Federal Court  Cour fédérale

Date: 20100922

Docket: T-1234-09

Citation: 2010 FC 948

Ottawa, Ontario, September 22, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FOND DU LAC DENESULINE FIRST NATION,
BLACK LAKE DENESULINE FIRST NATION,
HATCHET LAKE DENESULINE FIRST NATION and
THE NON-FIRST NATION ABORIGINAL
PROVINCIAL COMMUNITIES OF CAMSELL PORTAGE,
URANIUM CITY, STONY RAPIDS and WOLLASTON LAKE
(known collectively as the "Athabasca Regional Government")

Applicants

and

ATTORNEY GENERAL OF CANADA and
AREVA RESOURCES CANADA INC.

Respondents

and

CANADIAN NUCLEAR SAFETY COMMISSION and
ATTORNEY GENERAL FOR SASKATCHEWAN

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATION

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 for judicial review of the June 30, 2009 decision (Decision) of the Canadian Nuclear Safety Commission (Commission) to renew the operating licence for Areva Resources Canada Inc.'s McClean Lake Uranium mine and mill under section 24 of the *Nuclear Safety and Control Act*, S.C., 1997, c. 9 (Act), and the incorporation of the care and maintenance activities at AREVA's Midwest Uranium Mine into the renewed licence for McClean Lake.

BACKGROUND

[2] Areva Resources Canada Inc. (AREVA) applied to the Commission to renew its McClean Lake Operation Uranium Mine and Mill Operating Licence UMOL-MINEMILL-McCLEAN.04/2009 (McClean Lake Licence), which authorizes AREVA to operate a uranium mine, mill and other required facilities.

[3] AREVA applied for a ten-year licence renewal from May 31, 2009. AREVA also requested that the Commission incorporate the care and maintenance activities at its Midwest Uranium Mine site (Midwest Site) into the McClean Lake Licence and revoke the existing Midwest Uranium Mine

Site Preparation Licence (Midwest Licence). Although AREVA anticipates mining the Midwest Site at some time in the future, the Midwest Site is currently not in operation. Rather, it is undergoing environmental assessment with regard to future development.

[4] The Applicants are a group of both First Nation and non-First Nation communities. Three of the Applicants (Fond du Lac Denesuline First Nation, Black Lake Denesuline First Nation, and Hatchet Lake Denesuline First Nation) are Treaty First Nations. The Applicants were granted intervener status in order to participate in the public hearing related to the renewal of the McClean Lake Licence before the Commission scheduled for April 30, 2009.

[5] On April 12, 2009, the Applicants requested an adjournment of Day 2 of the public hearing in order to receive and review disclosure of information and make fully informed submissions and a response to AREVA's application for renewal. However, the Commission decided to proceed with the public hearing on the planned date, April 30, 2009, and the Applicants participated in this hearing. The Applicants then requested an extension of time to assess and provide submissions in response to information received by them at the hearing on April 30, 2009. The Commission agreed to extend the time for the Applicants to file written submissions to June 8, 2009.

[6] On June 30, 2009, the Commission issued its Decision and granted AREVA's McClean Lake Licence renewal for a period of eight years. The Commission also incorporated the care and maintenance provisions for the Midwest Site into the McClean Lake Licence for a period of eight years.

[7] On July 30, 2009, the Applicants filed their Notice of Application for judicial review of the Decision.

[8] The Commission was granted intervener status in this matter on December 18, 2009. The Attorney General for Saskatchewan (AGS) was granted intervener status on January 6, 2010.

DECISION UNDER REVIEW

[9] The Commission determined that the issues before it were as follows:

a. Whether AREVA is qualified to carry on the activity that the renewed McClean Lake Licence would authorize;

b. Whether, in carrying on that activity, AREVA would make adequate provision for the protection of the environment, the health and safety of persons, and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

[10] The Commission determined that AREVA was qualified to carry on the activities authorized in the McClean Lake Licence and was satisfied that AREVA would make adequate provision for protection of the environment, the health and safety of persons, and the maintenance of national security. Accordingly, the Commission renewed AREVA's McClean Lake Licence until June 30, 2017, pursuant to section 24 of the Act. Furthermore, the Commission also revoked the Midwest

Licence pursuant to section 24 of the Act and incorporated the maintenance and caretaking activities at the Midwest Site into the McClean Lake Licence.

[11] Within its Decision, the Commission directed AREVA to create a status report of safety performance after the midpoint of the eight-year licence. Commission staff were also directed by the Commission to prepare a report with regard to compliance activities. Both reports are to be presented at public proceedings of the Commission in June 2013.

Commission Findings

[12] The Decision was premised on the Commission's findings with regard to AREVA's proposed measures for protection of the environment, the health and safety of persons, as well as national security and international obligations to which Canada has agreed.

[13] The Commission first examined AREVA's operational performance. To make its determination, the Commission divided the operational performance safety aspects into four sub-programs: mine operations; mill operations; waste management; and packaging and transport. Upon examination of these sub-programs, the Commission was satisfied that "facility operations are effectively controlled with the safety programs in place and that they do not pose an unreasonable risk to the health and safety of persons, the environment and national security."

[14] Next, the Commission considered the radiation protection offered by AREVA by examining its past performance and future plans. The Commission was satisfied that AREVA has made, and will continue to make, adequate provision for the protection of both workers and the public from radiation at the McClean Lake Operation.

[15] In considering non-radiological health and safety, the Commission concluded that AREVA's Occupational Health and Safety Program and its implementation met the requirements. Furthermore, the Commission was satisfied with regard to AREVA's provision for the protection of persons from conventional hazards.

[16] The Commission also considered the environmental protections undertaken by AREVA concerning air quality, surface water and environmental monitoring, and it examined the impact of operations at McClean Lake on the environment. The Commission determined that AREVA had made and is making adequate provision to protect the environment at McClean Lake and that adequate monitoring is performed to determine the effects of operations on the environment.

[17] The Commission was also satisfied with AREVA's quality management and training, as well as its emergency preparedness capabilities, its fire protection abilities and its nuclear security. Similarly, the Commission determined that AREVA was in compliance with its international obligations and that AREVA had provided the Commission with all of the reports and information necessary with regard to McClean Lake.

[18] The Commission then considered AREVA's Preliminary Decommission Plan and associated cost estimate and determined that these were acceptable, although a proposed condition of the licence was that AREVA review its preliminary decommission plan every five years and maintain an adequate financial guarantee.

[19] The Commission then went on to consider AREVA's public information programs. AREVA says that its public information programs operate in a variety of ways, including through consultation activities and informational meetings. According to AREVA, the primary goal of its public consultation and information program "is to ensure that the environmental, health and safety issues that may arise as a result of AREVA's activities are effectively communicated to the public."

[20] The Commission inquired about AREVA's visits to northern communities and asked whether AREVA followed-up with members of the public who asked questions or offered comments at meetings. The Commission was satisfied that AREVA attempts to answer questions and provides informal opportunities for the public to bring forward comments or concerns. Moreover, AREVA noted that it provides many opportunities and invitations to meet with specific community leaders in northern Saskatchewan.

[21] Some interveners, however, including the Applicants, expressed concern that the goal of AREVA's public information program seemed to be the provision of information to promote an understanding of its activities at McClean Lake, as opposed to engaging in meaningful consultation with impacted communities. The Commission, however, stated that it was "satisfied that AREVA

has in place an adequate public information program", but noted that, "based on the concerns expressed by some interveners, the Commission invites AREVA to provide meaningful information in a clear and understandable manner to northern communities that are impacted by the McClean Lake Operation." Furthermore, the Commission stated that it "also invites AREVA to respond to concerns expressed by impacted northern communities in a clear and rapid manner."

[22] Two interveners before the Commission contended that a duty of consultation existed in this instance. The Applicants suggested that the Commission is a delegate of the provincial Crown for the purpose of consultation and that both AREVA and the provincial Crown have failed in their duties to consult and accommodate the interests of the Applicants. The Applicants submitted that the Commission's role is to "consider whether the Crown has satisfied its constitutional duty respecting consultation and accommodation of Aboriginal interests" and that "there is no evidence of Crown consultation here."

[23] The AGS's position, however, as stated by the Commission was that "[the province] is cognizant of its constitutional obligations regarding the duty to consult, and that any issues with respect to the discharge of that duty by the province, are beyond the constitutional bounds of the Commission's jurisdiction and should be dealt with by Saskatchewan."

[24] The Commission determined that, due to the submissions and issues before it, "it is necessary for the Commission to provide some general comments respecting its view of the role of the Commission with regard to the duty to consult Aboriginal peoples, and to apply that reasoning

to the arguments raised in this application." While the Commission stated that it is cognizant of the role that Parliament has set for it, it went on to say that "[a]s an agent of the Crown, the Commission is called upon to make a decision with respect to this licensing matter and it is incumbent on the Commission to ensure that its decision accords with the honour of the Crown."

[25] The Commission noted that the concerns of the interveners who participated in the public hearing related mostly to information and the ability of community members to understand the relevant information and that, "in this case, the submissions of the interveners did not indicate that there were specific unresolved impacts on rights, which could be addressed within the authority of the Commission's powers."

[26] Furthermore, while the interveners in the public hearing sought funding, and to compel the Commission, the province or AREVA to take certain actions with respect to their capacity concerns, the Commission noted that it does not have the authority to address such matters. Furthermore, the Commission held that "in regards to the consultative efforts and obligations of the province of Saskatchewan, it is not the role of the Commission to oversee matters over which it has no authority, such as resource allocation matters, which are not engaged by the Commission's licensing decision."

[27] As regards the duty to consult, the Commission concluded as follows:

> The Commission is satisfied that its process has provided an invitation to the intervenors to make submissions and participate in the regulatory process, and the Commission hearing process provided a forum in which concerns could be expressed and dealt

> with. In this matter, in response to concerns about the licensing action and knowledge gaps with respect to the information provided and understanding of the matters in issue, the Commission granted an extension of time to the ARG [Athabasca Regional Government] to provide it with time to seek, obtain and make submissions on the matters before the Commission. This has also provided the possibility for more discussions and engagement by the CNSC staff and AREVA, with the ARG in particular.
>
> The Commission is satisfied that its process has been adequate to address the concerns expressed relating to the impact communities receiving the information required and being able to speak to the matters in issue regarding the scope of this specific hearing. The Commission is satisfied that the intervenors have been informed of the Commission process and of the licensing action at issue, and have had a full opportunity to express their concerns and identify issues. The Commission has heard the intervenors, and has considered all of the submissions in making its decision. In this context, the Commission is satisfied that, to the extent that a duty to consult was engaged, it was fulfilled in this case respecting the licensing action, by the Commission process and by the opportunities that were afforded for consultation within that process.

[28] The Commission then considered the inclusion of the care and maintenance of the Midwest Site in the McClean Lake Licence and determined that

> [t]he activities are already authorized by the CNSC and will remain unchanged under the renewed licence for the McClean Lake Operation. As such, an environmental assessment pursuant to the CEAA [*Canadian Environmental Assessment Act*] is not required.

The Commission was satisfied that an environmental assessment was not required prior to a decision being made on the licence renewal application for McClean Lake.

[29] AREVA requested a licence renewal for a period of ten years and asked the Commission to amend the McClean Lake Licence to incorporate the care and maintenance activities at its Midwest

Site. Commission staff explained to the Commission that they expected "the Midwest Site to be included in the McClean Lake Operation licence in a manner similar to the other mine programs associated with the McClean Operation, such as the Sue Mine," since this approach allows for consistency in programs and controls.

[30] The Commission was satisfied that the effect of revoking the Midwest Licence and including the care and maintenance activities under the McClean Lake Licence "does not in any way alter the activities that have previously been assessed and authorized for the Midwest Site." The Commission noted further that "having the care and maintenance activities authorized in the licence for the McClean Lake Operation does not involve the transfer of a licence, which is prohibited under subsection 24(8) of the [*Nuclear Safety and Control Act*] NSCA."

[31] Accordingly, the Commission was satisfied that AREVA met the requirements of subsection 24(4) of the Act, and it renewed AREVA's McClean Lake Licence until June 30, 2017. This Licence incorporates the maintenance and caretaking activities at the Midwest Site in the same operating licence. Consequently, the Commission revoked the Midwest Licence.

ISSUES

[32] The issues on the application can be summarized as follows:

1. Does the Commission have the jurisdiction to consider whether a constitutional duty to consult was owed to the Applicants and whether that duty was met on the facts before it?
2. If the above is answered affirmatively, did the Commission err in concluding that, to the extent the above duty to consult was owed, the duty was met?
3. Did the Commission err in revoking the Midwest Licence and incorporating the care and maintenance activities authorized under that licence into the renewed McClean Lake Licence?

