program carried out in the vicinity of the Extension Project by the KTFN in 2007-2008 and the State of Knowledge Report for the Traditional Territory of the KTFN prepared by SENES Consultants Ltd.

[62] After listening to the KTFN's concerns and after considering the available information about the Cameron Hills' environment, Canada recognized that a more integrated approach to monitoring is needed and that the KTFN's direct participation would be appropriate. An integrated monitoring program would be beneficial to the KTFN to assist them in establishing indirect losses for wildlife compensation, as required by Paramount, and also to assist the Land and Water Board in developing appropriate mitigation measures for any licenes and permits that Paramount may seek. Therefore Canada offered the KTFN $30,000.00 to participate in the design of an integrated environmental monitoring program, and also asked the KTFN to participate directly in the monitoring and reporting of the Extension Project's potential adverse impacts. Paramount advised of its support for the program, in principle, and agreed to provide funding subject to approval of the design of the program. The KTFN would have liked the program to operate for the duration of the Extension Project, but INAC advised that it could not commit to multi-year funding, and would use best efforts to support the program going forward.

[63] The KTFN have accepted this accommodation measure and have submitted a proposal for the program's design. Accordingly, the Environmental Monitoring and Mitigation Plan is not at issue in this proceeding.

The Information Sharing Protocol

[64] The KTFN sought to enter an information sharing protocol with Paramount to address information sharing at the pre-application stage, ongoing project update meetings, traditional knowledge and other issues. Canada has recommended that the KTFN and Paramount work toward

an information sharing protocol. To facilitate the information sharing process, Canada has offered to host an annual open house. The KTFN have not accepted this offer.

The Traditional Land Use Compensation Fund

[65] The KTFN informed Canada that modified mitigation measure R-15 was inadequate and insufficient, and disagreed with Paramount's position that it will only compensate for direct, proven impacts to harvesters caused by activities that are not carried out pursuant to a permit or licence. The KTFN was of the view that impacts to its traditional land use are felt by the community as a whole, and sought a community administered fund to support traditional land use activities including elders trips to Tathlina Lake, trail rebuilding, trapper training and youth activities in traditional practices.

[66] In response, Canada proposed to facilitate the Cameron Hills wildlife harvesting plan between Paramount and potentially affected Aboriginal groups, including the KTFN. This was the subject of original mitigation measure R-15. This was unacceptable to the KTFN. At a consultation meeting of July 2, 2008, the KTFN reiterated its April 2008 proposal that traditional land use impacts be addressed by supporting land use programs at the community level, rather than through negotiation of compensation for trapping losses suffered by individual community members. By letter dated October 16, 2008, Canada agreed to consider a proposal for a separate, KTFN specific, traditional practices program.

[67] The KTFN originally requested an annual payment of $50,000.00 for the duration of the Extension Project. Canada indicated that it did not know how such remuneration could be properly

or fairly calculated. As an alternative, Canada indicated by letter dated November 5, 2008, its willingness to support a traditional land use program and offered $20,000.00 to the KTFN to retain a consultant to draft a proposal for the design and implementation of the traditional land use program. Canada also indicated that it could not commit to multi-year funding for this proposed program due to the nature of government funding processes, but that it would commit to make best efforts to secure ongoing funding for implementation of the program. Canada advised at the meeting on December 1, 2008 that the information gained by the traditional practices program should give the KTFN useful information for future regulatory processes. Paramount has advised of its support, in principle, for the program and has agreed, subject to approval of the design of the program, to consider providing funding.

[68] While noting that the absence of any firm commitment for long-term funding significantly undermines the ability of the program to meaningfully accommodate the impacts of the Extension Project, the KTFN nevertheless indicated in a letter dated June 9, 2009 that this program (as well as the environmental monitoring program) reflected a useful first step towards addressing two of the KTFN's concerns, and agreed to move forward with INAC and Paramount in developing those two programs. KTFN has indeed submitted a proposal for the program's design in July 2009.

Compensation for Lost Resources

[69] The KTFN sought compensation for lost resources related to costs incurred in litigation. Canada advised that there is a legal process to recover costs. The KTFN did not pursue this proposed accommodation measure.

Asserted Aboriginal Title and Participation in Resource Benefits

[70] This issue dominated the consultation process and was the main point of difference between Canada and the KTFN. From the first consultation meeting of August 30, 2007, the KTFN took the position that there was an economic component to their asserted Aboriginal title interest that required accommodation. It is the KTFN's view that this economic accommodation should occur by agreement between the KTFN and Paramount, but failing such agreement, the KTFN should be financially compensated by Canada. In a letter dated September 24, 2007, counsel for the Applicants captured the essence of the KTFN's argument:

> The point of consultation and accommodation is to fashion interim measures to address potential infringements to aboriginal title and rights and treaty rights, pending the development of broader instruments of reconciliation through longer-term processes such as comprehensive claim negotiations. Concerns regarding such potential infringements, including as related to the Ka'a'Gee Tu's aboriginal title interest, must be assessed, understood and accommodated as part of this consultation. To seek to defer addressing the Ka'a'Gee Tu's title interest to the Deh Cho Process would be inconsistent with the case law, and would undermine, rather than fulfil, the fundamental purposes of honourable consultation and accommodation.

