SUPREME COURT OF NOVA SCOTIA

Citation: *Sipekne'katik v. Alton Natural Gas Storage LP,* 2020 NSSC 34

Date: 20200123
Docket: Hfx No. 487834
Registry: Halifax

Between:

Sipekne'katik

Applicant

v.

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

Respondents

Decision

Judge:	The Honourable Justice John P. Bodurtha
Heard:	September 23, 2019, in Halifax, Nova Scotia
Written Release:	January 23, 2020
Counsel:	Ray Larkin, Q.C. and Balraj Dosanjh, for the Appellant Robert Grant, Q.C. and Daniela Bassan, for the Respondent, Alton Gas Sean Foreman, Q.C., for the Respondent, Minister of Environment

Introduction

[1] The appellant has appealed a Ministerial decision under the *Environment Act* and seeks an order allowing the introduction of evidence that was not before the Minister. The appellant says the proposed fresh evidence goes to the issue of the Crown's duty to consult.

Background

[2] The appellant, the Sipekne'katik Band, is a band under the *Indian Act*, RSC 1985, c I-5. It encompasses about six communities and some 2,700 members. In July 2007, the respondent Alton Natural Gas Storage registered an underground hydrocarbon facility for assessment under the *Environment Act*, SNS 1994-95, c 1. In the appellant's description, the proposed project includes "construction of buried pipelines from the area overlapping the salt formation to the Shubenacadie estuary, at a distance of approximately 12 km, where water will be drawn to the facility near Alton, Nova Scotia, with diluted brine returned to the Estuary during the cavern development process, and an underground natural gas storage facility."[1]

[3] The Department of Environment issued an Industrial Approval in January 2016, permitting Alton to operate a brine storage pond. This, the appellant says, meant that Alton could develop underground caverns for natural gas storage through solution mining. The appellant says it has treaty and aboriginal rights to fish, as well as a claim for aboriginal title, in part of the river where solution mining will occur.

[4] The appellant appealed the Industrial Approval to the Minister of Environment in February 2016, pursuant to section 137 of the *Environment Act*. The appellant claimed that the Department had failed to comply with s. 35(1) of the *Constitution Act, 1982*, by failing to meet the duty to consult with the Band. The Minister dismissed the appeal in April 2016. On further appeal pursuant to section 138 of the *Environment Act*, the Supreme Court allowed the appeal and quashed the Minister's decision. In her decision reported as 2017 NSSC 23, Justice Hood held that there had been a denial of procedural fairness due to the Minister's failure to disclose certain materials to the Band. She remitted the matter back to the Minister with a direction that the Band be permitted to respond to the additional material. The appellant accordingly provided further submissions to the Minister in July 2017. In April 2019 the Minister decided that there had been sufficient

[1] Appellant's brief at para. 7.

consultation with the Band, although she found that an amendment to the Industrial Approval was necessary. The Band appealed this decision in May 2019. That appeal is the background to this motion.

The motion

[5] On this preliminary motion, the appellant asks the court to admit an affidavit of Jennifer Copage, a consultant who has provided services to it, as evidence on the appeal. The evidence is allegedly relevant to the seventh ground of appeal identified by the appellant in its Notice of Appeal:

> (7) The Minister erred in law and in fact by failing to consider the capacity issues faced by Sipekne'katik and the impact of the capacity issues on Sipekne'katik's ability to meaningfully participate in the consultation process.

[6] According to counsel for the appellant, the Copage affidavit "provides evidence about Sipekne'katik's resources for Crown consultation, the volume of consultation files Sipekne'katik responds to, the funding sources available to Sipekne'katik for Crown consultation, Sipekne'katik's consultation process and the impact of Sipekne'katik's consultation capacity issues on the Alton Gas Project consultation."[2]

[7] In describing her own work with the appellant in her affidavit, Ms. Copage states that she has been a Senior Associate with Mi'kma'ki All Points Services (MAPS) since 2009. She explains that MAPS provides services to First Nation communities in areas such as project management, band governance, negotiation services, and land-use research. In her capacity with MAPS, Ms. Copage acted as a Consultation Coordinator with the appellant between December 2013 and April 2019. During this time, she states, she devoted about eighty percent of her working time to Sipekne'katik matters. She says that she was "overwhelmed and under-resourced" in this role, with her caseload rising from 60 to 133 active consultation files between 2015 and 2018. She attaches to her affidavit a list of federal and provincial files "located in Sipekne'katik's Consultation office" in the spring of 2019. She goes on to describe the appellant's inability to retain additional staff or expert assistance without drawing on its general revenues.

