PRELIMINARY DECISION **2018 NSUARB 154**
M08162

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION by **NOVA SCOTIA POWER INCORPORATED** for approval of capital work order CI#29807 for its Tusket Main Dam Refurbishment project in the amount of $18,157,609

BEFORE: Steven M. Murphy, MBA, P.Eng., Panel Chair
Roberta J. Clarke, Q.C., Member
Richard J. Melanson, LL.B., Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
Matthew Gorman, LL.B.

INTERVENORS: **ASSEMBLY OF NOVA SCOTIA MI'KMAQ CHIEFS**
Terrence Paul, Chief and Co-Chair
Sidney Peters, Chief and Co-Chair

ACADIA FIRST NATION
Deborah Robinson, Chief

CONSUMER ADVOCATE
William L. Mahody, Q.C.

INDUSTRIAL GROUP
Nancy G. Rubin, Q.C.

KWILMU'KW MAW-KLUSUAQN NEGOTIATION OFFICE
Janice M. Maloney, B.A., LL.B., Executive Director

PROVINCE OF NOVA SCOTIA
Sean Foreman, LL.B.

	SMALL BUSINESS ADVOCATE E.A. Nelson Blackburn, Q.C.
BOARD COUNSEL:	S. Bruce Outhouse, Q.C.
FINAL SUBMISSIONS:	May 14, 2018
DECISION DATE:	**August 7, 2018**
DECISION:	**Application is suspended pending a further consultation between the Province and Nova Scotia First Nations. See paragraphs [170] to [177].**

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I INTRODUCTION AND BACKGROUND

[1] Nova Scotia Power Incorporated (NS Power, Utility or Company) made application to the Nova Scotia Utility and Review Board (Board) on July 5, 2017, for approval of capital work order CI#29807 for its Tusket Main Dam Refurbishment Project in the amount of $18,157,609 (Application). NS Power also requested approval of its Confidentiality Undertaking and confidential treatment of certain information filed in support of the Application.

[2] The Utility says the Project is required to help ensure the dam is compliant with current Canadian Dam Association (CDA) dam safety guidelines and Nova Scotia Environment (NSE) requirements. NS Power also indicated that the existing gates within the main dam structure have reached the end of their expected useful life and need replacement.

[3] The Tusket Dam Refurbishment Project was identified in the Company's 2016 Annual Capital Expenditure (ACE) Plan in the amount of $6,543,233, as part of the proposed spending on subsequent approval items. NS Power subsequently deferred the project to allow for engagement with First Nations. The Project was again listed, among projects for subsequent approval, in the 2017 ACE Plan, for $9,940,664.

[4] Given the amount of the capital work order, and in accordance with Board practice, on July 13, 2017, the Board advised a number of parties, who frequently participate in Utility proceedings before the Board, that the Application had been filed and asked whether they wished to become Intervenors in the proceeding.

[5] A Notice of Intervention was filed by the Small Business Advocate (SBA), in response to the Board's notice of the proceeding.

[6] By letter dated July 21, 2017, the Board approved the Company's confidentiality requests and determined the matter could proceed by way of a paper hearing. A timetable was established for the issuance and responses to Information Requests (IRs) and written submissions. This timetable was subsequently amended by letter dated July 28, 2017.

[7] The Board timetable envisaged the completion of the paper hearing by September 26, 2017, when NS Power's Reply Submissions were due.

[8] On August 29, 2017, NS Power responded to IRs from the SBA and Board staff. On August 31, 2017, after reviewing the IR responses, the Board advised the parties it was retaining an expert, in the field of dam refurbishment, construction and decommissioning, to assist in its review. The original timeline was suspended pending the retention of such an expert. Ultimately, Midgard Consulting Inc. (Midgard) was retained by the Board.

[9] On July 27, 2017, the Supreme Court of Canada issued two decisions on the role of tribunals in assessing the adequacy of Crown consultation with Aboriginal peoples: *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*, 2017 SCC 41 and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40. The Crown's consultation obligations arise from s. 35(1) of the *Constitution Act*, *1982*, and the interpretation of this provision by the Courts:

> **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[10] After conducting a review and analysis of these cases, the Board determined a further process was required in this proceeding to address any potential duty to consult issues arising as a result of the Project.

[11] On September 29, 2017, the Board sent a letter to the Acadia First Nation, and Kwilmu'kw Maw-Klusuaqn Negotiation Office (KMKNO), which were the entities that had been identified in the Application as having been engaged by NSPI in the First Nations consultation process. The Board notes the KMKNO, also known as the Mi'kmaq Rights Initiative, is often designated to conduct consultations by 11 of the 13 Mi'kmaq First Nations. The letter said, in part:

> This is to advise the Board is in the process of reviewing an application by NSPI for the approval of a capital work order relating to the refurbishment of the Tusket Main Dam located on the Tusket River in Tusket Falls, Yarmouth County.
>
> …
>
> Any capital expenditure NSPI proposes to incur in excess of $250,000 must be approved by the Board pursuant to the *Public Utilities Act*. The estimated cost of this project is $18,157,609.
>
> The timeline for processing this application was temporarily suspended while the Board engaged an expert in the field of dam design, construction and decommissioning to review the matter.
>
> The Board has now retained Midgard Consulting Inc. to review the application.
> In the interim, the Board identified an issue relating to Aboriginal consultation which it wishes to bring to your attention.
>
> The recent decisions issued by the Supreme Court of Canada in *Chippewas of Thames First Nations v. Enbridge Pipeline Inc.*, 2017 SCC 41 (CanLII) and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40 (CanLII) have clarified the role of regulatory administrative tribunals in relation to Aboriginal consultation.
>
> As the Board understands these decisions, the Board must consider whether adequate Crown consultation with First Nations has occurred, if the concern is raised before it. This assumes both the Crown and any impacted Aboriginal group are aware of a matter before the Board that might require consultation.
>
> The record filed with the Board by NSPI, in the Tusket Dam Refurbishment project, describes the presence of significant Aboriginal archeological sites in the area surrounding where the work is to be undertaken, including sites which are currently submerged. NSPI describes certain mitigation measures relating to the protection of these sites. Other mitigation measures are set out in relation to fish ladders and the traditional gaspereau fishing season. NSPI says consultation with the Acadia First Nation and the Kwilmu'kw Maw-klusuaqn Negotiation Office was undertaken, and a Working Group established to monitor the project.
>
> The purpose of this correspondence is to bring the application to your attention, and to give you an opportunity to participate in the process, if KMKNO has any Aboriginal consultation issues which you wish the Board to consider in this matter.
>
> Please note that if you wish to participate in this matter you can become a Formal Intervenor, which status includes the right to make Information Requests and view confidential filings, provided a Confidentiality Undertaking is signed. Alternatively, you may wish to comment on the application in writing.

> …
>
> Once the Board knows whether you wish to participate in this matter, and if so, in what capacity, a timeline will be developed to complete the review of this application.
>
> [Letter to KMKNO, September 29, 2017]

[12] Similar correspondence was forwarded to the Province.

[13] The Province filed a Notice of Intervention on October 12, 2017. On October 13, 2017, KMKNO indicated more time was required to determine whether they would participate as an intervenor.

[14] On October 13, 2017, upon receiving correspondence from the Province and KMKNO, the Board issued a Hearing Order, and Notice of Paper Hearing, with a revised timeline, and further opportunity for the filing of interventions.

[15] Following the issuance of the Hearing Order, Notices of Intervention were received from the Consumer Advocate (CA), the Industrial Group, the Acadia First Nation, the Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC) and KMKNO.

[16] Evidence, including IR responses, was filed in this matter by NS Power, Midgard, the CA, and the SBA. The Province, ANSMC and Acadia First Nation filed evidence relating to the duty to consult, but no IRs were issued to these parties.

[17] Submissions were filed by NS Power, the CA, the SBA, the Province, ANSMC, and the Acadia First Nation, with final submissions being received on May 14, 2018.

