ALBERTA
ENVIRONMENTAL APPEAL BOARD

Procedural Decision

Date of Decision – March 22, 2002

IN THE MATTER OF sections 91, 92 and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by the Chipewyan Prairie First Nation with respect to Approval 153497-00-00 issued on December 7, 2001, under the *Environmental Protection and Enhancement Act* by the Director, Bow Region, Regional Services, Alberta Environment, to Enbridge Pipelines (Athabasca) Inc.

Cite as: Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc*.

EXECUTIVE SUMMARY

The Board received a Notice of Appeal from the Chipewyan Prairie First Nation (CPFN) with respect to an Approval issued under the *Environmental Protection and Enhancement Act* to Enbridge Pipelines (Athabasca) Inc. for the construction and reclamation of a pipeline near Christina Lake, Alberta. CPFN asked for a Stay of the Approval pending the resolution of their appeal.

Alberta Environment argued that the Board does not have the jurisdiction or expertise to decide constitutional issues relating to: the validity of the alleged aboriginal and treaty rights of CPFN; the alleged infringement of those rights; and the alleged duty of Alberta Environment to consult with CPFN. On this basis, Alberta Environment argues that the appeal should be dismissed.

The Board asked for submissions from the Parties on the questions:

> "1. What steps, if any, have the CPFN taken, since it first knew of the request for the Approval that is the subject of this appeal, to enforce the rights to which it now asks the Board to give effect?
>
> 2. Given the nature of the rights the CPFN seeks to enforce, and the likelihood of controversy between the parties over the existence, extent and consequences of those rights, why is the Board the appropriate forum to deal with these issues as opposed to the ordinary courts, which possesses among other powers, the power to grant appropriate interim relief?"

Following its review of these submissions, the Board has decided to adjourn the request for a Stay for 30 days to allow CPFN to commence an action in Court to enforce the rights that they are claiming, should they wish to do so. As part of such an action, CPFN can seek an order against Alberta Environment to restrain the granting of permission to proceed with the pipeline project. If such an injunction is granted, the Board will immediately review it and consider the request for a Stay in light of the terms of such an injunction. CPFN may instead seek a mandatory injunction requiring that the consultation measures they are requesting be carried out. Again, the Board will be guided by the decision of the Court, whatever it may be.

BEFORE: William A. Tilleman, Q.C., Chair

WRITTEN SUBMISSIONS:

Appellants: Chipewyan Prairie First Nation, represented by Mr. Jeffrey Rath and Ms. Allisun Rana, Rath & Company.

Director: Ms. May Mah-Paulson, Director, Bow Region, Regional Services, Alberta Environment, represented by Ms. Heather Veale and Ms. Gloria Hammermeister, Alberta Justice.

Approval Holder: Enbridge Pipelines (Athabasca) Inc., represented by Mr. Stephen Lee, Borden Ladner Gervais.

Intervenor: PanCanadian Energy Corporation, represented by Mr. Brian O'Ferrall, Bennett Jones.

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I. BACKGROUND

[1] On December 7, 2001, the Director, Bow Region, Regional Services, Alberta Environment (the "Director") issued Approval 153497-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA")[1] to Enbridge Pipelines (Athabasca) Inc. (the "Approval Holder") authorizing the construction and reclamation of a pipeline, being the Christina Lake Pipeline Project, near Christina Lake, Alberta.

[2] The Environmental Appeal Board (the "Board") received a Notice of Appeal and an Application for a Stay dated December 21, 2001, from the Chipewyan Prairie First Nation (the "Appellants" or "CPFN"). The Appellants provided further information regarding the Notice of Appeal on December 27, 2001.

[3] The Board acknowledged the Notice of Appeal and the Application for a Stay on December 27 and 31, 2001, respectively, and requested that the Director provide the records (the "Records") related to the appeal. The Parties to this appeal were requested to provide the Board with available dates for a mediation meeting and settlement conference or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. The Natural Resources Conservation Board responded in the negative. The Alberta Energy and Utilities Board wrote to the Board on January 17, 2002, and advised "…on July 3, 2001, the Board routinely issued a pipeline approval to Enbridge Pipelines (Athabasca) Inc. for the Christina Lake Pipeline Project. The Board held no public hearing or review into this matter."

