ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Submission of Whitefish Lake First Nation – December 7, 1999
Submission of Tri Link Resources Ltd. – December 23, 1999
Submission of the Director – December 23, 1999
Reply of the Whitefish Lake First Nation – January 7, 2000
Date of Decision: September 28, 2000

IN THE MATTER OF section 92.1 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3;

- and -

IN THE MATTER OF a request for reconsideration filed by the Whitefish Lake First Nation with respect to a Decision issued by the Environmental Appeal Board on November 19, 1999 regarding an appeal filed by Whitefish Lake First Nation with respect to Amending Approval 45-00-05 issued on February 5, 1999 to Tri Link Resources Ltd. by the Director, Northwest Boreal Region, Alberta Environment.

Cite as: Whitefish Lake First Nation Request for Reconsideration, re: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment*, re: *Tri Link Resources Ltd.*

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I. BACKGROUND

[1] On November 19, 1999 the Board dismissed an appeal involving a claim to aboriginal and treaty rights by the Whitefish Lake First Nation (the "Appellants") holding that the matter was not properly before the Board.[1] On December 7, 1999 the Whitefish Lake First Nation asked the Board to reconsider its decision pursuant to section 92.1 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act").

[2] The Whitefish Lake First Nation base their request for reconsideration on a recent decision of the British Columbia Court of Appeal - *Halfway River First Nation* v. *British Columbia (Minister of Forests)* [1999] B.C.J. No. 1880. The *Halfway River* decision is said to provide authority for the proposition that the Board was wrong when the Board said at paragraph [29] of the original decision:

> Thus, the Director would have to consider the potential impacts of his approval decision on those claims and accompanying uses, once they were brought to his attention in a Statement of Concern, *if the Alberta government recognized the validity of the First Nation's legal claims*. However, the Board is unaware of any law requiring or allowing the Director himself to decide for the Alberta government whether those claims are valid. [Emphasis in original.]

[3] The Board requested submissions from the Respondents in this appeal in regards to the request for reconsideration and received these submissions along with a reply from the Whitefish Lake First Nation.[2]

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[1] *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment*, re: *Tri Link Ltd.*, EAB Appeal No. 99-009-D.

[2] Submission of Whitefish Lake First Nation received December 7, 1999. Submission of Tri Link Resources Ltd. received December 23, 1999. Submission of the Director received December 23, 1999. Reply of the Whitefish Lake First Nation received January 7, 2000.

[4] The Respondent Director, Northwest Boreal Region, Environmental Service, Alberta Environment (the "Director") submits that the Board should reject the request for reconsideration because:

(a) Whitefish Lake First Nation has not provided any exceptional, compelling circumstances in this case to warrant a reconsideration of the Board's decision; and

(b) the Board was correct that the resolution of this serious legal dispute ought not to be resolved before it.

[5] The Respondent Tri Link Resources Ltd. ("Tri Link") argues that the request for reconsideration raises no new facts or legal doctrine. It suggests the Appellants are simply unhappy with the result of the first decision and are now rearguing the case. Tri Link highlights three points justifying the original decision:

(a) it would be improper for the Director (and, therefore, the Board) to determine, on behalf of the Government of Alberta, the validity of the claims asserted by the Whitefish Lake First Nation;

(b) the Board does not have expertise to make such determinations; and

(c) the ramifications of such claims extend beyond the environmental field.

Tri Link goes on in its submission to suggest that the dissenting judgment of Justice Southin in the *Halfway River* case supports the Board's original conclusion.

[6] Section 92.1 of the Act gives the Board the following power to reconsider its decisions. Section 92.1 provides:

> Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendations or ruling made by it.

While much can be said about the circumstances when it may be appropriate to exercise this power, it is sufficient for this case to focus on two factors.

[7] First, the power to reconsider is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.[3] The reconsideration power is an exception to the general rule that decisions are intended to be final. It is not to be used just to reargue the same issues a second time. Second, a substantial error of law may be a sufficient ground for reconsideration. Such an error may sometimes be revealed by new decisions from the Courts. Generally, a party's failure to cite an existing authority will not be a ground to reopen a matter, but new decisions not reasonably available for the original proceedings can provide an exception. To justify the reconsideration the decision in question must demonstrate an error of law that, once corrected, would change the original result.