[2] Appellant's brief at para. 18.

[8] In the affidavit, Ms. Copage describes the background of consultation between the appellant and the Province of Nova Scotia, starting with its participation in, and 2013 withdrawal from, the federal-provincial "Made-in-Nova Scotia Process", after which the appellant dealt directly with the Province on projects triggering the duty to consult. The affidavit sets out the history of the appellant's attempts to design a consultation process that "would improve the knowledge and understanding of rights-related issues at the community level", with the assistance of MAPS, and including discussions with the provincial Office of Aboriginal Affairs (OAA). This resulted in the "Shubenacadie Process." Ms. Copage details various meetings, discussions, and correspondence with OAA beginning in 2013. This led to agreements on consultation funding starting in 2014, which Ms. Copage describes in detail. She reviewed the various funding arrangements between the appellant and the federal and provincial governments during this time period.

[9] Ms. Copage also reviews in detail the history of consultation funding arrangements for the Alton Gas project specifically, beginning in 2014. This included her attendance at technical meetings in late 2015 arranged to discuss "uncertainties and data gaps identified in the Conestaga Rovers & Associates third-party review report, and to address potential actions or solutions to address gaps in data."[3] These meetings, at which Ms. Copage was an observer, led to the draft Industrial Approval being shared in December 2015. Ms. Copage goes on to describe the subsequent correspondence between the OAA and Sipekne'katik into January 2016, asserting that she "did not have sufficient time or resources to communicate and adequately explain" the information and documents arising out of the technical meetings to the band council and community members "between December 15, 2015 and January 6, 2016."[4] As a result, she states, the appellant did not have "an opportunity for direct community engagement with the membership as part of the consultation process … or the opportunity to identify the potential impacts to Sipekne'katik's Aboriginal and Treaty rights and title once Sipekne'katik Band Council and membership sufficiently understood the Alton Gas Project and the potential environmental impacts from the project."[5] She concludes by noting that she repeatedly advised provincial government representatives that the appellant could not "be in a position to engage in

[3] Copage affidavit at paras. 63-73.
[4] Copage affidavit at paras. 80-81.
[5] Copage affidavit at para. 83.

meaningful consultation with the Province without first being provided with an adequate opportunity to understand the scientific studies and reports."[6]

The legal framework

[10] Section 138 of the *Environment Act* allows "a person aggrieved" by a decision of the Minister under section 137 to appeal to the court "on a question of law or on a question of fact, or on a question of law and fact…": ss. 138(1)(b). The grounds of appeal in this case are framed as errors of law and fact. Denial of natural justice is not specifically identified as a ground of appeal.

[11] *Civil Procedure Rule* 7.28(1) addresses the introduction of evidence beyond the record on a statutory appeal:

> Evidence on judicial review or appeal
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> 7.28 (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction…

[12] The law governing the admission of fresh evidence on a section 138 appeal was considered in *Scotian Materials Ltd v Nova Scotia (Environment)*, 2016 NSSC 62, where Murray J said:

> [14] The Appellant relies on *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 322, for authority that fresh evidence may be admitted in situations where bias, fraud or jurisdiction is at issue.
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> [15] 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.
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> [16] 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…

[6] Copage affidavit at para. 85.

[13] The appellant does not dispute that a statutory appeal, like a judicial review, is presumptively heard based on the record that was before the decision maker. Therefore, the admission of new affidavit evidence on the appeal is exceptional. The appellant says the exceptional circumstances arises from the alleged violation of the duty to consult.

The duty to consult

[14] In an earlier motion to admit fresh affidavit evidence in the previous appeal in this matter, reported at 2016 NSSC 260 (*Sipekne'katik I*), Arnold J reviewed the law on the duty to consult as discussed in *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73, where the Supreme Court of Canada said the following:

> 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... It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
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> 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... 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:
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> > . . . "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.
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> 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.