[5] In their notice of appeal, the Appellants requested that the Board grant a Stay of the Approval until the appeal is heard. The Board, by way of a letter dated December 31, 2001, requested that the Appellants provide a submission with respect to their Application for a Stay. The Board's letter advised that:

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[1] The *Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12, replaced the *Environmental Protection and Enhancement Act*, S.A. 1993, c. E-13.3 on January 1, 2002.

> "Should the Board decide that the CPFN has presented sufficient argument for the Board to consider issuing a Stay, Enbridge Pipelines and Alberta Environment [(the Director)] will be given an opportunity to respond to CPFN's submission prior to the Board making its final decision respecting the Stay. You should also note that before the Board will grant a Stay, it must be satisfied that the CPFN has standing (i.e. is directly affected) in this appeal."

[6] On January 11, 2002, the Board acknowledged receipt of the Appellants' submission with respect to the Application for a Stay.

[7] On January 14, 2002, the Board received a letter from PanCanadian Energy ("PanCanadian") requesting intervenor status in this appeal. The Board acknowledged receipt of the letter from PanCanadian and advised it would consider their request.

[8] On January 14, 2002, the Board received the Record from the Director. In the accompanying letter the Director advised that:

> "The Director respectfully submits that the CPFN's notice of appeal also raises complex factual and legal issues that are not properly before the Board since they are outside the scope of the Board's jurisdiction and expertise to decide. Specifically, it is the Director's position, that the Board does not have the jurisdiction or expertise to decide constitutional issues regarding the validity of the alleged aboriginal and treaty rights of the CPFN, alleged infringement of those rights and the alleged duty to consult with the CPFN."[2]

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[2] The Director's letter also advised:

> "It is the Director's position that EAB Appeal No. 01-110 should be dismissed pursuant to section 95(5)(a)(ii) and/or (iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (EPEA). In this regard, the Director respectfully requests that a preliminary meeting be scheduled to determine whether EAB Appeal No. 01-110 should be dismissed. …
>
> The Director respectfully submits that the Chipewyan Prairie First Nation (CPFN) has not filed a valid notice of appeal for the following reasons set out below.
>
> Section 91(1)(a)(i) of EPEA provides that an appeal may be filed by a person who previously submitted a statement of concern in accordance with section 73 of the Act and is directly affected by the Director's decision. Section 73(2) of the Act stipulates that a statement of concern must be submitted to the Director within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice.
>
> The Notice of Application for the above-noted project was published in the Fort McMurray Today and Edmonton Journal on Friday, September 7, 2001. The final date for submitting statements of concern was October 8, 2001. CPFN submitted a letter to the Director on November 6, 2001, approximately one month after the thirty day period established by section 73(2) of the Act had expired. The Director rejected the letter as a statement of concern.
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> Section 73(1) of the Act also requires that a person filing a statement of concern must be directly affected. To date, it appears that the CPFN has not provided specific information to establish that they are in fact directly affected by the Director's decision."

[9] On January 21, 2002, the Board acknowledged receipt of the Record and a copy was subsequently provided to the Appellant, the Approval Holder and PanCanadian. In the same letter, the Board advised the Parties to this appeal that "…with respect to the Stay request filed by the Chipewyan Prairie First Nation (CPFN), the CPFN has presented sufficient information to warrant further consideration of their Stay request." The Board advised the Parties that a preliminary meeting to deal with the Stay and other preliminary issues would be held.

[10] On January 22, 2002, the Appellants advised the Board that construction on the pipeline was ongoing and requested that the consideration of the Application for a Stay be conducted on an expedited basis.

[11] On January 25, 2002, the Approval Holder asked the Board to "…include a consideration of Alberta Justice's motion to dismiss EAB appeal No. 01-110….". In this same letter, the Approval Holder advised that a preliminary meeting in this matter would "…result in more efficient use of parties' time and resources, avoid unnecessary expenses and afford the Board the opportunity to hear parties' submissions on all preliminary issues and how such issues may interrelate."

[12] On January 29, 2002, the Appellants advised the Board that the Preliminary Meeting date of February 15, 2002 that was being discussed by the Parties would be "…highly prejudicial to the constitutional rights of the CPFN."

