Federal Court Cour fédérale

Date: 20141201

Docket: T-699-09

Citation: 2014 FC 1154

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 1, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

THE HURON-WENDAT NATION OF WENDAKE

Applicant

and

THE CROWN IN RIGHT OF CANADA, herein represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

and

MASHTEUIATSH FIRST NATION AND THE INNU ASSI FIRST NATION OF ESSIPIT

Interveners

JUDGMENT AND REASONS

[1] This application for judicial review was filed by the Huron-Wendat Nation of Wendake (the applicant) and challenges the Agreement-in-Principle of General Nature (APGN or Agreement) signed on March 31, 2004, between Her Majesty the Queen in Right of Canada, represented by the Minister of Aboriginal Affairs and Northern Development (the respondent or the Crown), and certain Innu Nations including the Mashteuiatsh First Nation and the Innu First Nation of Essipit (the interveners). The applicant claims that in concluding the APGN, the respondent breached its duty to consult and accommodate, and consequently breached its constitutional duty to act honourably and in good faith in accordance with its obligations under the Anglo-Huron Treaty of 1760 (Treaty of 1760) in addition to breaching its international obligations.

[2] The respondent maintains that the applicant is essentially trying to obtain formal constitutional recognition of the territorial application of the Treaty of 1760 and activities covered by it by seeking a higher level of consultation, specifically accommodation and consent, while being bound by a minimal level of proof. Moreover, the Crown argues that the proceeding is premature in that the rights that may exist under the Treaty of 1760 and their territorial application are not clearly established and the signing of the APGN has not yet been crystallized in a final agreement. Last, the Crown challenges the jurisdiction of the Federal Court and contends that the appropriate recourse is to bring an action in the Superior Court of Québec, since the relief sought by the applicant requires determinations regarding treaty rights and the

exercise of the Crown prerogative to negotiate treaties, in addition to impacting the province and the exercise of its jurisdiction.

[3] The interveners, who were authorized to shed light on the issues, also maintain that the Federal Court did not have jurisdiction in this matter and that, in any case, the applicant had not proven that the respondent had a duty to obtain its consent before signing the APGN.

[4] Having carefully weighed the arguments of the parties and considered the evidence in the record, I find that this application for judicial review should be allowed in part.

I. Historical Context

[5] In September 1760, the Seven Years' War between the French and the British was coming to an end. Both parties were quite aware of the strategic importance of an alliance with the Aboriginal peoples and understood that control of North America required their cooperation. It was in this context that General Murray signed a peace treaty with the Huron-Wendat Nation on September 5, 1760. The Supreme Court described in detail the historic circumstances surrounding the signature of the Treaty in *R v Sioui*, [1990] 1 SCR 1025 at pp 1049-1061, 70 DLR (4th) 427 (*Sioui*), which I will discuss later.

[6] The Treaty reads as follows:

> THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt

> them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.
>
> Given under my hand at Longueil, this 5th day of September, 1760.
>
> By the Genl's Command
>
> JOHN COSNAN, JA. MURRAY
>
> Adjut Genl

[7] The Treaty of 1760 did not define the territorial scope of the rights guaranteed to the Huron-Wendat Nation. In *Sioui*, Justice Lamer expressed the view that the scope of the treaty could not be limited to the Lorette territory since Lorette is mentioned only as a destination for safe-conduct purposes and any significant exercise of protected customs would require territory extending beyond Lorette. It should be recalled that in this case, the Supreme Court did not have to determine a land claim, but rather the scope of the rights conferred by the Treaty of 1760. The respondents, members of the Huron band on the Lorette Indian reserve, claimed that the Treaty gave them the right to practise customs and religious rites in the territory of Jacques-Cartier Park because it was part of the territory frequented by the Hurons in 1760, namely the area between the Saguenay and the St-Maurice, whereas the Crown argued that that the free exercise of the customs mentioned in the Treaty of 1760 had to be limited to the Lorette territory. After noting that the area between the Saguenay and the St-Maurice was not land over which there was an Aboriginal title in favour of the Hurons because the Hurons did not have historical possession of this land, and that it was unlikely that the British would have granted absolute rights that might paralyze the Crown's use of the newly conquered territories, Justice Lamer ruled as follows:

> In view of the absence of any express mention of the territorial scope of the treaty, it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests. This, in my view, is the definition of the common intent of the parties which best reflects the actual intent of the Hurons and of Murray on September 5, 1760.
>
> *Sioui,* at p 1071.