[71] As previously mentioned, the KTFN set out their expectations regarding accommodation for their asserted Aboriginal title interest on April 24, 2008. Specifically, they sought compensation by participation in resource development through contracting and joint venture agreements between Parmount and the KTFN, and by resource revenue sharing.

[72] Pursuant to the *Canada Oil and Gas Operations Act*, s. 5.2, Paramount has submitted a Benefits Plan and Benefits Plan Update relating to its oil and gas operations in the Cameron Hills. The Benefits Plan and Update set out the principles, practices and processes that Paramount

implemented to provide access to employment and training and business opportunities for Canadians. However, the KTFN is of the view that these Benefits Plans were never prepared, nor intended, to address or provide for opportunities and benefits for local communities, including the KTFN.

[73] In addition, modified mitigation measure R-16 requires Paramount to report annually, documenting its performance in providing socio-economic benefits such as employment and training opportunities for local residents, including a detailed ongoing community consultation plan. Paramount submits its annual reports to INAC who then distributes these reports to potentially affected Aboriginal communities. These reports can assist the parties in preparing for anticipated employment opportunities. Paramount also provides contracting opportunity notices for upcoming activities to potentially affected Aboriginal communities. Addressing the KTFN specifically, Paramount has provided an average of $829,588.55 annually in business to Kakisa owned or allied companies between 2002 and 2007. Yet, the KTFN does not view the financial benefits flowing from these contracts as benefitting the community but as benefitting individual community members, which the First Nation asserts is insufficient as a form of accommodation. The KTFN also advised that only one of its members was directly employed by Paramount.

[74] It appears that Paramount does not wish to enter into a joint venture arrangement with the KTFN. Of course, Canada cannot compel that kind of agreement, as it has no legal authority to do so. Nevertheless, Canada has offered to provide technical support and expertise through economic development programs such as the Community Economic Opportunities Program and the

Community Economic Development Programs, so as to assist the KTFN to build its business capacity. The KTFN have not accepted this offer.

[75] As for resource revenue sharing, the KTFN sought an agreement with Paramount and provided a variety of examples they would accept as accommodation of their asserted Aboriginal title interest. In the alternative, the KTFN sought financial compensation from Canada.

[76] There appears to be competing claims to Aboriginal rights, including Aboriginal title, in the Cameron Hills. In a letter dated April 22, 2009 Canada provided examples of other Aboriginal groups (all members of the Deh Cho First Nations) who assert Aboriginal title and rights in the Cameron Hills area, and stated that it is clear from that information that the KTFN's assertion of stewardship of the Cameron Hills area in preference to other Aboriginal groups is not generally accepted by the other Aboriginal groups. The Deh Cho First Nations assert Aboriginal rights (including title) collectively on behalf of its members to the Deh Cho Region, which Region includes the Cameron Hills area. In addition, the Dene Tha First Nation of Alberta and the Northwest Territory Métis Nation assert Aboriginal rights over the Cameron Hills area. Canada was therefore of the view that the Aboriginal title issue was best left to the Deh Cho land claim process and was not the proper subject of a consultation process. Canada's position was that the Court ordered consultation was not intended to create another land claim process separate and apart from the existing Deh Cho Process, to which the KTFN participates as a member of the Deh Cho First Nations.

[77] The KTFN seems to recognize that there are competing claims and that there is no consensus amongst the Aboriginal groups. However, the KTFN maintain that because of the decision in *Chicot #1*, wherein Justice Blanchard found that they have a reasonably arguable case for unextinguished Aboriginal title to this area, and because of their asserted title claim and evidence gathered to support that claim, economic compensation for their asserted Aboriginal title interest to the area that includes the Extension Project, is warranted. In the absence of an agreement with Paramount, the KTFN sought a community regulatory and development fund financed by Canada with an initial contribution of $1.5 million and $500,000 per annum for the life of the Extension Project.

[78] In support of their asserted Aboriginal title interest to the Cameron Hills, the KTFN sent Canada two resolutions by the Dene Nation, of which all Deh Cho communities are members. The first resolution, issued at the Dene Assembly held in August 1996, states that the KTFN "are the main traditional land users, caretakers and managers of their traditional area, which includes the Cameron Hills" and "are dependent on the land and waters in their area for their livelihood". The Dene National Assembly therefore "fully endorses the rights of the [KTFN] to have final approval to future economic and land use activities in their traditional area, which includes the Cameron Hills". As for the second resolution, adopted in December 2007, it referred to previous resolution and to *Chicot #1* and resolved that "the Dene Leadership supports the Ka'a'Gee Tu First Nation's request that Canada and the Mackenzie Valley Land and Water Board not issue any further permits or licences to Paramount for the Cameron Hills, until Canada has addressed the Ka'a'Gee Tu First Nation's concerns through meaningful consultation and accommodation".

[79] The KTFN took the position all along that Canada is constitutionally required to consult with, and reasonably accommodate, Aboriginal peoples in relation to decisions and actions that may adversely affect Aboriginal interests pending resolution of claims through treaty negotiations. The existence of claims by other First Nations may be a factor considered in the strength of case assessment, but it does not relieve the Crown of its duty to consult to develop economic accommodation measures to address infringements to the KTFN's asserted Aboriginal title. They also asked Canada to provide, in writing, the information and facts it was relying on to inform its preliminary assessment of the strength of the KTFN's case for unextinguished Aboriginal title and rights, so that KTFN would have an opportunity to respond. Finally, KTFN argued that there is no conflict or overlap between the Deh Cho Process and the consultation process. Consultation regarding accommodation measures to address impacts and infringements from a specific project is not a claims negotiation, in their view, but rather the constitutionally mandated process of seeking honourable interim measures to protect and accommodate the rights and interests enshrined in s. 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 pending completion of, among other things, the claims negotiation process at the Deh Cho table.