[13] In response, on January 29, 2002, the Board wrote to the parties and posed two questions to the Appellants:

> "1. What steps, if any, have the CPFN taken, since it first knew of the request for the Approval that is the subject of this appeal, to enforce the rights to which it now asks the Board to give effect?
>
> 2. Given the nature of the rights the CPFN seeks to enforce, and the likelihood of controversy between the parties over the existence, extent

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Section 95(5) of EPEA provides:

> "The Board (a) may dismiss a notice of appeal if …
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> (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
>
> (iii) for any other reason the Board considers that the notice of appeal is not properly before it…."

> and consequences of those rights, why is the Board the appropriate forum to deal with these issues as opposed to the ordinary courts, which possesses among other powers, the power to grant appropriate interim relief?"

The Board requested that the Appellants and the other Parties to this appeal respond to these questions and provide their comments to the Board by January 31, 2002. The Board subsequently received a telephone call from the Appellants and, in a letter dated January 30, 2002, the Board extended the submission deadline to February 1, 2002.

[14] On February 1, 2002, the Board received submissions from the Appellants, the Director, the Approval Holder, and PanCanadian responding to the questions posed in the Board's letter of January 29, 2002.

[15] On February 4, 2002, the Board received a letter from the Appellants which stated "…we acknowledge that we do not have an official right of reply, [however,] we feel a response is required in order to set the record straight and to ensure that the Board is not misled by a number of points raised in …" the Director's letter. The Board acknowledged receipt of the letter on February 5, 2002, and advised that further correspondence would be forthcoming.

II. DISCUSSION

A. Framework

[16] The Board has before it an application by the Appellants for a Stay of the Approval for the construction and reclamation of a pipeline called the Christina Lake Pipeline Project. The Appellants want the Stay pending the hearing of the appeal that they have commenced in this matter. If the appeal is validly before the Board, something both the Director and the Approval Holder dispute, the Board has the power to grant a Stay of the Approval. The power to grant a Stay is discretionary, and authorized by section 97 of EPEA which provides:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[17] The Appellants are a First Nation located in the vicinity of the pipeline project being built by the Approval Holder for PanCanadian. To construct such a pipeline, it is necessary to obtain an approval from the Director.

[18] EPEA provides for a public notice and consultation process before such approvals are issued. Once an approval is issued, persons who filed Statements of Concern with the Director, but who feel their concerns have not been adequately dealt with, are entitled to file and pursue an appeal before this Board. The Board, upon receiving such an appeal may, in the end result, make a Report and Recommendations to the Minister of the Environment about what should be done.[3] On receipt of such a Report and Recommendations, the Minister may:

> "(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, …
>
> (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."[4]

[19] The scope of the Board's Report and Recommendations is thus customarily to provide a recommendation for a Ministerial decision in line with the decision that the Director in question could have, or perhaps ought to have, made in the first instance.[5]

[20] The Director, acting under EPEA, is a statutory delegate with a specific and limited scope of authority, and specific responsibilities. Before the Board (and if necessary before the Courts) the Director in question is customarily represented by her own counsel, with separate counsel retained to represent the Minister, or the Crown in a more general sense, when called for.

[21] In this case, the Approval Holder applied to the Director for an approval under EPEA for a pipeline. The Approval Holder submitted a detailed application called a

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[3] See section 99(1) of EPEA which provides:

> "In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act … the Board shall within 30 days after the completion of the hearing of the appeal shall submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

[4] See section 100(1) of EPEA.

[5] This recognizes that the Board, and thus the Minster, may well have the benefit of additional information and fuller argument than was available to the Director at the time the decision was initially made. (See section 95(2) of EPEA.)

Conservation and Reclamation Application. The Approval Holder published notice of the application in newspapers circulating in the area on September 7, 2001. These notices called for submissions (Statements of Concern) to be made to the Director within a 30-day time frame (here by October 8, 2001) by those with concerns. Valid Statements of Concern under EPEA oblige the Director to consider the objector's position. They also create an entitlement to appeal.[6]

[22] Section 73(1)[7] of EPEA requires that the person submitting a Statement of Concern must establish that they are "directly affected," a status that so far has neither been proven nor conceded in this case. In addition, the Approval Holder and the Director both allege that the Appellants failed to meet the 30-day time limit for submitting their Statement of Concern. It was only on November 6, 2001 – almost 30 days after the deadline had passed - that the Appellants wrote to the Director raising objections to the Approval, which had not, at that point, been granted.