STATUTORY PROVISIONS

[33] The following provisions of the Act are applicable in these proceedings:

Establishment of Commission	**Constitution**
8. (1) There is hereby established a body corporate to be known as the Canadian Nuclear Safety Commission.	**8.** (1) Est constituée une personne morale appelée la Commission canadienne de sûreté nucléaire.
Agent of Her Majesty	**Mandataire de Sa Majesté**
(2) The Commission is for all its purposes an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty.	(2) La Commission est mandataire de Sa Majesté et ne peut exercer ses attributions qu'à ce titre.
Objects	**Mission**
9. The objects of the Commission are	**9.** La Commission a pour mission :

(*a*) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to

a) de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés afin que :

(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,

(i) le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l'environnement, demeure acceptable,

(ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and

(ii) le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,

(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and

(iii) ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;

(*b*) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use referred to in paragraph (*a*).

b) d'informer objectivement le public — sur les plans scientifique ou technique ou en ce qui concerne la réglementation du domaine de l'énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et la sécurité des personnes et pour l'environnement, des activités mentionnées à l'alinéa *a*).

Licences

24. (1) The Commission may establish classes of licences authorizing the licensee to carry on any activity described in any of paragraphs 26(*a*) to (*f*) that is specified in the licence for the period that is specified in the licence.

Application

(2) The Commission may issue, renew, suspend in whole or in part, amend, revoke or replace a licence on receipt of an application

(*a*) in the prescribed form;

(*b*) containing the prescribed information and undertakings and accompanied by the prescribed documents; and

(*c*) accompanied by the prescribed fee.

Refund of fees

(3) The Commission may, under the prescribed circumstances, refund all or part of any fee referred to in paragraph (2)(*c*).

Conditions for issuance, etc.

(4) No licence may be issued, renewed, amended or

Catégories

24. (1) La Commission peut établir plusieurs catégories de licences et de permis; chaque licence ou permis autorise le titulaire à exercer celles des activités décrites aux alinéas 26*a*) à *f*) que la licence ou le permis mentionne, pendant la durée qui y est également mentionnée.

Demande

(2) La Commission peut délivrer, renouveler, suspendre en tout ou en partie, modifier, révoquer ou remplacer une licence ou un permis lorsqu'elle en reçoit la demande en la forme réglementaire, comportant les renseignements et engagements réglementaires et accompagnée des pièces et des droits réglementaires.

Remboursement

(3) Dans les cas réglementaires, la Commission peut rembourser la totalité ou une partie des droits visés au paragraphe (2).

Conditions préalables à la délivrance

(4) La Commission ne délivre, ne renouvelle, ne

replaced unless, in the opinion of the Commission, the applicant

modifie ou ne remplace une licence ou un permis que si elle est d'avis que l'auteur de la demande, à la fois :

(*a*) is qualified to carry on the activity that the licence will authorize the licensee to carry on; and

a) est compétent pour exercer les activités visées par la licence ou le permis;

(*b*) will, in carrying on that activity, make adequate provision for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

b) prendra, dans le cadre de ces activités, les mesures voulues pour préserver la santé et la sécurité des personnes, pour protéger l'environnement, pour maintenir la sécurité nationale et pour respecter les obligations internationales que le Canada a assumées.

Terms and conditions of licences

(5) A licence may contain any term or condition that the Commission considers necessary for the purposes of this Act, including a condition that the applicant provide a financial guarantee in a form that is acceptable to the Commission.

Conditions des licences et des permis

(5) Les licences et les permis peuvent être assortis des conditions que la Commission estime nécessaires à l'application de la présente loi, notamment le versement d'une garantie financière sous une forme que la Commission juge acceptable.

Application of proceeds of financial guarantee

(6) The Commission may authorize the application of the proceeds of any financial guarantee referred to in subsection (5) in such manner as it considers appropriate for

Affectation du produit de la garantie financière

(6) La Commission peut autoriser l'affectation du produit de la garantie financière fournie en conformité avec le paragraphe (5) de la façon qu'elle estime

the purposes of this Act.	indiquée pour l'application de la présente loi.
Refund	**Remboursement**
(7) The Commission shall grant to any person who provided a financial guarantee under subsection (5) a refund of any of the proceeds of the guarantee that have not been spent and may give the person, in addition to the refund, interest at the prescribed rate in respect of each month or fraction of a month between the time the financial guarantee is provided and the time the refund is granted, calculated on the amount of the refund.	(7) La Commission rembourse à la personne qui a fourni la garantie la partie non utilisée de celle-ci; le cas échéant, elle peut ajouter les intérêts calculés au taux réglementaire sur le montant du remboursement, pour chaque mois ou partie de mois entre le moment où la garantie a été donnée et celui du remboursement.
Licence not transferable	**Incessibilité des licences et permis**
(8) A licence may not be transferred.	(8) Les licences et les permis sont incessibles.

[34] The following provision of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 is also applicable in these proceedings:

Recognition of existing aboriginal and treaty rights	**Confirmation des droits existants des peuples autochtones**
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	**35.** (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.
Definition of "aboriginal	**Définition de « peuples**

peoples of Canada"	**autochtones du Canada »**
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.	(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.
Land claims agreements	**Accords sur des revendications territoriales**
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.	(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
Aboriginal and treaty rights are guaranteed equally to both sexes	**Égalité de garantie des droits pour les deux sexes**
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.	(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

STANDARD OF REVIEW

[35] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only

where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[36] The first issue before the Court is whether the Commission has the jurisdiction to consider whether a duty to consult was owed to the Applicants. Issues of true jurisdiction or *vires* are to be considered on a standard of correctness. See *Dunsmuir*, above, at paragraph 59. According to *Dunsmuir*, questions of true jurisdiction arise where a tribunal must determine whether its statutory grant of power gives it the authority to decide a certain issue. In my view, this issue was before the Commission. Hence, whether the Commission has the jurisdiction to consider whether a duty to consult was owed to the Applicants will be reviewed on a standard of correctness.

[37] If it is determined that the Commission had the jurisdiction to determine the duty to consult in this instance, the review of the Commission's Decision as to whether such a duty was owed to the Applicants and whether this duty was properly discharged is reviewable on a standard of reasonableness. See *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, [2009] F.C.J. No. 608 (*Brokenhead*) at paragraphs 17-18.

[38] The final issue before the Court is whether the Commission erred in revoking the Midwest Licence and incorporating the care and maintenance activities authorized under that licence into the renewed McClean Lake Licence. This issue is one of statutory interpretation in that the Court must consider whether the Commission erred in its interpretation of subsection 24(8) of the Act.

[39] According to *Dunsmuir*, above, legal questions of central importance to the legal system as a whole and outside a decision-maker's specialized area of expertise attract scrutiny on a correctness standard. However, questions of law that do not rise to this level may be compatible with a reasonableness standard. See *Dunsmuir*, above, at paragraphs 55 and 60.

[40] Considering whether the issue of statutory interpretation requires review on a standard of correctness or a standard of reasonableness necessitates consideration of the factors laid out by the Supreme Court of Canada in paragraph 64 of *Dunsmuir*, above, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal; (3) the nature of the question at issue; and (4) the expertise of the tribunal. The Supreme Court directs that in many cases it will not be necessary to consider all of these factors. I believe that this is such a case.

[41] According to paragraph 54 of *Dunsmuir*, above, deference is generally owed where a tribunal is interpreting its own statute or statutes closely connected to its function with which it will be particularly familiar. In this instance, the Commission is interpreting its enabling statute. As such, the Commission can be said to have relative expertise with regard to the Act.

[42] Furthermore, in this instance, the nature of the question at issue (the validity of the renewal of a licence and amalgamating activities within that licence), the purpose of the Commission (in part, to dispense licences under the Act) as well as the expertise of the Commission, suggest that reasonableness is the appropriate standard upon which to review the Commission's interpretation and application of the Act. As such, I am satisfied that a standard of reasonableness is appropriate

when considering whether the Commission erred in its interpretation and application of subsection 24(8) of the Act.

[43] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

Jurisdiction of Commission

[44] The Applicants contend that the issue of whether the Commission has the jurisdiction to determine issues pertaining to Aboriginal and treaty rights, or other matters of constitutional law, is dependent on whether the Commission has been granted the power to determine questions of law through its enabling statute. According to *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115 (*Cooper*), "if a tribunal does have the power to consider questions of law, then it follows … that it must be able to address constitutional issues."

[45] However, in order for a tribunal to address a constitutional issue – for example, an issue under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 – the tribunal must "already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought." See *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121 (*Cuddy Chicks*).

[46] The Applicants argue that jurisdiction is to be determined by a variety of practical matters, including the composition and structure of the tribunal, the procedure before the tribunal, the appeal route of the tribunal and the expertise of the tribunal. According to the Supreme Court in *Cooper*, above, "[t]hese practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature." Based on these considerations, the Applicants submit that whether a tribunal has the authority to consider questions of law, the duty to consult and other constitutional issues is dependent upon its statutory authority and must be determined on a case-by-case basis.

[47] The Applicants contend that the AGS erred in his determination of the authority of the Commission in his letter of June 8, 2009:

> It is the Attorney General's position that any issues related to the Province's duty to consult and accommodate Aboriginal peoples and, in particular, any issues related to whether the Province has fulfilled its obligations in connection with decisions related to either McClean Lake or Midwest projects are not within the mandate of the Commission and, in fact, are beyond the constitutional bounds of the Commission's jurisdiction.

[48] The Applicants rely on the reasoning of Justice Iacobucci in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, [1994] S.C.J. No. 13 (*National Energy Board*), (QL) at paragraph 60 to suggest that limitations of authority ought to be balanced with other factors when considering issues of federal and provincial overlap:

> In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective.

The Applicants contend that the jurisdictional limitations on the Commission, as suggested by the AGS, would render the function of the Commission meaningless or ineffective.

[49] The Applicants further submit that the AGS is attempting to evade his own responsibility to Aboriginal people by distinguishing himself from the Federal Crown. Furthermore, they say that the AGS is also denying that any consultation was required in this instance.

[50] According to a letter from Saskatchewan's Ministry of Environment dated April 22, 2009 to Vincent Martin, President and CEO of AREVA, "this type of licence amalgamation would be assessed as not triggering a duty to consult because it does not have the potential to adversely impact the exercise of Aboriginal rights as affirmed by section 35.1 of the *Constitution Act, 1982*." Furthermore, the Deputy Minister of the Provincial Ministry of Environment (Deputy Minister) has characterized the licence amalgamation as "an administrative process that has no material impact on the functioning of either site and will not result in any new impacts to the landscape itself." The Applicants submit that the Provincial Crown's pre-determination of its duty of consultation based

on whether the action in question is administrative in nature is unsupported by law and difficult to reconcile with existing laws.

[51] The Applicants contend that members of the Athabasca Regional Government (ARG) worked to develop a Land Use Plan for the Athabasca region. This plan was communicated to many entities, including the Provincial Crown.

[52] The Applicants say that the Commission erred by failing to determine that the Province of Saskatchewan owed a duty to consult with regard to the licensing of lands identified as hunting, trapping, fishing and gathering lands.

[53] Furthermore, the Applicants submit that if the Commission truly had jurisdiction to address consultation on the Crown's behalf, then it further erred in failing to consider the lack of Provincial Crown involvement. Moreover, the Commission's conclusion that "to the extent that a duty to consult was engaged, it was fulfilled in this case" is unreasonable.

Doctrine of Reconciliation

[54] The Applicants also contend that the position of the Provincial Crown with regard to the consultation and accommodation of Aboriginal rights is inconsistent with its own policy. In its publication entitled "The Legal Duty to Consult Aboriginal Peoples Saskatchewan Environment Policy," Saskatchewan Environment clearly acknowledges its duty to consult with Aboriginal

peoples prior to engaging in, or authorizing, activities that could infringe on Aboriginal or treaty rights. The Applicants suggest that the position of Saskatchewan in this application is contrary to "the endorsement of both the Deputy Minister of the Environment and the Attorney General for Saskatchewan."

[55] Moreover, in the Saskatchewan Environment Policy of 2003, Saskatchewan Environment notes that its legal duty to consult cannot be delegated to a third party and that "the legal duty and final accountability to protect and minimize infringements on constitutionally protected Treaty and Aboriginal rights will continue to be carried by the Crown."

[56] In this instance, however, the Applicants say that the Government of Saskatchewan has failed to acknowledge or address any existing legal duty. This is incompatible with the doctrine of reconciliation, which seeks to reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown.

Jurisdiction Conferred by the Act

[57] The Applicants submit that the Act does not provide either an express or implied mandate for the Commission to consider questions of law, constitutional issues or Aboriginal and treaty rights. The objects of the Commission are as follows:

Objects	**Mission**
9. The objects of the Commission are	**9.** La Commission a pour mission :

(*a*) to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information in order to

a) de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la production, la possession et l'utilisation des substances nucléaires, de l'équipement réglementé et des renseignements réglementés afin que :

(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,

(i) le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l'environnement, demeure acceptable,

(ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and

(ii) le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,

(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and

(iii) ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;

(*b*) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use referred to in paragraph (*a*).

b) d'informer objectivement le public — sur les plans scientifique ou technique ou en ce qui concerne la réglementation du domaine de l'énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et la sécurité des personnes et pour l'environnement, des activités mentionnées à l'alinéa *a*).