[8] In this regard, it is important to note that the *Halfway River* decision was issued on August 12, 1999. The submissions from the parties that form the basis of the original written decision were received by the Board on October 1, 1999, October 13, 1999 and October 22, 1999. The *Halfway River* decision was discussed in these submissions. The Board notes that the final submission from the Whitefish Lake First Nations' counsel, received by the Board on October 22, 1999, advises that "… we confirm we are not submitting a reply to the submissions made on behalf of the Director and Tri Link because, in our view no new issues were raised in those submissions."

II. THE ORIGINAL BOARD DECISION

[9] While the Board's original decision speaks for itself, a brief summary of the matters before the Board and the Board's disposition of the various arguments will help to put this reconsideration request in context. Tri Link held an Approval to operate its Seal Gas Processing Facility, a sour gas plant, located in a remote, mixed forest and muskeg region in the north-central part of Alberta. Tri Link wanted to add capacity to this facility by adding an additional "booster

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[3] *Bernice Kozdrowski* v. *Director, Chemicals Assessment and Management, Alberta Environmental Protection*, EAB Appeal No. 96-059.

compressor". One of the effects of adding this additional "booster compressor" would be an increase in the plant's overall air emissions of nitrogen oxides (NO_x) by over 20 percent.

[10] To build this additional "booster compressor" Tri Link needed an Approval from the Director under Division 2 of Part 2 of the Act. This is because sour gas processing plants are activities requiring an Approval.[4] Section 64 of the Act prohibits pollution-inducing changes to any approved activities, except pursuant to a new Approval or amended Approval issued by the Director. Section 84(1)(a) of the Act provides a right of appeal to the Environmental Appeal Board from the Director's decision to issue an Approval or the Director's decision to issue an amended Approval.

[11] The Whitefish Lake First Nation filed such an appeal but on quite specific grounds. The Whitefish Lake First Nation claimed that their traditional territories include the area in which the Seal Plant is located, and they claimed to have "treaty, constitutional and aboriginal rights" to those territories, including the right to "hunt, trap, fish, gather plants and hold sacred ceremonies." Paragraph [4] of the original decision described the appeal grounds more specifically:

> In its Notice of Appeal, the First Nation asserts that there is a "potential" that its aboriginal rights will be impaired by air pollution from the Seal plant, and by other, unspecified, environmental impacts on the flora and fauna of the area. The Notice further states that, given these "potential" effects, the Director had a duty to "consult" with the First Nation prior to deciding whether to issue the amended Approval, for purposes of: (1) obtaining information on the First Nation's uses of the potentially affected areas and how those uses might be impaired; and, (2) "advising" the First Nation "of the potential for infringement of its rights." The Notice of Appeal then claims that the Director failed to fulfill these consultation obligations and, as a result, the "amendment" should be withdrawn.

[12] The focus of the appeal is important. The Whitefish Lake First Nation might simply have written to the Director saying: "We are persons who will be directly affected by the extra pollution this compressor will generate and we ask you to refuse to issue the Approval." Once the

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[4] See sections 58 and 59 of the Act, and Schedule 1, Division 2, Part 8, section (h)(iv) of the Activities Designation Regulation, A.R. 211/96.

Approval was issued, the Whitefish Lake First Nation could have appealed to the Board saying: "We are persons affected by this Approval that will pollute the land we use. The Director should not have issued the Approval so please recommend to the Minister that it be reversed." Instead, the First Nation focused quite specifically on the right to be consulted by the Director.

[13] As set out in paragraphs [5] to [7] of the original decision of the Board, what the Whitefish Lake First Nation sought to establish was that they had a treaty right involving the land affected by this amended Approval, and that as a result the Director had a duty to consult with it over the requested amendment. The Board categorized the appeal as a "consultation claim" in paragraph [7] saying:

> The Board notes that the relationship between the First Nation's two claims – failure to adequately consider environmental impacts and failure to consult – is not entirely clear. However, the Board assumes for the purposes of this Decision that the First Nation intends the former claim to be dependent on the latter, rather than an independent claim - *i.e.*, that the Director's alleged failure to adequately consider the plant's environmental impacts results directly from his alleged failure to consult with the First Nation prior to issuing the amended Approval.