[18] The Acadia First Nation and the ANSMC submitted that the Crown had not fulfilled its duty to consult in this case. The Province disagreed. No other party took a position on the issue.

[19] As this is the first time this Board has directly addressed its jurisdiction in relation to duty to consult issues, and given the nature of the evidence and the parties'

arguments, the Board has determined this important matter should be addressed in a Preliminary Decision.

II ISSUES

[20] The following issues will be addressed in this Preliminary Decision:

1. Does the Board have the jurisdiction to consider whether the Crown had a duty to consult First Nations in this matter; and,
2. Did the Crown discharge its duty to consult with the Mi'kmaq of Nova Scotia?

[21] The Board finds it has the jurisdiction, and corresponding obligation, to address whether there was a Crown duty to consult First Nations in relation to the Project, and whether the duty has been fulfilled. The Board has determined that further Crown consultation is required. These findings will be explained in the reasons which follow.

III FACTS

[22] While there is disagreement amongst the parties as to the significance of certain actions and processes, as well as disagreement as to how to apply the relevant constitutional principles in this matter, there is no real dispute as to the factual background related to the consultation, or alleged lack thereof, which occurred.

i) The Province's Aboriginal Consultation Process

[23] Nova Scotia's Aboriginal consultation process has been developed in collaboration with the Mi'kmaq of Nova Scotia and the Federal Government. In 2007, the *Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference* (TOR) was instituted for

the purpose of a three-year pilot project. After evaluating the results of the pilot project, the TOR was revised, and signed by all the parties in 2010.

[24] The TOR sets out how Aboriginal consultation will take place, and with whom. Originally, all thirteen Mi'kmaq First Nations were part of the TOR process. In 2013, Sipekne'katik First Nation opted out of this process. Millbrook First Nation followed suit in 2016.

[25] The Province has developed a policy document to assist in implementing the TOR, which is set out in the *Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia* (*Polic*y).

[26] In its evidence, the Province describes the main elements of the *Policy*:

> Key elements of the Policy include clear principles for consultation, the legal and policy considerations for consultation, the clarification of roles and responsibilities of all participants in consultation, and a full description of Nova Scotia's six steps of consultation.
>
> 1. Consultation Screening
> 2. Initiate Consultation
> 3. Identification of Mi'kmaw Concerns
> 4. Accommodation
> 5. Decision
> 6. Monitoring
>
> [Exhibit N-7, p. 1]

[27] The Province advised the Board that, in the absence of any formal agreements, "…both Sipekne'katik and Millbrook First Nations have in the interim decided to follow a consultation process that is similar to…" the *Policy*. [Exhibit N-7, p. 2]

[28] As industrial projects, and the permits and approvals required to undertake such projects, may impact on the Crown's duty to consult, the Province, in collaboration with the Mi'kmaq of Nova Scotia and industry, has developed the *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* (*Proponents' Guide*).

[29] The Province described the *Proponents' Guide* "…as a means of supporting proponent engagement and better Crown consultation…". The Province goes on to state:

> The Proponents' Guide provides practical assistance to proponents considering a development or other activities that may impact Mi'kmaq interests in Nova Scotia. This assistance includes six steps proponents should follow when engaging the Mi'kmaq of Nova Scotia, an overview on Benefit Agreements, roles and responsibilities and key definitions.
>
> The six steps outlined in the Proponents' guide are:
>
> 1. Notify Mi'kmaq Early in the Development Process
> 2. Provide as Much Information as Possible
> 3. Meet with the Mi'kmaq Community(s)
> 4. Complete a Mi'kmaq Ecological Knowledge Study (MEKS)
> 5. Address Potential Project-Specific Impacts
> 6. Document the Engagement Process
>
> [Exhibit N-7, p. 2]

ii) NS Power Engagement

[30] The Tusket Hydro System is located in an area of known archaeological significance in relation to the Mi'kmaq of Nova Scotia. As well, there is an existing First Nations gaspereau fishery on the Tusket River.

[31] As construction activities, including, in particular, the proposed dewatering of Lake Vaughan, will have an impact on known and potential Mi'kmaw archaeological sites, and the Aboriginal fishery, NS Power sought to engage the Mi'kmaq of Nova Scotia.

[32] NS Power initiated the engagement process in 2015. Throughout 2015-2016, NS Power indicated "…discussions were focused on the archaeological reports conducted to understand the culturally significant areas within the footprint of construction" [Exhibit N-3 – IR-18 – Attachment 4, p. 8].

[33] A Working Group was established in February of 2017, with representatives from Acadia First Nation, KMKNO and NS Power.

[34] NS Power summarized its engagement process with the Mi'kmaq of Nova Scotia as follows:

6.3 First Nations Engagement

As indicated in the 2012 and 2013 archaeological resource impact assessments, the area surrounding the Tusket Main Dam structure has been occupied by the Mi'kmaq and their ancestors. Therefore, the area is of significance to the local First Nations communities.
As previously indicated, the environmental permitting process requires First Nations consultation and there are different levels of consultation required based on the significance of the archeological findings. In order to streamline the consultation process and establish ongoing relationships with local First Nations communities, NS Power decided to engage with the communities directly. This involved the formation of an official working group with representatives from the NS Power project team, the KMKNO, and representatives from the Acadia First Nation. The goals of the working group are to identify areas of concern to the First Nations communities, resolve the identified concerns, solicit information from First Nation elders regarding the project site, establish protocols in the event that archaeological resources are identified during construction, and communicate project information to the larger First Nation community. The engagement for the Project has included a review of all archeological impact assessment reports, test results, a review of the detailed design, and discussions on areas of concern with possible methods of resolution. It has also included a community open house at the Acadia First Nation Entertainment Centre in Arcadia, NS and a site visit to the Tusket Main Dam site. Please refer to **Figure 17** for a summary of the key concerns and resolutions that were addressed during each of the working group meetings.

Figure 17: First Nations Concerns

Concern	Resolution
Protection of First Nations archaeological resources	Water elevation of Lake Vaughan will only be reduced to its minimum approved operating level during construction. A professional archaeologist will be on site monitoring excavation activities within potentially sensitive areas. A shoreline reconnaissance and collection of any artifacts around Lake Vaughan will be completed by professional archaeologists if the water level is dropped to its low operating level.
Protection of AlDl-18	AlDl-18 is currently submerged under Lake Vaughan. Construction activities will be completed without exposing AlDl-18. However, the existing safety booms upstream of the Tusket Main Dam will be extended to contain AlDl-18 and not allow public boat traffic to travel in that area and disturb AlDl-18.
Fish passage	The construction strategy of constructing the main dam structure over two construction seasons will allow the first half of the dam to be constructed with no impact to the operation of the existing Main Dam fish ladder. In the second year the fish ladder will only be dewatered after the completion of the primary Gaspereau fish run and diversion tactics will be implemented to direct upstream fishes towards the Powerhouse fish ladder. Additionally, the upstream and downstream fish passage at the Tusket Powerhouse will remain in operation throughout the project.

Concern	Resolution
Modifications to the Tusket Main Dam Fish Ladder	The baffles and the water flows within the fish ladder will not be altered. Only the side walls of the fish ladder will be extended vertically to the new ground elevation. The effectiveness of the fish ladder will be monitored using cameras after the dam construction is completed to ensure its continued effective operation.
Construction during Gaspereau fishing season	NS Power will not be completing any in-stream construction activities during the Gaspereau fishing season. The NSE watercourse alteration permit defines when in-stream construction activities can occur. There will be no in-stream blasting or alteration of the river bed outside of the construction footprint.
Fish habitat compensation within the local area	Under the DFO Fisheries Act Authorization a HADD will be required. NS Power was unaware of anyone locally performing projects that would meet the HADD requirements and made alternate arrangements. However, local content is always a consideration and there may be opportunities in the future.