[58] Based on these objects, it appears that the Commission may consider matters of fact. There is nothing in the Act, however, to suggest that decisions of law ought to be made with regard to Aboriginal and treaty rights. Nevertheless, the Applicants acknowledge that "Courts and the Commission have found that they perform a Federal Crown function and as such, the honour of the Crown must be upheld, and that the Commission must itself act in accordance with s. 35 of the *Constitution Act, 1982* and its imperatives."

[59] Notwithstanding such findings, the Applicants say that the Commission has no jurisdiction to determine that it has jurisdiction to deal with consultation on behalf of the Crown or that its process was the appropriate forum in which to deal with these issues.

[60] Alternatively, if the Commission does have jurisdiction to consider questions of law, the Applicants contend that the Commission's statements that it "has the jurisdiction to deal with consultation on behalf of the Crown", and that "its process is the appropriate forum in which to deal with such issues" are erroneous. Indeed, these determinations would usurp the quasi-judicial function of the Commission, which requires impartiality.

[61] The Applicants submit that designating the Commission's process as the appropriate forum to address issues of consultation on behalf of the Crown "is to further place the Commission in the position of a fiduciary in relation to the Applicants, but not the rest of the participating parties." The Applicants also say that such a decision also results in a conflict of interest, since the Commission would have to administer its own consultation and accommodation processes rather than those of

the Crown. Moreover, the Applicants warn that courts must be careful not to compromise the independence of quasi-judicial tribunals by imposing fiduciary obligations on them.

[62] The Applicants concede that the Commission was correct to consider the rights of Aboriginal peoples of the ARG in determining whether the Crown had a duty to consult and accommodate Aboriginal interests. However, the Commission erred in limiting its consideration to communities receiving information and in concluding that the process was adequate to address the concerns expressed. The Commission erred further in finding that, to the extent that a duty was engaged in this instance, the duty was fulfilled by the Commission process and by the opportunities that were provided for consultation within that process.

[63] The Applicants submit that the Commission is not the appropriate entity for undertaking consultation or accommodation for many reasons, including the following:

a. Information was received by Commission staff following the hearing;

b. The Applicants were not given sufficient time to analyze thoroughly and respond to all impacts of their Aboriginal or treaty rights;

c. A party cannot be consulted while it is either observing or participating in the Commission proceeding;

d. It is unreasonable to expect a party to be consulted when it has not been fully or accurately informed as to the matters at issue;

e. Most of the information received by the Applicants was received following Day 2 of the hearing process and following notice of judicial review of the Decision.

[64] Moreover, the Applicants say that the Commission seemed to be unprepared to consider issues of Aboriginal and treaty rights. The Applicants contend that this is unfortunate in that "the Doctrine of the Crown's duty to consult, and where appropriate, accommodate members of First Nations, has become of fundamental importance to Aboriginal peoples."

Duty to Consult

[65] The Applicants point out that they were well-known by both the Crown and industry as having an interest in the Athabasca region and, in particular, in the land taken up for mining purposes.

[66] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 (*Delgamuukw*) established that the duty to consult is engaged at a low threshold and that the extent of the duty owed will vary depending on the circumstances. *Delgamuukw* at paragraph 168 also established that, in most cases, the duty to consult will be "significantly deeper than mere consultation."

[67] In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70 (*Haida*) at paragraphs 43-44, the Supreme Court of Canada discussed the spectrum of consultation required and determined that the content of the duty to consult will vary according to the circumstances of each case. Where an Aboriginal claim is relatively weak and the potential

adverse effects are minor, the Crown's duties may be limited to giving notice, disclosing information and discussing the issues raised in response to the notice. However, at the other end of the spectrum, deep consultation may be required. The important question to be asked in determining the appropriate content of the duty to consult is "What is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect the interests at stake?" See *Haida*, above, at paragraph 45.

[68] While the Commission in this case considered the broad duty to consult, it failed to acknowledge any of the specific concerns raised by the Applicants. Indeed, there is nothing on the record before the Court to demonstrate that meaningful consultation or accommodation took place. The Applicants submit that this is further emphasized by the Commission's failure to address the concerns of the Applicants and, in particular, their concerns that they had not had an opportunity to address fully and consider all of the material provided to them.

[69] Furthermore, in this instance, the ARG was granted only one 30-day extension, which then resulted in the receipt of additional information and a denial of any further extension of time. The Applicants suggest that the facts of the case at hand can be compared to the facts in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, [2004] S.C.J. No. 69 (*Taku River*). The Applicants submit that they are entitled to, but did not receive, all of the same considerations that were granted in *Taku River*, above.

[70] The Applicants say there is no evidence before the Court that the duty to consult or accommodate the Applicants was satisfied in the present case or that any efforts at reconciliation were attempted. Instead, the Applicants contend that it is clear on the evidence before the Court that:

a. No consideration was given to the Aboriginal or treaty rights of the Applicant First Nations;

b. The ARG was not given any notice of the application until it so requested;

c. The ARG, despite having previously served notice of its vision of land use and protocol arrangements, was not given notice of any pending application before the Commission;

d. The ARG learned only through the Commission website of the pending application of the McClean Lake and Midwest Lake Projects;

e. The ARG attempted to get as much information as possible but was not provided with all of the information until either on or after the day of the hearing;

f. The ARG was granted only one extension, most of which was taken up receiving information;

g. Only upon service of the Notice of Application in these proceedings did the ARG receive the entire record of material before the Commission (which the Applicants contend still has inherent deficiencies);

h. No questions asked by the ARG members during various meetings were accommodated;

i. There is no formal process within Saskatchewan to consult and accommodate the interests of Aboriginal peoples.

Transfer of Licence

[71] On this issue, the Applicants take the position that the incorporation of the care and maintenance aspects of the Midwest Site into the renewed McClean Lake Licence amounted to a licence transfer. The Applicants liken the case at hand to that of *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, [2004] B.C.J. No. 2714 (*Gitxsan*) in which the assignment of an existing licence was found to result in a change of control. In *Gitxsan*, the Court acknowledged that the potential infringement and impact on the claimed Aboriginal rights were low. However, the Court found that, because the licence already existed, the duty to consult also existed. Moreover, the Court in *Gitxsan* determined that since consultation had not occurred during the granting or subsequent renewals of the licence, the duty to consult at this stage had to account for previous failures to consult.

Legality of the Revocation and Amendment of the Licence Renewal Application

[72] The Applicants submit that subsection 24(8) of the Act prohibits the revocation of the existing care and maintenance licence at the Midwest Site and the transfer of these activities to the McClean Lake Licence. Subsection 24(8) of the Act makes it clear that each licence must be dealt with separately.

[73] In this instance, there were two licences to address two separate projects which are located in two different geographic areas. What is more, these projects have separate and specific purposes, conditions and requirements.

[74] The Applicants contend that AREVA's application is an attempt indirectly to transfer one licence to another, which is prohibited by subsection 24(8) of the Act. Furthermore, the Applicants submit that subsection 24(8) of the Act exists to require accountability, certainty and public scrutiny. The Commission's decision to grant AREVA's incorporation application could result in the avoidance of processes and conditions required to obtain the licence properly.

[75] Furthermore, the Applicants contend that the Commission's decision to allow AREVA to bypass the required licensing scheme could constitute a risk to both the environment and the affected people, including the Applicants. As such, consultation and accommodation were required in order to "ensure [the ARG's] opportunity to protect themselves and be protected from what they perceive to be an obvious undermining of the legislative protection which includes the creation of the Canadian Nuclear Safety Commission."

Remedy Requested

[76] At the hearing of this application in Saskatoon, the Applicants deviated significantly from their written submissions and submitted that their preferred remedy would be a Court-imposed, and Court-supervised, negotiation process between the Applicants, the Commission and both Crowns

which would consider the Applicants' own protocol for consultation and land-use development in the Athabasca Basin. However, they also took the position that, should such a remedy not be feasible, then the Decision of the Commission should be quashed. This would mean that operations at McClean Lake would have to cease because there would be no operating licence.

The Respondents

Attorney General of Canada

Duty to Consult

[77] The Respondent, the Attorney General of Canada (AGC), notes that subsection 8(2) of the Act states that the Commission is an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty. Accordingly, the AGC submits that in "[s]o far as the Crown is obliged to consult with the Applicants respecting its conduct, the Commission may fulfill the duty as a component of the overall process of consultation."

[78] Based on section 9 of the Act, the AGC says it is clearly within the Commission's mandate to assess and mitigate environmental, health and safety risks which result from the production or use of nuclear substances. In order to address these risks, the Commission has the technical expertise to gather and interpret information. It also has a process to consider and respond to public concerns with regard to the production of nuclear substances.

[79] Section 24 of the Act provides the Commission with the authority to refuse, suspend, revoke and place conditions on licences to carry out nuclear activities. If any conduct of a licensee or proposed licensee causes a risk to health, safety or environment, the Commission has resources to assess the risks and the authority to impose mitigation measures or refuse or revoke the licence.

[80] The AGC points out that the Supreme Court of Canada determined in *Taku River*, above, that the Crown can fulfill its duty to consult within an existing regulatory process. Given the authority granted to the Commission and the consultation processes conducted by the Commission in this instance, the Applicants' concerns fall within the Commission's legislated mandate. The Court also made this clear in *Brokenhead*, above, at paragraph 25.

[81] Indeed, the AGC points out that in *Brokenhead*, above, Justice Barnes rejected the need for an alternative or additional consultation process when the relevant regulatory process provided an adequate opportunity for consultation and mitigation.

[82] In this case, the AGC submits that, so far as the focus of consultation relates to matters that are within the Commission's legislated mandate, the Commission is the appropriate body to address the duty to consult with Aboriginal communities on behalf of the Crown.

Jurisdiction

[83] In *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, [2003] S.C.J. No. 34 (*Paul*) at paragraph 39, the Supreme Court of Canada determined that if the empowering legislation either explicitly or implicitly grants a commission or tribunal authority to determine questions of law, then it will also have the authority to determine these issues in light of section 35 of the *Constitution Act, 1982*.

[84] The Commission's empowering legislation states that the Commission is an agent of the Crown (subsection 8(2)) and that it is a court of record (subsection 20(1)). The Act further establishes extensive authority and power for the Commission to compel and collect evidence and to make and enforce a wide scope of decisions, including implied authority to make decisions of law.

[85] The AGC contends that the Commission in this instance is comparable to the Utilities Commission in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, [2009] B.C.J. No. 259 (*Carrier*) (leave to the SCC granted, hearing to take place in May 2010). As was the case with the Utilities Commission in *Carrier*, the Commission in this instance has the implicit jurisdiction to decide on the adequacy of consultation. Indeed, in paragraph 51 of *Carrier*, the British Columbia Court of Appeal determined that the Utilities Commission had not only the jurisdiction but also the duty to decide the issue of consultation. The case of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2009] F.C.J. No. 1434 (*Standing Buffalo*) at paragraphs 40-43 also contains a useful discussion on the Crown's duty to

consult that is consistent with the key Supreme Court of Canada jurisprudence in *Haida* and *Taku River*.

[86] In summary, the AGC takes the position that the Commission has the authority under its governing legislation to determine questions of law and that the subject matter of consultation falls within the Commission's mandate. As such, the Commission is the appropriate body to determine the adequacy of the consultation in this instance.

Reasonable Consultation by the Commission

[87] The AGC submits that, based on the evidence before the Commission, the consultation was adequate and reasonable in this instance. Where, in the case at hand, the potential impact on Aboriginal rights is merely technical in nature, deference to the expertise of the Commission should be afforded on judicial review.

[88] The Crown is not obliged to reach an agreement with Aboriginal peoples for consultation to have been meaningful and adequate. Moreover, consultation does not allow Aboriginal groups to have a veto power over development, and accommodation does not require that the Crown consent to the position of the Aboriginal peoples concerned. Rather, as stated by the Supreme Court of Canada in paragraph 48 of *Taku River*, above,

> [a]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.

[89] In this case, AREVA's licensing application contemplated virtually no new activity. Both mine sites have been taken up by the province for mining purposes and have been leased to AREVA for a number of years. In the absence of significant new activity within AREVA's renewal of licence request, the potential for any impact on existing Aboriginal rights to result from the Commission's Decision is limited. Because the potential adverse impact on Aboriginal and treaty rights was minor, the AGC says that the duty to consult in this instance was satisfied by providing notice and information and by entering into discussion with interested parties.

[90] The AGC submits that, through a combination of AREVA's efforts and the Commission's licensing process, the duty to consult in this instance was discharged. Evidence before the Court demonstrates that AREVA made efforts to inform relevant communities about its ongoing operations at the McClean Lake and Midwest sites, including meetings and attempts to set up meetings with community leaders. Furthermore, the Applicants participated fully in the licensing hearing with the presence of legal counsel. In this case, the Commission (with the cooperation of AREVA) provided the Applicants with the information they requested and granted the Applicants' request for an extension of time to file materials.