The Board notes that the Whitefish Lake First Nation takes no issue with this proposition in its request for reconsideration. The Board also notes, as identified in the submissions currently before the Board from both the Appellants and the Director, that the "consultation claim" is one of the issues raised in the case of *Athabasca Tribal Council et al.* v. *Minister of Environmental Protection et al.*, Court of Queen's Bench Action No. 9901-09172.[5]

[14] In response to the appeal, the Director asked the Board to dismiss the appeal pursuant

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[5] It is also important to recall that this consultation claim is aimed at the Director and not at the Board. Specifically, as stated in footnote 13 of the Board's original decision:

> For clarity, the Board emphasizes that the First Nation's consultation claim is aimed at the Director. The First Nation does not claim that the Environmental Appeal Board itself has a consultation duty above and beyond its normal hearing procedures or that the Board has any other special fiduciary obligations to the First Nation.

to section 87(5)(i.2). As the original decision recorded at paragraph [8] the Board said:

> The Director's letter argues that the appeal is "not properly before" the Board, in essence, because the consultation issues which it raises are issues of constitutional law which have little, if anything, to do with the merits of the "substance" of the amended Approval.

[15] The Board's analysis led it to a series of conclusions about the appeal and about the proper role of the Board and, in part, the Director under the Act. At paragraphs [15] to [23] the Board found that section 84(1) lists the matters that could come before the Board. As stated in paragraph [17], this section "… places no express limit on the actual grounds which the Board can consider in hearing appeals of those decisions." The Board has a wide discretion, due to sections 87(2) and 87(5)(a)(i.2), in choosing which matters to consider. The words "... as provided for in this Act..." do not limit the Board's authority to decide matters before the Board. However, as stated in paragraph [21], "... the Board agrees with the Director in the sense that the only issues which the Board can reasonably determine to be 'properly before' it are those which relate to the Act's broad environmental protection objective."

[16] The Board summarized its conclusion at paragraph [23] as follows:

> …[T]he Board concludes that the widest scope of appeal grounds which are "properly" before it are those factors: (1) which relate to the environmental, "public interest" objectives of the Act; *and*, (2) which the Director considered, or should have considered, in making the decision that has been appealed to the Board. The Board stresses, however, that the scope of appeal grounds defined by these factors represents the *outer limit* of permissible appeal grounds. The "properly before it" standard implicitly gives the Board wide discretion to choose a *narrower* scope of appeal grounds in any particular Appeal. [Emphasis in original.]

[17] The Board then posed three questions in respect to the Whitefish Lake First Nation's grounds of appeal:

> (a) Does the First Nation's claim relate to the environmental, "public interest" objectives of the Act?

(b) Did the Director consider, or should he have considered the First Nation's Consultation claim?

(c) Are there other, discretionary factors weighing against the Board's consideration of the First Nation's consultation claim?

[18] The answer to question (a) was, in paragraph [28], that "... the First Nation's claim appears to be grounded in environmental concerns which relate directly to the Act's environmental, 'public interest' objectives."

[19] The answer to question (b) was a qualified "yes." The Director's consideration is bounded only by the environmental "public interest" objectives specified in section 2 of the Act. As stated in paragraph [29], because Whitefish Lake First Nation's concerns were connected to the Act's objectives

> ... the Director would have to consider the potential impacts of his approval decision on those claims and accompanying uses, once they were brought to his attention in a Statement of Concern, if the Alberta government recognized the validity of the First Nation's legal claims. However, the Board is unaware of any law requiring or allowing the Director himself to decide for the Alberta government whether those claims are valid.

This is the passage, and the legal conclusion, to which the Whitefish Lake First Nation now objects, and asks to be reconsidered.

[20] The Board quite specifically said the Director should consider the issue of Whitefish Lake First Nation's concerns. The question was how far should the Director go. First, he should inquire. In paragraph [29] the Board said:

> Thus, in deciding whether to issue or amend an approval in the face of potential environmental impacts on legal claims and accompanying uses by a First Nation, the Director should first obtain the Alberta government's position on the validity of those claims and then factor that position into his discretionary consideration of the "public

interest" in light of the Act's objectives in section 2.