[80] Canada also took the position that issues regarding revenue sharing for resource development in the interim of a settled claims agreement are specifically addressed through IRDA entered into between the Crown and the Deh Cho First Nations on April 17, 2003. This agreement was intended to allow Deh Cho First Nation members to benefit from, and support development, while the Deh Cho Process is in negotiation. Canada acknowledged that IRDA may not have been negotiated with the express intent that it be used as an accommodation for asserted infringements to the economic component of Aboriginal title from specific projects, but rather to foster resource

development in Deh Cho territory. Nevertheless, Canada contends that it can accommodate potential adverse impacts on established or potential Aboriginal or treaty rights, pending final resolution of claims. It is therefore Canada's view that it is up to the KTFN to apply to the Deh Cho First Nations for further funding, and that any new arrangement for revenue sharing from any resource development in the Mackenzie Valley is currently a matter for discussion between Canada and the Deh Cho First Nations.

[81] The last face to face consultation meeting between Canada and the KTFN occurred on December 1, 2008 in Kakisa. The KTFN continued to press the point that some kind of arrangement to address impacts to Aboriginal title was required, and expressed a willingness to discuss a variety of options. At that meeting, Canada raised the possibility of the parties submitting their disagreement on title to either mediation or arbitration. The KTFN confirmed its interest in exploring that option, and subsequent to the meeting asked Canada for a further opportunity to examine the mediation and/or arbitration options. On further consideration, Canada advised by way of letter dated April 22, 2009 that these options were not appropriate for this consultation process, as they would not bring about any greater understanding of the KTFN's concerns.

[82] Canada concluded that considering all of the circumstances, negotiating financial compensation for any potential infringement of the KTFN's asserted Aboriginal title was not reasonable in the consultation process, and brought that process to a close on June 24, 2009. It provided reasons for doing so by letter dated August 7, 2009.

2. Issues

[83] The only issue to be resolved in this application for judicial review is whether Canada, as represented by INAC, has fulfilled its duty to consult and, if appropriate, to accommodate, in the Court ordered consultation process instituted as a result of the previous decision made by this Court in *Chicot #1*.

3. Analysis

[84] By way of preliminary argument, counsel for Canada submitted that the affidavit of Joe Acorn, sworn on October 16, 2009 is improper as it contains hearsay and argument and refers to irrelevant and extraneous matters. No motion to strike was filed, but counsel nevertheless asked the Court to give no weight to that affidavit.

[85] Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, explicitly states that "Affidavits shall be confined to facts within the deponent's personal knowledge…". The Federal Court of Appeal recently confirmed that the Court may strike all or portions of affidavits in circumstances where they are abusive, clearly irrelevant, or contain opinion, argument or legal conclusion (see *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18, 399 NR 33). An affidavit is not meant to replace or supplement the argument to be made by counsel; its function and purpose is to adduce the facts, and nothing more, relevant to the case at hand.

[86] Applying this yardstick, it is undisputable that the affidavit of Joe Acorn, an environmental consultant working for the KTFN, is replete with hearsay and arguments. Moreover, it appends material that was not before the decision-maker during the post-*Chicot #1* consultation process.

Indeed, the main purpose of this affidavit (paras 19 to 33) seems to be to bolster the KTFN's argument that Canada has negotiated impact benefits and socio-economic agreements of the type sought by the KTFN in the context of the regulatory approval process for major projects in the Mackenzie Valley, and that it would only be fair to be treated similarly.

[87] Counsel for the Applicants submitted that the existence of these agreements has been confirmed, to a large extent, during the cross-examination of the Crown witness. That is not the point, however. Even if I were to assume that Canada's representatives were aware of these agreements during the consultation process, they were never discussed at the various meetings or in correspondence, except in the most general terms. More importantly, the relevance of these documents has not been made clear and the Court is left to speculate as to what inferences should be drawn from these documents which relate to other Aboriginal groups and different resource projects located outside the Cameron Hills area. As a result, they cannot be relied upon to establish that similar agreements should have been part and parcel of the consultation process, let alone to demonstrate that the KTFN has been treated unfairly.

[88] Apart from paragraphs 1 to 6, which describe Mr. Acorn's professional and employment background, the remaining paragraphs (7 to 18) aimed at describing what happened before the Review Board, what the KTFN sought to achieve, why they sought various forms of agreements, what the Review Board Report says, and how Recommendation 16 was modified through the consult to modify process. Some of these affirmations do not reflect the personal knowledge of the deponent, and should more appropriately have come from the KTFN themselves. Paragraph 18 is clearly in the nature of expert evidence, as it asserts that "access (or impact) benefits agreements and

socio-economic agreements were well established components of the regulatory approval process for major projects in the Mackenzie Valley and Arctic region…". Overall, I agree with counsel for Canada that this affidavit is of marginal value, and shall accordingly be given little weight.

