2009 CarswellBC 2525, 2009 BCSC 1275, [2009] B.C.W.L.D. 7980, [2009] B.C.W.L.D. 8025, 46 C.E.L.R. (3d) 183, [2009] 4 C.N.L.R. 213

Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)

Nlaka'pamux Nation Tribal Council (Petitioner) and Derek Griffin in his capacity as Project Assessment Director, Environmental Assessment Office, Belkorp Environmental Services Inc. and Village of Cache Creek (Respondents)

British Columbia Supreme Court

Sewell J.

Heard: August 4-7, 2009
Judgment: September 17, 2009
Docket: Vancouver S092162

Counsel: Reidar Mogerman, M. Underhill for Petitioner

P. Foy, Q.C., E. Christie for Respondent, Derek Griffin in his capacity as Project Assessment Director, Environmental Assessment Office

S. Fitterman for Respondent, Belkorp Environmental Services Inc.

No one for Village of Cache Creek

Subject: Environmental; Public; Constitutional; Property

Environmental law --- Statutory protection of environment — Environmental assessment — Aboriginal interests

Proposal concerned 40 hectare extension of landfill — Landfill was located on or near boundary of Aboriginal Bands and Nations — Extension project was opposed by tribal council (NNTC) of one of Aboriginal Nations — NNTC brought application for order quashing order issued by project assessment director, and quashing approval of terms of reference — NNTC further sought declaration that director failed to comply with constitutional and legal duty to consult with NNTC in good faith and to seek accommodations in respect of environmental assessment — Alternatively, NNTC sought order requiring director to consult in good faith, to seek accommodations in respect of environmental assessment, and to add NNTC to definition of "First Nations" in order issued by director and in terms of reference approved by director — Application dismissed — When faced with diversity of putative representation on behalf of First Nation, government must discharge duty to consult by taking reasonable steps to ensure all points of view within First Nation are given appropriate consideration — Government acted appropriately in making decision to implement separate consultation protocols with NNTC and other Band — There was no apparent objection in principle to requiring proponents to consult with specific

Band if government also undertook appropriate consultation with First Nation — That was particularly so when there was clear divergence of opinion between putative representative of Nation and representatives of Band — Preliminary assessment was that claim of Nation to aboriginal title to land on which project was proposed to be located was weak — Decision to exclude NNTC from working group established pursuant to order and to amend order to provide that consultation with First Nations could be done on government-to-government basis was not failure to discharge duty — Environmental Assessment Office clearly recognized that it had duty to consult, and its procedure at this stage could not be said to be unreasonable — Intention to consult still had to be carried out, but it was appropriate at this stage to accept stated intention to consult as genuine.

Aboriginal law --- Constitutional issues — Land claims agreements — Miscellaneous

Duty of Crown to consult — Proposal concerned 40 hectare extension of landfill — Landfill was located on or near boundary of Aboriginal Bands and Nations — Extension project was opposed by tribal council (NNTC) of one of Aboriginal Nations — NNTC brought application for order quashing order issued by project assessment director, and quashing approval of terms of reference — NNTC further sought declaration that director failed to comply with constitutional and legal duty to consult with NNTC in good faith and to seek accommodations in respect of environmental assessment — Alternatively, NNTC sought order requiring director to consult in good faith, to seek accommodations in respect of environmental assessment, and to add NNTC to definition of "First Nations" in order issued by director and in terms of reference approved by director — Application dismissed — When faced with diversity of putative representation on behalf of First Nation, government must discharge duty to consult by taking reasonable steps to ensure all points of view within First Nation are given appropriate consideration — Government acted appropriately in making decision to implement separate consultation protocols with NNTC and other Band — There was no apparent objection in principle to requiring proponents to consult with specific Band if government also undertook appropriate consultation with First Nation — That was particularly so when there was clear divergence of opinion between putative representative of Nation and representatives of Band — Preliminary assessment was that claim of Nation to aboriginal title to land on which project was proposed to be located was weak — Decision to exclude NNTC from working group established pursuant to order and to amend order to provide that consultation with First Nations could be done on government-to-government basis was not failure to discharge duty — Environmental Assessment Office clearly recognized that it had duty to consult, and its procedure at this stage could not be said to be unreasonable — Intention to consult still had to be carried out, but it was appropriate at this stage to accept stated intention to consult as genuine.

Cases considered by *Sewell J.*:

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

Hupacasath First Nation v. British Columbia (Minister of Forests) (2005), 2005 BCSC 1712, 2005 CarswellBC 2936, [2006] 1 C.N.L.R. 22, 51 B.C.L.R. (4th) 133, 41 Admin. L.R. (4th) 179 (B.C. S.C.) — considered

Kwikwetlem First Nation v. British Columbia Transmission Corp. (2009), [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, 76 R.P.R. (4th) 213, 89 B.C.L.R. (4th) 273, 41 C.E.L.R. (3d) 159, 308 D.L.R. (4th) 285, [2009] 9 W.W.R. 92, 2009 BCCA 68, 2009 CarswellBC 341 (B.C. C.A.) — followed

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 327 N.R.

133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

Xeni Gwet'in First Nations v. British Columbia (2007), *(*sub nom. *Tsilhqot'in Nation v. British Columbia)* [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1, 2007 BCSC 1700, 2007 CarswellBC 2741 (B.C. S.C.) — considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 35 — referred to

Environmental Assessment Act, S.B.C. 2002, c. 43

Generally — referred to

Pt. 1 — referred to

Pt. 2 — referred to

Pt. 3 — referred to

Pt. 4 — referred to

Pt. 5 — referred to

Pt. 6 — referred to

s. 1 — referred to

s. 7(1) — referred to

s. 7(3) — referred to

s. 9 — referred to

s. 9(1) — referred to

s. 10 — referred to

s. 10(1)(c) — referred to

s. 11 — considered

s. 13 — referred to

s. 16 — referred to

s. 17 — referred to

s. 30 — referred to

Waste Management Act, R.S.B.C. 1996, c. 482

Generally — referred to

APPLICATION by Aboriginal tribal council to quash order with respect to order landfill extension project, and seeking other relief.

***Sewell J.*:**

1 Every year the people and businesses of Metro Vancouver create hundreds of thousands of metric tons of solid waste. Currently a significant part of that solid waste is trucked to a landfill located in the southern part of the village of Cache Creek (the Cache Creek Landfill). The Cache Creek Landfill in its present form began accepting the garbage created in the Lower Mainland of British Columbia in or about 1987. It is expected that sometime in 2010 the Cache Creek Landfill will reach its capacity. Accordingly, Metro Vancouver has turned its attention to the question of what to do with its solid waste.