The Director did so and, as stated in paragraph [30], "... found that the government disputed their validity as a matter of geographic uncertainty." In the face of that answer, the Board concluded in paragraph [31]:

> ... [I]t would not have been appropriate for the Director, within the Department of Environment, to decide the validity of the First Nation's claimed aboriginal rights. And because the scope of factors which the Board can consider is a function of the scope of factors which the Director can consider, it would likewise be inappropriate for the Board to decide the validity of the First Nation's claimed aboriginal rights. Thus, in the words of section 87 of the Act, the validity of those rights is not "properly before" the Board.

It is this conclusion that is said to conflict with the law set out in the decision in *Halfway River*.

[21] Before leaving the Board's original decision, it is important to note the answer to question (c). In paragraph [33] the Board concluded:

> Based on this discretion, [the discretion to decide what is properly before it] the Board concludes that the First Nation's aboriginal law claim is not "properly before" the Board for additional reasons related to expertise and division of powers. As to the issue of expertise, whatever expertise and background the Board members have, it does not include the training to decide the range of historical factual issues, and common law, treaty, and constitutional legal issues which arise in determinations of aboriginal law claims.

III. THE *HALFWAY RIVER* DECISION

[22] The *Halfway River* decision involved a judicial review motion to quash a decision made by a District Manager in the British Columbia Forestry Service. In the course of his duties, the Manager had approved an application for a cutting permit made by Canadian Forest Products Ltd. ("Canfor"). Canfor wanted to engage in logging on Crown land and needed the permit to do so. The land in question was next to reserve lands granted to the Halfway River First Nation.

[23] The Halfway River First Nation are descendants of the Beaver People who signed Treaty 8 with the Crown in 1900. The First Nation claimed a traditional right to hunt in the area covered by the cutting permit. They were also in the process of pursuing a Treaty Land Entitlement Claim and said that the lands they seek through that claim might involve the area covered by the cutting permit.

[24] Based on their claim, the Halfway River First Nation mounted a series of attacks on the validity of the permit, which the British Columbia Court of Appeal summarized at paragraph [4] of their decision:

> Among many other arguments advanced the petitioners said that issuance of the permit, and the logging it will allow, infringes their hunting rights under the Treaty, and that such infringement cannot be justified by the Crown. The petitioners also claimed that C.P. 212 was granted by the District Manager in breach of his administrative law duty of fairness, in that he fettered his discretion by applying government policy, prejudged Canfor's right to have the permit issued, failed to give adequate notice of his intention to decide the question, and failed to provide an adequate opportunity for them to be heard. The petitioners also said the District Manager reached a patently unreasonable decision in deciding factual issues on an incomplete evidentiary base.

[25] The three member Court split on the issues. Justice Finch, concurred in by Justice Huddart, found, at paragraph [8], that "... the only lack of procedural fairness in the decision-making process of the District Manager was the failure to provide to the petitioners an opportunity to be heard." Also, "… that the issuance of the cutting permit infringed the petitioners' treaty right to hunt, [and] that the Crown has failed to show that the infringement was justified...".

[26] There are two issues involved in *Halfway River* that are significant to the Whitefish Lake First Nation's request for reconsideration. The first is the way that the Court viewed the Halfway River First Nation's rights under Treaty 8 and the impact that the logging permit might have

on those rights. The second is the question of who should decide the extent of the Halfway River First Nation's rights and the justification for any infringement on those rights. This second question requires a look at the role assigned by the legislation in that case to the District Manager so that we can then compare it to the role assigned to the Director in the case at hand.

[27] It should also be noted that there is some difficulty in applying the Halfway River decision to the Alberta context. As stated in the December 23, 1999 submission of the Director:

> The existence of rights claimed in another jurisdictions is not dispositive of any claim of those rights in this province. The historical facts, the legal regimes and the actions of the Crown in one province are not necessarily identical or similar in other provinces.

A review of the various constitutional documents underpinning the entrance of Alberta and British Columbia into confederation supports this statement.

1. The Nature of the Right Involved

[28] As noted above, the Halfway River First Nation advanced a claim to hunt and fish in the area in question as well as a claim to the land. Treaty 8 is the same treaty involved in this case. However, since the land in the *Halfway River* case is in British Columbia, issues raised by the Alberta *Natural Resources Transfer Agreement*[6] do not apply. Justice Finch described the Crown's position as follows in paragraph [10]:

> On this appeal, counsel for the Ministry of Forests told the Court that the British Columbia government acknowledged that it was bound by the provision of Treaty 8 concerning the petitioner's rights to hunt and fish, but made no similar concession in respect of the petitioner's right to lands under the treaty.