[91] The Commission's process provided the Applicants the opportunity to raise concerns with regard to potential adverse impacts its decision might have on their Aboriginal and treaty rights. However, the Applicants have failed to articulate which rights were likely to be adversely affected by the Commission's Decision and which specific Aboriginal rights the Commission failed to consider.

[92] Had the Applicants identified specific Aboriginal or treaty rights that were likely to be adversely affected by the Decision, the Commission could have undertaken more extensive consultation and taken steps to address and accommodate these concerns. However, in the circumstances, the Applicants' concerns with regard to the environment and health and safety were adequately addressed. As noted by Justice Barnes in paragraph 34 of *Brokenhead*, above, "[t]here is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown's duty to consult."

[93] The Applicants failed to provide evidence of any specific unresolved impact on rights that could be addressed within the authority of the Commission. As such, the Commission's Decision on the adequacy of the consultation was reasonable.

Environmental Assessment not Necessary

[94] The AGC also submits that, because there were no new activities contemplated by the licence application in this case, the licensed activities do not trigger an environmental assessment under the *Canadian Environmental Assessment Act*, S.C., 1992, c. 37. As noted by the Commission staff, the inclusion of the care and maintenance aspects at the Midwest Site into the McClean Operating Licence is already an authorized activity that will remain unchanged, so the *Canadian Environmental Assessment Act* does not apply. Because an environmental assessment is not required

for the licensed activities contemplated by AREVA's application, the Commission's Decision on this point was correct.

Standing

[95] While it is clear that the ARG has an interest in being able to make submissions to the Commission with regard to the duty to consult, the AGC submits that the non-Aboriginal communities of Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake do not have similar interests at stake. According to the AGC, "there does not appear to be any evidence on the record as to the particular collective of persons within these communities that may be entitled to Aboriginal rights under section 35 of the *Constitution Act, 1982*."

[96] While the AGC concedes that the standing issue is not of practical significance with regard to the hearing before the Commission, he contends that standing may become an issue in this application if the Court were to decide to order specific relief.

Procedural Fairness

[97] If the Applicants have standing to intervene in a licensing application before the Commission, then procedural fairness should be addressed on a general scale.

[98] The AGC points out that AREVA and the Commission staff provided the ARG with disclosure of all of the submissions in this instance. The ARG was also given the opportunity to have legal representation and to make submissions. The Commission made specific inquiries to both AREVA and the Commission staff with regard to their efforts to consult the ARG. Furthermore, the Commission granted the Applicants a further period of 30 days to provide written submissions.

[99] When considered in the context of AREVA's application for a licence renewal, and the fact that the Commission hearing involved seven other interveners, the AGC submits that the ARG was afforded ample opportunity to provide its submissions before the Commission. As such, the Commission was correct in providing the Applicants with procedural opportunities that resulted in meaningful participation in the hearing process. See, for example, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*).

AREVA

Jurisdiction of the Commission

[100] AREVA notes that the Applicants have taken a different position with regard to the jurisdiction of the Commission in their Amended Notice of Application from that taken in their Memorandum of Fact and Law. While the Applicants now state that the Commission has no express or implied mandate to decide questions of law, constitutional issues, or Aboriginal and treaty rights,

the Applicants stated during the Commission hearing that “it is very much within the mandate of this Commission to consider and provide guidance with respect to this issue.”

[101] The Supreme Court of Canada determined in *Paul*, above, that where a tribunal has jurisdiction to decide any question of law, it is presumed to also have jurisdiction to consider that question in light of section 35 of the *Constitution Act, 1982*, or any other relevant constitutional provision.

[102] In applying *Paul*, above, the British Columbia Court of Appeal determined in *Carrier*, above, that a quasi-judicial tribunal with the authority to decide questions of law has the jurisdiction to determine whether a duty to consult exists in the case before it and, if so, whether this duty has been discharged. As stated by the British Columbia Court of Appeal in *Carrier*, at paragraph 54, “[t]he honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation.”

[103] Section 8 of the Act provides that the Commission is an agent of Her Majesty. Section 20 of the Act provides that the Commission is a court of record and that decisions and orders of the Commission may be enforced in a similar way to orders and decrees of the Federal Court. Moreover, section 43 of the Act describes the appeal of Commission decisions and orders. These provisions suggest that the Commission can consider issues beyond simple questions of fact.

[104] AREVA contends that the Commission is a quasi-judicial tribunal with the authority to determine questions of law. Accordingly, the Commission has the jurisdiction to determine whether a duty to consult existed in this case and, if so, whether this duty was discharged.

Duty to Consult

[105] The duty to consult arises when the Crown: a) has knowledge of the potential existence of Aboriginal rights, title or Treaty rights; and b) contemplates conduct that may adversely affect those rights. However, the duty to consult may not be triggered where there is minimal adverse affect on the rights or title alleged. Indeed, there must be evidence to establish an adverse impact on Aboriginal rights. Moreover, such evidence must: a) support the finding of an interference with an interest; b) be linked to the project or decision under consideration; and c) be more than simply submissions or generalities: see *Brokenhead*, above, at paragraphs 30, 33-34. As stated by the Court in paragraph 34 of *Brokenhead,* "to establish a procedural breach … there must be some evidence presented which establishes both an adverse impact on a credible claim to land or to Aboriginal rights accompanied by a failure to adequately consult." Furthermore, the Court in *Brokenhead* determined that "there must be some unresolved non-negligible impact arising from such a development to engage the Crown's duty to consult."

[106] In this instance, AREVA says that the Applicants failed to identify specific Aboriginal or treaty rights that could be adversely affected by the Commission's Decision. Moreover, the Applicants failed to present any evidence of an adverse impact or interference with specific

Aboriginal or treaty rights. Rather, the Applicants simply expressed broad and generalized concerns on matters unrelated to the particular licensing application before the Commission. What is more, the mining and milling operations associated with the McClean Lake Licence have been in existence for over ten years. For these reasons, AREVA contends that the duty to consult was not triggered.

[107] In the alternative, AREVA submits that any duty to consult that arose in this instance was minimal in scope and consisted only of giving notice, disclosing information and discussing with the Applicants the issues raised by them in response to the licensing application.

Duty was Discharged

[108] The Commission concluded that, to the extent that a duty to consult was engaged in this instance, it was fulfilled by the Commission process and by the opportunities given for consultation within that process. AREVA submits that the government is required to make reasonable efforts to inform and consult and that such efforts will discharge its duty of consultation. See *Haida*, above, at paragraph 52.

[109] The concerns of the Applicants in this instance were mostly with regard to requests for information as well as their lack of comprehension of the operations of the nuclear facility at McClean Lake. AREVA submits that, throughout the regulatory process, additional information

was provided to the Applicants. Moreover, AREVA notes that extensions of time were granted to the Applicants in order to allow them to participate fully in the Commission's process.

[110] Furthermore, the Applicants' concerns with regard to the potential impact of the licensing application on their ability to participate in the environmental assessment process for the Midwest project were answered during the course of the regulatory process; it was also made clear to the Applicants that the environmental assessment process of the Midwest Site would not be affected by the decision to revoke the Midwest Licence.

[111] AREVA's request to revoke the Midwest Licence and to amalgamate the care and maintenance activities under that licence with the McClean Lake Licence was also discussed during the hearing. The Commission staff explained that, from a regulatory perspective, this request was administrative and that the same level of control and expectations for nuclear facilities would exist, whether under one licence or two.

[112] In *Carrier*, above, the British Columbia Court of Appeal determined that the regulatory scheme was the most appropriate forum in which to determine issues of consultation. In paragraph 42 of *Carrier*, above, the British Columbia Court of Appeal held that "aboriginal law is not in the steady diet of the Commission", but that "there is no other forum more appropriate to decide consultation issues in a timely and effective manner." A similar finding was made in *Brokenhead*, above, in paragraph 37, where the Federal Court held that "except to the extent that Aboriginal

concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguable relevant ministry."

[113] To the extent that the Applicants' concerns are not related to the licensing action at issue but to their efforts to obtain agreement from the Government of Saskatchewan with regard to implementing the Applicants' own consultation protocol, such concerns fall outside the scope and the mandate of the Commission and cannot be properly addressed within this federal regulatory scheme.

[114] AREVA compares the case at hand to that of *Taku River*, above, in which the Supreme Court of Canada determined that the province had fulfilled the requirements of its duty to consult and accommodate notwithstanding that some of the broader concerns of the applicants in *Taku River* were outside of the scope of the environmental assessment process and could be the subject only of later negotiation with the province. A similar finding was made in *Brokenhead*, above, in which it was determined that the tribunal in question could not address the larger Aboriginal concerns raised and that larger issues such as land claims could properly be determined only outside of the regulatory process.

[115] In this instance, AREVA submits that the Crown's duty to consult was fulfilled by the public information and consultation activities carried out by AREVA, by the regulatory process itself and by the Applicants' participation in the regulatory process.

No Transfer of Licence

[116] The Commission has broad powers with regard to granting licences, pursuant to sections 24 and 25 of the Act. While subsection 24(8) of the Act states that a licence may not be transferred, the Commission was correct in determining that having the care and maintenance activities for the Midwest Project authorized in the McClean Lake Licence did not involve a transfer of a licence, as per subsection 24(8).

Remedy

[117] AREVA submits that this application ought to be dismissed. However, if the Court determines that relief is warranted, AREVA contends that quashing the Decision is drastic and not appropriate in the circumstances.

[118] The Supreme Court of Canada determined in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] S.C.J. No. 2 (*MiningWatch*) that a court has the power to exercise its discretion not to grant a remedy or to choose not to grant the entire remedy sought. AREVA submits that consideration of any disproportionate impact on third parties is a relevant consideration in the Court's exercise of its discretion.

[119] An order quashing the Commission's Decision will have a disproportionate effect on AREVA since it will essentially shut down mining and milling operations at McClean Lake. Such

an order would not be in the best interest of any of the parties and would, according to AREVA, "be counterproductive to ongoing relationships amongst the parties."

[120] Finally, AREVA submits that this relief is not warranted on the facts before the Court, where AREVA has demonstrated that it has met all of the licensing requirements with regard to the licensing application.

The Canadian Nuclear Safety Commission

Intervener Status

[121] The Commission was granted intervener status to submit representations to the Court on the nature of the Commission's jurisdiction with regard to the constitutional duty to consult Aboriginal peoples. This is of significance to the Commission because no jurisprudence currently exists with regard to its jurisdiction to consult with Aboriginal peoples.

[122] The Commission was also granted status to address the standard of review with respect to decisions made by the Commission. This is significant to the Commission because there is currently no jurisprudence with respect to the appropriate standard of review to be applied to Commission decisions.

[123] In their Application, the Applicants request

> [a]n order or Declaration the CNSC satisfy and grant the Applicants [ARG] a consultation process for the purpose of accommodation and

> reconciliation of the aboriginal rights and issues, at minimum in accordance with the Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult of the Government of Canada, dated February 2008.

Based on this request, it appears that the Applicants tacitly accept that the Commission's process is the proper forum to address the duty to consult and that it is within the Commission's jurisdiction to deal with issues relating to the duty.

[124] However, regardless of the Applicants' view, the Commission submits that its process is indeed the proper forum for dealing with issues relating to the duty to consult, to the extent that these issues fall within the Commission's jurisdiction pursuant to the Act.

[125] Furthermore, the Commission contends that it has the jurisdiction to determine constitutional questions, including issues related to section 35 of the *Constitution Act, 1982*. As long as reasonable efforts to inform and consult are made, then the Commission is justified in determining that the existing duty has been discharged.

Nature of the Commission's Jurisdiction

[126] The Commission says that the fiduciary relationship between the Crown and at least some of the Applicants does not impose a duty on the Commission to make decisions in the best interest of the Applicants. See *National Energy Board*, above.

[127] Where the Commission, as an agent of the Crown, determines that a duty to consult is engaged, the scope of the duty will vary according to the circumstances. The scope of the duty will be proportionate to the strength of the claim and the seriousness of the potential adverse effects of the planned activity.

[128] The Commission submits that it not only had the jurisdiction to decide questions related to section 35 of the *Constitution Act, 1982* but that it is the only appropriate forum within which to decide these issues in a timely way. Moreover, the honour of the Crown obliges it to determine these issues. According to the Commission, "[a]s a body to which powers have been delegated by Parliament, it must not deny Aboriginal groups timely access to a decision-maker with authority over the subject matter."

[129] The Commission says it has jurisdiction to address consultation on behalf of the Crown in cases where there are project-related matters that may cause concern to rights-holders with regard to potential impacts within the authority of the Commission. For example, see *Standing Buffalo*, above, at paragraph 40.

