SUPREME COURT OF NOVA SCOTIA

Citation: *Sipekne'katik v. Nova Scotia (Environment)*, 2016 NSSC 260

Date: 2016 10 05
Docket: Hfx No. 450765
Registry: Halifax

Between:

Sipekne'katik

Appellant

v.

Nova Scotia (Minister of Environment) and Alton Natural Gas Storage LP

Respondent

Judge:	The Honourable Justice Joshua Arnold
Heard:	August 17, 2016, in Halifax, Nova Scotia
Counsel:	Raymond Larkin, for the Appellant Alexander Cameron, for the Respondent Minister Robert Grant, for the Respondent Alton

By the Court:

Overview

[1] This case involves a dispute between Sipekne'katik, one of 13 First Nations in Nova Scotia, the Nova Scotia Department of Environment ("the Minister") and Alton Natural Gas Storage LP.

[2] Alton wants to develop an underground storage facility for natural gas in Nova Scotia. The facility requires a number of regulatory approvals prior to being completed and operated. One of these is an Industrial Approval under the *Environment Act*, S.N.S. 1994-95, c. 1, issued by the Minister on January 20, 2016. The approval authorizes the operation of a brine storage pond and associated works at Fort Ellis, Colchester County, Nova Scotia.

[3] Sipekne'katik was formerly known as the Shubenacadie Band. It claims aboriginal and treaty rights to hunt and fish in Nova Scotia, particularly in the area of the Shubenacadie River estuary.

[4] Sipekne'katik objected to the issuance of the Industrial Approval and appealed to the Minister of Environment under s. 137 of the *Environment Act*. The Minister dismissed the s. 137 appeal by decision issued on April 18, 2016, and Sipekne'katik appeals that determination to this court pursuant to s. 138 of the *Environment Act*.

[5] Sipekne'katik brought a motion for an order staying the Industrial Approval pending a final resolution of their s. 138 appeal. Affidavits were filed by all parties on the stay application. The stay application was denied by Wood J. (*Sipekne'katik v. Nova Scotia (Environment)*, 2016 NSSC 178).

[6] Affidavits were also filed by all parties on the s. 138 appeal. Sipekne'katik objects to the affidavits filed by Alton and the Minister, and they, in turn, object to certain of Sipekne'katik's affidavits.

[7] The s. 138 appeal was originally scheduled to be heard on August 17 and 18, 2016. Following receipt of correspondence from counsel dated August 15, 2016, outlining their objections, a telephone conference was held the same day. During the conference call, counsel confirmed they did not wish to argue the appeal prior to receiving the court's decision regarding admissibility of the affidavits.

Therefore, the scheduled August appeal dates were used to argue the admissibility issues. As counsel did not wish to proceed with the appeal until the admissibility issues were decided, new dates were offered by the court in August, September and October, however, counsel were not available at those times. November 10, 14 and 15, 2016, were the earliest dates convenient to all counsel and are now scheduled for the appeal.

[8] This decision deals with the objections to the affidavits filed on the appeal.

The Affidavits

[9] Sipekne'katik has filed affidavits on this appeal from James Michael, Chief Rufus Copage, Jennifer Copage, Erika Perrier and Andrew Younger. The Minister has filed an affidavit from Jason Huston. Alton has filed affidavits on this appeal from Tim Church and Charles R. Lyons.

Admissibility under the *Environment Act*

[10] Section 138 of the *Environment Act* details the appeal route for a party wishing to appeal the Minister's decision on a s. 137 appeal:

> **Appeal to Supreme Court**
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> 138 (1) Subject to subsection (2), a person aggrieved by
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> (a) a regulation;
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> (b) a decision of the Minister pursuant to Section 137;
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> (c) a decision of the Minister respecting the granting or refusal of a certificate or an approval;
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> (d) a decision of the Minister respecting the terms or conditions of a certificate or an approval;
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> (e) a decision of the Minister respecting the amendment, addition or deletion of terms and conditions of a certificate or an approval;
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> (f) a decision of the Minister respecting the cancellation or suspension of a certificate or an approval; or
>
> (g) an order,
>
> may, within thirty days of the decision or order, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court, and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.