[8] The following chronology is based for the most part on the affidavit of Daniel Tétreault, Senior Negotiator at the Negotiations Branch, Governance and Individual Affairs, Quebec Regional Office of Indian and Northern Affairs Canada (INAC). This affidavit, filed by the respondent in support of its submissions, was not contradicted by the applicant: Respondent's Record, vol II of IV, at pp 251 et seq.

[9] Following the Supreme Court decision in *Sioui,* above, the government of Quebec took the initiative to propose to the applicant the negotiation of an agreement on the manner of exercising the rights under the Treaty of 1760, specifically hunting, fishing, trapping, gathering and customary activities. In conjunction with this, on July 18, 1990, the applicant contacted the respondent to begin discussions with a view to signing a framework agreement on self-government.

[10] After receiving additional information about the proposed process and conducting an analysis, the respondent agreed to hold tripartite discussions to negotiate a framework agreement covering three issues: the rights of the Huron-Wendat Nation under the Treaty of 1760,

self-government and a specific claim regarding the surrender of 40 arpents of reserve land at the beginning of the century. The respondent also agreed to provide the applicant with financial support for the negotiations.

[11] The discussions that ensued were difficult because of certain positions adopted by the parties. The applicant wanted to link self-government with rights under the Treaty of 1760 while the federal policy, in effect at the time and as sanctioned by Cabinet, did not allow Canada to directly link self-government negotiations with negotiations on the application of the Treaty. Since the parties could not agree on the terms of the negotiations to be held, the negotiations failed.

[12] Nevertheless, the negotiations started again in autumn 1991 when the applicant agreed to separate the self-government discussions from those regarding the Treaty of 1760, which led to the conclusion of the "Framework agreement to establish a new relationship between Canada and the Huron-Wendat Nation" that was signed by both parties (Framework Agreement of 1992).

[13] Immediately after the Framework Agreement of 1992 was signed, the applicant refused to continue negotiations as long as self-government was not tied to the Treaty of 1760, and it demanded to negotiate a new framework agreement on the matter.

[14] In a letter to the applicant dated November 17, 1992, the respondent reiterated Canada's position that the federal policy in effect at the time did not allow self-government negotiations to be linked to the application of the Treaty of 1760, unless new policies were adopted through a

Cabinet decision or a constitutional amendment were ratified. The Minister of Indian Affairs and Northern Development once again suggested concluding a framework agreement that would govern simultaneous and distinct negotiations on self-government and the application of the Treaty of 1760.

[15] That proposal was accepted by the newly elected (August 1992) Huron-Wendat Nation Council, and the tripartite discussions (Canada-Quebec-Huron-Wendat Nation) began again based on the Framework Agreement of 1992.

[16] A new election in August 1994 resulted in a new council that refused to recognize the Framework Agreement of 1992 and the actions of the previous Council elected in 1992 with respect to self-government and the application of the Treaty of 1760.

[17] Thus the negotiations resumed based on the old draft framework agreement submitted to Canada in July 1990. Between May 1995 and April 1996, at least 31 negotiation meetings were held and led, in August 1995, to the signature of a "Framework agreement to establish a new relationship between the Huron-Wendat Nation, the government of Canada and the government of Quebec" regarding self-government negotiations and the application of the Treaty of 1760 (Framework Agreement of 1995).

[18] A new band council elected in September 1996 chose to focus on economic development and decided that the future of negotiations on self-government and the application of the Treaty of 1760 should be submitted to public consultation. A referendum was held on November 30,

1996, and the Huron-Wendat people rejected continuing negotiations by an 88% majority. Since then, the applicant has not shown any intention to resume negotiations regarding self-government or the application of the Treaty of 1760. It appears from Mr. Tétrault's affidavit that the respondent paid the applicant over $1,100,000 between 1990 and 1996 for negotiations on self-government and the application of the Treaty of 1760.