[15] In *Haida Nation*, the Supreme Court of Canada described a spectrum along which the content and scope of the duty to consult might vary, depending on the circumstances:

> 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…
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> 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.
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> 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.

[16] The court went on to expand on the forms of accommodation that may be necessary when consultation points to a need to change the Crown's proposed action or policy:

> 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".
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> 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.
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> 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.

[17] These principles of consultation and accommodation form the background to the issues related to consultation funding that have arisen in this case.

Funding as an aspect of the duty to consult

[18] There is authority for the proposition that funding may be relevant to the determination of whether there has been adequate consultation. In *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2007] OJ No 2214, 2007 CanLII 20790 (Ont Sup Ct J), the parties were attempting to design a consultation framework respecting proposed exploratory drilling on non-reserve land in traditional aboriginal territory. The First Nation had rejected a Crown funding proposal as inadequate. In directing further negotiations, and the possibility of a resolution of the issue by the court, GP Smith J said, "[T]he issue of appropriate

funding is essential to a fair and balanced consultation process, to ensure a "level playing field." There is insufficient material before the court at present for it to make an informed decision as to what level of funding would be reasonable": *Platinex* at para. 27.

[19] In *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456, the consultation in question related to a proposed limestone quarry. In setting aside the licenses issued by the Minister on account of inadequate consultation, the court reviewed the general principles of the duty to consult, including funding issues:

> [26] To have meaningful participation in consultations, a First Nation must have sufficient expertise and resources. This can lead to disagreement over whether funding is required, and if it is, how much is needed, and what should be done if the Crown and a First Nation disagree on these points. In some cases, First Nations have refused to meet in the absence of "funding to 'support… meaningful engagement in the issue'…" and when the Crown proposed funding, have "claimed that the funding provided was not adequate to support the [First Nation] in its efforts to consult…." Sometimes the First Nation has said that it was "unable to review and discuss matters… 'because of a lack of funding and staff'." The Crown has sometimes taken First Nations' positions on these issues as evidence of the First Nation "not approach[ing] the consultation in good faith".
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> [27] "[T]he issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'." Reasonable efforts should be made, on both sides, to avoid funding brinksmanship. Ultimately the decision on funding is the Crown's, as part of its design and implementation of a consultation process, and its decisions on funding issues will be reviewed on a standard of reasonableness.

[20] The court went on to make several additional points about consultation funding:

> [156] MNRF has agreed to fund preliminary consultation costs and SON has agreed to proceed on the basis of that funding, so it is not necessary to decide whether funding is required in the absence of agreement. It will be for the parties to discuss what further funding, if any, will be provided to SON to complete consultations. There are two related points worth noting, however.
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> [157] First, SON sought initial funding to help understand the issues raised by the Project, and to address those issues effectively with MNRF. SON did not ask to have all the technical work done over again by its own experts. SON's budget included modest legal costs. MNRF did not explain why it rejected and continues to reject funding for SON's reasonable legal costs to consult.

> [158] As noted above, SON is disinclined to spend its "community resources" to review someone else's project. That is a reasonable position.
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> [159] SON has limited resources. It does not participate in consultations as a party to the Project. The expense of consultation arises as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project move ahead. The Crown should not reasonably expect SON to absorb consultation costs from SON's general resources in these circumstances.
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> [160] Second, clearly the process went "sideways" in this case. SON was put to considerable legal expense to make its case to MNRF that there is a duty to consult and that the scope of that duty includes funded experts. It will be for the parties to decide whether and to what extent the Crown should reimburse these legal expenses on a reasonable basis, taking into account (a) the legal costs to be paid to SON as a result of this decision; (b) the legal and other costs reasonably incurred by SON in its dealings with MNRF and Hayes over the Project to this point.

[21] In *Clyde River (Hamlet) v Petroleum Geo‑Services Inc*, [2017] 1 SCR 1069, 2017 SCC 40, the Supreme Court of Canada commented on the significance of participant funding to the consultation process:

> [47] Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "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"... Despite the NEB's broad powers under COGOA to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument. While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation … and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship...