> ...
>
> (4) An appeal pursuant to this Part shall be commenced within thirty days of the date of the decision or the date of the order referred to in subsection (1).
>
> (5) The initiation of an appeal pursuant to this Part does not suspend the operation of any act or omission appealed from, including the requirement to comply with an order under Part XIII, pending the disposition of the appeal.
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> (6) The decision of the court under subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal.

[11] Section 138(3) was repealed in 2011. Prior to repeal, it stated:

> 138 (3) The judge on the hearing of an appeal may consider and hear evidence as to whether or not the matter that aggrieves the appellant is necessary to provide for the preservation and protection of the environment.

[12] Therefore, in 2011, the legislature consciously moved to change the manner in which s. 138 appeals are heard. No longer would additional evidence beyond the Record before the Minster be considered on appeal. That being said, there is a common law exception allowing fresh evidence on a s. 138 appeal in limited circumstances.

[13] In *Scotian Materials Ltd. v. Nova Scotia (Environment)*, 2016 NSSC 62, Murray J. dealt with an application for fresh evidence on a s. 138 appeal:

> 14 The jurisprudence is clear that where a breach of natural justice is alleged in the grounds, fresh evidence can be admissible to demonstrate a denial of natural justice. Such evidence must be relevant and is admissible for the limited purpose of showing for example a lack of jurisdiction or a denial of natural justice.
>
> 15 In those instances, fresh evidence can be introduced to establish the grounds of appeal. Further, in cases where the error alleged is on the face of the record fresh evidence is not admissible unless the affidavits show the record to be incomplete. (*Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)* (1996),150 N.S.R. (2nd) 360); (*IMP* at paragraph 41 in reference to the *Waverly* principle. *Waverly (Village Commissioners) v. Kerr*, (1994), 126 N.S.R. (2d) 147 (C.A.)
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> 16 The Minister states it is important to recognize that the power to admit such evidence must be used sparingly. Judicial review is traditionally conducted on the record. The general rule does not favour admission of evidence that was not before the tribunal. Fresh evidence on the merits is generally not permitted.
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> …

> 37 In *IMP* at paragraph 46 the court in referring the case of *Brar v. College of Veterinarians of British Columbia*, 2011 BCSC 215, cited its own decision in *Nechako Environmental Coalition v, British Columbia (Minister of Environment, Lands and Parks)*, [1997] BCJ No. 1790 (SC), stating at para.46:
>
> > [w]here the existence of relevant documents is known, the Court will not deprive itself of access thereto if there is no other bar to their production.
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> 38 This Court is cognizant of the risk of a trial de novo on the merits in admitting new evidence. For example, in paragraph 11 of its brief the Appellant argues that the affidavit is also intended to show that the Minister erred in fact or in law or both.
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> 39 These arguments in my view, are submissions that should be made at the appeal hearing itself. I turn now to my decision on the motion. In doing so I am reminded of the principle that the Court's power to admit evidence beyond the record of a proceeding must be exercised sparingly and only in exceptional cases.

[14] The statutory appeal in this case is very similar to a judicial review. Section 138 of the *Act* clearly limits the ability of parties to tender evidence not before the Minister. Therefore, to admit evidence beyond the Record will only be done in exceptional circumstances. According to *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, the four headings that allow such exceptions are 1) lack of jurisdiction; 2) reasonable apprehension of bias; 3) breach of procedural fairness and natural justice; and 4) fraud. In that case, Deschênes J.A. stated for the court:

> 64 In my view, affidavit evidence in a case of this nature may be allowed to the extent that it is relevant with respect to an alleged nominate defect causing a loss of jurisdiction such as an allegation that a discretionary decision was made for an improper purpose. No one can seriously suggest that if evidence existed that the discretionary decisions of the Minister in this case were only motivated by partisan politics, rather than by the objects of the legislation, that affidavit evidence to prove it could not be brought before the reviewing judge. On this point, I would adopt the views expressed in Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada*, vol. 2, looseleaf (Toronto: Canvasback Publishing, 1998) c.6 at 6:5300:
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> > ... Thus, any evidence that relates to excess of jurisdiction is admissible, as is evidence in support of an allegation that there was "no evidence" in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of duty of fairness. Of course, where the basis for judicial review involves bias or fraud, it will almost always be necessary to have evidence which is not part of the administrative record. As Denning L.J. noted in an early case, "[w]hen certiorari is granted on

> the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary." On the other hand, where the alleged error of law is not jurisdictional in nature and review is limited to only those errors of law which appear on the face of the administrative record, the applicant will be confined to the record of the tribunal's proceeding, and supplementary affidavit evidence will not be admitted.