2 There is considerable controversy about how to deal with Metro Vancouver's solid waste. Recently a number of proposals have been put forward. All of them have encountered significant opposition. The proposal which has given rise to this litigation involves an extension of the Cache Creek Landfill (the "Extension Project"), which proposes an approximately 40 hectare extension to the Cache Creek Landfill. Metro Vancouver is not a proponent of the Extension Project. The respondents Belkorp Environmental Services Inc. and Village of Cache Creek are the proponents. They, of course, hope to be able to continue to receive waste from Metro Vancouver. If they do, depending on the rate at which Metro Vancouver produces waste, the lifespan of the Extension Project is expected to range from 20 to 30 years.

3 The Extension Project is located within the municipal boundaries of the village of Cache Creek, west of the existing Cache Creek Landfill and immediately south of the village of Cache Creek.

4 The Cache Creek Landfill is located on or near the boundary of the traditional territory of the Secwepemc Nation, formerly called the Shuswap Nation, and the Nlaka'pamux Nation, formerly called the Thomson River Nation. The Bonaparte Indian Band, a member of the Secwepemc Nation, occupies land which is most closely proximate to the Extension Project. The Ashcroft First Nation Band (the "Ashcroft Band"), a member of the Nlaka'pamux Nation, occupies land slightly to the south of the Extension Project closer to the village of Ashcroft.

5 Not surprisingly, there is the same diversity of opinion with respect to landfills in general and the Extension Project in particular among the members of the Nlaka'pamux Nation as there is among the members of the public of British Columbia generally. Some members of the Nlaka'pamux Nation favour the Extension Project and are of the view that it will provide a net benefit to the members of the Nation. Others are opposed to it. The current representatives of the Ashcroft Band are among those who generally favour it. The petitioner, the Nlaka'pamux Nation Tribal Council (the "NNTC") is among those who oppose it.

6 On this application the NNTC applies for the following relief:

> (a) An order in the nature of *certiorari* quashing the order issued on October 22, 2008 pursuant to section 11 of the *Environment Assessment Act, S.B.C. 2002, c. 43* (the "*Act*") by Derek Griffin, Project Assessment Director,

Environmental Assessment Office (the "Director"), in respect of the Cache Creek Landfill Extension Project (the "Project");

(b) An order in the nature of *certiorari* quashing the Director's approval of the Terms of Reference for the Project on January 30, 2009;

(c) A declaration that the Director owes a constitutional and legal duty to consult with the Nlaka'pamux Nation Tribal Council ("NNTC") in good faith and endeavour to seek accommodations in respect of the environmental assessment of the Project;

(d) A declaration that the Director has failed to comply with his constitutional and legal duty to consult with the NNTC in good faith and endeavour to seek accommodations in respect of the environmental assessment of the Project;

(e) In the alternative, an order:

(i) in the nature of mandamus requiring the Director to consult with the NNTC in good faith and endeavour to seek accommodations in respect of the environmental assessment of the Project;

(ii) in the nature of mandamus requiring the Director to add the NNTC to the definition of "First Nations" in Schedule A of the section 11 order issued by the Director on October 22, 2008;

(iii) in the nature of mandamus requiring the Director to add the NNTC to the definition of "First Nations" in Section 2.0 of the Terms of Reference for the Project approved by the Director on January 30, 2009;

7 The NNTC is one of two organizations that represent members of the Nlaka'pamux Nation. The other organization is the Nicola Tribal Association. The Ashcroft Band is a member of the NNTC but its views with respect to the Extension Project are at odds with those of the NNTC and in particular the views of Chief Robert Pasco, the chair of the NNTC.

8 The government of British Columbia exercises regulatory control over the environmental aspects of the Extension Project through the Environmental Assessment Office (the "EAO") pursuant to the *Environmental Assessment Act*, SBC, 2002 Ch. 43 (the "EAA"). For convenience I have set out the relevant portions of the EAA in Schedule A to these reasons.

9 The EAO acknowledges that it has an obligation to consult with and, if appropriate, accommodate the views of the First Nations whose Aboriginal title and rights may be affected by the Extension Project. On the evidence before me it would appear that the First Nations whose title and rights may be affected by the Extension Project are the Secwepemc and the Nlaka'pamux. The Bonaparte Indian Band, as a member of the Secwepemc Nation, supports the Extension Project and no complaints about the process of environmental review have to my knowledge been raised by any other member of the Secwepemc Nation. On the other hand, as indicated above, there is a clear division of opinion about the Extension Project among the members of the Nlaka'pamux Nation.

10 The issue with which the Environmental Assessment Office has had to deal, and upon which I am being asked to pass judgment is how it should fulfill its duty to consult the Nlaka'pamux Nation with respect to its environmental review of the Extension Project, taking into account, among other things, the division of opinion within the Nation.

11 To appreciate the impact of the government action in issue it is necessary to understand the various stages of the

environmental assessment process required by the EAA. The process is initiated by the proponents submitting a Project Description, which is general description of the project which the proponents propose to undertake. A Project Description must contain sufficient information to permit the Executive Director of the EAO to determine whether the proposed project is a reviewable project under the EAA. In this case the proponents submitted a Project Description for the Extension Project on August 8, 2008.

12 Under the EAA the Executive Director may delegate his or her powers to a member of the EAO. In this case the powers of the Executive Director were delegated to the respondent, Derek Griffin, who exercised them as the Project Assessment Director.

13 The next step in the process is for the Project Assessment Director to determine whether the proposed project is a reviewable project which requires an Environmental Assessment Certificate (an "EAC"). The importance of an EAC is made clear by Sec. 9(1) of the EAA. In this case the Project Assessment Director issued an order under Sec.10(1)(c) of the EAA stating that the Extension Project was a reviewable project on August 28, 2008.

14 The next step in the process is for the Project Assessment Director to issue an order under Sec. 11 of the EAA determining the scope of and the procedures and methods for conducting the assessment of the proposed project. In this case the challenged Sec. 11 order (The Order) was issued on October 22, 2008.

15 An order under Sec. 11 typically requires the proponents to prepare Terms of Reference to identify the issues to be addressed and the information to be provided in the required application for an EAC. The drafting of the Terms of Reference is undertaken in consultation with persons and entities who are determined in the Sec. 11 order as parties with whom the proponents must consult.