[29] The part of Treaty 8 dealing with the right to hunt, fish and trap reads:

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[6] *Natural Resources Transfer Agreement*, confirmed by the *Constitution Act, 1930*.

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[7]

The three judges each took a different view of how this provision was affected by Canfor's logging permit. In particular they differed about whether the logging involved a "taking-up" of the land, or simply a concurrent use of that land.

[30] Justice Finch's position is set out between paragraphs [134] and [142] of his reasons.

> [134] ... [T]he Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *R.* v. *Sundown* [1999] S.C.J. No. 13 at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation" and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s. 35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.
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> [135] Fourth, the enactment of s. 35 in 1982 has improved the position of the petitioners. Their right to hunt, and other treaty rights, now have constitutional status. They are therefore protected by the supreme law of Canada, and those rights cannot be infringed or restricted other than in conformity with constitutional norms.
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> ...
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> [137] The effect of the decision to issue C.P. 212, and the reasonableness of the District Manager's decision, must be viewed in the context of the competing rights created by Treaty 8, namely the Indians' right to hunt, and the government's right to take up land for lumbering. ...

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[7] *Halfway River*, paragraph [2].

> [138] In my view the District Manager effectively acknowledged that C.P. 212 would affect the petitioners' hunting rights in some way. Given the fiduciary nature of the relationship between government and Indians, and the constitutional protection afforded by s. 35 over the treaty right to hunt, it seems to me that the interference contemplated by C.P. 212 amounts to an infringement of the petitioners' right to hunt. The granting of C.P. 212 was the de facto assertion of the government's right to take up land, a right that by its very nature limited or interfered with the right to hunt.
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> ...
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> [142] But despite these disagreements with the reasons of the learned chambers judge, I do not think she erred in concluding that approval of C.P. 212 constituted a prima facie infringement of the Treaty 8 right to hunt because the proposed activity would limit or impair in some degree the exercise of that right.

[31] Justice Huddart, while concurring in Justice Finch's disposition of the case, "parted company" with him on the application of the principles in *Sparrow* to the case.[8] In her view, at paragraph [171], Treaty 8 contemplated a shared use of land. The case did not involve "visible incompatible uses" such as would give rise to a "geographical limitation" on the right to hunt. The District manager was not "taking up" the land. She went on to hold, at paragraph [173]:

> I do not think the District Manager for a moment thought he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or to extinguish the hunting right over a particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use. There was evidence before the District Manager to support a finding that the treaty right to hunt and Canfor's tree harvesting were compatible uses. That finding must underpin his conclusion that C.P. 212 would not infringe the treaty right to hunt.

[32] Justice Huddart then concluded in paragraph [175] that, in order to do his job of allocating the use of land between "competing, perhaps conflicting but ultimately compatible uses

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[8] *Halfway River,* paragraph [170]. *R.* v. *Sparrow* [1990] 1 S.C.R. 1075.

among which the land could be shared," the District Manager needed to consult with the Halfway River First Nation. This was part of his obligation to perform his task in a constitutional manner. She concluded at paragraph [180]:

> It is only upon ascertaining the full scope of the right that an administrative decision-maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed.

[33] The difference between Justice Finch's approach and that of Justice Huddart is summarized at paragraph [186]:

> My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either *Sparrow* or *Badger* to support that view. As my colleague notes at para. 124, in *Sparrow* the court stated the question as "whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest." In *Badger*, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode an important aspect of the Indian hunting rights." In *Gladstone, supra*., Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the existing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.

[34] Justice Southin, in her dissenting reasons also expressly disagreed with Justice Finch's view that any interference with the right to hunt is a *prima facie* infringement of the First Nations' treaty rights as protected by section 35 of the *Constitution Act, 1982*.[9] In her view, the question of an alleged breach of the treaty protection had to be dealt with on a far broader basis taking into account the Crown's conduct in infringing the right to hunt since the commitment was made in 1900.

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[9] *Halfway River,* paragraphs [212] to [214].