[22] The appellant submits that the proposed new affidavit provides evidence on its capacity and resources for Crown consultation generally, and on the Alton Gas project specifically. It submits the funding and resources challenges it faced are relevant to the question of whether there was meaningful consultation on the

industrial approval, as well as the consultation process that came later during the project.

New evidence in "duty to consult" cases

[23] The appellant says the affidavit is admissible on the issue of procedural fairness as it relates to the duty to consult. The affidavit provides evidence on the consultation process and on the fulfillment of the duty to consult. It deals with the appellant's consultation resources. Ms. Copage lists the consultation files she was involved with, in order to make the point that the appellant lacked sufficient resources.

[24] In *Sipekne'katik I* Arnold J reviewed the law governing admissibility of new evidence in section 138 appeals where the duty to consult was in issue: 2016 NSSC 260 (*Sipekne'katik I*). After noting the principles described in *Scotian Materials*, he said:

> [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. [Emphasis added.]

[25] In the motion before Arnold J, Sipekne'katik alleged that there had been a breach of the duty of procedural fairness relating to the duty to consult. Sipekne'katik, as well as the Minister and Alton, sought to introduce affidavits on the appeal on the issue of "the duty to consult with Aboriginal peoples and accommodate their interests based on the honour of the Crown in this regard": see *Sipekne'katik I* at para. 18. Justice Arnold considered several cases where courts "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…": *Sipekne'katik I* at para. 21. He noted, however, that this did not suggest an open-ended right to adduce new evidence:

> [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.

[26] Due to the live issue relating to the honour of the Crown, and specifically the allegation of a breach of the duty to consult and accommodate, Arnold J admitted the new affidavits from each of the three parties.

[27] In *Tsuu T'ina Nation v Alberta (Environment)*, 2008 ABQB 547, the government of Alberta had developed a water management plan for the South Saskatchewan River Basin in the southern part of the Province. The plan was approved by cabinet and was embodied in an order in council. The applicant First Nations sought judicial review, alleging that the duty to consult and accommodate had not been met. The applicants filed affidavits, which the Crown applied to strike:

> [23] The Government of Alberta applied to the Court to strike portions of some of the affidavits and exhibits filed by the T'suu Tina and Samson in these proceedings as the Respondent submits that the evidence before the Court should be restricted to the Return. The Applicants submit that the additional affidavits and exhibits filed with the Court are necessary in order to prove that the Crown breached its' "constitutional" duty to consult and accommodate.
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> [24] The Respondent conceded that a large proportion of the evidence found in the affidavits and the exhibits which the Respondent sought to strike is already in the Return and, as a result, its admissibility is not in issue. The Respondent has provided the Court with a chart indicating portions of the additional evidence to which the Respondent has agreed. In addition, and, to meet the possibility that the additional evidence would be admitted in its entirety, the Respondent replied to the Applicants' additional evidence by filing, under reserve, an additional affidavit.

[28] The court in dismissing the application to strike the affidavits said:

> [26] In a duty to consult analysis, the Supreme Court of Canada in *Haida Nation* … 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.

[29] In *Chartrand v The District Manager*, 2013 BCSC 1068, the First Nation alleged that the Crown failed to meet the duty to consult in relation to various forestry management decisions. In respect of the evidence admissible on judicial review, the court acknowledged the general rule that the record is normally limited to what was before the decision-maker, but went on to say:

> [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:
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> > 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. [Emphasis added.]

[30] The court took note of the earlier *Tsuu T'ina Nation* decision, and continued:

> [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.
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> [116] There is a substantial body of evidence that was not before the decision maker in this case, including the Dewhirst, the Marshall, and the Galois expert reports. Those experts opine on the intentions of the parties at the time of the KFN Treaties. Lay witnesses have also provided oral history evidence regarding traditional use of the lands in question that was not before the decision maker. If this proceeding were a trial of the question of whether Aboriginal rights and title exists in relation to the KFN Traditional Territory beyond the KFN Treaty Lands, that opinion evidence would arguably be inadmissible as going to the ultimate issue and usurping the function of the Court.
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> [117] However, this proceeding is not a trial. At issue is whether the Provincial Crown met its duty to adequately consult. The expert and lay evidence was necessary to support a specific ground of review, namely whether the KFN has made out a credible case such that the Provincial Crown had a duty to consult the KFN in the context of its claims for Aboriginal rights and title in respect of the KFN Traditional Territory beyond the KFN Treaty Lands. The evidence is admissible to this limited extent… [Emphasis added.]