16 Both the Sec. 11 order and the Terms of Reference typically require that the proponents consult with interested parties, including specified First Nations. In this case the Terms of Reference were approved by the Project Assessment Director on January 30, 2009.

17 After the approval of the Terms of Reference the proponents prepare a formal application for an EAC. The Project Assessment Director must approve the form of the application. In this case the proponents first submitted their application on February 9, 2009. However the Project Assessment Director required further information and a revised application was submitted on May 19, 2009. On June 19, 2009 the application was accepted by the Project Assessment Director, with the result that the process of considering the application formally could begin.

18 Under the EAA, the Project Assessment Director, representing the Executive Director, must, within the prescribed time limit, refer the application to the ministers having jurisdiction. The Project Assessment Director must provide an assessment report to the ministers and may provide recommendations with respect to the application. If the Project Assessment Director provides recommendations, he or she must also provide reasons for the recommendations. The prescribed time limit is 180 days, but that time can be extended.

19 On receipt of the referral the ministers must consider the assessment report and any recommendations accompanying the assessment report and may consider any other matters they consider relevant in making their decision on the application. After such consideration, the ministers must either issue an EAC, with or without conditions, refuse to issue an EAC or order further assessment to be carried out.

20 To put this dispute in context, I must make reference to three other proposed landfill projects. The first is what is known as the Ashcroft Ranch Landfill Project. This was a proposal to locate a new landfill on the Ashcroft Ranch which

had been purchased by what was then called the GVRD as a possible replacement for the Cache Creek Landfill. The second project is referred to as the Highland Valley Copper Landfill Project. This was a project which proposed utilizing the worked out pit from the Highland Valley Copper Mine as a repository for landfill. Both the Ashcroft Ranch Landfill Project and the Highland Valley Copper Landfill Projects were deemed to be reviewable projects requiring an EAC. A third project, which is known as the Cache Creek Landfill Annex, contemplates a small expansion of the existing Cache Creek Landfill to extend its life for a year or two. No EAC was deemed necessary with respect to the Cache Creek Landfill Annex. In reviewing some of the correspondence it is necessary to distinguish among these various projects. In particular, at times the Cache Creek Landfill Annex Project is referred to as an extension or expansion. In these reasons I will endeavour to use specific terms with respect to the four projects.

21 The relevant history of the Cache Creek Landfill itself begins in 1987. On March 18, 1987 the Director of Waste Management, acting pursuant to the *Waste Management Act*, R.S.B.C., 1996, Ch. 482 (now repealed) authorized the issuance of a waste management permit to allow the discharge of Municipal refuse, including light industrial waste, from the Greater Vancouver Regional District into the Cache Creek Landfill.

22 Various parties, including the Bonaparte Indian Band and the Ashcroft Ranchers' Association, represented by, among others, Chief Robert Pasco appealed the issuance of the waste management permit to the Environmental Appeal Board. On September 21, 1987, the appeals were dismissed and with some minor modifications the waste management permit was upheld.

23 At the hearing before me counsel for the respondents pointed out that the NNTC was not an appellant at that appeal. The Bonaparte Indian Band was an appellant and on the appeal advanced grounds of appeal based on its claim to aboriginal title to the Cache Creek Landfill site, apparently without objection from the NNTC. In his oral submissions, counsel for NNTC replied that the NNTC had sought to be granted appellant status but its application had been dismissed, principally on the basis that the Environmental Appeal Board at that time took the position that questions of Aboriginal title and rights were beyond its jurisdiction.

24 In my view, the proceedings which took place in 1987 under the regulatory scheme then in place are of little or no assistance in assessing the issues on this application. Both the jurisprudence and the legislative framework with respect to the recognition of Aboriginal title and rights have changed dramatically since 1987. It would certainly be inappropriate and wrong to draw any adverse conclusions with respect to the NNTC or the rights it asserts from events which occurred prior to the present legislation being put in place and prior to the seminal decisions of the Supreme Court of Canada defining the nature and extent of the rights constitutionally protected under Sec. 35 of the *Constitution Act.*

25 On February 23, 2003, the Greater Vancouver Sewerage and Drainage District applied to the Executive Director under the EAA for an order that the Ashcroft Ranch Landfill Project be designated as a reviewable project under what was then Sec. 7.1 of the EAA.

26 On March 3, 2003, the Executive Director designated the Ashcroft Ranch Landfill Project as a reviewable project under what was then Sec. 7.3 of the EAA and on March 20, 2003, the Project Assessment Director ordered that an environmental assessment of the Ashcroft Ranch Landfill Project be conducted.

27 The Project Assessment Director directed that he would invite all levels of governments and First Nations in the vicinity of the Ashcroft Ranch Landfill Project to submit comments on the application within a time framework to be determined by him. The Project Assessment Director ordered the proponent to consult with First Nations and report the results of any meetings with the first nations conducted as part of the assessment.

28 On August 29, 2003, the EAO issued Terms of Reference with respect to the application for an EAC for the Ashcroft Ranch Landfill Project. Under the Terms of Reference relating to First Nations involvement in consultation, the EAO stated as follows:

> **A.4.3.2.4 Proponent Response**
>
> The Proponent provided written responses to all First Nations comments on the Draft Terms of Reference on July 30, 2003. First Nations comments and respective responses by the Proponent are summarized in the Agency and First Nations Issues Tracking Document (Volume 2, Part A).
>
> Some First Nations comments on the Draft Terms of Reference included issues that are beyond the scope of the assessment and that will not be directly addressed as part of the EA Review. These included:
>
> • GVRD solid waste management and waste reduction programs (i.e., alternatives to the Ashcroft Ranch Landfill Project), including the transport of municipal solid waste from the GVRD and other jurisdictions;
>
> • the day-to-day operations of the Ashcroft Ranch (e.g., use of Nutrifor); and
>
> • the operations and closure of the existing Cache Creek Landfill.
>
> **The EAO is satisfied that First Nations comments received that are within the scope of the assessment have been properly considered to the extent possible at this stage of the review.**
>
> [Italics and bold in original.]

29 The GVRD did not submit a formal application for an EAC with respect to the Ashcroft Ranch Landfill Project until August 2, 2004. On November 14, 2004, the NNTC made a comprehensive submission with respect to the Ashcroft Ranch Landfill Project to the EAO. At that time judgment had not yet been delivered in the Supreme Court of Canada in the two seminal cases with respect to Aboriginal title and rights; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.) and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (S.C.C.).