Standard of Review

[130] The Commission contends that, with regard to the duty to consult, the Commission's process should be reviewed on a standard of reasonableness. The question at issue is whether the Commission's regulatory scheme, when viewed as a whole, accommodates the collective

Aboriginal right in question. See *Haida*, above, at paragraph 62. In other words, according to the Commission, "[i]nsofar as the Commission process evidences reasonable efforts to inform and consult, a determination that the duty was discharged is reasonable and should be upheld."

[131] It is only where the Commission misconceives the seriousness of the claim or the impact of the infringement that a standard of correctness is appropriate with regard to the duty to consult.

Attorney General for Saskatchewan

Intervener Status

[132] The Attorney General for Saskatchewan (AGS) was granted intervener status in order to address: a) whether the Applicants are entitled to consultation; b) whether the Commission exceeded its jurisdiction with regard to determining the duty to consult; c) whether the Commission is the proper forum for addressing the Crown's duty to consult; and d) whether the Commission erred in failing to satisfy its duty of consultation. Furthermore, the Federal Court also granted the AGS leave to respond to any submissions the Applicants have made concerning the duty to consult and accommodate.

[133] The AGS intervened in the proceedings before the Commission by way of a letter, dated June 8, 2009, which sets out the Province's position in relation to its control over Crown lands and the Province's consultation policy. The letter stated that "any issues related to the Province's duty to

consult and accommodate Aboriginal Peoples … are not within the mandate of the Commission and, in fact, are beyond the constitutional bounds of the Commission's jurisdiction."

[134] Although the Applicants refer to a letter written by the Deputy Minister, the AGS submits that it is not clear that this letter was before the Commission. The Commission did not refer to this letter in its reasons.

Jurisdiction of Commission

[135] The AGS says that no matter what the Commission's jurisdiction involves in relation to the duty to consult, it does not include the authority to determine whether the Provincial duty has been triggered or to review the adequacy of Provincial consultations.

[136] The duty to consult is triggered when the Crown contemplates conduct that might adversely affect the exercise of treaty or Aboriginal rights. In this instance, the only Crown conduct at issue relates to the licensing decisions before the Commission. The Commission is a federal body over which Saskatchewan has no responsibility or jurisdiction. As such, the Commission's Decision or process cannot be properly described as conduct that could trigger a duty to consult for Saskatchewan.

[137] The Crown is divisible, and the duty to accommodate is triggered for Saskatchewan only when the Crown in right of Saskatchewan contemplates conduct that could adversely affect the

exercise of treaty or Aboriginal rights. The AGS takes the position that "[i]t is for the Crown in right of Saskatchewan to inform itself of whether its decisions or activities trigger a duty and, if so, to determine the proper scope of its consultations." It is not appropriate for a federal commission to usurp this responsibility.

[138] Where a First Nation or Aboriginal group seeks to assert the existence of a Provincial duty to consult or disputes the scope of such consultations, these matters must be taken up with the Province. Failing this, a remedy may be sought in the Saskatchewan Court of Queen's Bench. Federal commissions, boards and tribunals are not the proper fora in which to bring or determine such issues.

[139] The Commission was correct in its Decision not to address whether Saskatchewan owed or satisfied any duty of consultation in this instance. Indeed, the Commission noted in its Decision that it is not within its authority to oversee the Province's consultative efforts or obligations.

[140] The Commission's acknowledgement of its jurisdictional limits is consistent with the Supreme Court of Canada's determination in *National Energy Board*, above, which held that the jurisdiction of a federal board is limited to matters of federal concern only.

[141] Although the Applicants cite *National Energy Board*, above, to suggest that the Commission would be rendered "meaningless and ineffective" if it was unable to determine the adequacy of provincial consultations, the AGS submits that the Applicants have mischaracterized this case.

National Energy Board does not stand for the proposition that the National Energy Board had jurisdiction to review the adequacy of provincial decisions, policies or processes, let alone that the Board's function would be rendered meaningless and ineffective because it was unable to do so. Moreover, the AGS submits that in *Standing Buffalo*, above, the Federal Court of Appeal confirmed that the National Energy Board is without jurisdiction to review provincial consultations.

[142] The Commission's jurisdiction is similarly limited. The alternative of this would be an untenable constitutional situation in which a federal commission could be used as a reviewing body for provincial licensing decisions and concomitant processes.

Other Allegations Irrelevant

[143] The Applicants make a number of allegations against the Province that are irrelevant to the application before the Court. Such allegations include:

a. That the Provincial Crown foists all responsibility for Aboriginal consultation, involving the environment and the safety of Canadians, on the Federal Crown. The Province denies this. The Province states that "[it] takes seriously its obligation to consult Aboriginal peoples where its decisions or activities have the potential to negatively impact the exercise of Treaty or Aboriginal rights";

b. Concern with the April 22, 2009 letter from the Deputy Minister, which did not form any part of the Commission's Decision;

c. An alleged inconsistency between letters and a policy on the duty to consult neither of which are relevant to the current proceeding;

d. That the Province's interim consultation guidelines are "an unstructured discretionary administrative regime."

No Crown Obligation to Consult with the ARG

[144] The Province does not recognize the ARG as an entity that is entitled to consultation or accommodation. Where these duties are triggered, they are owed to the "rights-bearing community or communities whose rights, or asserted rights, have the potential to be negatively impacted." The AGS points out that while some of the ARG's members are rights-bearing communities, the ARG itself is not an entity to which a duty to consult is owed.

[145] Federal Court jurisprudence has determined that a body representing Aboriginal peoples is not owed a duty to consult even if its members might be owed such a duty. See *Native Council of Nova Scotia v. Canada*, 2002 FCT 6, [2002] F.C.J. No. 4 (*Native Council of NS*) at paragraph 13. The AGS suggests that "these cases stand among other Federal Court decisions in which such representative bodies were found not to have standing to bring actions on the basis of Treaty or Aboriginal rights."

[146] While some courts have held that the Crown may satisfy its consultative obligations through multilateral processes, such cases do not stand for the proposition that the Crown is required to

consult in this manner or to consult a representative organization. See *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, [2008] F.C.J. No. 946 (*Ahousaht*) at paragraphs 47-51 and *R. v. Douglas*, 2007 BCCA 265, [2007] B.C.J. No. 891 (*Douglas*) at paragraph 40.

[147] A number of the ARG's member are not rights-bearing communities to whom the duty to consult is owed; rather, they are creatures of Provincial statute. Moreover, the ARG, which is composed of both First Nation and provincial communities is not an entity that the Crown is required to consult.

ANALYSIS

General

[148] During the hearing of this matter in Saskatoon on June 8, 2010, the Applicants made significant adjustments to their position – in terms of the capacity and jurisdiction of the Commission to address the Crown's consultation obligations and in terms of the remedies they are seeking from this Court – that helped to clarify both their objectives in bringing this application and why they see the Decision in question as an opportunity to further those objectives.

[149] When it comes to mining and other development initiatives in the Athabasca region of Northern Saskatchewan, the Applicants feel that their rights and interests are not being taken seriously by the Province or the Federal Crown and they want a greater say (a significant degree of

control in fact) over all such initiatives. They have developed their own Consultation Protocol and Development Review Process and Approval Process, which they think should govern all development initiatives in their region. As yet, however, they have not succeeded in having their position recognized to the full at the political level. The Saskatchewan Crown, for instance, does not recognize the ARG as an entity that is entitled to be consulted and accommodated.

[150] Still feeling marginalized and unheeded by the powers that control development in their region of Northern Saskatchewan, the Applicants have turned to the Court with a view to establishing at a legal level the degree of consultation and control over development in the Athabasca Basin that they believe is rightly theirs. They have chosen, in fact, to use the Decision under review in this application to try to secure legal recognition for the rights set out in their own Consultation Protocol. Moreover, they have invited the Court to use this Consultation Protocol as a comparator for the inadequate consultation which they say took place around the Commission's Decision both to renew the McClean Lake Licence and to roll the care and maintenance aspects of the Midwest Site into the McClean Lake Licence.

[151] What they would like to see – and the principal remedy proposed – is a Court-ordered and Court-supervised negotiation process whereby the Province, the Federal Crown and the Applicants would establish a consultative protocol (much like the Applicants' own Consultation Protocol) to govern any aspect of development in the Athabasca basin. This would also involve the Court ordering that the negotiations towards such a protocol be fully financed and resourced by the Federal and Provincial Crowns.

[152] In other words, the Applicants now want the Court both to order that the Province and the Federal Crown negotiate with them and to oversee the process that will lead to the achievement of the Applicants' developmental objectives for the Athabasca basin as embodied in their own Consultation Protocol.

[153] This remedy was suggested at the hearing only and did not appear in the Applicants' written materials. Consequently, there has been no opportunity for the Court or opposing counsel to explore fully what such an approach would involve or whether there is any legal precedent for what would inevitably be a long and confrontational ordeal for all involved. The Court knows nothing about other communities (Aboriginal or otherwise) in the region, some of whom might have very different ideas from the Applicants. In the end, the Court cannot compel the Federal Crown and the Province to negotiate with the Applicants on matters of such historical difficulty. There is insufficient material presented in this application to allow the Court to ascertain what such a proposal would involve, the legalities of implementing it and why the ARG – an entity that is not even recognized by, at least, the Province – is entitled to play such a role when the interests of the whole region are taken into account. The Applicants have established neither a factual nor a legal basis for such an extraordinary remedy.

[154] The Applicants say that, if the Court cannot or will not impose the negotiation regime outlined above, then they want the Court to quash the Decision renewing the McClean Lake Licence. This would, of course, have very serious consequences, and not only for AREVA. AREVA has been operating the mine at McClean Lake for years. Provincial, regional and

community development as well as individual livelihoods depend upon the mine. In fact, it is clear from the evidence before me that the Applicants themselves have a significant interest in the continued operation of the mine at McClean Lake.

[155] As part of the written submissions made to the Commission when the renewal and amendment of the McClean Lake Licence were being considered, the Athabasca Basin Development Limited Partnership provided the following letter of support:

> Athabasca Basin Development Limited Partnership (ABDLP) is owned by seven northern Saskatchewan Athabasca communities: three First Nations (Black Lake, Fond du Lac and Hatchet Lake) and four settlement/hamlets (Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake).
>
> ABDLP is a mining and exploration services company that provides construction, underground mining, drilling, janitorial and security as well as logistical services. ABDLP was recently awarded the inaugural Skookum Jim Award by the Prospectors and Developers Association of Canada for excellence by a Canadian aboriginal firm in the mining and exploration sector.
>
> ABDLP supports the renewal of the McClean Lake operating license in its present form as the benefits derived from the current operations at McClean Lake are substantial. This operation has provided us, and would continue to provide us with construction, security and janitorial, and drilling contracts. The McClean Lake Mine also provides increased traffic to Points North Landing which benefits one of our holdings, Points North Freight Forwarding.
>
> As a result of the contracts that ABDLP receives and from direct employment by AREVA, the Athabasca region benefits from the operation of the McClean Lake mine, and these benefits would carry on into the future with the continuation of its operation. These benefits include such things as a significant increase in First Nations employment levels, increased education and training of First Nation and other local employees, and additional spin off opportunities for the First Nations people and their communities.

> ABDLP has partnered with AREVA because we feel their operations will strive to deliver economic benefits to the Athabasca, ensure safety of their employees and the region, and bring prosperity to the people and the land.
>
> It is the goal of the Athabasca region to fully participate in the economy and ABDLP supports all companies and operations that share this goal as well. We are confident that the existing operations at McClean Lake share our goal and we would fully support the renewal of McClean Lake's licence in its present form.

[156] This letter of support speaks eloquently of the regional importance of the mine and the need for the renewal of the McClean Lake Licence.

[157] It cannot escape the Court's notice that the ABDLP – which wrote such a glowing letter in support of the renewal of the McClean Lake Licence – is made up of Black Lake, Fond du Lac and Hatchet Lake First Nations, as well as Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake Settlement, the very same entities that make up the ARG. Now, as the Applicants in this application, the ARG is telling the Court that, if the Court cannot impose upon the two Crowns some form of mandatory negotiation process to give the Applicants a broad say in land-use and development in the Region, then the McClean Lake Licence should be quashed indefinitely.

[158] The Applicants have offered no explanation for this inconsistency. Apparently, all of the benefits outlined in the ABDLP letter can now be sacrificed to give the Applicants leverage in their negotiations with the Provincial and Federal Crowns over the establishment of a general Consultation Protocol for the Athabasca basin.

[159] Whatever the reason for these contradictions, they highlight the need for extreme caution when considering the evidence, arguments and remedies that the Applicants have now placed before the Court to justify quashing the Commission's Decision. In fact, one of the problems with such a contradiction is that the Court cannot be certain that the persons directing this application on behalf of the Applicants are truly representing the views and objectives of the Applicants. The Court has no authorizing resolutions to rely upon and must confront a request for a draconian remedy in the face of a record that is unclear on the issue of what the Applicants truly want. This confusion became clear at the hearing before me when the Applicants tried to back away from asking for an order to quash the Decision in favour of a Court-imposed negotiation process that would lead to the adoption of their own Consultation Protocol.