[23] The objection as stated in the Appellants' Statement of Concern, and asserted again in these proceedings, is that the Appellants have a constitutional right to be consulted about a project of this nature and, in violation of that right and the Crown's fiduciary duty towards the Appellants, the Crown in Right of Alberta has failed to consult, sufficiently or at all, with the Appellants about the proposed approval.

[24] The Director was of the view that the November 6, 2001 letter, being outside the statutorily provided timeframe, was not validly before her as a Statement of Concern.

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6 Section 91(1)(a) of EPEA provides:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)…."

7 Section 73(1) of EPEA provides:

"Where notice is provided under section 72(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of

Nonetheless some correspondence ensued over the Appellants' concerns. Ultimately, however, the Director issued the Approval on December 7, 2001.

[25] On December 20, 2001, the Appellants submitted their Notice of Appeal. The Notice of Appeal describes the details of the decision objected to in the following terms:

> "The decision does not address the concerns that CPFN related to the decision-maker with regard to the potential impact the project would have on the environment and the ability of the members of the CPFN to exercise their treaty rights to hunt, trap and fish. The decision does not include mitigative measures designed in consultation with CPFN to ensure that their treaty rights are impacted as little as possible as required by law. Further, the decision was made without the Crown fulfilling its constitutional obligation to consult with CPFN."

The Appellants cited in support of their claim, among other cases, the recent decision of the Federal Court of Canada, Trial Division in *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage, and the Thebacha Road Society.*[8]

[26] The respondents in this appeal, so far, are the Director and Enbridge.[9] The Crown, through the Attorney General, has not been notified. The Director's position, put briefly, is that the appeal is ineffective because it is not based on any valid Statement of Concern and because the Appellants have failed to establish their "directly affected" status. However, on a broader note, as stated, the Director goes on to say:

> "The Director respectfully submits that the CPFN's notice of appeal also raises complex factual and legal issues that are not properly before the Board since they are outside the scope of the Board's jurisdiction and expertise to decide. Specifically, it is the Director's position, that the Board does not have the jurisdiction or expertise to decide constitutional issues regarding the validity of the alleged aboriginal and treaty rights of the CPFN, alleged infringement of those rights and the alleged duty to consult with the CPFN."

[27] The Approval Holder raises quite different concerns. It too relies on the lack of status and un-timeliness. However, it goes on to suggest it has evidence that the land in question, which is off-reserve land, has not been used for hunting. The Approval Holder's own

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concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change."

8 *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage, and the Thebacha Road Society*, [2001] FCT 1426, [2001] F.C.J. No. 187, [2002] 1 C.N.L.R. 169.

9 The Board has yet to formally determine the status of PanCanadian.

consultation with Band Elders, it asserts, suggest their traditional hunting grounds have been confined to an area north of the proposed project.

[28] In addition, the Approval Holder objects that the Appellants are using the appeal for an improper purpose. It alleges that the Appellants are raising the constitutional rights argument only to slow down the regulatory approval process. This is to increase their bargaining power in an effort to secure a sole source labour supply agreement with the Approval Holder for the project. The Approval Holder objects to the Board's processes being used in such a manner. We caution that the Board is making no finding whatsoever on this point, given the preliminary state of the proceedings.

[29] The right the Appellants are asserting is not a right that springs from EPEA. Rather, it is a claim to a broader and constitutionally entrenched aboriginal and treaty right. It is a right that, if established, would fall under the umbrella of section 35(1) of the *Constitution Act, 1982*. This section provides:

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[30] The Appellants further assert that the alleged duty to consult is a part of an existing constitutionally entrenched section 35(1) right or part of a broad fiduciary duty owed by the Provincial Crown to the Appellants.