[31] The appellant has also cited *Enge v Mandeville et al*, 2013 NWTSC 33, where the issue was what should be included in the record on judicial review of a decision respecting the management of caribou populations. After reviewing the relevant rules of court, the court said:

> [16] The nature of this judicial review is also relevant. Judicial review is a process intended "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes." ... In a duty to consult case, the focus is on the process of consultation and accommodation rather than the outcome. This requires a preliminary assessment of the strength of the claim and the seriousness of the potential impact upon the affected right... In determining whether the government has met its duty to consult obligations, the Court is required to review evidence relating to the preliminary assessment...
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> [17] Where the claim is that the government failed to conduct the preliminary assessment and failed to meet its duty to consult, it is difficult to see how all of

> the relevant evidence could be included in the record that the government has filed... Indeed, the argument of the Applicant is that, had the Respondents engaged in meaningful consultation, the evidence in issue would have been included in the return because the documents would have been before the Minister. I agree. Had the Respondents conducted a preliminary assessment, the issues of the strength of the claim and seriousness of the impact upon the affected right would likely have resulted in dialogue and the exchange of information between the parties.
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> [18] Further, the duty to consult regarding Aboriginal rights is a constitutional issue which should not be discussed in a factual vacuum... Courts require evidence regarding a claimant's Aboriginal rights in order to assess the merits of a claim and whether the government has met its duty to consult. The honour of the Crown grounds the duty to consult and accommodate Aboriginal peoples and it would be inconsistent with the honour of the Crown to limit the evidence which might assist the court in making that determination…
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> …
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> [20] Much of the content of the Chambers Record is included in the return filed by the Respondents. While the Respondents' position is that the only evidence that should be permitted on the judicial review is the return, I note that no objections were raised to any specific item in the Chambers Record and, in submissions, counsel for the Respondents did not dispute any specific facts or evidence alleged by the Applicant. That being said, I am mindful that much of this evidence has not been tested as it would be during a trial. However, this is not a trial and I am of the view that it is incumbent on the Court to accept at face value the documents filed by both parties in order to fulfill my obligation to conduct a preliminary assessment of the nature and extent of the Respondents' duty to consult and accommodate and whether the Respondents fulfilled that duty. [Citations omitted.]

[32] In *Pimicikamak et al v Manitoba et al*, 2014 MBQB 143, the issue was whether affidavits filed on judicial review were admissible for the purpose of determining whether the Province met the duty to consult in relation to an agreement with the Incorporated Community of Cross Lake in respect of certain Crown lands. The court said:

> [21] As part of their application for judicial review, the applicants have filed various affidavits that are now impugned by the respondents as inadmissible extrinsic evidence on the judicial review. The applicants contend, amongst other things, that the impugned affidavit evidence properly demonstrates that prior to the agreement being entered into, the applicants were not given an opportunity to share all of the relevant information with Manitoba before Manitoba "unilaterally cut off" consultations, over the applicants' protest that they still had more

> information to provide. Manitoba strongly opposes any characterization of the consultations as inadequate or as having been "unilaterally" terminated...

[33] Reviewing the circumstances for the admission of new evidence, the court said:

> [57] In cases of judicial review in which a breach of the duty to consult and accommodate (as between the Crown and an Aboriginal community) is alleged, extrinsic evidence establishing the elements of the duty has also been determined to be a potential exception to the general rule that the review must take place on the basis of the record before the decision maker(s).
>
> [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 fulfillment (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.