[160] It is also clear from a review of the Applicants' submissions to the Commission and the record before me in this application that the Applicants are seeking to assert a general right to consultation, and a right to control development, in the Athabascar region irrespective of whether or not section 35 rights under the *Constitution Act, 1982* are engaged. As I shall discuss later, our present jurisprudence does not support such a general right.

Standing

[161] As the contradictions and political dimensions evident in the evidence suggest, there are serious issues of standing with regard to the Applicants making this judicial review application.

[162] To begin with, the ARG is not a legal person. Counsel's information is that the ARG is just a collective term for the individual Applicants. So the ARG has no rights of its own to assert and has no capacity to engage in these proceedings in its own right. Any rights to be asserted must be those of individual Applicants.

[163] The general tenor of this application suggests that the Applicants are attempting to rely upon both the rights referred to in section 35 of the *Constitution Act, 1982* and the right to consultation that our jurisprudence recognizes is owed by the Crown to Aboriginal peoples in certain contexts. Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake may well have Aboriginal residents and connections to Aboriginal communities, but these entities themselves do not enjoy section 35 rights. Counsel for the Applicants has explained that these entities are being used in a convenient representative capacity for the Aboriginal members of their respective communities, but there is nothing before the Court to show how they acquired this representative capacity and whether they are truly authorized to make this application on behalf of the Aboriginal members of their communities. Consequently, in so far as this application depends upon section 35 rights and the duty of the Crown to consult with Aboriginal groups or persons, Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake have not established that they have standing.

[164] A more general problem occurs in relation to subsection 18.1(1) of the *Federal Courts Act*:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la

demande.

[165] The Decision is the renewal of the McClean Lake Licence for a further eight years and the incorporation of the care and maintenance activities at the Midwest Site into the same McClean Lake Licence. Subsection 18.1(1) requires that those seeking judicial review be "directly affected" by this Decision, but it is by no means clear to the Court how any of the Applicants see themselves as being so affected. The Applicants have not sought or asserted public interest standing. Their own evidence, when they were wearing the hat of the ABDLP, was that the McClean Lake Licence should be renewed because the benefits derived from operations at McClean Lake "are substantial" for the region. If the Applicants have been affected by the Decision, the evidence before me suggests that they can only have been affected in a positive way.

[166] The same parties, now wearing the hat of the ARG, say that the Decision should be quashed if necessary because their rights to consultation were denied during the process that led to the renewal of the McClean Lake Licence. In short, the Applicants now wish to quash the renewal of an operating licence that they enthusiastically supported as members of the ABDLP.

[167] The only sense I can make of this paradox is that the Applicants support the renewal of the McClean Lake Licence but also wish to assert cultural, political and legal rights (in the form of a right to consultation and control over development in their region), and so they have chosen the licensing process undertaken by the Commission in this case as the forum in which to assert those rights.

[168] It is not clear to me how the Applicants can support a decision and then, when the decision is rendered, attempt to have the same decision quashed because they now wish to assert section 35 rights and claim inadequate consultation.

[169] This casts doubt on the substance of the Applicants' opposition to the Decision as manifested in this application. Moreover, it raises the issue of how a group that supported the Decision through its own limited partnership can now say it was "directly affected" by it such that they should have standing to attack it and attempt to have it quashed in a judicial review application.

[170] This situation is unique in my experience. It suggests to me that the Applicants are now impugning a Decision they once endorsed as members of the ABDLP so as to advance a broader objective. I think they know full well that the McClean Lake mine must go on operating because, *inter alia*, it provides the numerous benefits to the region, and to the Aboriginal people of the region, that they themselves have identified. Knowing that the McClean Lake Licence will continue, they now wish to use the Decision to achieve a further benefit by having the Court endorse and order that they be given more control over general development in the Athabasca basin.

[171] How can the Applicants argue that a positive Decision – one which they played a material role in helping to bring about – affects their legal rights, imposes a legal obligation on them or directly and prejudicially affects them such that they should now have standing to attack that Decision by way of judicial review? In my view, they cannot. If the Decision has unforeseen consequences and they now regret supporting it (and there is no evidence of this), then the

Commission cannot be blamed for such consequences that were not before it. And if the Applicants now wish to use the Decision to promote a general right of consultation in a bid to secure greater control over development in their region, I do not think they can qualify as being "directly affected" by the Decision in the way required by our jurisprudence for standing. Any effect of the Decision has been promoted, encouraged and endorsed by the Applicants themselves in their role as the ABDLP.

[172] This Court has determined that the phrase "anyone directly affected by the matter" should not be given a restricted meaning. See *Alberta v. Canadian Wheat Board*, [1998] 2 F.C. 156 (*Alberta*). However, the Court has also held in *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, 102 D.L.R. (4th) 696 at 737 (*Friends* cited to D.L.R.) that

> the wording in subsection 18.1(1) allows the court discretion to grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted. (This assumes there is a justiciable issue and no other effective and practical means of getting the issue before the courts.)

[173] In *Alberta*, above, there was a vast number of permit book holders directly affected by the decision, none of whom had joined the judicial review. As such, the Court determined that the Applicant did not meet the test for standing because, clearly, there was another way that the issue could be brought before the Court.

[174] *Alberta*, above, at paragraph 31 also makes the helpful distinction between having an interest in a decision and being directly affected by it:

> On the evidence before me, I find no basis to conclude that the applicant is "anyone directly affected" within the meaning of subsection 18.1(1) of the *Federal Court Act*. While it is undoubtedly true that the applicant has an interest in the respondent's grain delivery programs, and the evidence is sufficient for that purpose, that is not, I conclude sufficient to establish direct affect.

[175] In the recent case of *Irving Shipbuilding Inc. v. Canada (Attorney General),* 2009 FCA 116, [2009] F.C.J. No. 449 (*Irving*), the Federal Court of Appeal also considered the issue of standing under section 18.1. The Court determined at paragraph 28 that "the question of the appellants' standing should be answered … in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness." Therefore, if the applicants were owed a duty of procedural fairness, then they had the right to bring their application before the Court. However, "if they do not have a right to procedural fairness, that should normally conclude the matter" (paragraph 28).

[176] Jurisprudence from other jurisdictions is also helpful in determining the scope of the term "directly affected." For instance, the Alberta Court of Queen's Bench noted in *Athabasca Environmental Assn. (Friends of) v. Alberta (Public Health Advisory and Appeal Board)*, (1993), 24 Admin. L.R. (2d) 156, [1994] A.J. No. 296 (*Athabasca*) (QL), that the phrase 'directly affected' is different from the mere use of the word 'affected' because "the adverb 'directly' brings a restrictive connotation to the word 'affects'."

[177] The Privy Council has also offered some insight into this term in *Re Endowed Schools Act*, [1898] A.C. 477 (P.C.) at 483, noting that "directly affected" points to "a personal and individual interest as distinct from the general interest which appertains to the whole community."

[178] Also of relevance to the present application is *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30, [2003] F.C.J. No. 98 (*Tribes*). In that case at paragraph 12, the Federal Court held as follows:

> The fact that an activity may be "disrespectful" to one's way of life is not sufficient to establish that **one is suffering a direct, adverse impact from such activity such as to bring oneself within the scope of s. 18.1(1) of the Federal Court Act.**

[179] According to *Tribes*, above, to be directly affected by a decision a party must be "suffering a direct, adverse impact" from the decision at issue. The Applicants in the instant case have not provided any evidence that they have suffered a direct, adverse impact from the licence renewal at McClean Lake or from the incorporation of the care and maintenance activities at the Midwest Site into the McClean Lake Licence. Indeed, the Aboriginal Applicants have failed to show any Aboriginal or treaty right that has been impacted by the licence renewal or incorporation. What is more, the non-aboriginal communities have not even shown that they have a right that could have been impacted in any way.

[180] Also, as noted above, the ABDLP letter supporting the licence application demonstrates how the Applicant communities actually benefit from the Decision. Accordingly, they cannot be

said to be suffering a direct, adverse impact from it. As a result, I believe that all of the Applicants lack standing to bring the current application before the Federal Court.

Evidentiary Problems

[181] AREVA submits that the Applicants' affidavits contain hearsay, opinion and argument and that they refer to irrelevant and extraneous matters. Furthermore, they are replete with material that was not before the Commission when it made its Decision. AREVA has filed affidavit material to respond to incorrect evidence contained in the Applicants' affidavits, in the event that such was determined by the court to be admissible evidence. However, in all of the circumstances, AREVA submits that the Applicants' affidavits should be disregarded and given little or no weight.

Fond du Lac Evidentiary Problems

[182] Upon examination of the affidavits in question, it is clear to me that they contain a great deal that is hearsay, opinion and/or extraneous information and argument.

[183] In situations such as this where the affiants have not adhered to the Federal Court Rules when swearing their affidavits, the Court may choose to strike portions of an affidavit or the entirety of an affidavit; in the alternative, it may choose to assign no weight to an affidavit.

[184] Although the Applicants' affidavits should not be struck in their entirety, I conclude that, given the problems noted above, they do not provide a sufficient evidentiary basis for the principal allegations made by the Applicants in this application, and they certainly do not provide a sufficient evidentiary basis for the draconian relief requested by the Applicants.

[185] In my view, then, the serious issues of standing and evidence before me suggest that the Court should not grant the relief sought. I will, nevertheless, address the merits of the application.

The Decision

[186] There are two principal aspects to the Decision:

a. The McClean Lake Licence was renewed, pursuant to section 24 of the Act, from July 1, 2009 to June 30, 2017; and

b. The Midwest Uranium Site Preparation Licence was revoked pursuant to section 24 of the Act, and the maintenance and caretaking activities at the Midwest Site were incorporated into the McClean Lake Licence.

[187] A great deal is made in the Applicants' evidence and argument about what could happen at the Midwest Site. However, the process for dealing with Midwest will run its own course and the Applicants will be given a full opportunity to participate and raise any objections they might have long before Midwest becomes operational. If they are not given such opportunities, then they are at liberty to bring their concerns before this Court at the appropriate time. As I will discuss later, the

incorporation of the interim care and maintenance aspects of the Midwest Site into the McClean Lake Licence changes nothing on the ground. It is a mere administrative measure that does not affect the Applicants' rights in any way. It is a common practice throughout Saskatchewan to include different sites under one licence where the Commission sees no negative impact upon its statute-defined responsibilities. The Applicants' attempts to incorporate the Midwest situation into their present attack upon the McClean Lake Licence simply highlights, in my view, the lack of genuine grounds they have to quash the Decision.

The Alleged Grounds

Jurisdiction and Capacity

[188] Generally speaking, I am in agreement with most of the points made by the Respondents on the merits of this application. Consequently, I have adopted and incorporated portions of their submissions into my own reasons because they provide comprehensive summaries of the existing relevant jurisprudence.

[189] In their written materials, the Applicants argue that the Commission has no jurisdiction or capacity to deal with consultation issues on behalf of the Crown and can only inquire and decide whether the Crown has otherwise fulfilled its obligations to consult.

[190] This has led to contradictions in the Applicants' position because part of the relief requested is as follows:

> (c) An Order or declaration that the [Commission] satisfy and grant the Applicants … a consultation process for the purpose of accommodation and reconciliation of the Aboriginal rights and issues, at minimum in accordance with the Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult of the Government of Canada, dated February 2008.

[191] The Applicants would not ask for this relief if they really believed the Commission lacked the jurisdiction and capacity to fulfill the terms of such an order. At the hearing on June 8, 2010, the Applicants acknowledged to the Court that the Commission does have the jurisdiction and capacity to address section 35 rights and the Crown's obligations regarding consultation. I think this position is correct.

[192] As the AGC pointed out in his submissions, subsection 8(2) of the Act states as follows:

8(2) The Commission is for all its purposes an agent of Her Majesty and may exercise its powers only as an agent of Her Majesty.	8(2) La Commission est mandataire de Sa Majesté et ne peut exercer ses attributions qu'à ce titre.

[193] So far as the Crown is obliged to consult with the Applicants respecting its conduct, the Commission may fulfill the duty as a component of the overall process of consultation.

[194] The objects of the Commission, as established by section 9 of the Act are as follows:

9. The objects of the Commission are	**9.** La Commission a pour mission :
(*a*) to regulate the development, production and use of nuclear energy and the production, possession and use	*a*) de réglementer le développement, la production et l'utilisation de l'énergie nucléaire ainsi que la

of nuclear substances, prescribed equipment and prescribed information in order to	production, la possession et l’utilisation des substances nucléaires, de l’équipement réglementé et des renseignements réglementés afin que :
(i) prevent unreasonable risk, to the environment and to the health and safety of persons, associated with that development, production, possession or use,	(i) le niveau de risque inhérent à ces activités tant pour la santé et la sécurité des personnes que pour l’environnement, demeure acceptable,
(ii) prevent unreasonable risk to national security associated with that development, production, possession or use, and	(ii) le niveau de risque inhérent à ces activités pour la sécurité nationale demeure acceptable,
(iii) achieve conformity with measures of control and international obligations to which Canada has agreed; and	(iii) ces activités soient exercées en conformité avec les mesures de contrôle et les obligations internationales que le Canada a assumées;
(*b*) to disseminate objective scientific, technical and regulatory information to the public concerning the activities of the Commission and the effects, on the environment and on the health and safety of persons, of the development, production, possession and use referred to in paragraph (*a*).	*b*) d’informer objectivement le public — sur les plans scientifique ou technique ou en ce qui concerne la réglementation du domaine de l’énergie nucléaire — sur ses activités et sur les conséquences, pour la santé et la sécurité des personnes et pour l’environnement, des activités mentionnées à l’alinéa *a*).