> NS Power remains committed to balance the needs and concerns of Mi'kmaq of Nova Scotia in conjunction with regulatory and business requirements in order to execute successful capital work orders to the benefit of all customers.
>
> [Exhibit N-1, pp. 42-44]

[35] It is apparent, from the responses to Board IRs, the only option discussed with the Mi'kmaw representatives and communities during the engagement process was the proposed dam refurbishment project submitted to the Board.

[36] NS Power advised the Board that while it has maintained documentation regarding First Nations engagement, it cannot be disclosed without the permission of the First Nations involved in the process. [Exhibit N-2, IR-13(c)]

[37] The Board notes the ANSMC and Acadia First Nation were complimentary of NS Power's efforts to recognize and address Mi'kmaq concerns:

> We would like to be clear that in this project, relations with NSPI have, on the whole, gone smoothly. We commend NSPI for its commitment to recognizing our interests and concerns and their respectful treatment of our heritage and our culture. Our relationship-building with NSPI on this project and others is substantive and we urge the Board to encourage NSPI to continue to work with us in the future as they are at the present. We believe their corporate philosophy of respectful relationship building does indeed promote reconciliation and bode well for a future of good relations.
>
> [Exhibit N-20, p. 30]

[38] The Board commends NS Power for its engagement efforts.

[39] This said, the ANSMC and Acadia First Nation take the position that NS Power's efforts were not part of a formally delegated Crown consultation process pursuant to the TOR, but an exercise in relationship building.

iii) Crown Consultation Record

[40] As part of Exhibit N-7, the Province submitted an Aboriginal Consultation Record, which includes its communications with the Mi'kmaq of Nova Scotia in relation to the Tusket Main Dam Refurbishment Project. Many of the same documents were included in Exhibit N-10, which is a Book of Documents jointly submitted by KMKNO and Acadia First Nation.

[41] There is no disagreement as to the extent and content of the communications discussed in more detail below. There is disagreement between the Province and ANSMC/Acadia First Nation as to whether these communications, together with NS Power's engagement, fulfill the Crown's constitutional duty to consult.

[42] On December 22, 2016, the Province wrote to KMKNO. This correspondence described the nature of the proposed Tusket Main Dam Refurbishment Project, the construction activities required to complete the project, mitigation measures in relation to water management, erosion and sediment control, the dewatering process, including in relation to an existing fish ladder, and the return of areas disturbed by machinery to pre-construction conditions.

[43] The Province advised that NS Power would require a watercourse alteration permit from NSE. An application for this permit had been received by NSE, and a condensed version was attached to the December 22, 2016, correspondence.

[44] The Province also advised that because of the size of the Project's footprint, the federal Department of Fisheries and Oceans (DFO) had been notified of the application. The Province advised it was likely an authorization pursuant to the federal *Fisheries Act* would be required.

[45] The Province further advised "…NSE, DFO, and NSPI will discuss any recommendations or requirements prepared by DFO regarding authorization for the project when this information becomes available."

[46] Finally, it was suggested additional "authorizations from NSTIR may be required as part of replacing the bridge downstream of the dam structure, and will be obtained by NSPI prior to completing the works."

[47] The December 22, 2016, letter addressed potential Aboriginal consultation as follows:

> NSE will lead aboriginal consultation at the provincial level and coordinate the process with any departments (provincial or federal) that will be involved. We anticipate that the project will involve the following departments: DFO, NSTIR. Note that the coordination of Aboriginal consultation is subject to change as the approval process evolves, in which case the Assembly will be kept informed.
>
> Please advise us whether you are interested in consultation on this matter. Should you be interested, we would like to hear from the Assembly about any concerns you may have, including the details of any asserted Aboriginal or Treaty rights that could be adversely impacted by this project. We require a response outlining the concerns and interests of Assembly with this project by January 31, 2017. [Emphasis added]
>
> [Exhibit N-7, Schedule D]

[48] On the same date, the Province wrote to the Chiefs and Councils of the Sipekne'katik First Nation and the Millbrook First Nation. These letters were in substantially the same form as the one addressed to KMKNO. The Board notes Millbrook First Nation did not respond to this correspondence. No further communications between the Province and Millbrook First Nation appear on the record.

[49] On January 23, 2017, the Chief of the Sipekne'katik First Nation wrote to the Province acknowledging receipt of the December 22, 2016, correspondence. Chief Michael P. Sack advised as follows:

> Within the attachment provided, you advise that NSPI has engaged KMKNO as well as the closest Mi'kmaq communities of Acadia First Nation and Bear River First Nation with engagement continuing with the development of a working group with regularly scheduled meetings to address issues and concerns related to potential impact to those communities.
>
> Please provide a copy of each (3) archaeological assessment which were completed in 2012 and 2013.
>
> At the time when the Department of Fisheries and Oceans (DFO) has completed its review of the application and recommendations are prepared, a copy of these recommendations is requested.
>
> [Exhibit N-7, Schedule G]

[50] On January 25, 2017, Twila Gaudet, LL.B., Director of Consultation with KMKNO, wrote to the Province. Ms. Gaudet stated:

> This will advise we have received your letter dated December 22, 2016 and that we wish to proceed with consultation under the *Terms of Reference Mi'kmaq-Nova Scotia-Canada Consultation Process* as ratified on August 31, 2010 on the above noted.
>
> We request a copy of any reports relevant to the Tusket Main Dam Refurbishment. KMKNO wishes to conduct an internal analysis to determine any potential impacts to Mi'kmaq Right and Title, as well as, any other concerns pertinent to the Mi'kmaq of Nova Scotia.
>
> It is requested that all information and correspondence be forwarded to KMKNO to facilitate the flow of the process and communication. I will be the contact person for KMKNO and accordingly, I will coordinate further consultation with regards to this project.
>
> We look forward to consulting with you on this matter. [Emphasis added]
>
> [Exhibit N-7, Schedule H]

[51] By email dated February 3, 2017, which attached NS Power's full application, as submitted to NSE, the Province advised Ms. Gaudet that DFO would require NS Power to obtain a permit pursuant to s. 35(2)(b) of the *Fisheries Act* because of the potential for serious harm to fish occasioned by "…permanently destroying approximately 1600 m^2 of freshwater habitat in the Tusket River…".

[52] The February 3, 2017, email went on to state:

> As the project is a multi-year project, there are some design details that are still in a state of flux – I will send through correspondence and supporting information for any substantive

> changes (e.g., changes that would require additional environmental considerations/mitigations) as the project progresses.
>
> Cheers Twila and please let me know of any questions/comments/concerns!
>
> [Exhibit N-7, Schedule I]

[53] On February 15, the Province emailed Ms. Gaudet asking for confirmation she had received the February 3, 2017, email, and again asked if KMKNO had any questions, comments or concerns.

[54] On February 22, 2017, the Province wrote to the Sipekne'katik First Nation, enclosing the requested archaeological assessments, which totaled 265 pages, and summarizing DFO's decision that NSPI would require a permit under the *Fisheries Act.*

[55] The February 22, 2017, letter concluded with the following:

> The watercourse alteration application was submitted by NSPI on November 30th, 2016 and NSE's review of the application is nearing completion, subject to continued consultation with Sipekne'katik First Nation and the Assembly of Nova Scotia Mi'kmaq Chiefs. Please be advised that the Proponent has tentatively scheduled project development work for the spring season of 2017 and would like to proceed. We require a response outlining the concerns and interests of Sipekne'katik First Nation with this project/policy by April 1, 2017.
>
> [Exhibit N-7, Schedule L]

[56] On March 21, 2017, the Province wrote to KMKNO outlining two changes to the replacement bridge contemplated by the Project:

- A change to the construction schedule such that this Project would commence in 2017 instead of 2018; and
- A slight change in the orientation of the bridge.

[57] The Province again requested KMKNO provide any questions, concerns or comments.

[58] On the same date, an email outlining the same information was sent to the Sipekne'katik First Nation. No further communications between the Province and Sipekne'katik First Nation appear in the record.