30 I think it is fair to say that the submission made by the NNTC with respect to the Ashcroft Ranch Landfill Project placed particular reliance on a strong *prima facie* claim to aboriginal title to the land in question. I think it is also fair to say that the general approach taken by the NNTC was one of complete opposition to the location of a landfill on land within the traditional territory of the Nlaka'pamux Nation.

31 On June 7, 2005, the Minister of Sustainable Resource Management made an order Sec. 30 of the EAA suspending the environmental assessment with respect to the Ashcroft Ranch Landfill Project.

32 On March 13, 2006, a Project Assessment Manager made an order under Sec. 11 of the EAA with respect to the Highland Valley Copper Landfill Project. Schedule A to the Highland Valley Copper Landfill Project Sec. 11 order contained a definition section defining, amongst other things, First Nations. First Nations were defined to include a number of Bands affiliated with the NNTC, the Nicola Tribal Association, and the Shuswap Nation Tribal Council. Sec. 15.1 of the Sec. 11 order directed the proponent to provide copies of the application to the First Nations and provided that the First Nations may respond to an invitation from the Project Assessment Director to submit comments on the application, either through their participation in the working group or independently.

33 In June of 2006, the Province of British Columbia, Metro Vancouver (then the Greater Vancouver Regional District ("GVRD"), and the First Nations Leadership Council formally commenced a tripartite process to consider replacements for the Cache Creek Landfill (the "Replacement Process"). The Replacement Process included an Advisory Panel. The Leadership Council appointed former Court of Appeal Justice Douglas Lambert as a First Nations representative to the Advisory Panel. The Advisory Panel ultimately began looking at interim solutions for waste disposal, including a proposed extension to the Cache Creek Landfill. That process appeared to come to a conclusion in January of 2008 when the GVRD announced that it was suspending consideration of interior landfilling as an option to meet its waste disposal needs.

34 In December of 2007, just prior to the GVRD's announcement, Mr. Griffin, acting on behalf of the EAO, wrote to the NNTC and advised them of the process that the EAO intended to follow to directly involve the NNTC in the environmental assessment of projects within the Nlaka'pamux Nation's indigenous territory. Mr. Griffin specifically indicated that, if and when a proposed extension to the Cache Creek Landfill formally entered the Environmental Assessment process, the EAO would want to meet with the NNTC to discuss their interests and concerns with respect to the project, including what Aboriginal title and rights were asserted by the Nation.

35 I was not provided with copies of the communications leading up to the letter of December 7, 2007. However, from a review of the letter itself, I conclude that the NNTC was urging on the government a process of consultation which would involve the NNTC in a decision-making role as to whether a proposed project should be prohibited from entering the environmental assessment process at all. In the December 7 letter Mr. Griffin also stated that the EAO was prepared to ensure that the NNTC had an opportunity to consult on a government-to-government basis outside of the EA working group process for any project under review. Mr. Griffin added the following:

> In saying this, it is also important to note that we believe the purpose of such government-to-government discussions must be to address any outstanding ***Haida*** obligations that are not sufficiently discharged in the working group, and that there is not a duty to reach agreement on all issues of interest to First Nations (although we certainly prefer to do so where possible).

36 On May 26, 2008, the solicitors for the NNTC wrote to the Honourable Barry Penner, then Minister of the Environment. This letter was written with respect to the solid waste management amendment process being undertaken by the GVRD. It expressed concern about reports that, notwithstanding its stated intention to abandon an in Province solution to its solid waste requirements, the GVRD and the Ministry were considering about 23 other options in the solid waste management plan process, including landfills in Nlaka'pamux territory. In the letter counsel for the NNTC took the position that if the Province had any intention to return to an in Province solution for the disposal of waste a fair, transparent and unbiased review of alternatives must be completed.

37 On July 31, 2008, in response the May 26, 2008 letter, Lynn Bailey, an Assistant Deputy Minister in the Environmental Protection Division wrote to NNTC with respect to private third party proposals for the creation of waste disposal projects. Ms. Bailey stated that as these projects were being proposed by independent third parties, the projects themselves would not require an amendment to Metro Vancouver's solid waste management plan but would, of course, be subject to applicable provincial regulatory processes including, in most cases, an assessment under the EAA and that First Nations' consultation would occur in relation to those processes prior to project approval.

38 On August 15, 2008, Front Counter B.C. wrote to the NNTC to the attention of Chief Robert Pasco with respect to an application by the Village of Cache Creek for the Cache Creek Landfill Annex, which was described in the letter as an extension to the existing Cache Creek Landfill site, to add an annex of approximately 7 hectares to permit the contin-

ued operation of the landfill. The proposal called for the annex to be operated to the same standard as that of the existing Cache Creek Landfill.

39 The July 31 letter from Lynn Bailey and Front Counter B.C.'s referral of the proposal for the Cache Creek Landfill Annex prompted a letter dated August 28, 2008, from counsel for the NNTC. I pause here to say there was some discrepancy in the evidence as to the date of this letter. The copy of the letter provided in the evidence is dated September 5, 2008. However, in correspondence the letter is referred to as dated August 28, 2008. Counsel are agreed that there is only one letter, dated August 28, 2008, and speculate that the dating discrepancy may arise from the idiosyncrasies of the auto-dating programs on the computers on which copies of this document had been retained.

40 In my view, the August 28, 2008 letter is important to understanding the approach taken by the Project Assessment Director in dealing with the Extension Project. The specific subject matter of the letter is the Cache Creek Landfill Annex. In the letter NNTC's counsel objects to the de-linking of the Cache Creek Landfill Annex from the ongoing review being undertaken of Metro Vancouver's Waste Management Plan. In particular, on page 2 of the letter counsel for NNTC takes the following position:

> A Cache Creek Expansion cannot even been contemplated unless and until Nlaka'pamux's Title and Rights are properly addressed in respect of the historic, existing and ongoing impacts and infringements of the entire Cache Creek landfill. We want to be very clear that this will embroil the Province and Metro Vancouver in an examination and accommodation of the unjustified infringements created by the Cache Creek landfill from its inception.

41 I take two things from the letter. The first is that the NNTC was opposed to a consideration of the Cache Creek Landfill Annex outside of the Replacement Process. The second is that it was NNTC's position that any further expansion of the Cache Creek Landfill could not be undertaken without addressing the asserted historical infringements on Nlaka'pamux's title and rights resulting from the original Cache Creek Landfill. Further, in the letter NNTC took the position that the Cache Creek Landfill and the transportation corridor providing access to it constituted one of the most serious on-going infringements of Nlaka'pamux title and rights.