[89] The standard of review is not in dispute between the parties, and it was aptly summarized by my colleague Justice Blanchard in *Chicot #1* on the basis of the principles articulated by the Supreme Court of Canada in *Haida*, above. There is therefore no need to revisit the issue. A reviewing court owes very little deference to the decision-maker when determining whether the duty to consult is triggered or delineating the scope and extent of the duty in regard to legal and constitutional limits. On the other hand, the question as to whether the Crown discharged its duty to consult and accommodate will be reviewable on the standard of reasonableness.

[90] Three caveats must be added to this apparently straightforward explanation of the applicable standard of review. First, the duty to consult and accommodate heavily depends on the particular circumstances of each case, and questions of law will therefore often be intertwined with questions of fact. As the Chief Justice stated in *Haida*, above at paras 61, 63:

> (…) The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal…
>
> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus,

> as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[91] Second, perfection is not required when assessing the conduct of Crown officials. As is always the case when the standard of reasonableness is applied, the best outcome is not necessarily the benchmark; as long as it can be shown that reasonable efforts have been made to consult and accommodate and that the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, there will be no justification to intervene.

[92] Finally, and closely related to the previous observation, the focus should not be on the outcome but rather on the process of consultation and accommodation.

[93] With those principles in mind, I will now address the various arguments put forward by counsel for the Applicants and for both of the Respondents.

[94] The duty to consult has been canvassed by my colleague Justice Blanchard in *Chicot #1*, and there is little need to revisit the issue at length. Suffice it to say that it is grounded in the honour of the Crown, which in turn gives rise to different duties depending on the circumstances. It may give rise to a fiduciary duty where the Crown has assumed discretionary control over specific Aboriginal interests (*Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245), and it will also permeate the treaty making process and treaty interpretation (*R v Marshall*, [1999] 3 SCR 456; *R v Sparrow*, [1990] 1 SCR 1075). In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], the Supreme Court found that whether and to what extent an Aboriginal group has

been consulted, will be relevant to determining whether the infringement of Aboriginal title is justified.

[95] The Supreme Court went one step further in *Haida*, above, recognizing for the first time that the duty to consult can arise in the absence of a proven (through judicial declaration) or recognized (through treaty) Aboriginal right. Asking rhetorically whether the Crown was entitled to use the resources at issue as it chooses, pending proof and resolution of an Aboriginal claim, the Court concluded that reconciliation has to be achieved through honourable consultation and accommodation on an ongoing and active basis, and cannot be hived off and left to be achieved through long-term negotiations. As the Court stated in *Haida*, above at para 27:

> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty 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.

[96] The difficulty, of course, is to assess when this duty will arise and what it entails. As for the trigger of that duty, the Court indicated that it will be sufficient for the Crown to have "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida*, above at para 35). Building upon *Delgamuukw*, where the Court considered the duty to consult and accommodate in the context of established

claims, the Chief Justice used the concept of a spectrum to delineate the general tenor of this duty. "Deep consultation" will be required where a strong *prima facie* case for the claim is established and the potential infringement is of high significance to the Aboriginal peoples. On the other hand, the duty to consult will be less exacting and may be fulfilled by the Crown giving notice, disclosing information and discussing any issues raised by the Aboriginal peoples when the claim to title is weak and the potential for infringement is minor. In most cases, of course, the situation will lie between these two extremes. As the Chief Justice put it, on behalf of a unanimous Court in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal*, 2010 SCC 43 at para 36, [2010] 2 SCR 650 [*Rio Tinto*] "[t]he richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right…".

[97] In the case at bar, there is no need to determine what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the KTFN. The scope and content of the duty to consult and accommodate was established by Justice Blanchard in *Chicot #1*, and his conclusions must be considered definitive as his decision has not been appealed.

[98] With respect to the strength of the KTFN's treaty rights and asserted Aboriginal title claim, Justice Blanchard made the following findings. First, he noted as a fact that there is no dispute as to the existence of the Applicants' treaty rights to hunt, fish and trap in the Cameron Hills area (see *Chicot #1*, above at paras 14, 101). As for the asserted claim for Aboriginal title, he found that the KTFN's claim raises a "reasonably arguable case" for Aboriginal title over the Cameron Hills (*Chicot #1*, above at paras 103-107), despite the fact that there is no consensus amongst a number of Aboriginal groups regarding the stewardship of that area (*Chicot #1*, above at para 7). On the basis

of those findings, he came to the conclusion that the Crown's duty to consult is "elevated" from what would otherwise have been the case had the content of the duty been based exclusively on the interpretation of the treaty rights (*Chicot #1*, above at para 107).

[99] With respect to the seriousness of the impact of the Extension Project upon the KTFN, Justice Blanchard determined that it will have a "significant and lasting impact" on the Cameron Hills area and, consequently, on the lands over which the KTFN assert Aboriginal title. He was also satisfied that the project has the potential of having a "significant impact" on the KTFN's broad harvesting rights to hunt, trap and fish (*Chicot #1*, above at para 112).

[100] Accordingly, Justice Blanchard stated that the duty to consult did not lie at the lower end of the spectrum and called for greater participation than that found to be the case in *Mikisew Cree*, above, where the Court found that the Crown was required to provide notice and to engage directly with the Mikisew. Justice Blanchard characterized the content of the duty to consult in the present case as follows:

> 117. In my view, the contextual factors in this case, particularly the seriousness of the impact on the Aboriginal people, by the Crown's proposed course of action and the strength of the Applicants' asserted aboriginal claim, militate in favour of a more important role of consultation. The duty must in these circumstances involve formal participation in the decision-making process.
>
> *Chicot #1*, above at para 117.