[59] On March 31, 2017, the Province wrote to KMKNO, stating the following:

> As part of continued consultation on the proposed Tusket Main Dam refurbishment project, Nova Scotia Environment (NSE) would like to highlight the fact that we have not received any comment from the Assembly related to the information provided in our email dated February 3, 2017. We have now passed the 30 day window since this email was provided (current date: March 31, 2017), and are looking for any feedback prior to issuing the approval.
>
> Further to the project update provided on February 3rd, 2017 by email, additional information related to minor changes to the project schedule were communicated through an email sent March 21st, 2017. The changes summarized in the March 21st, 2017 email relate to the timing of the bridge replacement and a proposed change in alignment. As well, the changes highlighted are now proposed to be completed in the 2017 construction season.
>
> Please note, if we do not receive any comments on this project by April 14th, 2017, NSE will proceed with the approval process.
>
> [Exhibit N-7, Schedule R]

[60] This correspondence was also sent by email on April 3, 2017.

[61] On May 4, 2017, the Province advised it would be issuing the watercourse alteration permit, which was ultimately issued on May 15, 2017.

[62] No further communications between the Province and KMKNO occurred until October 25, 2017, when Ms. Gaudet emailed the Province requesting information on the status of the watercourse alteration application before NSE and the DFO authorization under the *Fisheries Act.*

[63] On November 3, 2017, the Province advised KMKNO that both the watercourse application before NSE, and the authorization required from DFO, had been issued.

IV ANALYSIS AND FINDINGS

ISSUE 1: Does the Board have the jurisdiction to consider whether the Crown had a duty to consult First Nations in this matter?

a) General Principles

[64] Identifying the Board's role in the Aboriginal consultation process is a question of statutory interpretation. The object is to determine what role, if any, has been assigned to the Board by the Legislature. As the Board is a statutory tribunal, its jurisdiction is prescribed by the legislation which created and empowers it, together with any powers necessarily incidental thereto.

[65] The general principles of law relating to the roles of statutory tribunals in Aboriginal consultation are discussed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribunal Council*, [2010] 2 S.C.R. 650 (*Carrier Sekani)*.

[66] Chief Justice McLachlin set out various considerations:

> [55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22 (CanLII), [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
>
> [56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.
>
> [57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
>
> [58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all. [Emphasis added]

[67] The Supreme Court of Canada went on to hold that the British Columbia Utilities Commission had the jurisdiction to consider whether adequate consultation with concerned Aboriginal peoples had taken place, but not the duty to engage in the consultation process itself.

[68] The key factors in support of its conclusion on the first issue are set out in *Carrier Sekani*:

> [69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.
>
> [70] Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42). [Emphasis added]

[69] Despite the findings in *Carrier Sekani*, an unresolved issue arose relating to a tribunal's role where the Crown was neither a proponent nor a party to a proceeding. This issue was addressed in decisions of the Federal Court of Appeal such as *Standing Buffalo Dakota v. Enbridge Pipelines Inc.*, 2009 FCA 308, and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* [2015] F.C.J. No. 222. The Board notes that *Standing Buffalo* was decided before *Carrier Sekani*, but leave to appeal to the Supreme Court of Canada was denied, without reasons, after *Carrier Sekani* was decided.

[70] In *Chippewas*, the Federal Court of Appeal explained its rationale for distinguishing *Carrier Sekani:*

> [38] In *Carrier Sekani*, the party seeking an approval from BCUC was the Crown itself. In contrast, the Crown did not participate in the approval proceedings before the Board in *Standing Buffalo*. Instead, the party seeking approval from the Board was Enbridge, a private-sector corporation that was unrelated to the Crown.
>
> [39] The non-participation of the Crown in the hearing process in *Standing Buffalo* is significant.
>
> [40] While it is clear that the Board has the power to decide questions of law, it is important to note that the *Haida* Determinations also include factual findings. As stated by the Supreme Court in *Haida Nation*, at paragraph 61:
>
> > [61] …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. …
>
> Similarly the question of whether an existing *Haida* duty has been met is largely factual.
>
> [41] Because the Crown participated in the proceedings in *Carrier Sekani*, BCUC was in a position to make the factual findings required by the *Haida* Determinations in the normal adversarial context. If the Board had decided to make the Haida Determinations in *Standing Buffalo*, it would have had to make the requisite factual findings outside of that adversarial context.
>
> [42] Moreover, it is noteworthy that the implied power of a tribunal to undertake the *Haida* Determinations, which is stipulated in paragraph 69 of *Carrier Sekani*, refers to "constitutional issues that are properly before" the tribunal. Because the Crown was not a party to the Project approval proceedings, it is not clear that the *Haida D*eterminations were "properly before" the Board in these proceedings.
>
> [[2015] FCJ No. 222, paras. 38-47]

[71] *Chippewas* was appealed to the Supreme Court of Canada. On July 26, 2017, the Supreme Court of Canada released its decision in the *Chippewas* matter [see 2017 SCC 41], along with a decision in a companion case [see *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40].

[72] While one of the primary issues addressed in *Chippewas* and *Clyde River* relates to whether the process followed by the National Energy Board (NEB) fulfilled the Crown's duty to consult, the issue of the Crown not being a party to the proceedings before the NEB was also addressed.

[73] In *Clyde River*, the Supreme Court of Canada held:

> [29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the

> Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action.

[74] In *Chippewas*, the proposition was restated:

> [30] We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).
>
> [31] As the respondents conceded before this Court, the NEB's contemplated decision on the project's approval would amount to Crown conduct. When the NEB grants an exemption under s. 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work — the increase in flow capacity and change to heavy crude — could potentially adversely affect the Chippewas of the Thames' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to Enbridge's project application.

[75] No party argued the Board is empowered to conduct Aboriginal consultation as part of its mandate. The relevant legislation does not provide any statutory authority in this regard, and the Crown has not sought to delegate this role to the Board. The Board therefore plays no role in actually conducting Aboriginal consultation in this matter. That issue need not be discussed further.

[76] The issue is whether under the statutory scheme applicable to NS Power's application before the Board, the principles discussed above provide the Board with the

jurisdiction, and the accompanying obligation, to address whether adequate Crown consultation occurred in this case.

b) Application of legal principles to the matter before the Board

[77] NS Power applied for Board approval of a capital work order for its Tusket Main Dam Refurbishment Project pursuant to s. 35 of the *Public Utilities Act* (*PUA*), which states:

> **Approval of improvement over $250,000**
> **35** No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[78] The Board was created pursuant to the *Utility and Review Board Act* (*URB Act*). Its overarching jurisdiction is set out in s. 22 of the *URB Act*:

> **22 (1)** The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact. [Emphasis added]

[79] With respect to the Application, the Province argued that unlike the *Clyde River* and *Chippewas* matters, the Board itself will not authorize a specific project activity that could have a physical or strategic, high level impact on asserted Aboriginal or treaty rights.

[80] It is the Province's position that s. 35 of the *PUA* only directs the Board to perform a cost-benefit analysis of the proposed project to ensure the prudency of the required capital expenditure.

[81] The Province's argument is summarized in the following excerpt:

> 18. Required approval of the estimated costs for a proposed project or activity is altogether a different exercise to approving the actual or specific activities themselves (which has already been completed in other forums).