[34] The court in *Pimicikamak* at para. 61 noted that "even in the particular and unique context of judicial reviews respecting Crown-Aboriginal consultations, the basic principle of judicial review must not be casually set aside…" The court cited the following passage from *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 32, where the court referenced *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904:

> 28 I do not read his decision, however, as establishing a fixed set of categories of evidence admissible on judicial review. Rather, his point was that one must not lose sight of the purpose of judicial review - to determine whether a decision meets the appropriate standard of review, not to usurp the decision maker's role and reconsider the decision made on its merits.
>
> 29 In *Tsuu T'ina* the Court did permit the admission of new evidence on the basis that, like here, one of the decisions to be reviewed was the adequacy of the consultation process, where the Crown must evaluate its own efforts to discharge

> its duty to consult. However, nothing in *Tsuu T'ina* (nor in *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139) mandates or permits a party to adduce new evidence that is irrelevant or which is tendered in an effort to have the judicial review judge conduct a trial *de novo*, essentially usurping the jurisdiction of the initial decision maker.

[35] Ultimately the court in *Pimicikamak* decided that the affidavits should be struck:

> [63] To summarize, I have determined on the evidence adduced on this motion (which includes the existing consultation record) that the impugned evidence cannot be justified and admitted in the particular circumstances of this case to fill in any supposed gaps in the consultation record. Neither are the affidavits admissible on the basis of a need to demonstrate procedural unfairness, the possible proof of which has not been established on this motion – even on a low threshold and even with reference to any of the additional affidavits. The affidavits can similarly not be justified and admitted in this case to establish the scope and conduct of the duty to consult and accommodate owed by Manitoba. With Manitoba having conceded that the scope and content of its duty is at least at the medium and potentially high level, Manitoba has willingly set itself up for an assessment on the existing record which will examine both the accuracy of that concession and whether Manitoba has satisfied that duty. With the scope and content of Manitoba's duty sitting perhaps at the high end of the spectrum (by Manitoba's own admission), the applicants cannot claim it is necessary to consider extrinsic evidence for a purpose now rendered somewhat moot by Manitoba's concession. For reasons set out below, I have determined that the existing record is both fair and adequate for reviewing how Manitoba "scoped" and assessed the level of its duty, as well as for reviewing whether it satisfied that duty.
>
> [64] Without being able to successfully invoke the above justifications, the 11 affidavits which were not before the decision maker(s), cannot now on this judicial review be justifiably admitted in order to establish that the duty to consult and accommodate was not met.
>
> [65] While the question as to whether Manitoba fulfilled its duty to consult remains a main and live issue on the judicial review, the need to determine that question, absent the applicability of any of the other exceptions that might justify the admission of the 11 affidavits, is not such so as to require the court to allow what would otherwise be inadmissible extrinsic evidence. The review as to whether Manitoba has met its duty to consult will take place on the existing consultation record and that review will be conducted on a standard of reasonableness.

> [66] The applicants' affidavits are "in addition to" the consultation record. Manitoba is correct in saying that some of the affidavits repeat what is already in the consultation record and some of the affidavits include information that the applicants failed to provide to Manitoba during the process of consultation where there existed a reciprocal duty on the part of the applicants to bring forth relevant information. For example, some of the affidavits can be seen to address historical and traditional uses of specific land subject to the Agreement, which information, it would seem, if not already in the consultation record, is information the applicants could have provided (but did not) during the process of consultation. Moreover, there is still other information contained in the affidavits which, separate and apart from its extrinsic nature, is not clearly information relevant to the main question on the judicial review as to whether Manitoba fulfilled its duty of consultation.

[36] The Nova Scotia Court of Appeal adopted various legal principles drawn from *Pimicikamak* in *Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation*, 2019 NSCA 75, including the principle that the duty to consult will normally be reviewed in accordance with administrative law principles. This was said in the context of a judicial review, but I would infer that the same principles will govern a statutory appeal.