[19] Three years later, on February 23, 1999, the applicant asked the respondent again for financial support, this time for historical and anthropological research to define the rights or customs arising under the Treaty of 1760, the territorial application of the Treaty and the nature of the Huron-Wendat occupation of its territory, in order to eventually file a claim under the *Federal Comprehensive Land Claims Policy*. The following information about funding for the for the applicant's research to support its land claims is based on the affidavit of Roxanne Gagné, manager at the Research and Negotiations Funding Unit, DIAND. That affidavit, filed by the respondent to support her submissions, was not contradicted by the applicant and can be found (with exhibits) at volume III of IV of the Respondent's Record.

[20] Under the Aboriginal claims contribution program, the respondent concluded annual funding agreements to enable the applicant to carry out its research. Under these agreements, the applicant received about $885,567 in funding between 1999-2000 and 2008-2009, without ever filing a comprehensive land claim submission.

[21] Since it had never received a final research report, the respondent formally advised the applicant in a letter dated August 4, 2009, that no funding would be provided for the 2009-

2010 fiscal year to continue research to document a possible comprehensive land claim, because of the applicant's repeated failure to meet the work plan deadlines. At a meeting on January 9, 2009, with the historian hired by the applicant to lead its research project, Ms. Gagné also explained that a DIAND policy provided that no funding could be granted for comprehensive land claim research if there were concern that the money could be used in whole or in part to fund litigation against DIAND.

[22] It should be noted that at the hearing the applicant withdrew its claim for relief seeking a declaration that the Crown had acted unlawfully and breached its duty to act honourably by refusing to continue its funding on the assumption that the applicant might decide to institute this proceeding. That relief is found in paragraph 18(e) of its notice of application.

[23] It is clear from the foregoing that since the 1996 referendum the Huron-Wendat have never filed a formal request with DIAND to negotiate an agreement on the rights they claim, whether through a comprehensive land claim, an application for self-government or a request to negotiate the modern application of the Treaty of 1760. The Atikamekw and the Montagnais (also called the Innu or Innu Montagnais) filed a comprehensive land claim submission that was accepted by Canada, for negotiation, on October 5, 1979.

[24] Comprehensive land claim negotiations are not intended to define the Aboriginal rights of an Aboriginal group, or their scope, but rather to provide clarity and certainty about the rights that the Aboriginal group may exercise following a final agreement. Any final agreement resulting from these negotiations thus would establish certainty with respect to the title and rights

related to the ownership and use of the land and resources in a given territory, clarify the terms of access to it and increase socio-economic opportunities and economic development in Aboriginal communities.

[25] Discussions on the Atikamekw and Montagnais Council (AMC) comprehensive land claim began in 1980 and ended on September 13, 1988, with a framework agreement between the AMC and the governments of Canada and Quebec, which essentially set out the subjects for negotiation and a work plan.

[26] Since 1994, the negotiation structure of the Aboriginal party has changed several times, leading to the dissolution of the AMC and the creation of distinct entities representing the Atikamekw and various Innu groups in separate negotiations. At the time, the Mamuitun mak Nutashkuan Tribal Council represented the Innu communities of Mashteuiatsh, Essipit, Nutashkuan and Betsiamites.

[27] On March 31, 2004, the governments of Quebec and Canada and the Mamuitun mak Nutashkuan Tribal Council signed the APGN. This agreement has 19 chapters covering the topics to be negotiated (for example, there are chapters on lands; the right to practise activities linked to Innu culture, values and traditional way of life; participation in the management of lands, natural resources and the environment; royalty sharing; self-government; the administration of justice; financing; taxation; socio-economic development and dispute resolution). There is no doubt that a significant portion of the territory covered by this agreement

overlaps a large section of the northern part of Nionwentsïo that is claimed by the Huron-Wendat Nation.

[28] The Huron-Wendat Nation expressed its concerns to the Minister of Indian Affairs and Northern Development about the impact that the APGN and any final treaty with the Innu could have on the territory it claimed as its traditional territory. On July 22, 2004, Grand Chief Wellie Picard wrote to the Minister to assert the rights of his nation and requested a meeting to discuss their position. The Minister answered this letter on October 6, 2004, referring to article 3.4.2 of the APGN that stipulates that the status of the south-west part should be determined before the treaty is signed and adding that Canada [TRANSLATION] "has a policy of concluding final agreements only if the agreement provides that the rights of other First Nations will not be affected".