[15] I will now consider the affidavits filed in this case in the context of the categories identified in *Mr. Shredding*:

1. Lack of Jurisdiction

[16] No party is requesting the admission of their affidavits to assist in proving a claim of lack of jurisdiction.

2. Reasonable Apprehension of Bias

[17] No party is requesting the admission of affidavits to assist in proving a claim of reasonable apprehension of bias.

3. Breach of Procedural Fairness and Natural Justice

[18] Sipekne'katik, Alton and the Minister all claim the affidavits they wish to file are admissible under the broad heading of breach of procedural fairness. The parties all rely on the duty to consult with Aboriginal peoples and accommodate their interests based on the honour of the Crown in this regard.

[19] In *Haida Nation v. British Columbia*, 2004 SCC 73, the unanimous court set out the framework in a duty to consult and accommodate case:

> 11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

[20] The Supreme Court of Canada in *Haida Nation* went on to explain:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3

> S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> 17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
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> 18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > ... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

[21] In numerous cases involving disputes between First Nations and various levels of Canadian government in many provinces, where a breach of the Crown's duty to consult and/or accommodate is alleged, courts have allowed evidence beyond the Record, under the broad heading of procedural fairness, to assist in determining the duty to consult based on the honour of the Crown (*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568; *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2008 ABQB 547 (affirmed 2010 ABCA 137); *White Bear First Nation v. Saskatchewan (Minister of Environment)*, 2009 SKQB 151; and *Liidlii Kue First Nation v. Canada (Attorney General)*, [2000] 4 C.N.L.R. 123 (F.C.)).

[22] As LoVecchio J. stated in *Tsuu T'ina Nation*, the duty to consult is grounded in the honour of the Crown:

> 26 In a duty to consult analysis, the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* has stated that a preliminary assessment of the merits of the claim must be made by the Court. To make this preliminary assessment, the Court would be required to review something. Unless the particular government action put in issue the claim made, it is difficult to envision a set of circumstances where the information the Court might be required to review would all be found in the Return.
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> 27 It is clear from the language used by the Supreme Court of Canada in *Haida* that the Justice who heard the case in the reviewing Court considered evidence that the Justice described as "voluminous" with respect to the history of the *Haida* people, their culture and traditions. Although it is not stated how this evidence was led, there is no suggestion in the decision that it was part of a return. It was most likely led through affidavit evidence.
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> 28 The decision in *Haida* must be seen as a tacit approval of evidence, which would go beyond that contained in a return, being considered by the Court in a judicial review when the Crown's duty to consult is an issue.
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> 29 Perhaps more fundamentally, the duty to consult is grounded in the honour of the Crown. It would not be in keeping with the honour of the Crown to strike evidence which is available and might assist the Court in making a preliminary assessment of the merits of the right claimed and the other issues before the Court.

[23] The scope of this exception was discussed in *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2013 BCSC 1068, [2013] B.C.J. No. 1288, varied on other grounds, 2015 BCCA 345, where Weatherill J. determined that further material, if otherwise inadmissible, can be properly considered where the duty to consult and the honour of the Crown is an issue:

> 112 Generally, evidence beyond the record is not admissible in the context of an application for judicial review unless it is demonstrably necessary to support a specific ground of review. In *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, the court stated, at para. 69:
>
> > It is true that extensive Affidavits or transcripts will assist a party who sets out to abuse the process of the court by trying to turn a judicial review application into a hearing de novo. A court need not tolerate such a practice, and can refuse to admit Affidavit evidence if it is not relevant to a genuine ground of judicial review.
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> 113 However, in *Liidlii Kue First Nation v. Canada (Attorney General)*, [2000] 4 C.N.L.R. 123 (F.C.) at paras. 31 - 32, the Federal Court distinguished

consultation cases from typical administrative law matters, thereby justifying the admission of records that were not before the original decision maker:

> The requirement that a decision must only be reviewed on the basis of the material before the decision-maker, applies when a decision is challenged on the ground that it is based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the decision-maker. The challenge to the decision in this case is not based on those grounds. It is based on the allegation that there was an obligation to adequately consult the applicant, which consultation it is alleged did not occur and is not contemplated.
>
> Challenges to decisions on the ground that procedural fairness has not occurred, because the affected party has not been given adequate opportunity to present its case, are likely to involve the adducing of information that was not before the decision-maker. In the present case, evidence relating to the status of an applicant, and whether a duty to consult exists, and the scope of that duty, is relevant, even though it may not have been before the decision-maker. To the extent that the new evidence relates to those issues, it is properly a part of the application records.

[24] Weatherill J. referred to the Alberta decision in *Tsuu T'ina Nation*, and added:

> 115 This approach has been followed in B.C. where expert reports, oral history and other evidence extrinsic to the record before the decision maker are routinely received and considered by the court in consultation cases. For instance, in *Lax Kw'Alaams Indian Band v. British Columbia (Minister of forests)*, 2004 BCSC 420 at para. 31 Mr. Justice Shabbits stated:
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> > I am of the opinion that in deciding whether a constitutional duty has been fulfilled, the court can consider evidence additional to that on which the approval for the cutting permit was made. All of the parties to this application, including the interveners, filed material for consideration that was not before Ms. Hanna. In my opinion, the further material, if otherwise admissible, must be considered.

[25] In *Haida Nation* the Supreme Court of Canada clarified that while Crown honour imposes a duty to consult, this does not equate to veto power on the part of First Nations:

> 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] 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), 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.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ...
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> .
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> ...
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> ... genuine consultation means a process that involves ...:
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> - gathering information to test policy proposals
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> - putting forward proposals that are not yet finalised
>
> - seeking Maori opinion on those proposals
>
> - informing Maori of all relevant information upon which those proposals are based
>
> - not promoting but listening with an open mind to what Maori have to say
>
> - being prepared to alter the original proposal
>
> - providing feedback both during the consultation process and after the decision-process.

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] 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.

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current*

> *English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

[26] This lack of veto power is reflected in the *Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'Kmaq of Nova Scotia, April 2015* (Record, Vol. 1, Tab 5, p.7):

> The goal of consultation is to reach consensus or agreement on how to avoid adverse impacts on asserted Aboriginal and/or treaty rights. However, there is no duty to reach an agreement, and Aboriginal groups do not have a veto over government decision making.

[27] In *Pimichikamak v. Her Majesty The Queen in Right of Manitoba*, 2014 MBQB 143, Joyal C.J.Q.B. confirmed the scope of admissible evidence when considering a claim of breach of the duty to consult:

> 58 In addition to establishing the existence of the duty, such evidence - not before the original decision maker(s) - has also been admitted in order to permit the court to determine the scope, content and ultimately, the fulfilment (or not) of the duty to consult and accommodate. ...
>
> 59 In the present case, as earlier stated, there will be no issue at the judicial review that there existed and Manitoba owed a duty to consult the applicants. The issue on the judicial review will be whether Manitoba fulfilled its duty, taking into consideration the scope and content of the duty owed and the circumstances of the consultation which would include the process of consultation. The issue on this particular preliminary evidentiary motion leading up to the judicial review, is whether the applicants can successfully invoke the exceptions and justifications that would require the issue on the judicial review to be determined based upon a record different from that which was before the original decision maker(s) prior to the Agreement.

[28] When the honour of the Crown is raised as an issue, the reviewing court requires relevant information in order to determine whether the Minister's decision should be interfered with because the Crown failed to meet its constitutional obligations.