[37] The issue in *Pictou Landing* was the existence of a duty to consult. The dispute over the application of fresh evidence arose out of a failure of the Province to disclose information. The Court of Appeal applied the test from *R v Wolkins*, 2005 NSCA 2, which would allow the court to "remedy inadequate Crown disclosure by admitting fresh evidence that is relevant to whether consultation is triggered under s. 35(1) of the *Constitution Act, 1982*": *Pictou Landing* at para. 70. The court made general observations about the legal context:

> [64] *Wolkins* mentioned "failure of disclosure by the Crown" as an example of a process concern that supported the admission of fresh evidence. Justice Cromwell cited *R. v. Taillefer*, which discussed inadequate Crown disclosure that would impair the accused's right to full answer and defence in a criminal case.
>
> [65] In my view, similar considerations govern inadequate Crown disclosure respecting consultation under s. 35(1) of the *Constitution Act, 1982*.
>
> [66] Extrinsic evidence may be admitted to assess the appropriate scope of Aboriginal consultation that is required by the honour of the Crown... Adequate disclosure inheres in the honour of the Crown as liberally defined by the Chief Justice in *Haida Nation* … and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, paras. 23-24. Adequate disclosure is necessary both for meaningful consultation and so a court may assess whether the Crown's duty to consult is triggered.

> [67] Generally, on a judicial review, extrinsic evidence may be admitted to add the necessary background, remedy inadequate disclosure and address the absence of evidence on a central factual issue... This is especially so in a judicial review that follows an atypically restricted production of relevant information...

[38] The court determined that new affidavits from the Mill and from the First Nation should be admitted, except for certain materials that post-dated the hearing before the chambers judge.

Background and context exception

[39] The appellant also relies on the "general background" exception to the usual restriction on extrinsic evidence, as allowed in *Squamish Indian Band v Canada (Fisheries and Oceans)*, 2017 FC 1182, reversed on other grounds, 2019 FCA 216. In that case the application judge said:

> [32] The law relevant to these motions is set out in *Association of Universities and Colleges of Canada v Canadian Copyright Licencing Agency (Access Copyright)*, 2012 FCA 22. There, the Federal Court of Appeal noted that the evidentiary record before the court on judicial review must be the same as the record that was before the individual decision-maker, subject to certain exceptions.
>
> [33] The exception relevant to both motions here is the "general background" exception: "where the affidavit provides general background information that might assist in understanding the issues relevant to the judicial review" (*Access Copyright*, at para 20).
>
> [34] Notwithstanding the limited record here, I am of the view that this evidence is admissible under the "general background" exception. Considering the relationship between these parties, the complex nature of fisheries management, and the constitutional rights asserted by the Squamish Nation, in my view this information provided by both parties is appropriate to consider within that context.

[40] Similarly, in *Sipekne'katik I*, the appellant says, Arnold J admitted the fresh evidence to provide context and fill gaps in the record. I disagree with this assertion. The passage the appellant cites consists mainly of a recitation of arguments made by the parties. Arnold J ultimately said the following:

> [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.
>
> …
>
> [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.

[41] The appellant's characterization is also undermined by Justice Arnold's remarks that the affidavits in question were admissible on the issues of duty of fairness and whether there was evidence for the Minister's decision: *Sipekne'katik I* at paras. 66-67. It is not apparent from his reasons that Arnold J was in fact admitting the affidavits for the broader "background" purpose.

[42] The Respondent Alton says the material in question is intended to support an entire ground of appeal respecting the appellant's capacity, and it cannot therefore be taken as merely going to background and context. Further, Alton says there is no gap in the record, other than any gap arising from the manner in which the appellant has conducted the proceeding.

Conclusion

[43] The appellant argues that in *Sipekne'katik I*, Arnold J took a "liberal and generous approach" to new evidence in allowing both the Band and Alton to introduce affidavit evidence not in the record on the issue of procedural fairness and the duty to consult. Justice Arnold noted, however, that the fact that the honour of the Crown is in issue "does not mean that any and all affidavit evidence will be admissible": *Sipekne'katik I* at para. 29. This echoes the comments in *Pimicikamak* to the effect that the general principles governing the introduction of new evidence "must not be casually set aside": *Pimicikamak* at para. 61. The appellant's counsel

did not state it this bluntly, but the implication of their argument was that where the honour of the Crown is in issue, new evidence will be admissible as of right. *Pimicikamak* does not support such an expansive view and I agree with that court's rationale for limiting the introduction of new evidence on a judicial review where the honour of the Crown is in issue.