[101] The parties diverge sharply as to their understanding of the deficiencies identified by Justice Blanchard in the consultation process and as to the scope of consultation that he ordered, as a result of his finding that Canada had breached its duty to consult before deciding to approve the Extension

Project. Counsel for the Applicants strenuously argued that the decision requiring consultation was the final decision to approve the Extension Project, since this is the decision that will ultimately have a serious impact on the KTFN's asserted title. It is the KTFN's position that the Court ordered consultations should have encompassed a discussion of the types of impacts and accommodations that are unique to the KTFN's Aboriginal title, which entails an ownership interest and the right to benefit economically from the use of the title lands, as distinct from treaty rights or other forms of Aboriginal rights.

[102] Counsel for Canada, on the other hand, argued that the consultation deficiency identified in *Chicot #1* is that the KTFN were not consulted about modifications to the recommended measures, and in particular were not consulted about modifications to R-15 and R-16, which provided for a wildlife and resource harvesting plan and a socio-economic agreement intended to benefit the KTFN and other affected Aboriginal groups in the Cameron Hills. In Canada's view, the further consultations mandated by *Chicot #1* were not meant to address the impact of the final approval of the Extension Project, but the potential adverse impacts to the KTFN resulting from the mitigation measures as modified by the responsible ministers.

[103] I agree with the Applicants that the proper identification of the decision at issue does matter, both from a legal and practical perspective. If the Crown is to gauge correctly the scope of consultations required, it must obviously correctly identify the decision at issue and the potential impacts of that decision on the concerned Aboriginal people. As well, the potential accommodation measures that will be the subject of the discussions will very much depend on the proper characterization of the decision at stake.

[104] That being said, I agree with Canada that the further consultations which Justice Blanchard had in mind were meant to address the deficiencies of the consult to modify stage, where modifications were made to R-15 and R-16 without the participation of the KTFN. A close reading of Justice Blanchard's reasons reveals that, in his view, the Extension Project approval process was satisfactory and in keeping with the duty to consult of the Crown, up to the consult to modify phase of the process provided by the *MVRMA*. Indeed, paragraphs 74 to 85 of his reasons show that the KTFN were able to offer some input even during that last stage of the process, as they were invited by the Review Board to provide comments related to the responsible ministers' proposed modifications to the mitigation measures, which they did on December 17, 2004. From then on, however, they were excluded from the consult to modify process. The Board adopted the revised recommendations on March 15, 2005, after a meeting with the Ministers to which the KTFN was not invited to participate, and the Ministers adopted the recommended mitigating measures of the Review Board with modifications on July 5, 2005, without ever responding to the six letters written directly to the Minister of INAC by counsel for the KTFN.

[105] Reviewing this process, Justice Blanchard found that the consultation process provided for under the Act is comprehensive and does give an opportunity for significant consultation between the developer and the affected Aboriginal groups. He also stated that the Applicants were "heavily involved" in the process, and that the Environmental Assessment Report of the Review Board "clearly shows" that many of their concerns were taken into account. Crucially, he went on to write:

> 119. Up until this point, the process, in my view, provided an opportunity for the Applicants to express their interests and concerns,

> and ensured that these concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. Up until this point in the process, I am satisfied that the Applicants benefited from formal participation in the decision-making process.
>
> *Chicot #1,* above at para 119.

[106] It is obvious, in my mind, that the failure to fulfill the Crown's duty to consult identified by Justice Blanchard related to the manner in which the consult to modify process was implemented in this case. The next paragraph of his reasons makes it abundantly clear that the Crown breached its fiduciary duty because it failed to provide to the KTFN any meaningful opportunity to be involved in the changes that were ultimately made to the recommendations of the Review Board. It is worth quoting in full that paragraph of Justice Blanchard's reasons, considering its saliency and its central importance in resolving the dispute between the parties as to its proper interpretation:

> 120. The difficulty in this case arises when the Crown elected to avail itself of the "consult to modify process" provided for in the Act. Under the Act, where a recommendation approving a project is made by the Review Board and is subject to the imposition of measures considered necessary to prevent the significant adverse impact of the project, this process provides that the Responsible Ministers may agree to adopt the recommendation with modifications after consulting the Review Board. As a result of the consult to modify process, many of the Review Board's recommendations were modified. Recommendations R-15 and R-16 were of particular importance to the Applicants, affecting the wildlife compensation plan and the socio-economic agreement. This occurred notwithstanding the firmly expressed and long held position of the Applicants that these recommendations were critical to them. The Applicants, apart from objecting to any change or deletion of these recommendations, had no opportunity for any input in respect to proposed changes to these recommendations. There may well have been other options that could have gone a long way in satisfying the Applicants' objections. In the absence of consultations we will never know. The consult to modify process, in the circumstances of this case, essentially allowed the Crown to unilaterally change the outcome of what was arguably, until that point, a meaningful process of consultation. Implementation of the mitigating measures

> recommended by the Review Board may not have been sufficient to address all of the concerns of the Applicants, but may have been sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is so because the recommendations were the product of a process that provided the Aboriginals an opportunity for meaningful input whereby the Crown, through the Review Board, demonstrated an intention of substantially addressing their concerns. Clearly, this cannot be said of the consult to modify process. The new proposals which resulted from the consult to modify process were never submitted to the Applicants for their input. There was simply no consultation, let alone any meaningful consultation at this stage.
>
> *Chicot #1,* above at para 120.