[29] Merely because the honour of the Crown is raised as an issue does not mean that any and all affidavit evidence will be admissible. To be admitted under this exception, the evidence must be relevant to determining whether the honour of the Crown is a real issue, the scope and content of the duty to consult and whether

such a duty has been fulfilled. Such evidence is only admissible to assist in determining whether procedural fairness was denied.

[30] There is a sliding scale regarding the duty to consult depending on the strength of the case supporting the right and the seriousness of the potentially adverse impact on the right. As the Supreme Court of Canada stated in *Haida Nation*:

> 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.

[31] The repeal of s. 138(3) of the *Environment Act* clarifies that the Record before the Minister when the decision was made should be final. A s. 138 appeal is not a trial *de novo*. There are no legislative exceptions. Therefore, only in exceptional circumstances, such as when the duty to consult and the honour of the Crown is in issue, will fresh affidavit evidence be permitted on a s. 138 appeal.

4. False Testimony

[32] No decision should be based on false evidence. If false evidence was placed before the Minister, and if such false evidence is therefore before the appeal court as part of the Record, then fairness would dictate that the parties should have an opportunity to prove the evidence was false to avoid the appeal court relying on such information. In *Canada v. Khosa* 2009 SCC 12, Binnie J. noted at para. 47 that "The common law would not allow a statutory decision maker to rely on fraudulent or perjured testimony." In such circumstances, the court would be expected to exercise its discretion to grant a remedy.

Sipekne'katik's Affidavits

James Michael

[33] Sipekne'katik filed Mr. Michael's affidavit in an effort to show a breach of the duty to consult and denial of procedural fairness. Neither Alton nor the Minister object to its admission. Mr. Michael is the solicitor for Sipekne'katik. His evidence details communications relevant to this appeal between Sipekne'katik

and the Minister during the appeal of the Industrial Approval at the Ministerial level. His affidavit is admissible under the duty to consult exception.

Chief Rufus Copage, Jennifer Copage and Erika Perrier

[34] Chief Copage, Jennifer Copage and Erika Perrier each filed affidavits in support of Sipekne'katik's s. 137 appeal to the Minister prior to this s. 138 appeal. Their previous affidavits were similar to the current affidavits, although they were not all mirror images. In an unexpected twist, Sipekne'katik now argues that in order to be consistent in their own arguments objecting to the affidavits filed by Alton and the Minister, certain paragraphs of their own witnesses' affidavits should be struck, mainly because they are a repetition of the Record.

[35] In a further twist, Alton argues that all of Sipekne'katik's affidavits should be admitted as the admission of these affidavits supports the admission of the affidavits Alton has filed. Alton also argues that even if part or all of Sipekne'katik's proposed affidavits on the appeal are struck, the fact that Alton did not have an opportunity to file affidavits during the appeal to the Minister creates an imbalance in the material before the court in this matter. Alton argues that whether or not the affidavits of Chief Copage, Jennifer Copage or Erika Perrier are admissible on this appeal in whole or in part, fairness dictates that Alton be able to file affidavits on similar topic areas from their own witnesses because they were not a party to the s. 137 appeal.

[36] Alton also argues that because there are differences between some of the previous and the current affidavits filed by Sipekne'katik on this appeal, the court must have access to both sets of affidavits to determine the significance of any inconsistencies. In other words, Alton says that Sipekne'katik cannot withdraw its own witnesses current affidavits to avoid a finding of inconsistencies with their previous affidavits.

[37] The Minister does not object to the admission of the affidavits of Chief Copage, Jennifer Copage and Erika Perrier.

[38] The affidavits of Chief Copage, Jennifer Copage and Erika Perrier are all admissible under the duty to consult exception. No paragraphs will be struck because they are a repetition of the Record. The Record on this appeal is voluminous. Having reference to specific materials already contained in the Record to provide context to each individual's affidavit can be helpful to the court

in limited circumstances. The weight to be ascribed to these affidavits will be determined once the s. 138 appeal is heard.

Andrew Younger

[39] Sipekne'katik filed an affidavit from Andrew Younger on the s. 137 appeal. Alton makes the same argument on the admission of Mr. Younger's affidavit as they did about the affidavits of Chief Copage, Jennifer Copage and Erika Perrier.