2. Who Decides

[35] The Justices in *Halfway River* each took somewhat different views of who should decide the issues raised by the First Nation in their objection to the permit. Justice Finch began by reviewing the legislation setting out the District Manager's authority to act.[10] The right to harvest timber could only be acquired by a grant from the Crown and the District Manager had the authority to make that grant, expressly "on behalf of the Crown." His role was actually to dispense the right, not simply to regulate an otherwise private activity. The legislation sets out a broad obligation to consult, and consider all comments received. The legislation said the opportunity for review and comment "… will be only be adequate ... [if it is] ... commensurate with the nature and extent of that person's interest in the area under the plan and any right that person may have to use the area...".[11]

[36] In *Halfway River*, the legislation in question included a Forestry Practices Code that included within its preamble:

> AND WHEREAS SUSTAINABLE USE INCLUDES
>
> ...
>
> (c) balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations.[12]

[37] Justice Finch noted, at paragraph [34]:

> I observe in passing that the District Manager's discretion to determine the adequacy of the opportunity to "review and comment" does not extend to that consultation required by the jurisprudence concerning the Crown's obligation to justify infringement of aboriginal or treaty rights.

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[10] *Ibid*., paragraphs [23] to [36].

[11] *Ibid*., paragraph [33].

[12] *Ibid*., paragraph [28].

[38] Without saying so directly, Justice Finch quite clearly saw making a decision on the impact of the permit on Halfway River First Nation's treaty rights as part of the job given to the District Manager under the legislation. The Crown in British Columbia had, of course, conceded the existence of the treaty right to hunt, and the other claim was, at that point, unallocated geographically. Justice Finch said at paragraph [55]:

> In considering whether to issue C.P. 212, the District Manager must be taken to have been aware of his *fiduciary duty to the petitioners*, as an agent of the Crown, of the right the petitioners asserted under Treaty 8, and of the possibility that issuance of the permit might constitute an infringement of that right. Of necessity his decision included a ruling on legal and constitutional rights. On these matters his decision is owed no deference by the courts, and is to be judged on the standard of correctness. [Emphasis added.]

[39] Justice Finch viewed judicial review as the appropriate means of challenging the District Manager's action (there apparently being no appeal process), although he recognized that the reviewing Court could have directed a trial of the issue if appropriate (an option not open to this Board). He concluded, at paragraph [57]:

> ... [I]t would be unfair to all concerned to refuse now to decide the treaty issues dealt with by the chambers judge, *and which the District Manager could not avoid confronting.* [Emphasis added.]

[40] While the District Manager "could not avoid confronting the issue" apparently because it was part of his job and arose out of his fiduciary duty, he had no expertise to deal with it and was afforded no curial difference once he did so. At paragraph [85]:

> With respect, interpreting the treaty, deciding on the scope and interplay of the rights granted by it to both the petitioners and the Crown, and determining whether the petitioners' rights under the treaty were infringed, are all questions of law, although the last question may be one of mixed fact and law. Even though he has a fiduciary duty, the District Manager had no special expertise in deciding any of these issues, and as I understand the legislation, he has no authority to decide questions of general law such as these. To the extent that his decisions involve legal components in the

> absence of any preclusive clause, they are reviewable on the standard of correctness….

[41] In Justice Huddart's view, the District Manager's duties required that he recognize and affirm Halfway River's right to hunt. She said at paragraph [178]:

> This constitutional obligation required him to interpret the *Forest Act* and the *Forest Practices Code* so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation.

And at paragraph [177]:

> The District Manager can no more follow a provision of a statute, regulation, or policy of the Ministry of Forestry in such a way as to offend the *Constitution* than he could to offend the *Criminal Code* or the *Offence Act*.

[42] Justice Southin's dissent (although she and Justice Huddart are in the majority on the Sparrow analysis) takes quite a different view on how the treaty rights question should be dealt with. At paragraph [201] she stated:

> I would allow the appeal on the simple footing that the central issue in this case concerning the existence or non-existence of rights in the Halfway River First Nation under s. 35 of the *Constitution Act, 1982,* ought to have been dealt with by action.