[31] Before deciding the existence, scope or breach of an alleged duty of consultation, one must first determine the existence and infringement of the asserted aboriginal rights.[10]

[32] The Appellants do not see the processes under EPEA as being the appropriate way for the Crown to fulfill its duties towards them. Instead, they argue the Crown's fiduciary duty calls for a *separate* process. The Appellants argue that consultation by the Crown, with First Nations such as themselves, is an essential prerequisite to granting the Approval. It is not saying that the Director failed to consult as a part of the statutory approval process, but that the

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[10] See: *Taku River Tlingit First Nation* v. *Tulsequah Chief Mine Project*, [2002] BCCA 59, [2002] B.C.J. No. 155; but see *Ontario (Minister of Municipal Affairs and Housing)* v. *TransCanada Pipelines Ltd*. (2000), 186 D.L.R. (4th) 403, [2000] O.J. No. 1066, [2000] 3 C.N.L.R. 153 (Ont.C.A.). See also: *Haida Nation* v. *British Columbia (Minister of Forests)*, [2002] BCCA 147, [2002] B.C.J. No. 378.

statutory approval process and any resulting approval are invalid if it trenches upon the Appellants' broader rights.

[33] The Director relies upon the time limits and other statutory and regulatory procedures that flow from EPEA to support her position that the appeal is untimely and that the Appellants have failed to establish that they are directly affected. The Appellants' answer is that the right it claims, to be consulted, is not one arising from the statute at all. It is a right to be separately consulted and not, therefore, to be constrained by the time limits and statutory procedures EPEA imposes. The Appellants do not accept that the Director's consultation under EPEA, or indeed any resulting appeal hearing, will constitute the required consultation. Rather, the Appellants argue that the Approval cannot be given at all until the separate consultation occurs.

[34] So far this has only been a summary review of the Parties' main points. What the Appellants seek through their Application for a Stay is what amounts to an interim injunction prohibiting the pipeline construction from proceeding pending the determination of the appeal. The Appellants seek to accomplish this indirectly by staying the Approval that is necessary for the development to proceed.

[35] The Director's objection requires the Board to assess two questions:

1. Does this Board have the authority to adjudicate all the issues necessary to determine this matter?
2. Assuming the Board has sufficient statutory authority to do so (and all our authority arises solely from statute), is the Board the appropriate forum for resolving these issues?

A finding that the Board *can rule* on such issues (assuming its jurisdiction in the matter is not exclusive) does not mean that it *should rule* on such issues if another forum can provide a fuller or fairer process. These are administrative and constitutional law issues rather than aboriginal rights issues.

B. Can the Board Rule?

[36] The Courts have ruled that some administrative tribunals do have the mandate to rule upon Charter and constitutional questions that arise in the course of their proceedings. They have established the test to determine when a tribunal's statutory authority is sufficient to vest it with the authority to decide a Charter matter.

[37] No administrative tribunal has an independent source of jurisdiction pursuant to section 52(1) of the *Constitution Act, 1982*.[11] The essential question facing a Court is whether the administrative tribunal, through its enabling statute, has been granted the power to determine questions of law. If a tribunal does have the power to consider questions of law, then it follows by the operation of section 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.[12]

[38] The question in this case is *not* directly about the constitutional validity of a provision of EPEA. EPEA can co-exist with the Appellants' position so long as no approvals are granted until the Crown (in the fullest sense and not just the Director) has met whatever its constitutional obligation may be.

[39] The Supreme Court of Canada in *Cooper*[13] said the following about an administrative tribunal's authority to consider Charter matters:

> "[45] In three previous cases, *Douglas College*, *supra*, Cuddy Chicks, *supra*, and *Tetreault-Gadoury*, *supra*, this Court has had the opportunity to address the principles underlying an administrative tribunal's jurisdiction to consider the constitutionality of its enabling statute. … [T]he inquiry must begin with an examination of the mandate given to the particular tribunal by the legislature.
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> [46] If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute. This principle was clearly enunciated by this Court in *Cuddy Chicks*, *supra*, at pp. 13-14…. There is no doubt that the power to consider questions of law can be bestowed on

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11 Section 52(1) of the *Constitution Act, 1982* provides:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

12 See: *Douglas/Kwantlen Faculty Association* v. *Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Cuddy Chicks Ltd*. v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358; and *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193.

13 *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 at p. 45.

> 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:
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> > [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."

[40] The Courts have already considered whether this Board can rule on questions of law that properly arise in its proceedings. The latest statement to that effect is contained in *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Alberta Environmental Appeal Board and McCain Foods (Canada) Ltd*.[14] While EPEA contains no express provision to that effect, the Courts have held it to be implicit in the Board's statutory mandate.[15]

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[14] In *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Environmental Appeal Board and McCain Foods (Canada) Ltd.* (2000), 22 C.E.L.R. (N.S.) 258 (Alta.Q.B.), the Court held at paragraph 20 that:

> "The result of the pragmatic and functional analysis [as set out in Union des employes de service Loc. 298 v. Bibeault [1988] 2 S.C.R. 1048] leads to the conclusion that that the Board does have the jurisdiction to consider and recommend to the Minister whether or not the Director acted within his jurisdiction in including the Condition in the approval. The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privitive clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal."