> 19. While the Board may, in appropriate circumstances, have the legal powers to consider the adequacy of consultation directly related to a specific project approval it may issue within its jurisdiction, it does not enjoy the same powers as the Supreme Court to "judicially review" and potentially "void" unrelated prior approvals within this current process.
>
> 20. The Province submits that the role of the Board in this proceeding is closer to the situation in *Rio Tinto Alcan*[6] where the BC Utilities Commission accepted that it had the power to consider the adequacy of consultation in an appropriate case, but reasonably determined that approval of an Energy Purchase Agreement itself did not trigger a duty to consult, as it could not adversely affect any aboriginal or treaty interest.
>
> 21. To be clear, the Province is not arguing that the Board may never be required to assess the adequacy of Crown consultation in other types of proceedings, as clarified by the Supreme Court of Canada, where the Board may be acting as a final decision-maker in determining whether to issue actual project approvals under its legal powers and jurisdiction that could itself impact an aboriginal or treaty right.
>
> 22. However, in this type of proceeding, the role and purely economic nature of the specific decision to be made by the Board can have no independent potential impact on the aboriginal or treaty rights asserted by the KMKNO.
>
> 23. While it may be argued that the Project cannot proceed at this stage until the Board gives approval for estimated costs pursuant to s.35 of the Act, it does not mean that the Board's decision in this proceeding authorizes the actual work and project activities to proceed (which is the "conduct" from which any potential impacts to asserted aboriginal or treaty rights may arise).
>
> 24. Approval of costs greater than $250,000.00 required by s.35 of the Act (flowing from an analysis of whether the estimated costs are prudent for the benefit of ratepayers) does not equal prior or subsequent "project approvals" required from another regulator, and independently cannot impact aboriginal or treaty rights absent further action or conduct approved in other forums.
>
> 25. As such, the various concerns raised by the KMKNO as "failures to consult" in relation to now-existing permits or approvals, cannot be "judicially reviewed" or assessed in this forum or proceeding.
>
> 26. What is at issue for the Board here is the prudency of the costs associated with various components of the Project sought by NSPI, which include the costs of engagement and mitigation of Mi'kmaq concerns that have already been properly identified in the prior regulatory process. [Emphasis in original]
>
> [Province's Final Submissions, May 7, 2018]

[82] The ANSMC and Acadia First Nation response to the Province's argument clarifies that its suggested remedy to the alleged failure of the Crown in its duty to consult is that the Application be suspended or delayed; the matter be remitted for further consultation; and, that the Board remain seized with jurisdiction in this matter and take no further action in relation to the Application until it is satisfied adequate consultation has taken place.

[83] After citing s. 22 of the *URB Act*, the ANSMC and Acadia First Nation said:

> In *Clyde River*, the Court stated:
>
> > [36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2017 SCC 40 (CanLII) 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the Constitution Act, 1982 (*Carrier Sekani*, at para. 72).
>
> In the companion case, *Chippewas of the Thames*, the Court built on its decision in *Clyde River*, stating
>
> > [37] As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).
>
> Contrary to the assertion in paragraph 21 of the Province's Final Submission, the UARB *is* the final decision maker in relation to the Tusket Dam refurbishment project. Without Board approval a project may not proceed, despite any other permits or Ministerial Authorizations the project may have received or may receive in future.
>
> Therefore, we submit, the Board does have a constitutionally mandated duty to determine if the Crown has fulfilled its duty to consult. "The role and purely economic nature of the specific decision to be made by the Board" does, we submit, have a very real potential impact on Mi'kmaw rights and title. Unlike the Energy Purchase Agreement (EPA) at issue in *Rio Tinto* where it was determined that the EPA would not affect water levels in the Nechako River, the work on the Tusket Dam proposed by NSPI will affect the physical environment of the Tusket River watershed.
>
> [ANSMC and Acadia First Nation Final Submissions, May 14, 2018]

[84] The Board has the power to consider and determine questions of law. There are no statutory provisions in the *PUA*, or the *URB Act*, which demonstrably indicate that the Legislature intended to withdraw the Board's jurisdiction to consider and determine constitutional issues. The Board must therefore generally ensure its decisions comply with s. 35 of the *Constitution Act*, *1982*, if the issue is properly before it. This is

the basic premise of the *Carrier Sekani* case, which was confirmed in *Chippewas* and *Clyde River.*

[85] In *Standing Buffalo* and *Chippewas*, the Federal Court of Appeal essentially determined a s. 35 constitutional issue is not properly before a tribunal where the Crown is neither a proponent nor a party. The Supreme Court of Canada decisions in *Chippewas* and *Clyde River* effectively overrule the Federal Court of Appeal's decisions.

[86] As well, the Province participated as a party in this proceeding, and did not limit its arguments, or its evidence, to the issue of whether or not the Board had the jurisdiction to consider the adequacy of the Crown's duty to consult. It presented evidence and submissions on the adequacy of Crown consultation as well. However, as the Board invited participation in this matter, based on its preliminary interpretation of the *Clyde River* and *Chippewas* decisions, without the benefit of adversarial legal argument, such participation does not determine the issue.

[87] While it is true that the Board's role in assessing an application pursuant to s. 35 of the *PUA* is primarily one of an economic regulator, reviewing a cost-benefit analysis, and assessing the economic prudency of a particular project, the Board does not only approve the capital expenditure, but also approves the project itself.

[88] The comprehensive role in utility regulation of the Board is expressed in the often quoted *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.,* 1976 CanLII 1234 (NS CA):

> The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined — that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects — that a public utility give adequate service and charge only reasonable and just rates.

The service requirement is expressed in s. 48, as follows:

> 48. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

[89] The service requirement is now set out in s. 52 of the *PUA*, and there are now performance standards enacted in relation to service as well.

[90] There is no language in s. 35 of the *PUA* which specifically directs the Board to consider the public interest, as was the case in the legislative language discussed in *Carrier Sekani*. This said, the concepts of adequacy and safety of service, along with just and reasonable service requirements, expressed in s. 52 of the *PUA*, are examples of public interest considerations the Board can consider.

[91] That factors other than a pure economic cost-benefit and prudency analysis are considered by the Board is shown in the extensive record in this matter.

[92] Evidence and expert analysis have been provided to the Board on whether the project is needed for safety reasons in the first place, in order to meet Canadian Dam Safety Guidelines. A number of potential scenarios, completely different than those considered in the NSE and DFO permit applications, have been discussed and analysed in the evidence.

[93] The Board has the jurisdiction to consider all aspects of the proposed Project, to determine whether NS Power's facilities are safe and adequate, and whether alternative scenarios are available.

[94] With respect to the Province's argument that the Board is essentially not a final decision maker, as the term is used in *Chippewas* and *Clyde River*, the Board does not agree.

[95] It is true that, in this Application, the Board does not have the same extensive approval authority as the NEB, and that it plays no role in the issuance of

permits under the *Fisheries Act*, the *Environment Act*, or the *Special Places Protection Act*. In this regard, the Board agrees with the Crown that it does not have the powers of a court to void permits and authorizations which have already been issued pursuant to the foregoing legislation.

[96] Nevertheless, absent Board approval for the Tusket Main Dam Refurbishment Project, it cannot be inferred that NS Power will proceed with construction, even though it already has the required provincial and federal approvals in hand.

[97] A literal reading of s. 35 of the *PUA* indicates NS Power cannot proceed without Board approval. This is the position advanced by the ANSMC and Acadia First Nation. The situation may be slightly more nuanced, in that one of the potential remedies the Board has utilized, on limited occasions in the past, is to exclude expenditures for unapproved projects from rate base.

[98] However, a Board refusal of this Application, for a project of this magnitude, with ongoing financial obligations for operational, safety and maintenance requirements, for an asset designed to directly produce electricity for distribution to the public, would almost certainly result in the project not proceeding.

[99] Therefore, prior Crown approvals aside, the Board is effectively the final decision maker for the Project in the circumstances of this case.

[100] Finally, the Board agrees with the ANSMC and Acadia First Nation that the nature of this requested approval is fundamentally different than the one discussed in *Carrier Sekani*. There, although the Supreme Court of Canada found that the British Columbia regulator had the jurisdiction to consider the duty to consult issue, no consultation was required, because it was considering the approval of power purchase

agreements for existing hydro facilities. Approving commercial agreements which did not alter the footprint of the hydro facilities did not engage a duty to consult.

[101] In this matter, the footprint of the existing dam is being altered, with an impact on water flows, and the potential exposure, or disturbance, by virtue of dewatering and construction activities, of pre-contact Mi'kmaw archeological artifacts and a continuing Aboriginal fishery. Therefore, Board approval does have the potential to impact asserted Aboriginal or treaty rights.