42 I find that any reasonable person reading this letter would conclude that the concerns expressed by NNTC went far beyond concerns related directly to any application for an environmental assessment of any specific project being brought forward in respect of the Cache Creek Landfill.

43 In my mind it is also significant that the letter states that litigation would be the likely result of the positions outlined in the July 31, 2008, letter from Ms. Bailey. It is to be remembered that that letter makes as its essential point the fact that any future projects brought forward by private third party proponents would be subject to review pursuant to the EAA but that that review would not initially require an amendment to Metro Vancouver's Solid Waste Management Plan. The position of Ms. Bailey was that such an amendment would be required only if Metro Vancouver elected to enter into an agreement with the operator of such a facility. Thus, by August 28, 2008, the expressed position of the NNTC was that any process of environmental review of landfill projects must be undertaken as part of the Replacement Process and if it was not, would likely result in litigation.

44 On September 16, 2008, the Ashcroft Band Council wrote to Ms. Bailey taking the position that the NNTC was not acting on behalf of the Nlaka'pamux Nation in its dealings with respect to the Cache Creek Landfill Annex. The letter took the position that NNTC did not reflect the position of the Nlaka'pamux Nation with respect to the Cache Creek Landfill Annex. On November 6, 2008, Ms. Bailey responded to the August 28, 2008, letter from counsel, and enclosed a copy of the Ashcroft Band Council letter raising the issue of the authority of NNTC to speak on behalf of the

Nlaka'pamux Nation.

45 Against the background of this correspondence Belcorp Environmental Services Inc. and the Village of Cache Creek prepared a joint proposal for the Extension Project, which proposed the expansion and extension of the Cache Creek Landfill by a further 40 hectares to provide an additional 15 million tons of disposal capacity.

46 As indicated above, the Executive Director delegated to Mr. Derek Griffin as Project Assessment Director, the powers and functions of the Executive Director under the EAA with respect to the Extension Project.

47 On August 28, 2008, the Project Assessment Director issued an order under Sec. 10.1(c) of the EAA stating the Extension Project required an EAC and that the proponents may not proceed with the Extension Project without an assessment.

48 On October 22, 2008, Mr. Griffin made the Order which is challenged on this application. Certain portions of the order should be hi-lighted.

49 Firstly, the Order states that the Extension Project is located within the asserted territory of the Bonaparte Indian Band of the Secwepemc Nation and appears to be close to or within the asserted traditional territory of the Nlaka'pamux Nation, with the Ashcroft Indian Band being the Nlaka'pamux Nation Band that appears to be most closely associated with the extended project area. Secondly, First Nations are defined in Schedule A to the Order to mean the Ashcroft and Bonaparte Indian Bands, and such other Bands as are added by way of written notification to the proponent by the EAO.

50 Section 10 of Schedule A provided that:

> For the purpose of developing the Application the proponent must consult with First Nations with respect to their perspectives and opinions about the project and the potential effects of the project on their aboriginal interests.

It is to be noted that the defined term "First Nations" does not include the NNTC.

51 On December 3, 2008, counsel for the NNTC wrote to the Ministry of Environment with a copy to Mr. Griffin taking the position that the Order was issued in violation of the honour of Crown, was unconstitutional and was of no force and effect. The letter also took the strong position that it was the NNTC which had the authority to speak for and protect the title and rights of the Nlaka'pamux Nation.

52 On January 30, 2009, the Terms of Reference prepared by the proponents for the application for an EAC for the Extension Project were approved.

53 The Terms of Reference contained the following provisions with respect to consultation with First Nations:

> **Preamble**
>
> This section will provide information on consultation with First Nations, impact and benefit sharing agreements, and involvement of First Nations in all phases of the environmental assessment. "First Nations" means Ashcroft and Bonaparte Indian Bands and such other bands as are added to this list by way of written notification to the Proponents by the Environmental Assessment Office.

Subsections	**Coverage**

2.1	Consultation	•— General description of history of Bonaparte and Ashcroft Indian Bands, and the consultation efforts and outcomes.
2.2	Impact and Benefit Sharing Agreement	•— Rationale for developing the agreements, communication principles, capacity building, funding commitments, and promotion of culture.
2.3	Involvement of First Nations	•— Description of Bonaparte and Ashcroft Indian Bands' involvement in all phases (including the identification of the "valued ecosystem components", the scope, environmental and archeological studies) and project implementation.

54 On June 19, 2009, the EAO accepted the application for an Environmental Assessment Certificate and began the formal review of that application. The NNTC was informed of this by letter dated June 22, 2009.

55 In paragraph 53 of his affidavit Mr. Griffin summarizes the considerations on which he based his assessment of entities with which it would be most appropriate for the proponents to engage in consultation. He states that he considered the following factors:

> (a) the absence of any single entity that clearly represented the interests of the Nlaka'pamux Nation as a whole;
>
> (b) the geographic proximity of the Ashcroft Indian Band and location of its reserves showing that within the Nlaka'pamux Nation the Ashcroft Indian Band would potentially be the most directly impacted by design issues for the Extension Project;
>
> (c) the fact that the EAO had received no responses when it wrote to all bands of the Nlaka'pamux Nation with copies to the NNTC or the Nicola Tribal Association as appropriate advising it that he proposed to name the Ashcroft and Bonaparte Indian Bands in the Sec. 11 order and specifically asking if any other Bands wished to be engaged directly in consultation.

56 Mr. Griffin has deposed that the EAO is prepared to consult with the NNTC, including sharing all EAO correspondence, meeting with the NNTC, addressing NNTC positions in the report to the responsible ministers, allowing the NNTC to review and comment on the draft report to the ministers required by Sec. 17 of the EAA, and providing the NNTC the opportunity to provide their own submission directly to the ministers.

57 The task which faces me is to determine whether the issuance of the Order and approval of the Terms of Reference violated the honour of the Crown by depriving the Nlaka'pamux Nation of the opportunity to consult meaningfully with respect to the environment assessment of the Extension Project.