See also: *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.); *Chem-Security (Alberta) Ltd*. v. *Environmental Appeal Board (Alberta*) (1997), 22

C. The Duty to Consult

[41] If a duty of consultation exists, the duty is on the Crown itself, not specifically on the particular statutory delegate given the task of issuing approvals under EPEA. This is not to say that the Director can ignore any duty to consult; only that the responsibility for the consultation itself involves the Crown in the fullest sense.[16] This is important in respect to whether the Crown has received proper notice of the issues raised by the Appellants in these proceedings. It is similarly important for the question as to whether we have jurisdiction over the Parties. While this Board advises the Minister, the party before the Board that implements the decision is the Director in her role as a statutory delegate with specific (and thus limited) authority.

[42] As to authority over the subject matter, this Board has full jurisdiction to rule (or at least advise the Minister upon) the validity of the Approval. Our only claim to authority over the underlying question of whether a constitutionally protected aboriginal and treaty right to

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C.E.L.R.(N.S.) 141 (Alta.Q.B.), Medhurst J.; and *Chem-Security (Alberta) Ltd*. v. *Environmental Appeal Board (Alberta)* (1997), 23 C.E.L.R.(N.S.) 165 (Alta.C.A), Berger J.A.

[15] But see: *Paul* v. *Forest Appeals Commission*, [2001] BCCA 411, [2001] B.C.J. No. 1227, [2001] 4 C.N.L.R. 210. In this case Mr. Paul cut three trees, possessed four trees, and claimed he had an aboriginal right to the trees. This cutting and possession was without authorization under the British Columbia Forest Practices Code. The British Columbia Court of Appeal reasoned that a determination of this question by the Forest Appeals Commission was unconstitutional because the Legislature cannot grant authority to determine matters under section 91(24) of the *Constitution Act, 1867*. This case determined that the Legislature of British Columbia had no constitutional capacity to confer upon the British Columbia Forest Appeals Commission (or the District Forest Manager or the Administrative Review Panel) the jurisdiction to decide questions of aboriginal rights and title, including questions of entitlement, infringement and justification, and past extinguishment when deciding appeals about alleged violations of the British Columbia Forest Practices Code. This case was determined on the question of the application of the Division of Powers under the *Constitution Act, 1867* rather than the scope of the quasi-judicial powers of the Forest Appeals Commission.

Section 91(24) of the Constitution Act, 1867 provides:

> "…[It] is the hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, - … 24. Indians and Lands reserved for Indians…."

The Division of Powers refers to the division of authority to make laws between the federal and provincial governments as described in sections 91, 92, and 92A of the *Constitution Act, 1867.*

[16] In this respect, the Director in Alberta is in a different position than the officer involved in *Halfway River First Nation* v. *British Columbia (Ministry of Forests),* [1999] BCCA 470, [1999] 4 C.N.L.R. 1. See the Board's review of that case in Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom*. *Whitefish Lake First Nation* Request for Reconsideration: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment* re: *Tri-Link Resources Ltd*.) EAB Appeal No. 99-009.

consultation exists, or has been breached, arises because that right may be a pre-condition to the issuance of a valid approval. If our authority extends to let us rule on this point it does so only for the purpose of establishing the validity of the approval. We have no original jurisdiction over the question and certainly no exclusive jurisdiction to decide the matter. But for its impact on the Approval here, this would be a question to be decided in the Courts.

D. The Approval Holder's Objections

[43] The next question relates to the objections raised by the Approval Holder. The Appellants seek, in essence, an interim injunction, based upon an alleged breach of its right to be consulted. The Approval Holder's answer to this is twofold. First, it disputes that there is any right because, it says, its information, from Elders of the Appellants, is that hunting and trapping has not gone on in this area, but only in the area to the north of the reserve. Second, it argues that these objections are being raised, and thus what is in effect an injunction is being sought, for improper purposes. The Courts deal with such matters by imposing certain requirements before granting the equitable remedy of an injunction. First, there is the requirement to provide sufficient initial proof of the right to justify an interim order pending trial. Second, there is often a requirement for an undertaking in damages. Third, there is the requirement that the party seeking an injunction must come to the Courts with clean hands. Fourth, there is the need to balance the competing interests involved. In noting these matters we make *no* determination that any one of these might be applicable in this case, either on the facts, or because the case may involve constitutionally protected rights.