[195] Hence, it is within the Commission’s mandate to assess and mitigate environmental, health and safety risks resulting from the development, production or use of nuclear substances. I agree

with the Respondents that the Commission has taken appropriate steps to address such risks. It maintains the technical expertise to gather, interpret and assess complex information respecting the production and handling of nuclear substances, and it provides a process to receive, consider and respond to public concerns related to the production of nuclear substances.

[196] Furthermore, section 25 of the Act provides the Commission with authority to refuse, suspend, revoke or place conditions upon any licence to carry out activities involving nuclear substances. As the Respondents point out, if the conduct, proposed or real, of any licencee of, or applicant to, the Commission causes unacceptable or uncertain risks to health, safety or the environment, the Commission has appropriate resources to assess the risks presented and the authority to impose and enforce appropriate mitigation measures and, ultimately, to revoke or deny the licence.

[197] The Supreme Court of Canada in *Taku River*, above, provides authority for the proposition that the Crown can rely on existing regulatory processes to fulfill its duty to consult but need not do so if it chooses to employ other means.

[198] Considering the authority granted to the Commission, and considering the consultation processes conducted by the Commission, it is my view that the Applicants' concerns respecting potential risks to the environment, to health and to public safety, and the Crown's obligations of consultation, all fall within the Commission's legislated mandate. The Federal Court in *Brokenhead*,

above, citing both the Supreme Court of Canada and the British Columbia Supreme Court, stated at paragraph 25 that

> [i]n determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review … . Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated. (citations omitted)

[199] In *Brokenhead*, above, Justice Barnes specifically rejected the need for an alternative or additional consultation process when the relevant regulatory process provides adequate opportunity for consultation and mitigation. In response to the First Nations' assertion that an alternative consultation to the National Energy Board's process was required, Justice Barnes had the following to say at paragraph 37:

> This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.

[200] The Court in *Brokenhead* proceeded to determine in paragraph 25 that the Brokenhead Ojibway First Nation's concerns respecting the passage of a pipeline through its traditional territory were best and properly addressed by the National Energy Board, which could provide for appropriate mitigation efforts and could further address environmental concerns.

[201] Akin to the circumstances in *Brokenhead*, so far as the focus of consultation relates to matters within the scope of the Commission's legislated mandate, it is my view that the Commission is an appropriate body to address the duty to consult with Aboriginal communities on behalf of the Crown.

The Commission's Jurisdiction to Decide on the Adequacy of Consultation

[202] The Supreme Court of Canada established in *Paul*, above, at paragraph 39 that if the empowering legislation implicitly or explicitly grants a commission or tribunal the authority to interpret or decide any question of law, it will also have authority to decide those matters in light of section 35 of the *Constitution Act, 1982*.

[203] In the context of a duty to consult, it is necessary to consider the particular facts of each case to determine whether the subject matter of consultation and accommodation falls within the deciding body's mandate.

[204] As the Respondents point out, subsection 8(2) of the Commission's empowering legislation states that the Commission is an agent of the Crown. Furthermore, subsection 20(1) of the Act states that the Commission is a court of record, and subsections 20(2) through 21(1) establish the extensive authority and power of the Commission to compel and collect evidence and to make and enforce decisions of a wide scope, including the implied authority to make decisions of law.

[205] The extent to which any particular body has the ability to decide issues related to consultation is still an undetermined point of law in many cases. The British Columbia Court of Appeal in *Carrier*, above, found that although the Utilities Commission did not have explicit authority to determine consultation issues, it had implicit jurisdiction to decide on the adequacy of consultation. Justice Donald of the B.C. Court of Appeal declared in paragraph 51 of *Carrier* that the Utilities Commission not only had jurisdiction to decide on section 35 matters, it had a duty to decide:

> Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[206] The AGC maintains that the approach of the Federal Court of Appeal in *Standing Buffalo*, above, is more consistent with key Supreme Court of Canada jurisprudence such as *Haida* and *Taku River*, above. For example, in *Standing Buffalo*, the Federal Court of Appeal addressed whether the National Energy Board had the authority to decide issues relating to the Crown's duty to consult. Justice Ryer provided the following guidance:

> **40** First, as noted above, the decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision-making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable Project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my

> view, this process ensures that the applicant for the Project approval has due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution.
>
> **41** Secondly, the appellants were unable to point to any provision of the NEB Act or any other legislation that prevents it from issuing a Section 52 Certificate without first undertaking a *Haida* analysis or that empowers it to order the Crown to undertake *Haida* consultations.
>
> **42** Thirdly, the Province of Saskatchewan argued that the NEB lacks jurisdiction to undertake a *Haida* analysis where the Crown that is alleged to have a *Haida* duty is the Crown in right of a province. The appellants did not contest this limitation on the ability of the NEB to conduct a *Haida* analysis in relation to the Crown in right of a province.
>
> **43** Fourthly, a determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making the Decisions does not preclude the adjudication of those matters by a court of competent jurisdiction. Indeed, the quotations from paragraphs 37 and 60 of *Haida* and paragraph 47 of *Paul* point towards recourse to the courts in such circumstances.

[207] In relation to the licence application before it, the Commission in the present case has the authority under its governing legislation to decide questions of law, and the subject matter of consultation falls within the Commission's mandate and expertise. Therefore, the Commission, in my view, is an appropriate body to decide if the adequacy of the consultation is consistent with section 35 of the *Constitution Act, 1982*.

Does the Duty to Consult Exist in this Case?

[208] As the evidence makes clear, a considerable amount of consultation with the Applicants concerning the Decision did occur in this case. This does not mean, however, that a duty to consult existed.

[209] When the Crown knows that Aboriginal rights or title exist, or that Treaty rights exist, and it contemplates conduct that may adversely affect those rights, a legal duty to consult arises.

[210] As the Respondents point out, the duty to consult may not be triggered at all where there is a relatively minimal adverse effect on claims to Aboriginal title or rights or treaty rights claims. In *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009 at page 34), Professor Dwight Newman summarizes when the duty to consult may be triggered:

> The application of the triggering test is obviously far from simple. Where government departments are uncertain about whether their action triggers a duty to consult, the safer course may be to act as if it did and extend at least notice of the proposed action to potentially affected Aboriginal communities. After all, a failure to consult may provoke litigation that will cause delays in the government action. Moreover, there is an important rationale for some ease in the triggering of a duty to consult; in circumstances where an Aboriginal community will be able to add to the Crown understanding of the extent of impact of particular decisions, it may be valuable for the duty to be considered triggered simply in order to ensure that there is input from the Aboriginal community.
>
> Government departments need not consult in circumstances where there are overriding doubts about the Aboriginal title or right or treaty right. They need not consult in circumstances where there is no plausible adverse effect on an Aboriginal claim. They need not consult if they are not involved in the kinds of action that trigger a

> duty to consult. However, it is not always easy for government officials to make those determinations with certainty, which may support the notion that to avoid the risk of not consulting in circumstances where consultation should have occurred, where there is any argument for doing so and it is practical to do so, at least notice to Aboriginal communities should be extended. It would be impractical to consult on every governmental decision, though, so there is a need for good judgment in applying this principle.

[211] For the duty to consult to arise there must be some evidence presented to establish an adverse impact on Aboriginal rights. Further, evidence to support the finding of an interference with a specific or tangible interest must be linked to the project or decision under consideration and must constitute more than mere submissions or generalities.

[212] In *Brokenhead*, above, at paragraph 34, the Federal Court confirmed that no at-large duty to consult arises in the absence of an unresolved non-negligible impact:

> I do not question that the above statements reflect a profoundly held concern not only of Chief Nelson but of others in the Manitoba Aboriginal community. The problem is that to establish a procedural breach around projects such as these there must be some evidence presented which establishes both an adverse impact on a credible claim to land or to Aboriginal rights accompanied by a failure to adequately consult. The Treaty One First Nations are simply not correct when they assert in their evidence that a duty to consult is engaged whenever the Government of Canada makes "any decision related to lands in our traditional territory inside the boundaries of Treaty 1". There is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown's duty to consult. (emphasis added)

[213] It is well established that where a duty to consult is engaged, its content will vary according to the circumstances. The scope of the duty has been said to be proportionate to a preliminary

assessment of the strength of the claim and to the seriousness of the potentially adverse effect of the planned government activity upon the right or title claimed. See *Haida*, above, at paragraph 39.

[214] It is also well established that the specific consultation obligations that may be required exist on a spectrum. At one end, where the Aboriginal claim is relatively weak and the potential adverse impacts are minor, the Crown's duties may be limited to giving notice, disclosing information and discussing issues raised in response to the notice with the Aboriginal group concerned. At the other end of the spectrum, where a strong prima facie case for a claim is established and the potential infringement is severe, deeper consultation may be required. See *Haida*, above, at paragraphs 43-44.

[215] Accordingly, within this spectrum, the governing jurisprudence, which is cited by the Respondents, directs that the duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interest. However, this spectrum does not include an Aboriginal veto power over any particular decision. See *Haida*, above, at paragraphs 47-48.

[216] The Crown may delegate procedural aspects of consultation to industry proponents, but the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

[217] My review of the record before the Commission reveals that the Applicants failed to identify or establish specific Aboriginal or Treaty rights that could potentially be adversely affected by a decision to grant AREVA's application for renewal of, and/or the inclusion of the Midwest care and

maintenance obligations within, the McClean Lake Licence. Furthermore, despite having the full opportunity to appear before the Commission and file several written submissions, the Applicants provided no evidence of adverse impact or interference with specific Aboriginal or Treaty rights. Instead, the Applicants expressed broad and generalized concerns on matters unrelated to the particular licensing application before the Commission.

[218] These mining and milling operations have been in existence for over ten years; renewal of an operating licence was being sought; and no evidence was provided that the granting of the licensing application by the Commission would result in a negative impact on specific Aboriginal or Treaty rights of the Applicants. In these circumstances, I think that AREVA is correct to say that the duty to consult was not even triggered.

[219] At the very most, given the low threshold for triggering the duty to consult, any duty triggered was minimal in scope and at the lower end of the spectrum, and it was discharged through the process that took place in this instance.

[220] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (*Mikisew*), the Mikisew challenged the decision of the Minister to approve the building of a winter road that tracked the reserve boundary. There was evidence to show that the proposed road would reduce the territory over which the Mikisew were entitled to exercise treaty rights, remove hunting within the road corridor and injuriously affect the Mikisew's exercise of rights in the surrounding bush. The Supreme Court of Canada held that where the proposed road

was to be built on surrendered lands (where the Mikisew hunting, fishing and trapping rights were subject to the "taking up" limitation), the Crown's duty was at the lower end of the spectrum. The Crown was required to engage directly with the Mikisew, provide information, solicit the Mikisew's concerns and attempt to minimize adverse impacts on treaty rights.

[221] In the present case, where the licensing application sought renewal of an operating licence for a mine and mill that have been in operation for over ten years with no new taking up of land or authorized activities, and where there was no evidence of adverse impacts on the Applicants' Aboriginal or Treaty rights by a decision to grant the licensing application, any duty to consult that existed was minimal and consisted of giving notice, disclosing information and discussing with the Applicants the issues raised by them in response to the licensing application. All of this occurred.

[222] Accordingly, in my view, if a duty to consult was triggered on these facts, then the Commission's decision on the existence and extent of the duty to consult in the circumstances was correct.

[223] As the Commission itself pointed out in its Decision, the specific concerns raised by the Applicants in respect of the matter before the Commission related mostly to requests for information and the Applicants' need to understand certain technical matters concerning the operation of this nuclear facility. The evidence before me shows that, through the regulatory process, the Applicants received additional information regarding the licensing application and extensions of time to allow them to participate fully in the Commission's process. The Applicants

filed several written submissions with the Commission. Their legal counsel and a leadership representative participated in the public hearings. The Applicants engaged in dialogue and discussed their concerns with both Commission Staff and AREVA.

[224] Also, in the course of the regulatory process, concerns raised by the Applicants over the potential impact of the licensing application on their ability to participate in the environmental assessment process for the proposed Midwest project were answered and addressed. The written submissions filed by Commission Staff and AREVA made it clear that the proposed Midwest project was not the subject of the McClean Lake licensing application and that the environmental assessment process for the proposed Midwest project would not be affected by a decision to revoke the Midwest Licence.