58 This application raises the difficult question of the effect of the Order and its interplay with the duty to consult and endeavour to accommodate. Broadly speaking the government action being undertaken is the environmental assessment of the Extension Project, culminating in a decision by the ministers as to whether to issue an EAC. As I have already outlined, there a number of stages in that process. The stages in issue in this case all predate the EAO's acceptance of an application from the proponents. It is common ground that the honour of the Crown requires the government to consult with and attempt to accommodate the Nlaka'pamux Nation with respect to the decision whether to issue an

EAC. The question before me is when and in what form that consultation must take place.

59 The NNTC's position is that the Project Assessment Director's decision to exclude it, as the representative of the Nlaka'pamux Nation, from the definition of First Nation in the Order and from the working group means that there has not been and cannot be adequate consultation with the Nlaka'pamux Nation with respect to the decision whether to issue an EAC. The government's position is that there can be adequate and effective consultation undertaken by the EAO and the Project Assessment Director during the project assessment of the application for an EAC. As I understand the government's position, it is that given the nature of the concerns expressed by the NNTC and the issues raised by it, in fact the only truly effective consultation is on a government to government basis and that the proponents really have no useful role to play in that consultation.

60 This position can be usefully compared to the provisions of the Terms of Reference for the Ashcroft Ranch Landfill Project described in paragraph 28 of these reasons. In both cases it appears that the EAO draws a distinction between issues directly relating to the project under consideration and issues of wider concern.

61 The EAO also points out that every member band of the NNTC was notified of the initiation of the assessment process and was informed that the EAO would be consulting with the Ashcroft Band and asked whether each Band wanted to be consulted separately and received no response. The NNTC was copied with each of these letters.

62 In his affidavit Mr. Griffin outlines in detail the letters which were sent to member Bands of the Nlaka'pamux Nation. In each case the letter to the Band associated with the Nlaka'pamux Nation was copied to the tribal organization with which the Band in question was affiliated. For example, the letter of September 3, 2008, to the Cooks Ferry Indian Band was copied to the Nicola Tribal Association and letters to the Boothroyd Band and the Spuzzum and Boston Bar First Nations were copied to the NNTC.

63 Chief Jennifer Bob of the Spuzzum Indian Band has filed an affidavit stating that that Band has no record of having received the correspondence from the EAO. In the course of argument I asked counsel whether I needed to determine whether the letters referred to in Mr. Griffin's affidavit were, in fact, received by the various member Bands of the Nlaka'pamux Nation. Mr. Mogerman, counsel for NNTC, submitted that it did not matter whether those letters were, in fact, received. It was his submission that even if the letters had been received they were not relevant to the issues before me. However, as the lack of response to these letters was amongst the reasons that Mr. Griffin gave for naming only the Bonaparte and Ashcroft Bands in the Order, I think I must make a finding with respect to the receipt of these letters.

64 On the basis of all of the evidence before me, I conclude that the NNTC and its member Bands did, in fact, receive the September letters. Apart from Chief Jennifer Bob and Chief Robert Pasco, none of the other member Bands of the NNTC have denied receipt of the letters. In addition the affidavit material filed by Chief Jennifer Bob and Chief Robert Pasco does not specifically deny that they had knowledge of the letters but rather says that neither the Band or the NNTC have any record of having received them. However, Mr. Griffin's affidavit does give detailed evidence of the mailing of the letters. None of the letters addressed to Bands which support the NNTC or the copies sent to the NNTC were returned. I therefore conclude that the member Bands of the NNTC and the NNTC office did receive the September letters.

65 This petition was filed on March 20, 2009.

66 After the petition was issued the Project Assessment Director made an order under Sec. 13 of the EAA amending the Order. The purpose of the amendment was to address the issue of consultation with First Nations. It added a new paragraph 22 to the Order in the following terms:

> 22.2. This order is not intended to restrict the full scope or extent of the Crown's duty to consult in respect of a decision on an EA certificate, and the EAO may engage in additional consultations with an aboriginal entity, whether or not it is named as a First Nation in section 1 of this order, if the EAO believes that such consultation is necessary to discharge the Crown's duty or the EAO is otherwise prepared to do so.

67 These amendments were not satisfactory to the NNTC and this petition accordingly proceeded to hearing.

68 The issue before me resolves itself into a number of sub-issues. The first is how the EAO as representative of the Crown should go about discharging its duty to consult with a First Nation when it is clear that there is no consensus within the First Nation with respect to the subject matter of the consultation. In this case, that issue is made even more difficult by the fact that the government is dealing with two nations, the Nlaka'pamux Nation and the Secwepemc.

69 In analysing this problem, it must not be forgotten that the EAO also has a statutory duty to ensure that there was a thorough, effective and expeditious environmental review of the proposed Extension Project.

70 In *Haida Nation* the Supreme Court of Canada said the following at paras. 16 and 17:

> 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.

71 The petitioner in this case is the NNTC. The action is not framed as a representative action brought on behalf of all members of the Nlaka'pamux First Nation. In the course of argument, I was referred to the reasons for judgment of Mr. Justice Vickers in *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.). At para. 470 His Lordship said the following:

> 470 I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub- group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

72 The difficulty in this case is that the authority of NNTC to speak on behalf of all Nlaka'pamux people is disputed. The authority of the NNTC to speak on behalf of the people of the Ashcroft Band was expressly put in issue before the EAO.

73 What is the government to do when faced with a diversity of putative representation on behalf of a First Nation.

In my view, the government must discharge its duty to consult by taking reasonable steps to ensure that all points of view within a First Nation are given appropriate consideration. As I indicated above, government also has a duty to carry out its statutory mandate under applicable legislation. It must therefore balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner. It is to be expected that this balancing will require a flexible approach by Government to adapt to the particular circumstances of each case.

74 In this case the Project Assessment Director does not dispute that the EAO has a duty to consult with the NNTC with respect to the environmental assessment of the Extension Project. In the course of the argument I asked Mr Foy what the respondents' position was on the question of the authority of NNTC to represent the Nlaka'pamux Nation. His response was that the respondents acknowledge that the NNTC does represent some members of the Nation but he was not specific as to which members of the Nation it represented. It is however clear on the evidence that the Project Assessment Director has recognized that the NNTC has sufficient authority to be treated as a party with whom the government should engage in government-to-government consultation with respect to the Extension Project.

75 I have concluded that the government acted appropriately in this case in making a decision to implement separate consultation protocols with the Ashcroft Band and the NNTC. I can see no objection in principle to requiring the proponents to consult with a specific Band if the government also undertakes appropriate consultation with the First Nation. That must be particularly so when there is a clear divergence of opinion between the putative representative of the Nation and the representatives of the Band.