E. Should the Board Determine this Constitutional Question?

[44] Whatever jurisdiction this Board may possess to rule on the Appellant's position on its right to be consulted by the Crown, it is clear that jurisdiction is not exclusive. The Courts would clearly have jurisdiction over such a question at the instance of the Appellants or the Crown. Unlike the Board, the ordinary Courts are equipped to give a full range of constitutional and equitable remedies.

[45] There are obvious advantages to such constitutionally sensitive and important issues as the Crown's duty of fidelity and a first nation's treaty rights being dealt with by a section 96 Court.[17] No case calls for judicial independence more than a case involving such fundamental rights. The scope of such rights, if established, impose broad duties on the Crown and can restrict or impede major third party interests. The resources, independence, and stature of the ordinary Courts create the most desirable forum for such complex adjudication. This is in no way counterbalanced by the Board's expertise in environmental issues.

[46] Whether in the Courts or before the Board, the threshold question of the Appellants' treaty and constitutional rights needs to be determined. The Board has no processes equivalent to the Rules of Court to handle such complex questions and proceedings. The Appellants suggest an urgency. However, we note that despite knowing for several months of this pending development, they did not resort to the Court. Should they choose to do so, they could apply for an interim order from the Courts either preserving the status quo or imposing consultation obligations upon the Crown. This Board could and would be guided by any such order in exercising its powers under section 97 of EPEA and more generally.

[47] Even if the Board needs to ultimately decide the constitutional question for its own purposes, the Courts can nonetheless exercise their inherent jurisdiction to assist an inferior tribunal like the Board by dealing with the question of interim relief.[18]

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[17] A section 96 Court is a commonly known as a Superior Court, and includes the Alberta Court of Queen's Bench. Section 96 refers to the provision of the *Constitution Act, 1867* that provides:

> "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

[18] See: *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583 at paragraph 57 which states:

> "It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in St. Anne Nackawic confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in Moore v. British Columbia (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in St. Anne Nackawic (at p. 723), is a 'real deprivation of ultimate remedy'."

[48] Requiring the Appellants to first assert its claimed constitutional and treaty rights in the ordinary Courts would:

1. Allow the Attorney General to be notified and to be present to represent the full interests of the Crown on this important constitutional question, the effect of which extends well beyond the office of the Director involved in this case.
2. Allow the Approval Holder to present its arguments in opposition to the application on the basis of the common law of injunctions, the scope of which extend beyond the simple power of a Stay given to this Board under, and only for the purposes of proceedings under, EPEA. If it is appropriate, the Courts can grant any injunction subject to terms beyond which this Board has the ability to consider or impose.
3. Leave the Board to carry out its assigned statutory mandate of advising the Minister on what the Director could or should have done without entering into an inquiry as to fundamental constitutional and treaty rights customarily and constitutionally the task of a section 96 Court.

[49] *To this end, the Board is adjourning the request for a Stay* to allow the Appellants to commence an action in the Courts to enforce those rights that they are claiming, should they wish to do so. As part of such an action the Appellants can seek orders against the Crown restraining the granting of permission to proceed with this development. If such an injunction is granted, the Board will immediately take cognizance of it and resolve the request for a stay in light of the terms of such an order. The Appellants may instead seek a mandatory injunction, forcing the measure of consultation they seek. Again, the Board will be guided by the decision of the Court, whatever it may be.

III. DECISION

[50] *The Board has decided to hold this request in abeyance for a period of one month*. In the interim, if a Court order is obtained, the matter will be immediately reactivated and dealt with in light of the terms of any such order. The Appellants are directed to advise the Board in any event within 30 days of whatever steps it has taken to assert the rights it seeks to rely upon here as a precondition to the Director's exercise of her statutory authority.

Dated on March 22, 2002, at Edmonton, Alberta.

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William A. Tilleman, Q.C.
Chair