[107] If this was not clear enough, the penultimate paragraph of his discussion on this issue reiterates that it is at the last stage of the statutory process that the Crown failed to live up to its constitutional obligations. It is worth quoting this paragraph once more:

> 124. I find the Crown failed to discharge its duty to consult in the circumstances of this case. In sum, the consult to modify process allowed for fundamental changes to be made to important recommendations which were the result of an earlier consultative process involving the Applicants and other stakeholders. These changes were made without input from the Applicants. It cannot be said, therefore, that the consult to modify process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. At this stage, the Applicants were essentially shut out of the process.
>
> *Chicot #1,* above at para 124.

[108] I fail to see how it can seriously be contended that the further consultations ordered by Justice Blanchard could have been meant to encompass mitigation measures designed to take into consideration the impact of the Extension Project on the KTFN's asserted title. Not only would this be inconsistent with the reasons for which further consultations were ordered by Justice Blanchard, but it would not even be in accordance with what the KTFN was seeking when they wrote to the

Minister of INAC on March 24, 2005 to comment on the proposed modifications. At that point in time, it appears they were seeking a full blown environmental impact review because they felt that the proposed modifications were in effect tantamount to a rejection of the original recommendations (see *Chicot #1*, above at para 83). The KTFN could not use the reopening of the consultation process ordered by Justice Blanchard to turn back the clock and expand on the substance of what had been discussed all along.

[109] Counsel for the Applicants submitted that the decision requiring consultation was the decision to approve the Extension Project, because this is the decision that will cause a serious and lasting impact to the lands over which the KTFN asserts title, and therefore that this is the decision that must be revisited through the Court ordered consultations in order to integrate and address the KTFN's concerns. With all due respect, I fail to see where in his decision Justice Blanchard determined that the trigger for the further consultations that he ordered was the final approval of the Extension Project, and that these consultations were to include a consideration of impacts to the KTFN's Aboriginal title.

[110] To the contrary, and for the reasons previously mentioned, the focus of Justice Blanchard's reasoning was undoubtedly Canada's failure to consult at the last stage of the process. It is true that in his Order, Justice Blanchard's language appears to be open ended when he instructed the parties "to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns". However, one must not overlook that he qualified that order with the opening words "In accordance with the above reasons". This leaves no doubt as to his intent with respect to the scope of the further consultations

which the parties were to pursue. When read in the context of his overall reasons, (the most relevant paragraphs of which I quoted earlier at paras. 38 and 105-107 of my reasons), there can be no ambiguity: the further consultations were meant to address the deficiencies of the consult to modify stage of the process, and not to reopen the whole decision-making process mandated by the *MVRMA*.

[111] It is quite telling that Justice Blanchard did not see fit to quash the decision of the responsible ministers to approve the Extension Project. Had he been of the view that the whole process was vitiated by a lack of consultation throughout, this is most likely the remedy he would have ordered. As a result, the involvement of the KTFN in the final approval decision, as requested by counsel for the Applicants, would not only have been untenable but without meaning and purpose. The further consultations could only be meant to take into consideration the KTFN's concerns with respect to the modified recommendations and reasonably accommodate them as the Extension Project progressed. Accordingly, I find that Canada had properly identified the proper scope of the consultations that were ordered by Justice Blanchard in *Chicot #1*.

[112] Having carefully reviewed the record submitted by the parties, I also find that the consultation process following the decision of Justice Blanchard was meaningful and transparent, and in conformity with the requirements set out by the Supreme Court in cases such as *Haida*, above, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*], *Mikisew Cree*, above, and *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103. Of particular significance are the following elements pointed out by Canada:

(a) The KTFN's participation, and the participation of the KTFN's legal counsel, was fully funded;

(b) The KTFN's representatives attended all meetings and fully participated in the process which was uniquely designed and shaped by them;

(c) Information was regularly and openly shared between Canada and the KTFN, except in instances where the KTFN expressed its wish that information be kept confidential, in which case the KTFN's wishes were respected, as was the case for the Traditional Knowledge study;

(d) The consultation process was on the record, and minutes recording the process were kept, circulated and approved by the parties;

(e) In accordance with the KTFN's wishes, the discussions only started after a consultation protocol describing the scope of the Court ordered consultations was drafted over the course of three months;

(f) The KTFN was given multiple opportunities to share their concerns, which were thoroughly discussed, and they were involved in exploring options to address their concerns.

[113] The record also demonstrates that Canada made a genuine effort to address the KTFN's views about proposed accommodation measures. For example, Canada funded a traditional land use study, despite the fact that there was already similar data available, because Canada respected the KTFN's view that such a study was necessary. Canada also agreed to fund a traditional practices program aimed at supporting the KTFN's traditional land use activities, as well as an integrated environmental monitoring program with the KTFN's participation in the design

monitoring of that program. Finally, Canada also proposed to host and fund an annual open house to share information relating to development in the Cameron Hills, and offered to assist the KTFN in building business capacity through economic development programs.