[43] More directly, Justice Southin felt this type of issue is inappropriate to be dealt with by a judicial review attack on a decision by a statutory delegate. To do so was not only unfair to the issues and those involved, but to the third parties caught up in such processes. In paragraphs [229] and [230] she stated:

> With respect, to create a system in which those appointed to administrative positions under the *Forest Act* or any other statute of British Columbia regulating Crown land in the Peace River are expected to consult "to ascertain the nature and scope of the treaty right at issue" and to determine "whether the proposed use is compatible with the treaty right" is to place on our civil servants a burden they should not have to bear - a patchwork quilt of decision making by persons appointed not for their skill in legal

> questions but for their skill in forestry, mining, oil and gas, and agriculture.
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> A District Manager under the *Forest Act* is no more qualified to decide a legal issue arising under this treaty than my colleagues and I are qualified to decide how much timber Canfor should be permitted or required to cut in any one year in order to conform to the terms of its tenure.

[44] As can be seen from this review there are several important parallels between this Board's original *Whitefish Lake* decision and *Halfway River*. However, there are also some important factual and statutory differences, and the judgments reviewed above contain differences over some very important questions of law and policy.

IV. THE ROLE OF THE DIRECTOR

[45] It is clear from the majority decisions in *Halfway River* and from the legislative framework set out that the District Manager's legislative job description differs materially from that assigned to the Director in this case. First, the District Manager is the agent of the Crown with direct statutory authority for granting the "competing rights" that might diminish the right to hunt. Second, he has a clear statutory obligation to consult. Third, the preamble to the Forestry Code makes it clear that the Halfway River First Nations' rights are one of the sets of rights he has to consult over and to weigh. The legislation has quite clearly given all these tasks expressly to the District Manager.

[46] Under the *Environmental Protection and Enhancement Act*, the Director's responsibilities are less express and less direct. His task involves approving an amendment to an Approval designed in part to expand, but also to limit, the polluting effect of a plant already in existence and already operating under an Approval. While he had a duty to give notice and receive statements of concern, the process is much less elaborate. He is not expressly given the task of ascertaining or balancing rights as the Crown's agent.

[47] As the *Halfway River* decision confirms, the rights asserted by the Whitefish Lake First Nation are constitutional in nature as a result of section 35 of the *Constitution Act, 1982*.

However, unlike the situation in British Columbia, the existence and scope of those rights is not conceded. This is the Alberta government's position, apparently adopted by an official of the Crown more directly involved in such matters than the Director. What is the Director to do when faced with such a question?

[48] The position of the Whitefish Lake First Nation is that the Director must proceed, in the face of the Crown's position, to ascertain the existence and scope of those rights, consult with the First Nation and, only once that is done, tell the applicant whether it can extend its compressor station. Essentially, Whitefish Lake First Nation is saying, as a designated decision-maker, the Director has no option but to decide on these issues notwithstanding the Province's position and notwithstanding the fact that the same issue is conceded to be before the Courts in Alberta in law suits involving the Crown. The parties agree in their submissions that the issues identified by the Whitefish Lake First Nation are currently before the Court in the *Athabasca Tribal Council* case.

[49] While this question involves a special form of constitutional matter, it is not the first time the question has arisen about how and where constitutional questions should get resolved when they are raised in an issue properly before a statutory delegate. And the position taken by Whitefish Lake First Nation does raise a constitutional question. If the Director is to consult, as requested, it is to ascertain and weigh these rights and, potentially, refuse or perhaps withdraw a permit because of that right, even though it might otherwise be justified under the delegate's home statute, in this case the *Environmental Protection and Enhancement Act*.

[50] In addressing the analogous question of an ability to decide Charter issues, the Supreme Court has said in *Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854:

> [46] … There is no doubt that the power to consider questions of law can be bestowed on an administrative tribunal either explicitly or implicitly by the legislature. All the parties agree that there is no provision in the Act that expressly confers on the Commission a general power to consider questions of law. There

being no such express authority, it becomes necessary to determine whether Parliament has granted it implicit jurisdiction to consider such questions. As stated in *Cuddy Chicks*, *supra.*, at p. 14:

> [J]urisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a Charter issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought.

[47] In considering whether a tribunal has jurisdiction over the parties, the subject matter before it, and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. These practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature. At the same time there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, though such concerns can never supplant the intention of the legislature.