[40] Sipekne'katik, however, goes even further in its position to strike part of its own affidavits in Mr. Younger's case and submits that Mr. Younger's current affidavit should be totally struck on the ground that it is a repetition of the Record.

[41] The Minister argues that because there are such material differences between Mr. Younger's former and current affidavits, the request by Sipekne'katik to exclude Mr. Younger's current affidavit would unfairly eliminate the Minister's ability to attack Mr. Younger's credibility based on the inconsistencies.

[42] The Minister also argues that because Mr. Younger's current affidavit is admissible and necessary, the affidavit the Minister has tendered from Justin Huston is also necessary to rebut Mr. Younger's evidence in both his current and previous affidavits.

[43] Sipekne'katik filed the current affidavit of Mr. Younger. Inconsistencies between Mr. Younger's former and current affidavits were subsequently identified by the Minister. The Minister argues that Sipekne'katik cannot now withdraw the current affidavit as it may assist the Minister in arguing that Mr. Huston's evidence, if admitted, should be preferred over that of Mr. Younger. The Minister argues that even if Mr. Huston's evidence is not admitted, the current affidavit of Mr. Younger should be admitted to allow the court to note inconsistencies in Mr. Youngers testimony.

[44] Mr. Younger's affidavit will not be struck. The significance of Mr. Younger's affidavit and the weight to be attached to it will be considerations on the appeal.

The Minister's Affidavit

Justin Huston

[45] The Minister argues that Mr. Younger's affidavits contain false evidence and says the affidavit of Mr. Huston is responsive to Mr. Younger's evidence. That is, the Minister argues that Mr. Huston's affidavit is required to show Mr. Younger's evidence is false. The Minister also argues that Mr. Huston's evidence is required to fill gaps in the Record and, therefore, falls under the umbrella of procedural fairness.

[46] The Minister also argues that Mr. Huston's evidence is necessary in relation to the issue of the duty to consult and accommodate.

[47] Alton takes no position on the admissibility of Mr. Huston's affidavit.

[48] Sipekne'katik objects to Mr. Huston's affidavit on the ground that it is a repetition of the Record and is littered with hearsay in the background information provided by Mr. Huston. Any hearsay, such as that contained in paras. 7-15, will not be considered.

[49] Sipekne'katik also says that if the Minister wants to dispute the evidence of Mr. Younger then they can cross-examine him. This might be a legitimate objection if the issues raised in Mr. Huston's affidavit were collateral. However, Mr. Huston's affidavit relates to whether the duty to consult was fulfilled, which is a central issue on this appeal.

[50] Asserting that an affiant has supplied false evidence or fraudulent information is a serious accusation. There is a distinct difference between inconsistent evidence and false evidence. The Crown will be given an opportunity to make their arguments regarding Mr. Younger's evidence. Mr. Huston's affidavit will be admitted, but the weight to be ascribed to it is yet to be determined.

Alton's Affidavits

Tim Church and Charles R. Lyons

[51] Alton filed the affidavits of Tim Church and Charles R. Lyons on the stay application. Copies of those same affidavits were filed by Alton on this appeal.

Sipekne'katik objects to the affidavits of Mr. Church and Mr. Lyons. Sipekne'katik argues that these affidavits include information that is repetitive of the Record, is argumentative, and that certain information included in the affidavits was not part of the Record before the Minister. Because the evidence does not address any of the recognized exceptions, Sipekne'katik says the affidavits are therefore not relevant or admissible.

[52] Alton argues that the affidavits of Church and Lyons are necessary and relevant in order to respond to the broad scope of Sipekne'katik's appeal. They argue that in cases dealing with the honour of the Crown and the duty to consult, the court should have all relevant information needed to assess the existence of a duty to consult, the scope and content of any such duty, and, possibly, whether the duty to consult and accommodate was fulfilled. Alton argues that this information is necessary to determine whether the Crown has met its constitutional obligations.

[53] Alton says that because of the broad scope and broad time frame of Sipekne'katik's appeal, Alton must introduce evidence to respond to the allegation that the 2006 Mi'kmaq Ecological Knowledge Study was not meaningfully considered and that its recommendations remain unanswered.