[114] Of course, the implementation of the duty to consult is not to be assessed by the dollar figures contributed by the Crown nor by the procedural framework put in place to conduct the discussions. In the present case, however, the *bona fides* of the discussion did lead to agreements on accommodating measures to address the concerns of the KTFN with the Extension Project's impacts on their treaty rights and asserted Aboriginal rights. As previously mentioned, the parties came to an agreement on an environmental monitoring and mitigation plan, as well as on a traditional land use compensation fund. In fact, the only stumbling block out of the five areas of accommodation identified by the KTFN on April 24, 2008 was their request for resource revenue sharing.

[115] The record before the Court shows that the KTFN were preoccupied throughout the consultation process with assertions that monetary compensation is required for their asserted title. The KTFN went so far as to particularize exactly how much money would be required to adequately compensate the asserted title infringement, demanding from Canada a monetary payment of $1.5 million and subsequent annual monetary payments of $555,000 for the duration of the Extension Project. Despite the parties agreeing to examine this issue in the Consultation Protocol, it is the Applicants' position that Canada never had the intention to enter into any meaningful discussion of that type of accommodation. The Applicants alleged that Canada did not act in good faith and was guilty of misrepresentation.

[116] To support that accusation, counsel for the KTFN referred to particular statements from the lead negotiators on behalf of INAC to the effect that they had no mandate to address or discuss Aboriginal title and their economic component. They also highlighted the fact that Canada never had any discussions with them regarding the various socio-economic agreements that they tabled and that have been used throughout the Northwest Territories to accommodate for impacts on Aboriginal communities of major projects.

[117] It is no doubt true that, at various points during the discussion, representatives of INAC asserted that issues concerning Aboriginal title were outside the purview of the consultation process and were better left to another forum like the Deh Cho Process. I do not think that these comments genuinely and properly reflect what took place during the entirety of the consultation process.

[118] As previously mentioned, the consultation records show that the KTFN's asserted title and their alleged right to compensation for interference with their ownership interest dominated the discussions that took place following the agreement on the Consultation Protocol. Despite Canada being of the view that the Court ordered consultation was to focus on the impact arising from the modifications to the mitigation measures, it showed a willingness to consider possible means of addressing the KTFN's concerns about the asserted Cameron Hills title infringement. It is true that INAC officials were not prepared to discuss title *per se*, and for good reason. A judicial review proceeding is ill-suited to assess the weight of the evidence or make any detailed findings of fact on the strength of the KTFN's claim of Aboriginal title. As stated by Justice Blanchard, "[s]uch questions are best left to be dealt with in the context of a trial where the ethnographic, historical, and

traditional evidence is comprehensively reviewed and considered" (*Chicot #1*, above at para 107). Moreover, the comprehensive land claim relating to Treaty 11, which includes the Cameron Hills, has been accepted for negotiation by the Crown in right of Canada in 1998 and is the subject of the Deh Cho Process.

[119] That being said, Canada was prepared to discuss the impact of the Extension Project on the KTFN's asserted title, and genuinely asked the KTFN to provide more information as to what these impacts would be. In the end, the KTFN did not provide any information as to unique asserted impact to the Cameron Hills area that would require economic accommodation, nor did they make any clear suggestions, besides monetary compensation, as to how Canada might mitigate the asserted infringements upon the KTFN's unproven underlying interest in the Cameron Hills. The KTFN were, in essence, making a claim for damages.

[120] The fact that Canada and the KTFN were unable to agree on this particular aspect of the KTFN's demands does not amount to bad faith. After all, one must not lose sight of the fact that the duty to consult does not translate into a duty to accommodate or a duty to agree on any specific measure to alleviate the potential impact of a project or of a decision. As the Supreme Court stated in *Haida*, above at para 42, there is no duty to agree, only to consult through a meaningful process (see also *Taku River*, above at para. 22; *Dene Tah' First Nation v Minister of Environment*, 2006 FC 1354 at para 82, 303 FTR 106; *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, 2006 Can LII 26171 at para 91 (Ont. S.C.). Moreover, the Crown must not only balance the Aboriginal concerns with the potential impact of the decision on the asserted right or title, but must also take

into consideration other societal interests, as well as the asserted rights of other groups (*Haida*, above at para 50).

[121] Aboriginal title undoubtedly entails an ownership interest and a correlative right to compensation for interference with that interest. It does not follow, however, that prior to the determination of title, consultations must include meaningful discussions and accommodation of the impacts to the economic component of that title. As Hall J.A., of the British Columbia Court of Appeal, stated in *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at para 97, 251 DLR (4th) 717 "…it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest".

[122] The duty to accommodate is not a free-standing legal right. It is an adjunct of the duty to consult, the purpose of which is to prevent irreversible damages to claimed Aboriginal interests pending proof or determination through treaty negotiations. The rationale underlying the duty to consult, as expounded by Chief Justice McLachlin in *Haida*, above at para 33, confirms that accommodation is sometimes required lest the long-term negotiations necessary to resolve formal claims resolution, end up being meaningless:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and [page 529] title: S*parrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

[123] The duty to consult is not intended to provide Aboriginal people immediately with what they could be entitled to, if and when they prove their claims or settle them through treaty. Otherwise, there would be no incentive for Aboriginal people to negotiate treaties or seek to prove their claims. The duty to consult, therefore, is not meant to be an alternative to comprehensive land claims settlements, but a means to ensure that the land and the resources that are the subject of the negotiations will not have been irremediably depleted or alienated by the time an agreement is reached.