[102] The Board notes that while there may well be differences in the extent to which public policy considerations may be considered by a particular tribunal, or the extent to which a particular Board's own decision may be the Crown action which triggers a duty to consult, the basic premise found in the jurisprudence is that where a tribunal has the power to interpret questions of law, absent a clear expression to the contrary, it should consider and apply the *Constitution Act, 1982.*

[103] Based on the foregoing considerations, in the context of this Application, the Board finds it has the jurisdiction to consider duty to consult issues arising pursuant to s. 35(1) of the *Constitution Act*, *1982*, and the corresponding duty to make decisions in conformity with constitutional requirements. This means it must assess the adequacy of the Crown's consultation in relation to the Tusket Main Dam Refurbishment Project.

ISSUE 2: Did the Crown discharge its duty to consult with the Mi'kmaq of Nova Scotia?

a) General Principles

[104] *Clyde River* provides a concise summary of the conceptual underpinnings of the duty to consult:

> [19] The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

[105] The scope of the duty to consult is addressed in some detail in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. As the *Haida Nation* principles have formed the basis for the subsequent caselaw relating to this issue, it is helpful to set out a portion of this decision:

> 39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.
>
> …
>
> 42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 2003 BCSC 1422 (CanLII), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

> 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev*. 49, at p. 61.
>
> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 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.
>
> ...
>
> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".
>
> 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take. [Emphasis added]

[106] While certain procedural aspects of the Crown's duty to consult may be delegated to third party proponents, such as NS Power, "…the ultimate legal responsibility

for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated" [see *Haida Nation* at para. 53].

[107] The ANSMC and Acadia First Nation, citing *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, say that "reasonableness, not perfection, is required, of the Crown in its efforts to consult with and accommodate Aboriginal peoples when it makes decisions potentially affecting claimed Aboriginal rights" (see para. 252). The Province agrees with this proposition.

b) Application of legal principles to the matter before the Board

[108] The TOR, *Policy* and *Proponents' Guide* were developed as a response to the jurisprudence related to the Crown's duty to consult Aboriginal peoples derived from s. 35(1) of the *Constitution Act, 1982.*

[109] In this matter, the Province initiated the TOR consultation process by virtue of its December 22, 2016, correspondence. As the purpose of the TOR is to allow for "consultation on the record and with prejudice with one or more Mi'kmaq Bands respecting established or asserted Mi'kmaq Aboriginal or treaty rights…", it is apparent the Province determined that NS Power's Tusket Main Dam Refurbishment Project attracted a duty to consult.

[110] The Province acknowledges this obligation in its February 14, 2018 submission:

> 18. As noted by the KMKNO at page 2 of its Notice of Intervention, the requirement for NSPI to obtain the Watercourse Alteration Permit from NSE as a component of the proposed Project triggered the Crown duty to consult, considering the potential impacts on Mi'kmaq archaeological resources in proximity to the Tusket Main Dam and other environmental and fishery-related considerations.
>
> [Exhibit N-18, p. 4]

[111] There is therefore no dispute that a duty to consult arose in relation to the Project. No party to the proceeding has asserted otherwise.

[112] The Province argued it followed the agreed upon consultation process set out in the TOR and *Policy*. It says it initiated the formal TOR process in accordance with the *Policy*, provided project information, and responded to any queries.

[113] The Province submitted that none of the notified parties raised any treaty or Aboriginal rights concerns, despite numerous requests; including the March 31, 2017, letter to KMKNO, which indicated the Province intended to process the Watercourse Alteration Permit if no response was received by April 14, 2017. The permit was ultimately issued on May 15, 2017.

[114] The Province further submitted it was informed of the proponent engagement process by NS Power, which included the formation of a working group, and the hiring of an observer from Acadia First Nation to monitor the Project site and keep the community informed. A summary of this information was included in NS Power's application to NSE, which summary was included in NS Power's application materials provided by NSE to KMKNO.

[115] The Province's position is summarized as follows:

> 28. Perfection is not required. What is required are reasonable steps and collaboration by all parties involved. A holistic review of all the evidence filed that touches on the issue of consultation, filed to support the costs that NSPI says it is required to incur should the Project proceed, leads to the conclusion that it was reasonable for the Province to understand that the KMKNO was satisfied with the overall process of consultation and perhaps most importantly proponent engagement, and that any concerns identified in consultation with the KMKNO regarding potential impacts of the Project were being satisfactorily identified and addressed (e.g. archaeological resources).
>
> [Province's Final Submission, May 7, 2018, p. 7]

[116] The ANSMC and Acadia First Nation submitted that no adequate consultation has taken place. They said that the Province did not follow the TOR process, as expanded upon by the Guidelines.

[117] While discussed in detail in its February 14, 2018, submission, a summary of the alleged failures is set out in the final submission of the ANSMC and Acadia First Nation, dated May 14, 2018:

> In its submission of 14 February 2018, the Crown states "Provincial Crown consultation on the Project has followed the agreed consultation process set out in the [*Nova Scotia Policy & Guidelines: Consultation with the Mi'kmaq of Nova Scotia*]." We disagree. As outlined in our 14 February 2018 submission, the Crown has failed to follow its own consultation policy by:
>
> - ➢ Failing to inform the proponent (and the Mi'kmaq) in writing of its delegated consultation duties;
> - ➢ Failing to properly coordinate with Canada on the issuance of a *Fisheries Act* Ministerial authorization and ensuring that as the lead on the project that both Crowns properly fulfilled their respective duties to consult;
> - ➢ Failing to properly screen the Tusket Dam refurbishment project to assess the depth of consultation required for the project and to discuss that assessment with the Mi'kmaq;
> - ➢ Failing to properly oversee any delegated consultation (which we dispute) undertaken on its behalf by NSPI;
> - ➢ Failing to ensure that the Mi'kmaw Nation had and has sufficient resources to respond to the Crown in a timely manner and insisting upon the thirty (30) day suggested "typical" timeline for a response from the Mi'kmaw Nation regarding potential impacts on asserted rights and title;
> - ➢ Failing entirely to consult prior to the issuance of Heritage Research Permits; and,
> - ➢ Failing to properly document the consultation process (which we expressly deny occurred) and ensure both the Crown and NSPI properly communicated with each other and the Mi'kmaq and to ensure adequate accommodation of Mi'kmaw rights and title.
>
> [ANSMC and Acadia First Nation's Final Submission, May 14, 2017, p. 7]

[118] The ANSMC and Acadia First Nation place particular emphasis on the failure to properly delegate any procedural aspects of consultation to NS Power, or to properly oversee this engagement process. They say NS Power was never advised in writing of what delegated duties it was to undertake. They further say the ANSMC and Acadia First Nation were unaware the Province was relying on their relationship building as if NS Power was a component of the Crown's consultation.

[119] With respect to the failure to respond to the Province's communications requesting Aboriginal rights and concerns be expressed, the ANSMC and Acadia First Nation raise the following concerns:

- Until the March 31, 2017, correspondence, providing notice the Application would be processed if no comments were received by April 14, 2017, there was no indication by the Province that there was a looming deadline;
- The thirty day deadline set out in the *Policy* is flexible, and a reasonable timeline must take account of First Nations' ability to respond;
- In fiscal 2016-2017, KMKNO staff, consisting of three full-time employees, one 80% time employee, and three other employees who could offer assistance, handled 315 new consultation requests, with a total of 451 active consultations for the fiscal year;
- Limited staffing and resources simply did not allow for a response within the stipulated time.

[120] The Board notes s. 12(a) of the TOR directs the Province to "…provide notification in writing to the Chief and Council of all thirteen (13) Mi'kmaq Bands and the Assembly…" when it wishes to initiate the formal process. In this case, the evidence shows the original December 22, 2016, notification was only sent to KMKNO (which arguably is also notice to the ANSMC, as the two entities share an address), and the two First Nations who no longer participate in the TOR process.