[51] In *Bell* it must be recognized that every statutory delegate has some scope to decide legal issues:

> [55] Notwithstanding the general scheme of the Act, there are specific provisions, notably ss. 27, 40 and 41, that both the appellants and the Commission fastened upon as indicating an intent by Parliament to have the Commission determine questions of law. However, these sections amount to no more than the Commission has power to interpret and apply its enabling statute. It does not follow that it then has a jurisdiction to address general questions of law. Every administrative body, to one degree or another, must have the power to interpret and apply its own enabling statute. If this were not the case, it would be at the mercy of the parties before it and would never be the master of its own proceedings. The power to refuse to accept a complaint, or to turn down an application, or to refuse to do one of the countless duties that administrative bodies are charged with, does not amount to a power to determine questions of law as envisaged in *Douglas/Kwantlen, Cuddy Chicks* and *Tetreault-Gadoury*. To decide otherwise would be to accept that all administrative bodies and tribunals are competent to question the constitutional validity of their enabling statutes, a position this Court has consistently rejected.

[52] The Court in *Bell* noted that a power to decide a constitutional matter is on a different plane than an ordinary question of law, such as the division of powers, because of the potential that the constitutionally protected rights may fly in the face of the legislature's intention in enacting our statute. This potential exists for rights guaranteed by section 35 of the *Constitution Act, 1982* as well as for Charter rights.[13]

[53] The analysis this Board undertook in its initial decision is analogous to the one set out above. *Halfway River* suggests the District Manager in that case, under his enabling statute, had authority to decide the issue in question. Despite this conclusion, and given the differences in enabling legislation here, we are not convinced that *Halfway River* means the Board was wrong in its analysis. Indeed, given the position of the Crown in Alberta, which is in contrast to the concession by the Crown in British Columbia, the Board is reinforced in its view.

[54] The Board is also reinforced in the discretionary aspect of its decision. *Halfway River* suggested a Court, on judicial review, could have directed that the matter, if sufficiently controversial, be sent to trial. This Board has no power to direct a trial of an issue, but declining to hear the matter on a discretionary basis achieves the same result. This is particularly true when the issue in dispute is conceded by all parties to be before the Courts.

[55] The Whitefish Lake First Nation argues, on the basis of *Badger* [1996] 1 S.C.R. 771 as well as *Halfway River* that, despite the Crown's assertion that their treaty rights are in dispute, the issues have in fact been decided. Indeed, both cases deal with Treaty 8 rights, and the Court in *Halfway River* has said that the Lesser Slave Lake obligations are not to be interpreted differently than those that result from the later adhesion at Fort St. John. However, there remain the issues related to the *Natural Resources Transfer Act*, a matter that *Badger*, a criminal case, may not have resolved exhaustively. The unresolved nature of these issues is identified in the *Halfway River* decision itself. At paragraph [132] Justice Finch states:

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[13] *Bell*, paragraph [57].

> I begin by observing that earlier cases involving the interpretation of the proviso in Treaty 8 (e.g. *R.* v. *Badger*, *supra*.) or similar language in other treaties (e.g. *R.* v. Horse, *supra*.) are of limited assistance for two reasons. First, they are cases involving a charge against an Indian for breach of a provincial statute, in answer to which the accused relied upon the treaty right to hunt. Second, they are cases involving the interpretation of s.12 of the *Natural Resource Transfer Agreement*, in addition to the language of the treaty granting the right to hunt. The only case we were cited involving the interpretation of Treaty 8, and in which the *Natural Resource Transfer Agreement* was not a factor, is *R.* v. *Noel*, [1995] 4 C.N.L.R. 78, a decision of the Northwest Territories Territorial Court. As with the other cases, Noel was a charge against a native for breach of legislation in answer to which he relied on his Treaty 8 right to hunt.

[56] The original Board decision does not proceed on the footing that Whitefish Lake First Nation does not have rights under Treaty 8. Indeed, it contemplates that they may well have such rights. However, there is a dispute over not only the existence but the extent and application of those rights. *Halfway River's* split decision does not answer all those questions even aside from any differences due to the Alberta location of Whitefish Lake First Nation. The Courts, rather than the Director or the Board, provide the more appropriate form for resolving these important constitutional issues.

V. DECISION

[57] Having considered all these matters, the Board is not persuaded that the *Halfway River* decision illustrates an error in the decision we are now asked to reconsider. For the reasons above and the reasons in the original decision, the Board declines the request to reconsider.

Dated on September 28, 2000, at Edmonton, Alberta.

Dr. William A. Tilleman