[54] I agree that all affidavits currently tendered that are relevant to the Crown's duty to consult can be admitted in this case. The amount of weight to be attributed, if any, to each piece of evidence is an exercise to be dealt with later in the proceedings. The issue of weight differs from the issue of admissibility.

[55] Alton argues that while Sipekne'katik alleges a lack of consultation, the Record does not adequately address the issue. Therefore, they say, additional evidence is required. When the duty to consult is raised, fresh evidence can be adduced to flesh out the relevant details. Sipekne'katik has filed affidavits in this regard and fairness dictates that the other parties to this appeal can also file affidavits on this very limited topic.

[56] Alton argues that they did not have an opportunity to file affidavit evidence on the s. 137 appeal, although Sipekne'katik did file evidence. Alton says they are unfairly disadvantaged as a result. Sipekne'katik argues that the fact that Alton was not given notice of the s. 137 appeal, was not a party to the appeal and was not provided an opportunity to make submissions on that appeal highlights the lack of procedural fairness in that process. What is usually relevant on a s. 138 appeal is whether the Minister's decision was reasonable, based on the Record. Alton's inability to file information on the s. 137 appeal would usually be of no

significance on a s. 138 appeal. However, the scope of relevance in this case is much broader than usual because of the issues related to the duty to consult and the honour of the Crown.

[57] Alton argues that Sipekne'katik also attacks the adequacy of the scientific studies relied on by the Minister. This goes to the seriousness of the potentially adverse effect on the right being claimed as was deemed relevant in *Haida Nation*.

[58] Alton argues that the Record is incomplete and since they did not create the Record they must be permitted to file evidence to fill in the gaps. Alton also argues that due to the volume of material filed on this appeal, affidavit evidence that references and contextualizes the Record can be admissible. Due to the large volume of material filed on this appeal, if the affidavits filed refer to material within the Record in order to condense the evidence or to provide context to the rest of the evidence relating to the duty to consult without devolving into advocacy and argument, this is acceptable from a common sense and time management perspective since fresh evidence is admissible regarding the duty to consult.

[59] The Crown downloaded some responsibility in the consultation process to Alton, as noted in correspondence dated September 8, 2014, from Helen MacPhail, Supervisor, Environmental Assessment, to David Birkett, President, Alton Natural Gas Storage Inc.:

> I am writing on behalf of the Province of Nova Scotia to outline our expectations regarding proponent engagement with the Mi'kmaq of Nova Scotia on the Alton Natural Gas Storage Facility and Natural Gas Pipeline Project located in Colchester County, Nova Scotia.
>
> As you know, the Crown has a duty to consult Aboriginal peoples in Canada when contemplating decisions/actions that have the potential to adversely impact asserted Aboriginal and/or Treaty rights. The Province of Nova Scotia, the Government of Canada and the Mi'kmaq of Nova Scotia signed an agreement in August 2010 that formalizes a process for consultation with First Nations in Nova Scotia. Please note that since March 2013, Sipekne'katik First Nation is no longer a signatory to this agreement. The Province, therefore, conducts a parallel consultation process with Sipekne'katik First Nation while also consulting with the Assembly of Nova Scotia Mi'kmaq Chiefs.
>
> While proponents and third parties do not have a legal duty to consult Aboriginal peoples, the Crown may delegate procedural aspects of consultation to the proponent, as part of the Crown's consultation process. Engagement by the proponent helps to meet the Crown's obligations. The proponent knows the

project details best, and is best suited to mitigate the concerns of the Mi'kmaq that may arise in discussions during project development.

This letter reiterates the direction provided to Alton at the May 29, 2014 meeting with provincial and federal regulators. It also references the recommendations provided to Alton at the June 23, 2014 consultation meeting with Chief Prosper and representatives from the Mi'kmaq Rights Initiative (KMKNO) and provincial regulators:

1. Alton Natural Gas is required to submit to NS Environment (NSE) a more detailed and proactive Aboriginal communication plan. The current information provided with the *Industrial Approval Application – Alton Gas: Phase 3* is unsatisfactory.