[121] While arguably this could have had some impact on any delay in responding to the consultation request, as no party raised this issue in argument, it may be that the practice has developed otherwise. In any event, the KMKNO's response of January 25,

2017, made it clear that for those First Nations under its representation umbrella, comments should flow to Ms. Gaudet.

[122] The Province submits that it would have been a relatively simple matter for the KMKNO to express its concerns with respect to timing and process in a letter or email for consideration by the Crown. However, absent such contact, the Province could not respond to concerns of which it was unaware.

[123] In order to determine whether adequate consultation has taken place, the Board would ordinarily have to assess the nature of the Aboriginal or treaty rights which will potentially be impacted, and if they are asserted rights, the strength of the claim, together with the extent of any potential adverse impact.

[124] In this case, the main areas addressed in the evidence and submissions relate to the impact on an existing Aboriginal fishery on the Tusket River, and the potential disturbance, and exposure to looting, of pre-contact archaeological sites.

[125] The Aboriginal fishery is an existing one, and it is clear that dewatering and fish ladder alterations, together with construction itself, could have significant impacts on this fishery.

[126] The number of known and potential archaeological sites are extensive. It is clear that as part of the consultation arising pursuant to Step 1 of the *Policy*, the possible disturbance of recognized historic or cultural sites forms part of an assessment relating to the level of consultation required.

[127] These cultural and historic sites can be tied, as gleaned from the ANSMC and Acadia First Nation submissions, to asserted rights of self-governance, ownership by the Mi'kmaq people of their own material culture and archaeological heritage, and

potential land title claims. The ANSMC and Acadia First Nation's position is that Nova Scotia lands were not ceded to the Province or Canada, by treaty or otherwise, as was the case with many First Nations who entered into more modern treaties. Evidence of occupation and use, and the nature of this occupation and use, could be valuable.

[128] The Board notes that there was no direct analysis in the parties' submissions with respect to the level of consultation required. In fact, this is one of the concerns raised by the ANSMC and Acadia First Nation in relation to the Province's initial screening, and subsequent consultation letter of December 22, 2016.

[129] The situation is not dissimilar to *Chippewas*, where neither the NEB, nor the Federal Court of Appeal, discussed the degree of consultation required. In that case, the Supreme Court of Canada still was able to address the issues holding the Crown's obligation had been met, even assuming a deep level of consultation.

[130] Given the potential negative impacts of the Project on the Aboriginal fishery, and the archaeological sites, as discussed in the evidence, the level of consultation would be relatively deep. An assessment of the potential impact, an opportunity to make submissions, and participation in the decision-making process, which could lead to negotiations and accommodations, would be required in the circumstances of this case.

[131] It is clear from the initial exchange of correspondence between the Province and KMKNO (December 22, 2016, and January 25, 2017) that it was this level of consultation which was contemplated. The Board notes the content of the initial letter seems to have followed the form set out in the *Policy*. Addressing the issue of inadequate screening at the front end, it would be difficult for the Province to determine the full extent of consultation required, absent input from the impacted First Nations. In the Board's

view, the difficulty which arose in this consultation did not solely relate to the initial screening. Rather, capacity and communication issues appear to have led to a misunderstanding as to whether and how the consultation should unfold.

[132] KMKNO's January 25, 2017, response to the Province's December 22, 2016, letter, made it clear that it wished to engage in consultation pursuant to the TOR, and needed to perform an impact assessment to determine any pertinent concerns.

[133] While the Province's subsequent communications asked if the KMKNO wished to raise any concerns, there was no further discussion on how the consultation would unfold. It was only the March 31, 2017, letter that imposed an actual deadline of April 14, 2017.

[134] The Board notes that Figure 7 titled Project Milestones, in NS Power's Application, indicated it was only anticipated the NSE and DFO permits would be issued in May of 2018. This was updated in response to Board IR-10. In fact, the NSE permit was obtained on May 15, 2017, and the DFO permit was obtained on July 31, 2017.

[135] This said, it appears from Attachment 4 to NS Power's response to SBA IR-18, that the working group was established in February, 2017.

[136] Attachment 4 to SBA IR-18 is described by NS Power as presentation boards which were given to the Acadia First Nation "for their use during Open House sessions and temporarily installed at the Southwest Nova Biosphere Reserve facility on the Yarmouth Waterfront."

[137] The presentation boards indicated a proposed timeline for the installation of the replacement bridge in mid-2017, and completion of 50% of the new main dam by 2017

Q4, fish ladder modification to be completed by early 2018, and concrete construction completed by September, 2018.

[138] KMKNO responded to the Province's consultation offer within the time frame contemplated by the December 22, 2016, letter. KMKNO anticipated it would have an opportunity to complete an internal assessment, and that a further process would follow.

[139] While KMKNO may have been aware of the anticipated timeline to commence work on the Project, given the ongoing discussions with NS Power, and as the thirty day timeframe is stated to be flexible in the *Policy*, and as additional materials were provided by the Province after the original December 22, 2016, correspondence; KMKNO cannot be faulted for not appreciating there was a looming deadline until the March 31, 2017, letter.

[140] Given the number of consultation matters which KMKNO was dealing with, it is apparent, from the submissions of ANSMC and Acadia First Nation, that KMKNO simply was not able to respond within the fourteen day deadline set out in the March 31, 2017, letter.

[141] While it is incumbent on First Nations to assert their rights in a timely manner, the Board agrees that the capacity of First Nations to respond to consultation requests is a relevant consideration, as are the public interest, or safety considerations, where immediate action may be required.

[142] In this case, where the Tusket Main Dam Refurbishment Project was initially identified in the 2016 ACE Plan, and the Application itself showed a proposed start date of 2018, immediate public interest or safety concerns are not apparent.

[143] The immediacy of the requested response time appears to have related primarily to NS Power's desire to initiate construction in 2017, rather than in 2018. While this is a relevant consideration, as it is in the public interest that governmental authorizations to project proponents be issued in a timely manner, in this particular case, it is not a determining factor.

[144] This said, it is difficult to fault the Province for having proceeded with the issuance of the Watercourse Alteration Permit, when KMKNO did not advise of any ongoing concerns, which would show an ongoing desire for consultation, when KMKNO did not advise the Province of its inability to adequately deal with the consultation request within the indicated timeframe.

[145] This is particularly the case, where the Province had NS Power's written description of its engagement process, and how First Nations' concerns were being addressed, which information was shared with KMKNO on February 13, 2017, without any indication these mitigation measures were insufficient to address any Aboriginal concerns KMKNO wished to raise.

[146] The process whereby procedural aspects of consultation are delegated to third party proponents is not entirely clear. The *Policy* says:

> While proponents do not have a duty to consult, they will be delegated certain procedural aspects of consultation, where appropriate. OAA and the lead department will inform third parties of their delegated responsibilities, in writing (see section on Roles and Responsibilities, "Project Proponents or Third Parties"). [Emphasis added]
>
> [Exhibit N-7, Schedule B, p. 20]

[147] The section on "Project Proponents or Third Parties", in the "Rules and Responsibilities" part of the *Policy*, says, in part:

> The duty to consult always belongs to the provincial and/or federal Crown, and the Crown cannot delegate the duty to consult to a third party. Courts have been clear, however, that procedural aspects of consultation may be delegated to proponents or third parties. This is because it is the proponent that knows the details of their project best and will be best