[225] The request by AREVA to revoke the Midwest Licence and to amalgamate the care and maintenance activities authorized under that licence into the McClean Lake Licence was also discussed during Day 2 of public hearings, which the Applicants attended. Commission Staff explained that, from a regulatory perspective, the request was purely administrative in nature and that the same level of control and expectations for nuclear facilities would carry forward whether there were one or two licences. Commission Staff also explained that the licensing application did not impact on the environmental assessment process for the proposed Midwest project, for which a consultation approach was being developed under the Major Projects Management Office.

[226] To the extent that the Applicants' concerns were not truly related to the licensing action under consideration by the Commission but were instead an attempt to obtain the agreement of the Government of Saskatchewan to implement the Applicants' Consultation Protocol, those concerns fall outside the mandate of the Commission and cannot properly be addressed within the federal regulatory scheme for the licensing of nuclear facilities.

[227] As the Respondents point out, in *Taku River*, above, the Supreme Court of Canada found that the province fulfilled the requirements of its duty to consult and accommodate through its environmental assessment process. This was so notwithstanding that broader concerns raised by the Taku River Tlingit First Nation (TRTFN) (specifically, land-use planning strategy, an interest in TRTFN jurisdiction to approve permits for the project and revenue-sharing) were found to be outside the ambit of the environmental assessment process and could be the subject only of later negotiation with the province.

[228] Similarly, in *Brokenhead*, above, it was found that the NEB could not deal with larger Aboriginal concerns that were raised, such as unresolved land claims. Those issues could be properly addressed only outside of the regulatory process.

[229] In all of the circumstances of the present case, the Court agrees with AREVA's submissions that, if a duty to consult did arise, the Crown's duty to consult was fulfilled by the public information and consultation activities carried out by AREVA in respect of the licensing application, by the regulatory process, and by the full participation of the Applicants in that process.

The Province and the Duty to Consult

[230] In my view, the duty to consult did not involve the Province of Saskatchewan in this case. This is because there was no provincial decision or conduct at issue before the Commission that could trigger a duty to consult on the part of the Province. Even if such a duty had arisen, the Commission has no jurisdiction to determine whether or not the Province has fulfilled that duty. The Commission dealt correctly with these issues in its Decision.

[231] The Applicants may well be experiencing frustration with the Province regarding the acceptance and implementation of their proposed Consultation Protocol, but there are processes and remedies for dealing with this issue. It has no relevance to the matters before me in this judicial review application. The Applicants, in effect, are asking the Court to order the Province to deal with them on their terms. The Court has no jurisdiction to do this. This is a matter for the Applicants to work out with the Province. It is beyond the jurisdiction of the Commission and the Court.

Summary

[232] In the end, the Applicants are, in my view, attempting to assert a general right to consultation that exists irrespective of any specific section 35 rights and impacts. This is the position adopted in the Applicants' Consultation Protocol, which they want to have adopted by both the Province and the Federal Crown. As the above jurisprudence makes clear, such a general, free-floating right does not exist in Canadian law.

[233] The evidence is clear in the present case that both AREVA's and the Commission's processes provided the Applicants with an opportunity to understand the nature of the Decision being made and an opportunity to provide input regarding any Aboriginal and Treaty rights affected and any impacts. The Applicants failed to articulate any Aboriginal rights that would be affected by the Decision or any adverse impacts. The Commission was correct at paragraph 131 of its Decision when it said that

> … the specific concerns that were raised relate mostly to information and the ability of the members of the impact communities to understand the information relevant to the operations of the licenced facility. The interveners did not provide information about specific rights that could be affected by the renewal of the licence for the McClean Lake Operation.

[234] By the time the Court heard this matter on June 8, 2010, little had changed. Notwithstanding the Court's attempts to find out what the Applicant's felt had not been addressed by the Commission and what section 35 rights might have been impacted, there was no clear articulation on these points by the Applicants. There were some vague generalities and speculations about the concentration of mining activities in the area but nothing upon which either the Court, or the Commission, could act. In the end, the Court was left with a clear impression that the Applicants have concerns about what may eventually happen at the Midwest Site, a matter they will have an opportunity to address as the development of that site proceeds, but they could come up with no clear articulation of why their rights have been, or could be, impacted by a continuation of activities at McClean Lake. This is hardly surprising given the Applicants' earlier support for McClean Lake, as found in the evidence. It seems to me that the purpose of this judicial review application is not really an attempt to review the Decision but is, rather, an attempt by the Applicants to have the

Court impose their Consultation Protocol upon the Province and the Federal Crown in order to give the Applicants more control over general land-use and development in their region. I do not fault the Applicants for what is an entirely legitimate political aspiration, but that is not the purpose of judicial review.

Midwest Care and Maintenance

[235] The Applicants assert that the Commission was not authorized by the Act to incorporate the care and maintenance activities of AREVA's Midwest Site into AREVA's McClean Lake Licence.

[236] As AREVA pointed out in its submissions, however, the Commission has broad powers with respect to the granting of licences as set out in sections 24 and 25 of the Act. By way of example, the Commission may, on its own motion, suspend in whole or in part, amend, revoke or replace a licence.

[237] Subsection 24(8) of the Act states that a licence may not be transferred. The Commission reviewed AREVA's licensing application and concluded that having the care and maintenance activities authorized in the McClean Lake Licence did not involve the transfer of a licence under subsection 24(8).

[238] On the evidence and facts adduced in the present application, it is my view that a transfer of licence did not take place. The existing Midwest Licence was revoked and the present care and

maintenance obligations at the Midwest Site were, for administrative reasons, brought under the McClean Lake renewal.

[239] There is nothing extraordinary in having two sites dealt with under one licence, and nothing has changed with regard to ownership or the obligations required to care for and maintain the Midwest Site. It is noteworthy that the two sites are within three kilometers of each other and the nearest permanent community (Hatchet Lake) is 50 kilometers away.

[240] The Court cannot see how the Act prohibits what has occurred in this case, how uncertainty or a lack of scrutiny might be created, how the licensing process may have been subverted or how the Applicants, or anyone else for that matter, could be adversely impacted by such an arrangement. What matters is that the activities in question are regulated appropriately. There is no evidence before me to suggest that the new care and maintenance aspects of the McClean Lake Licence pertaining to the Midwest Site will prevent proper and effective regulation.

[241] Once again, the Applicants appear to be attacking this aspect of the Decision in order to gain leverage for their general aspirations to have the Province and the Federal Crown adopt their Consultation Protocol.

Conclusions

[242] My findings and conclusions in these reasons are not intended to cast aspersions upon, or to discourage, the Applicants' attempts to secure a greater degree of control over land-use and resource development in the Athabasca region of Northern Saskatchewan. In fact, I do not detect in the submissions of the Respondents or the Interveners any such disapproval or discouragement. All participants obviously recognize that harmonious and mutually supportive objectives and processes are absolutely essential for the region and for those who live and work there. The objections raised by the Respondents and the Interveners relate to the method chosen by the Applicants to further their aspirations.

[243] This judicial review application is, of necessity, focused upon a particular decision. In attacking that decision, the Applicants have revealed that their real concerns relate to more general policy and practice in the region. This is why their preferred remedy is the implementation of a Court-ordered and Court-supervised negotiation process that would secure provincial and federal recognition for their Consultation Protocol and the general concerns it embodies.

[244] However, in terms of the issues and the jurisprudence that the Court is required to consider as part of a judicial review application, I do not think it can be said that the Applicants have established any kind of reviewable error with regard to the Commission's Decision. Even if the duty to consult was triggered in this case, and I do not think it was, that duty was fulfilled as part of the licensing process. In addition, it is my view that this application presents the Court with serious

evidentiary and standing problems that disqualify the Applicants from receiving the relief claimed. None of this, however, is meant as a negative comment upon the Applicants' more general aspirations, and I am pleased to detect in the presentations of the Respondents and the Interveners that they have not approached this application in a politically negative way; they have, rather, concentrated upon the Decision in hand and the relevant jurisprudence on consultation.

[245] At the oral hearing, the Applicants alleged that the Decision was procedurally unfair in that they were denied information and were not given the opportunity to bring their concerns before the Commission. The Applicants simply assert that there is no evidence on the record of the Commission and/or AREVA seeking traditional advice or of having regard for their issues of concern. My review of the written record, however, reveals it is replete with evidence that says otherwise. AREVA runs a comprehensive information program and there is ample written correspondence about the licensing activities specific to this case that was directed at the Applicants. When faced with this evidence at the oral hearing, counsel for the Applicants could provide no adequate explanation for the discrepancies between the Applicants' assertions and what the written record shows.

[246] The Applicants also complain that they did not receive all of the information they requested, which they needed to enable them to make an informed decision about whether their rights were in jeopardy. The Applicants may not have received everything as and when they wanted it, but it has to be borne in mind that the Decision was about the renewal of a long-standing licence. The Applicants knew this and they knew that no new activities were contemplated. They must be taken

to have known what their section 35 rights were, and they have had ample time and opportunity over the operational life of the McClean Lake Mine to observe and define any negative impacts on those rights. All information has now been disclosed. Yet there is still no indication from the Applicants of a negative impact upon any Aboriginal or treaty rights.

[247] In oral argument, all that counsel for the Applicants could say was that there was a "concern for the implications" of renewing the McClean Lake Licence and bringing care and maintenance at the Midwest Site under that licence. No specifics were offered about the rights affected or any negative impact or, for that matter, about safety and environmental concerns in general.

[248] The Applicants also say that there is nothing on the record to show that their concerns were taken into account. Quite apart from the Applicants' refusal or inability to articulate specific section 35 concerns that the Commission could address, the Decision itself makes it clear that the Applicants' concerns were heard and taken into account. What the Applicants appear to be complaining about is that the Commission did not use the whole licensing application process to assist the Applicants in dealing with the Province over their proposed Consultation Protocol. For reasons already explained – and as explained by the Commission in its Decision – this was beyond the jurisdiction of the Commission and irrelevant to the task in hand.

[249] At the oral hearing of this matter before me, counsel for the Applicants conceded that "there may be no impact on any rights of the Applicants as a result of the Decision." The concern appears

to be, then, that the process did not sufficiently inquire into whether there could be any such impact. The Applicants now argue that “no one is sure what the impact will be.”

[250] I find this position not only lacks the substance needed for the Court to deal with the remedies requested, it is also disingenuous. The McClean Lake Mine has been operating under a long-standing licence. All of its activities are heavily regulated. The Applicants have had years and every opportunity to assess any negative impact upon their rights. No new activities and no new impacts are contemplated under the renewal of the licence; the licence is for “business as usual.”

[251] The Applicants’ own position before the Court is, now, that there was no evidence of negative impacts upon their rights but that such negative impacts could, conceivably, occur. On the basis of this position they have asked the Court to quash the McClean Lake Licence and shut operations down at the mine. I cannot think of a more inappropriate approach to achieving the broader objectives of securing more control over land-use and development in their region, which are the real issues behind this application.

[252] The Applicants have not shown that the Commission lacked the jurisdiction to make the Decision, that the Decision was made in a way that was procedurally unfair or that the Decision was incorrect or unreasonable in any respect. The success of the McClean Lake Mine and its importance to the people of the region are adequately attested to by the Applicants themselves who, in their role as the ABDLP, had no reservations about assuring the Commission that “we are confident that the

existing operations at McClean Lake share our goal and we would fully support the renewal of McClean Lake's licence in its present form."

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;
2. Any party or participant may address the Court on costs. This should be done, initially at least, by way of written submissions.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1234-09
STYLE OF CAUSE:	**FOND DU LAC DENESULINE FIRST NATION, BLACK LAKE DENESULINE FIRST NATION, HATCHET LAKE DENESULINE FIRST NATION and THE NON-FIRST NATION ABORIGINAL PROVINCIAL COMMUNITIES OF CAMSELL PORTAGE, URANIUM CITY, STONY RAPIDS and WOLLASTON LAKE (known collectively as the "Athabasca Regional Government")** **Applicants** **and** **ATTORNEY GENERAL OF CANADA and AREVA RESOURCES CANADA INC.** **Respondents** **and** **CANADIAN NUCLEAR SAFETY COMMISSION and ATTORNEY GENERAL FOR SASKATCHEWAN** **Interveners**
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	June 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	September 22, 2010

APPEARANCES:

Mr. Bruce Slusar	APPLICANTS
Mr. Scott Spencer	RESPONDENT Attorney General of Canada
Mr. Marlon Miller	RESPONDENT Attorney General of Canada
Mr. Douglas C. Hodson	RESPONDENT Areva Resources Canada Inc.
Ms. Vanessa M. Enweani	RESPONDENT Areva Resources Canada Inc.
Mr. Michael A. James	INTERVENER Canadian Nuclear Safety Commission
Mr. James Fyfe	INTERVENER Attorney General of Saskatchewan

SOLICITORS OF RECORD:

Bruce J. Slusar Barrister & Solicitor Saskatoon, Saskachewan	APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	RESPONDENTS