2. Alton Natural Gas should contact the Assembly of Nova Scotia Mi'kmaq Chiefs. In this case, the Benefits Committee of the Assembly should be contacted first, as requested by KMKNO representatives at the June 23, 2014 consultation meeting. The Benefits Officer is Jennifer MacGillivray and she can assist in coordinating the meeting.

3. Work together with the Mi'kmaq to develop mutually beneficial solutions, and consider how the Mi'kmaq could make a contribution to the project.

4. A request may be made by the Mi'kmaq to present to the entire Assembly. Offer to meet to discuss the project and offer a site visit, when appropriate, so that Chief Prosper can view the project area and gain a first-hand understanding of the proposed project activities.

5. I understand that Alton Natural Gas has held a meeting to date with Sipekne'katik First Nation. I wish to stress the importance of engaging both the Assembly of Nova Scotia Mi'kmaq Chiefs as well as Sipekne'katik First Nation.

6. During discussions with the Mi'kmaq, please identify all concerns and identify how these concerns could be mitigated. Also provide project updates and share any available new reports, in particular the final Archaeological Resource Impact Assessment report.

7. NSE is in the process of scheduling a consultation meeting with Sipekne'katik First Nation and may invite Alton Natural Gas to attend and present project information.

8. Provide a summary report to NSE. The summary report should include:

Attempts to contact the Mi'kmaq;

A summary of Mi'kmaq concerns;

Identification of how Mi'kmaq concerns were considered, and where appropriate, addressed by the proponent;

> Any outstanding issues the proponent was unable to address; and whether any other agreements were developed with the Mi'kmaq.
>
> 9. Provide copies of the engagement report to the KMKNO and NS Office of Aboriginal Affairs.
>
> More in depth information is contained in the *Proponents' Guide to Engaging the Mi'kmaq of Nova Scotia*, which can be found here:
>
> http://www.gov.ns.ca/abor/docs/Proponents-Guide.pdf

[60] The Church and Lyons affidavits address Alton's involvement in the project and the consultation process. However, their affidavits are replete with information that is a repetition of the Record. There was a large volume of material filed on this application. Having a party provide background information from the Record to provide context to their evidence and to help focus on the relevance of their submissions is acceptable in this specific situation, considering the significance of the duty to consult in this case.

[61] Sipekne'katik points out that the Lyons affidavit is argumentative. There are certainly paragraphs of the Lyons affidavit that are more akin to advocacy than evidence.

[62] Sipekne'katik also argues that certain information included in the Church and Lyons affidavits was not part of the Record before the Minister and that this evidence does not address any of the recognized exceptions. Sipekne'katik wants to confine the duty to consult merely to the scope of the duty and not whether the duty was or was not fulfilled. In my opinion, an exploration of the duty to consult includes the fulfillment (or not) of that duty.

[63] But for the issue of the duty to consult being front and center on this appeal, the affidavits of Church and Lyons would be inadmissible. However, considering the potentially broad scope of the duty to consult issue, the affidavit of Tim Church is admissible with the exception of paragraph 9 and 18 (argument). The weight to be attributed to the remaining paragraphs that are not merely a repetition of the Record will be determined on the appeal.

[64] The Lyons affidavit, which was originally prepared for the stay motion, has many paragraphs that may have been relevant to the stay application, but which are irrelevant on this motion. Specifically, paragraphs 121-164 will be struck for this reason.

[65] Paragraphs 42, 43, 44, and 79 of the Lyons affidavit are argument and will be struck. The offending portions (argument) of paragraphs 51, 74, and 78 of the Lyons affidavit will also be excised.

Conclusion

[66] Sipekne'katik alleges a breach of the duty to consult and accommodate. The honour of the Crown is an issue in this case. All affidavits filed on this appeal are relevant and admissible, subject to editing, because of the alleged breach of procedural fairness.

[67] In addition to addressing the duty to consult, the Younger and Huston affidavits will also be admitted to allow argument that the Minister did not have credible evidence before her on the s. 137 appeal.

[68] The weight to be given to each affidavit will be determined on the s. 138 appeal.

Arnold, J.