[29] On September 22, 2008, Grand Chief Gros-Louis wrote to the Chiefs of the Councils of the Montagnais du Lac Saint-Jean, the Innu First Nation of Essipit, the Innu of Pessamit and the Montagnais of Nutashkuan, as well as the Quebec Minister responsible for Aboriginal Affairs and the Minister of Indian Affairs and Northern Development to give them [TRANSLATION] "formal notice" that the southern part of the territory referred to as the Nitassinan of the Mashteuiatsh First Nation encroaches on the ancestral and customary territory of the Huron-Wendat Nation. At the same time, the Grand Chief directed the parties to not agree to measures concerning the territorial regime on the disputed land, and deemed [TRANSLATION] "null and void any type of territorial boundary that does not take into account the territorial rights of the Huron-Wendat Nation" (Exhibit 20 to the Affidavit of Max "One Onti" Gros-Louis, at p 678 of

the Applicant's Motion Record). The federal minister at the time responded to the letter on December 4, 2008, reiterating that the government of Canada [TRANSLATION] "is aware of its duty to consult on matters of Aboriginal rights and claims" and assuring the newly elected Grand Chief Konrad Sioui that the government of Canada would assess the Huron-Wendat Nation's claim on the territory between the Saint-Maurice and Saguenay Rivers once it is submitted, in accordance with the *Comprehensive Land Claims Policy*.

[30] Given the federal authorities' refusal to commit to not signing a final treaty with the Innu that would cover or affect Nionwentsïo in any way, the applicant filed this application for judicial review against the respondent on April 30, 2009. In particular, the applicant faults the respondent for signing the APGN with the Innu interveners without first consulting and accommodating it and for refusing to confirm and renew the Treaty of 1760 in the form of a modern agreement. The applicant is seeking several heads of declaratory relief and relief in the nature of *mandamus*, including an order to consult, accommodate and obtain consent before a final treaty is signed with the Innu interveners for the part that overlaps Nionwentsïo and to force the federal Crown to negotiate the contemporary confirmation and renewal of the Treaty of 1760 in the form of a modern agreement.

[31] On October 8, 2010, four days before the hearing on the merits scheduled for October 12 to 15, Prothonotary Tabib agreed to adjourn the hearing *sine die* in order to allow the parties to try to find an alternative to litigation to settle the application for judicial review and to encourage private discussions to this effect. The account of how these negotiations were held and what happened differs in several ways depending on the parties.

[32] Apparently there was a first meeting between the Huron-Wendat Nation and Canada on November 29, 2010, in order to establish a bilateral process for discussions on the Treaty of 1760. In a letter to Grand Chief Sioui dated December 3, 2010, Canada once again acknowledged the validity of the Treaty of 1760 and undertook to not finalize negotiations with the Innu and Quebec without fulfilling its duty to consult. Canada also indicated its willingness to continue discussions on the Huron-Wendat Nation's grievances regarding the Treaty. The Senior Assistant Deputy Minister for Treaties and Aboriginal Government undertook to obtain the required authorization to establish a discussion table on the Treaty of 1760, authorization that was ultimately given by the Minister on May 13, 2011.

[33] On June 20, 2011, the parties signed the Memorandum of Understanding (the MOU) establishing the *Discussion Table on the Anglo-Huron Treaty of 1760* (the Discussion Table). Canada acknowledged again the existence and validity of the Treaty of 1760, and the fact that the Supreme Court confirmed in *Sioui* [TRANSLATION] "that Jacques-Cartier Park and the Lorette territory in 1760 were within the boundaries of the lands frequented by the Huron-Wendat Nation when the Treaty was concluded". Moreover, the parties indicated that the engagement process was based on an [TRANSLATION] "objective of reconciliation" and that it was in their interest to [TRANSLATION] "develop a common perspective on the significance of the Treaty of 1760 and its present-day application". Last, the parties confirmed that [TRANSLATION] "the work resulting from the Discussion Table could enable Canada, if necessary, to start the process of obtaining a formal negotiation mandate to resolve the issues related to the Anglo-Huron Treaty of 1760" (Exhibit 10 to the affidavit of Grand Chief Sioui affirmed on June 27, 2013). The government of Quebec joined the discussions on November 25, 2011.