76 The next issue between the parties is at what stage in the approval process that consultation must take place. The NNTC's position is that it should have been named in the Order as a First Nation with whom the proponents were required to consult and should have been included in the working group. NNTC's counsel submits that anything less would not constitute adequate consultation.

77 In *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712 (B.C. S.C.), Madam Justice Smith pointed out that in *Haida Nation*, the Supreme Court of Canada held that the content of a duty to consult and accommodate varies with the circumstances and is proportionate to a preliminary assessment of the strength of the case supporting the existence of the title or rights and seriousness of the potentially adverse effects upon the title or rights claimed. The authorities are clear that a process of consultation does not give aboriginal groups a veto over what can be done with land pending final resolution of a claim.

78 At paras. 48 and 49 of the *Haida Nation* decision Chief Justice McLachlin stated the following:

> 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.

79 Based on the limited material before me, my preliminary assessment is that the claim of the Nlaka'pamux Nation to aboriginal title to the land on which the Extension Project is proposed to be located is weak. I base this assessment on the fact that in the original land claim made by the Nlaka'pamux Nation stated that Ashcroft was the northern boundary of its territorial land claim. Further, on the evidence before me it appears that it is the Bonaparte Indian Band, a member of the Secwepemc Nation, which had had historical possession of the lands in question. In this regard, it is to be noted that the affidavit of Leslie Edmonds, an elder of the Village of Stassh, which is located on the Ashcroft Indian Reserve No. 2, does not specifically assert that the Extension Project is on land which has been exclusively occupied by the Nlaka'pamux Nation. As pointed out by counsel for the respondents, Mr. Edmonds is, of course, a member of the Cache Creek Band.

80 The seriousness of the impact of the government action also bears close scrutiny in this case. The petitioners submit that the impact of their exclusion from the Order and the working group effectively deprives them of any meaningful consultation and consequential accommodation with respect to the environment review process and with respect to consideration of whether to issue an EAC. The specific relief sought in this case is an order quashing the Order and the approval of the Terms of Reference.

81 The respondents' position is that in the circumstances it was unnecessary and inappropriate to name the NNTC in the Order or require it to be named in the Terms of Reference. Their submission is that it is more appropriate to carry on consultation with the NNTC on a government-to-government basis and take the views of the NNTC into account in preparing the assessment report and making any recommendation to the ministers, and by offering the consultation opportunities outlined in paragraph 56 of these reasons.

82 I conclude that the decision of the Project Assessment Director to exclude the NNTC from the working group established pursuant to the Order and to amend the Sec. 11 order to provide that consultation with First Nations can be done on a government-to-government basis cannot, at this stage, be said to be a failure on the part of the Crown to discharge its duty to consult with the Nlaka'pamux Nation.

83 In reviewing the decision which the EAO has made with respect to the form of consultation, I conclude the appropriate standard of review is reasonableness. In this case, the EAO has clearly recognized that it has a duty to consult with the Nlaka'pamux Nation. The EAO has proposed a procedure pursuant to which that consultation can take place.

84 In my view, given the following factors, that procedure cannot at this stage be said to be unreasonable:

(a) the EAO has recognized that the NNTC represents at least some portion of the Nlaka'pamux Nation;

(b) the EAO I think correctly, has identified that the stated objective of NNTC is the abandonment of any proposal to construct or extend landfills which will receive refuse from Metro Vancouver anywhere in the vicinity of its territory;

(c) the position of the NNTC that any assessment of landfill projects must be part of the Replacement Process;

(d) the stated position of NNTC is that no project can proceed without addressing the underlying land and rights of the Nlaka'pamux Nation to the territory in question;

(e) the fact that the mandate of the EAO is to ensure a thorough and expeditious review of the environmental impacts of the Extension Project;

> (f) my preliminary assessment that the Nlaka'pamux Nation's claim to aboriginal title to the actual location of the Extension Project is weak.

85 I think that I should accept as sincere of the stated willingness of the EAO to engage in government-to-government consultations with the NNTC with respect to the Extension Project in the course of the EAO's review of the proponents' application. Having read the letters containing the stated position of the NNTC with respect to the Extension Project and landfill projects in general and taking into account the fact that the NNTC has been effectively able to make its voice heard with respect to environmental concerns about the existing Cache Creek Landfill, I consider that the promise made by the EAO in its amendment to the Order can provide an adequate opportunity to the NNTC to consult fully with respect to the Extension Project.

86 I wish to emphasize in these reasons that my decision is limited to the matters before me, and, in particular, is limited to the attack made in the petition on the Order, and on the approval by the Project Assessment Director of the Terms of Reference.

87 It is clearly too early in the process to determine whether the EAO will, in fact, discharge its duty to consult and accommodate if appropriate with respect to the environmental assessment of the Extension Project. At this stage, I have simply concluded that it cannot be said that the NNTC has been denied an appropriate and effective opportunity to be consulted and accommodated with respect to the environmental assessment of the project.

88 On behalf of NNTC Mr. Mogerman submitted that the authorities have consistently held that to be meaningful, consultation must occur at the strategic planning stage of a proposed government action. For example in *Haida Nation*, the Supreme Court rejected an argument that the Crown could discharge its duty to consult at the stage of granting cutting permits under a Tree Farm Licence and therefore need not consult with the Haida with respect to the renewal of the Tree Farm Licence itself. At paragraph 76 of *Haida Nation*, Madam Justice McLachlin pointed out that decisions made during the strategic planning stage may have serious impacts on Aboriginal rights and title.

89 Mr. Mogerman drew a parallel between such cases and the present case in arguing that it was essential for NNTC to be named in the Order and for the Terms of Reference to require consultation with it.

90 Mr. Mogerman relied on *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 BCCA 68 (B.C. C.A.). At paragraph 65 the Court stated as follows:

> 65 Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida Nation*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

91 In my view this paragraph succinctly sets out the issue I must address in this case. I must decide whether the decision maker, that is, the Project Assessment Director, has adequately determined the scope and content of the duty to consult with the NNTC. If the Project Assessment Director has adequately determined the scope and content of the duty to consult it is premature to determine whether that duty has been adequately discharged given the stage the approval

process has now reached.