> suited to mitigate or avoid any potential adverse impacts. Unmitigated potential impacts to Mi'kmaw interests can delay decision-making and other related processes. Establishing positive relationships and regular communications with the Mi'kmaq of Nova Scotia early in the project development process is beneficial to all parties involved and can help build better projects.
>
> Procedural aspects of consultation, such as information exchange, conducting studies, and communication and relationship building between proponents and communities (including the Mi'kmaq of Nova Scotia), is commonly called "engagement." Proponents have an opportunity to engage the Mi'kmaq of Nova Scotia early and throughout the development of their projects. In Nova Scotia, this has resulted in partnership opportunities with the Mi'kmaq, improved and more efficient decision making, and project improvements that benefit all Nova Scotians.
>
> Proponents have asked governments to provide clear instructions regarding the delegation of procedural aspects and their role in Crown consultation. Nova Scotia has developed a *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* that outlines third-party responsibilities in consultation, and lays out a step-by-step process for proponents to follow. It is the proponents' responsibility to be informed and carry out those tasks. Government of Nova Scotia departments should ensure this document is accessible to proponents seeking permits and authorizations. OAA can help proponents to develop an engagement plan with the Mi'kmaq of Nova Scotia; however, the lead department will be the main contact for the proponent throughout the consultation process. [Emphasis added]
>
> [Exhibit N-7, Schedule B, p. 13]

[148] The above section of the *Policy* then refers the reader to the published *Proponents' Guide*, which says:

> The SCC also stated that proponents have no legal duty to consult with Aboriginal peoples. However, the SCC said that prior to or concurrent with Crown consultation, the Province may delegate certain procedural aspects of consultation to proponents. This document outlines how the Province may delegate the procedural aspects of consultation to the proponent, and how the proponent can play a proactive role in engaging the Mi'kmaq throughout the approval process. In instances where there is no Crown duty to consult, proponents may still wish to engage the Mi'kmaq to share information about their project.
>
> [Exhibit N-7, Schedule 3, p. 2]

[149] One of the requirements of the engagement process in the *Proponents' Guide* is that the proponent document the engagement process, share the documentation with the applicable government departments, and provide a summary report to government.

[150] It is not clear whether the *Guidelines* envisage a written delegation from the Province each time it intends to rely on project engagement, as the ANSMC and Acadia

First Nation argue, or whether the provisions above, read together, mean that the delegation in writing comes from the obligations set out in the *Proponents' Guide.*

[151] The Board considers, from a transparency and oversight point of view, that at an early stage, the Province, the proponent and the impacted First Nation must have a common understanding of what has been delegated in a particular consultation, and what gaps need to be addressed outside the engagement process. This would alleviate potential confusion.

[152] This concept is similar to the situation in *Chippewas* and *Clyde River*, where the Supreme Court of Canada indicated if consultation was to be delegated to a regulatory body, the impacted First Nation should be notified as soon as possible.

[153] This said, *Haida Nation* makes it clear that the Crown cannot delegate the ultimate responsibility for consultation to a third party proponent. This would ordinarily mean a measure of Crown coordination, and this is what is envisaged by the *Policy*.

[154] In any event, while NS Power submitted a summary of its Aboriginal engagement to the Province, it appears there was no coordinated process, directly involving the Province, NS Power and KMKNO.

[155] The Board is therefore left with a situation where:

- NS Power attempted to fulfill its engagement obligations as a third party proponent by providing impacted First Nations with project information; listened to First Nations' concerns throughout a meaningful engagement process; and attempted to mitigate those concerns in a cooperative manner, with input from the KMKNO and Acadia First Nation;
- NS Power provided a summary of its engagement activities to the Province;

- The Province initiated the formal TOR consultation process, and, in the absence of any indication to the contrary, appears to have assumed Aboriginal concerns had been addressed to the impacted First Nations satisfactorily;
- The KMKNO desired to engage in a formal TOR consultation process with the Province, on behalf of the ANSMC, and the Band Councils it represents, but did not appreciate to what extent its ongoing engagement with NS Power would be relied upon by the Province, and was unable to respond in relation to its concerns, due to capacity issues, within the deadlines requested by the Province.

[156] There is no evidence any party was acting in bad faith. There is no evidence the failure to respond by KMKNO was in any way an attempt to delay or frustrate the consultation process. Rather, it appears to have been a capacity issue.

[157] The Board is not a reviewing court, but a tribunal which, in this case, will make a final determination as to whether or not the Tusket Main Dam Refurbishment Project should be approved.

[158] The undesirable result of the KMKNO's inability to respond discussed above is that the formal TOR consultation process did not occur, in that the KMKNO did not have the opportunity to fully engage with the Province, and become involved in direct consultation with the Province as a result of that response. In the Board's view, it is not too late to address this issue and complete the TOR process. In fact, it is required if the Board is to fulfill its constitutional mandate.

[159] Crown consultation is an ongoing responsibility. It may be impacted as additional information is acquired. In this matter, the Board has before it considerably more information about the Project, its design, and potential alternative scenarios, such

as complete decommissioning of the hydro system. Each of these potential alternatives would potentially have a different impact on the Mi'kmaq of Nova Scotia, and the record does not show that any of these alternatives were discussed with the First Nations.

[160] While the Board cannot approve any project which is not placed before it, these potential alternatives, which, it is acknowledged, NS Power said are not in the best interest of ratepayers, may assist in informing continuing consultation.

[161] Attempting to assign blame in the context of this proceeding would also not assist in achieving the goal of reconciliation. All parties appear to have had a genuine desire to undertake meaningful consultation.

[162] It would be most unfortunate if the comprehensive engagement performed by NS Power did not result in a consultation process with which the Province, NS Power and the Mi'kmaq of Nova Scotia were not mutually satisfied. This would not appear to be the best avenue for achieving reconciliation objectives.

[163] The capacity of impacted First Nations to respond is a relevant issue, as identified in *Clyde River*. The objective of reconciliation is not advanced if the ANSMC and Acadia First Nation, through the KMKNO, are unable to complete the full consultation contemplated by the initial exchange of correspondence with the Province, because KMKNO was overburdened when this consultation request was made.

[164] The ANSMC and Acadia First Nation expressed a continuing desire to complete the TOR consultation process, and have been timely in responses to the Board's process.

[165] Based on all the foregoing considerations, the Board finds that the Crown has not adequately met its duty to consult obligations. In order to meet these obligations, as outlined in *Chippewas* and *Clyde* River, a further process is required.

V REMEDY

[166] The Board generally would have two potential remedies in a situation where the Crown's duty to consult has not been completed:

i) The Board could adjourn the proceedings until the duty to consult had been fulfilled;

ii) The Board could approve a project and impose terms and conditions, within its jurisdiction, to alleviate First Nations' concerns which have not yet been addressed.

[167] In this case, the Board finds the appropriate remedy is, as submitted by ANSMC and Acadia First Nation, to adjourn the proceedings pursuant to s. 20 of the *URB Act* and provide the parties with a further opportunity to complete consultations.

[168] At page 4 of its February 14, 2018, submission, the ANSMC and Acadia First Nation have outlined a potential manner of completing the consultation process, which would utilize the information gathering and engagement which has occurred to date, and attempt to fill any gaps.

[169] While this proposal appears a sensible way to proceed, as the Board does not have the jurisdiction to conduct the consultation, and may be required to further adjudicate on the adequacy of such consultation in the future, it will defer comment on this issue, and not attempt to impose any particular process at this stage.

VI CONCLUSION

[170] The Board has determined it has the jurisdiction, and the corresponding obligation, to consider whether the Crown's duty to consult has been fulfilled in relation to the Tusket Main Dam Refurbishment Project.

[171] Due to internal capacity issues, KMKNO was unable to respond to the Province's requests to set out its comments or concerns about the proposed consultation and the Project's potential impact on asserted Mi'kmaq Aboriginal or Treaty rights within the time frame requested.

[172] The failure to respond resulted in KMKNO not being able to avail itself of the full TOR formal process.

[173] In the circumstances of this case, in order to afford KMKNO the opportunity to engage in a meaningful consultation pursuant to the TOR, further consultation is required.

[174] The Board does not have the jurisdiction to void any permits which have been issued by the Province, or DFO.

[175] The Board will retain jurisdiction in this matter. The parties are requested to report back to the Board within three months to advise of the status of the consultation.

[176] Any decision on the Application will be held in abeyance until the results of the consultation are known.

[177] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 7th day of August, 2018.

Steven M. Murphy

Roberta J. Clarke

Richard J. Melanson