[124] The KTFN argued that Canada's representatives had a closed mind during the discussions. They were not prepared to discuss or examine various options for accommodation measures to address impacts on title, such as other types of agreements and measures commonly used throughout the Northwest Territories, and to address the impacts of major projects on Aboriginal communities. It is in that context that they submitted a number of socio-economic agreements in the context of other major projects currently underway in the Northwest Territories.

[125] This argument fails to take into account that the precise requirements of the duty to consult and, where necessary, to accommodate, will vary with the circumstances. Each case must be approached on the basis of its own facts, as recognized by the Supreme Court in *Haida*, above at para 45:

> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is

> bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[126] Socio-economic agreements and interim benefits agreements are heavily fact-dependant. They depend on the regulatory milieu, as well as on many other factors like the nature and size of a project, its likely impact on the Aboriginal community, and the fabric of that community. As pointed out by Paramount, the Extension Project in the Cameron Hills is not of the same scale as other major projects currently underway in the Northwest Territories, as referred to by the KTFN. Moreover, there is no disagreement that Paramount meets its statutory obligations to provide benefits to Northern residents through an approved Benefits Plan pursuant to the *Canada Oil and Gas Operations Act* and the Interim Measures Agreement developed in the context of the Deh Cho Process.

[127] Moreover, the reasons given by Canada to refuse to provide economic accommodation for the KTFN's asserted infringement of Aboriginal title were not capricious. The first one being the assertion by other Aboriginal communities of rights to the Cameron Hills. INAC's representatives identified six communities as making competing claims to that area. It is true that none of these claims have been substantiated or supported by any evidence, and that the Dene Nation Assembly has twice recognized the KTFN as the main users and caretakers of the Cameron Hills. However, there was no need for Canada to assess the strength of these competing claims, in part because Justice Blanchard had already concluded that the KTFN had an arguable case, despite an absence of consensus amongst these Aboriginal groups. He also concluded that these competing claims needed to be worked out among these First Nations themselves. Moreover, there were some comments

made by the KTFN representatives during the consultation to the effect that other Aboriginal groups were “impacting” and “undermining” the First Nation. As for the Dene Nation Assembly’s resolutions, they do not necessarily amount to the recognition of an exclusive land title for the KTFN, and they do not necessarily represent the view of the Deh Cho First Nation, which is the sub-group asserting a collective Aboriginal title claim on the territory, including the Cameron Hills. In those circumstances, it would have been perilous for Canada to sort out these claims as part of the consultation process, especially if Canada’s assessment of a claim ended up being different from the assessment that emerged from the Deh Cho Process.

[128] Canada has indicated all along that if the comprehensive land claims negotiation taking place via the Deh Cho Process does not meet the KTFN’s needs and interests, it would be open to discussing alternatives to that claims process with the KTFN. Having not taken that offer up, it was perfectly reasonable for Canada not to enter into negotiations with respect to accommodation based on an individual Aboriginal title assertion with an individual member of the Deh Cho First Nations, while that individual member is still part of the Deh Cho Process.

[129] The second reason given by Canada to decline the KTFN’s request for economic accommodation was the existence of IRDA, the interim agreement negotiated as part of the Deh Cho Process. As previously mentioned, IRDA provides for a small percentage of federal resource royalties in the Mackenzie Valley to be set aside annually and accounted for as part of any future final claims settlement. The Deh Cho First Nations may access no more than 50 percent of that annual amount for the purposes of supporting economic development opportunities in their claimed

territory. The annual amount is administered by a Deh Cho committee that reviews business plan submissions and allocates the funding.

[130] There is no disagreement between the parties that IRDA was established to assist Deh Cho individuals or enterprises in developing business and economic development opportunities. It was not meant to provide interim accommodation for infringements to the Aboriginal title from projects such as Paramount's oil and gas operations on a collective basis. That being the case, there is nothing to prevent the KTFN from applying to the Deh Cho committee for further IRDA funding, or indeed for any new arrangement for revenue sharing, taking into account the collective interests of their community. IRDA provides that it may be amended at any time by agreement between the Crown and the Deh Cho First Nations. There are other avenues open to the KTFN to address their grievances with the way IRDA funding is allocated. Once again, Canada's determination that financial accommodation for the KTFN's asserted title claim was an inappropriate outcome for this consultation process and was better left to the comprehensive land claim negotiations, was reasonable.

[131] In conclusion, I am satisfied that Canada correctly identified the scope and extent of the consultations ordered by Justice Blanchard in *Chicot #1*. Additionally, I find that Canada's officials during the consultation process ordered by Justice Blanchard were reasonable and that Canada acted honourably throughout these consultations. These consultations were transparent and genuine, the KTFN were empowered to make their case as best they could and had every opportunity to voice their concerns, there was an agreement on substantial measures accommodating many of the KTFN's concerns about the Extension Project's impacts, and the reasons provided by Canada to

refuse economic accommodation for the KTFN's asserted Aboriginal title were cogent and defensible.

[132] For all of the foregoing reasons, this application for judicial review must therefore be dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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