92 The facts of this case are distinguishable from *Kwikwetlem*. In *Kwikwetlem* the British Columbia Utilities Commission had decided that it was not necessary to consult with First Nations with respect to question of issuing a Certificate of Public Convenience for a proposed new transmission line from the Interior to the Lower Mainland. The Commission was of the view that there would be adequate consultation with First Nations in the course of the application process under the EAA and it was therefore unnecessary for it to consult with respect to the issuance of a Certificate of Public Convenience.

93 The Court of Appeal held that the Commission erred in failing to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the application before it, that is, the application for a Certificate of Public Convenience. As I understand the *Kwikwetlem* decision, it stands for the proposition that a decision maker must consider whether the Crown's duty to consult and accommodate has been appropriately dealt with at each stage of an approval process. The error which the Commission fell into was to decline to consider this issue at all and to rely on the process under the EAA to address the Crown's duty to consult.

94 What the Court did not do was to dictate what form of consultation was required to fulfill the duty. This is made clear from paragraph 65 of the reasons for judgment quoted at paragraph 90 above. In this case it seems to me that the EAO did define the scope and content of consultation which would be appropriate given the particular circumstances it had to consider.

95 I have already set out the circumstances which faced Mr. Griffin. Those circumstances led Mr. Griffin to conclude that it would be more effective to consult directly with the NNTC on a government-to-government basis throughout the approval process rather than direct the proponents to consult with NNTC pursuant to the Order. It remains to be seen whether the EAO carries through with its stated intention to consult with the NNTC. However, at this stage I consider it to be appropriate to accept the stated intention to consult as genuine.

96 The role of an environmental review under the EAA is summed up in paragraph 57 of *Kwikwetlem* as follows:

> 57 The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal title and rights are undoubtedly included, although not identified in the current *Act.*

97 In my view, if the EAO does provide the consultation opportunities outlined in paragraph 56 above, it will have satisfied its obligations to consult pursuant to the *Constitution Act* and the EAA. It is now up to the EAO to carry through on its promise and up to the NNTC to make a good faith attempt to take advantage of this opportunity.

98 Because I have concluded that the EAO had made a genuine offer of consultation and has recognized its duty to consult and endeavour to accommodate it would be inappropriate to make the alternative declarations sought.

99 I therefore dismiss the claims set out in the petition.

Schedule A

This Act is Current to April 8, 2009

Environmental Assessment Act

[SBC 2002] Chapter 43

Assented to May 30, 2002

Contents

Section

Part 1 — Definitions

Definitions

1 In this Act:

"approval under another enactment" means an approval, licence, permit or other authorization under another enactment and **"approvals under other enactments"** has a corresponding meaning;

"assessment" means an assessment under this Act of a reviewable projects potential effects that is conducted in relation to an application for

(a) an environmental assessment certificate, or

(b) an amendment of an environmental assessment certificate;

"**assessment report**" means a written report submitted to ministers under section 17 (2), summarizing the procedures followed during, and the findings of, an assessment;

"**class assessment**" means an assessment conducted under section 20 of some or all of the potential effects of a specified category of projects, and includes a set of measures or conditions for managing some or all of the potential adverse effects of the specified category of projects to the satisfaction of the executive director;

"**environmental assessment certificate**" means an environmental assessment certificate issued by the ministers under section 17 (3);

"**executive director**" means the individual appointed under section 3 as the Executive Director of the Environmental Assessment Office;

"**ministers**" means the minister, the Minister of Water, Land and Air Protection and the responsible minister, if other than the Minister of Water, Land and Air Protection;

"**project**" means any

(a) activity that has or may have adverse effects, or

(b) construction, operation, modification, dismantling or abandonment of a physical work;

"**proponent**" means a person or an organization that proposes to undertake a reviewable project, and includes the government of Canada, British Columbia, a municipality or regional district, another province, another jurisdiction and a first nation;

"**responsible minister**" means the member of the Executive Council that the Lieutenant Governor in Council designates by order as the minister responsible for a specified reviewable project or specified category of reviewable projects;

"**reviewable project**" means a project that is within a category of projects prescribed under section 5 or that is designated by the minister under section 6 or the executive director under section 7, and includes

(a) the facilities at the main site of the project,

(b) any off-site facilities related to the project that the executive director or the minister may designate, and

(c) any activities related to the project that the executive director or the minister may designate.

Effect on approvals under other enactments

9 (1) Despite any other enactment, a minister who administers another enactment, or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project, or

(b) construct, operate, modify, dismantle or abandon all or part of the facilities of a reviewable project, unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

(d) there is in effect a determination under section 10 (1) (b) that an environmental assessment certificate is not required for the project.

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

Determining the need for assessment

10 (1) The executive director by order

(a) may refer a reviewable project to the minister for a determination under section 14,

(b) if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is not required for the project, and

(ii) the proponent may proceed with the project without an assessment, or

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment.

(2) The executive director may attach conditions he or she considers necessary to an order under subsection (1) (b).

(3) A determination under subsection (1) (b) does not relieve the proponent from compliance with the applicable requirements pertaining to the reviewable project under other enactments.

Executive director determines assessment scope, procedures and methods

11 (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

(a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;

(b) the potential effects to be considered in the assessment;

(c) the information required from the proponent

(i) in relation to or to supplement the proponents application, and

(ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);

(d) the role of any class assessment in fulfilling the information requirements for the assessment of the reviewable project;

(e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2) (a).

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

Variation of scope, procedures and methods by executive director

13 The executive director may vary the scope, procedures and methods determined under section 11

(a) to take into account modifications proposed for the reviewable project by the proponent, including modifications proposed in relation to an application submitted under section 16, or

(b) if necessary in his or her opinion to complete an effective and timely assessment of the reviewable project.

Applying for environmental assessment certificate

16 (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

(4) On accepting the application for review, the executive director

(a) must notify the proponent of the acceptance for review, and

(b) may require the proponent, for the purpose of the review, to supply a specified number of paper or electronic copies of the application, in the format specified by the executive director.

(5) On receipt of the copies of the application required under subsection (4), the executive director must proceed with and administer the review of the application in accordance with the assessment procedure determined under section 11 (1) or as varied under section 13.

(6) The proponent of a reviewable project for which the minister has made a determination under section 14 may apply for an environmental assessment certificate in the manner determined by the minister, and must pay any prescribed fee in the prescribed manner.

Decision on application for environmental assessment certificate

17 (1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied

(a) under section 11 or 13 by the executive director,

(b) under section 14 or 15 by the minister, or

(c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person the executive director, commission, hearing panel or other person, as the case may be, must refer the proponents application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,

(b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and

(c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

Application dismissed.

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