[44] I disagree with the appellant's position that the affidavit of Ms. Copage is "general background" and therefore meets one of the exceptions for the admission of extrinsic evidence on a judicial review or appeal. Ms. Copage's affidavit speaks directly to the appellant's seventh ground of appeal - not as background but in support of the appellant's position. The affidavit addresses the appellant's capacity issues again for a third time. Ms. Copage's first two affidavits addressed the same general subject matter. There are no supposed gaps in the consultation record that would justify admitting the evidence under this exception.

[45] The respondents also point to the principle of proportionality as embodied in the Supreme Court of Canada's decision in *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7, as well as *Civil Procedure Rule* 1.01 to deny the new evidence. I am not persuaded by this argument. To apply this reasoning in the specific context of a dispute over the duty to consult – particularly if the proportionality argument seems decisive – would run contrary to the honour of the Crown.

[46] The court in *Pimicikamak* addressed how the issue on judicial review would not be whether there existed a duty to consult but whether Manitoba fulfilled its duty, taking into consideration the scope and content of the duty owed. The issue it needed to decide was whether the applicants could successfully invoke one of the exceptions to admit new evidence that was not before the initial decision maker.

[47] I agree with the respondents' argument against admission of the new affidavit on the basis that it amounts to an attempt to "litigate in slices" by advancing evidence on different issues on different appeals.

[48] The appellant has had ample opportunity to augment the evidence on capacity and consultation funding over the relevant time period. Ms. Copage's first two affidavits addressed the same general subject matter and time periods, and the proposed third affidavit merely expands on subject matter that was canvassed in the prior affidavits. Justice Hood's decision on the denial of natural justice placed no limits on what could be put before the Minister. It is clear, among other things, that the issue of consultation and capacity funding was raised earlier in the proceeding and was specifically alluded to by the Minister in the 2019 decision.

Whether or not this amounts to an abuse of process by relitigation as suggested by the respondents, it does raise the question of whether there is any limit to the introduction of new evidence on a statutory appeal.

[49] The caselaw on the duty to consult provides some support for the expansive view propounded by the appellant. Evidence relevant to the duty to consult – including funding decisions – will not be lightly set aside on judicial review or appeal. The honour of the Crown mandates that such evidence be before the decision-maker. However, neither *Sipekne'katik I* nor *Pictou Landing* suggest that the right to introduce new evidence at this stage is unlimited. It is clear that "exceptional circumstances" are required.

[50] *Pimicikamak* provides a more nuanced view regarding what evidence should be before the decision maker on a judicial review dealing with the honour of the Crown. In that case, there was no dispute as to the existence of a duty to consult. Similarly, in this case, where funding is the core dispute, there is no apparent dispute as to the existence of a duty to consult or to provide funding. The ground of appeal is very specific: the Minister allegedly "failed to consider" the impact of the alleged capacity issues on the appellant's ability to meaningfully participate in the consultation process. It is the Minister's consideration of the information before her that is in question. This is not a case where the record must be supplemented in order to allow a reviewing court to assess the process that was followed by the decision-maker. It would amount to treating the appeal as a trial *de novo* if the record were to be supplemented for the purpose of establishing an error of law or of fact. If material was not put before the Minister, it is not clear how the Minister could err by not considering it.

[51] I do not agree with the respondent Alton that the duty to consult issue is irrelevant here because the appeal is not based on a denial of procedural fairness. However, in my opinion, the framing of the appeal as one of law and fact must be of some relevance.

[52] In reviewing the caselaw, I am cognizant of various statements favouring an expansive approach to the admission of evidence in duty to consult cases. However, this case is different and requires the more nuanced approach taken in *Pimicikamak*. In the circumstances of this case, the admission of new evidence on an issue that is not new, relating to time periods that have already been extensively litigated over, should not be admitted simply on the grounds that it falls within the scope of the duty to consult. To allow the admission of new evidence would usurp

the jurisdiction of the decision maker and turn the statutory appeal into a trial *de novo*. In many instances where the duty of the Crown is the issue, applying an expansive approach to new evidence will be appropriate, but this is not one of those instances. The existing record is sufficient for the issue on appeal.

[53] The appellant's motion is dismissed, with costs in the cause.

Bodurtha, J.