[34] On July 13, 2011, the Huron-Wendat Nation and Canada agreed on a work plan for the Discussion Table. Establishing the plan enabled the Department of Aboriginal Affairs and Northern Development Canada (DAAND) to provide the applicant with $100,000 in funding for this work. The mandate of the Discussion Table set out in the work plan is to [TRANSLATION] "[p]romote open and transparent discussions in order to better identify the interests of the parties involved with respect to the Treaty of 1760 and explore the options and processes that could lead to the concrete application of said Treaty, so that each party can make its recommendations regarding follow-up to the work of the table" (Affidavit of Martin Desrosiers, affirmed on November 25, 2013, at para 75).

[35] Between July 2011 and December 2012, over twenty meetings of the main discussion table and about ten meetings of the sectoral table on historical research were held. On March 14 and August 23, 2012, counsel for the applicant sent participants in the Discussion Table two documents on the significance and renewal of the Treaty of 1760. Canada's chief representative at the Discussion Table replied to each of these documents on June 18 and November 5, 2012. He noted a considerable difference in the parties' respective vision of the significance of the Treaty of 1760.

[36] The MOU provided that the Table would last two years, and thus it would end by June 30, 2013, at the latest. With respect to determining the end date for the engagement process, December 31, 2012, was accepted by the three parties to the engagement process, following the suggestion by counsel for the applicant.

[37] In November 2012, the federal representative at the Discussion Table verbally informed counsel for the applicant of the renewal of the federal mandate to negotiate a land claim and self-government agreement with the Innu interveners. Mr. Pelletier apparently also signalled his clear intent to end the engagement process after December 31, 2012. He also reiterated Canada's commitments to the Huron-Wendat in relation to negotiations with the Innu interveners.

[38] On November 30, 2012, counsel for the applicant asked that the engagement process continue after December 31, 2012. On December 7, 2012, Canada's representatives said that they noticed at a Discussion Table meeting that the Huron-Wendat Nation had nothing new to say about the significance of the Treaty and its modern application. The parties apparently then agreed that the last meeting would be held on December 13, 2012. At that meeting, counsel for the applicant informed Canada of their intention to file a notice in the Court that would allow them to renew this application for judicial review.

[39] On January 23, 2013, Jean-François Tremblay, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, confirmed that the Discussion Table had ended. First he mentioned that the mandate of the Discussion Table had not been intended to discuss or settle the various issues raised in the proceeding brought in 2009, and thus stated that the Discussion Table was not the [TRANSLATION] "result" of the stay order of October 8, 2010. He emphasized that when the parties began the discussion, they had decided to specifically look at the issue of the Treaty of 1760 for a limited period.

[40] Counsel for the applicant replied to this letter on April 23, 2013, indicating that this position was completely inconceivable and in bad faith in that Canada was totally ignoring the discussions and agreements that had led to the joint request by Canada and the Huron-Wendat Nation to the Court in October 2010. In the meanwhile, on February 25, 2013, counsel for the applicant sent the parties involved in this file a 30-day notice of their intention to ask the Court for a new hearing date.

[41] On June 14, 2013, the respondent informed Grand Chief Sioui that DAAND would not take steps to obtain a formal mandate to negotiate from Cabinet in order to negotiate the renewal of the Treaty of 1760, given that the parties' positions on the significance and scope of the Treaty were very far apart. Despite having said this, the Department still proposed two measures that aimed to meet several of the interests and aspirations expressed by representatives of the Huron-Wendat Nation, specifically self-government negotiations and the development of a consultation protocol that would help ensure that the Huron-Wendat's activities and claims of the would be taken into account in decision-making by the government or others. Moreover, the Department said that it was ready to support and facilitate the possible continuation of discussions that began in spring 2012 between the Huron-Wendat and the Innu of Mashteuiatsh in order to settle the issues regarding overlapping territory. The applicant replied favourably to the second aspect of the offer but did not reply to the first aspect.

[42] Last, Canada wrote to Grand Chief Sioui, as well as to chiefs of other First Nations, on March 20, 2013, to invite them to a meeting to discuss a consultation process regarding the APGN with Quebec and the Innu interveners. The proposed consultation sought to find out the

concerns of the Huron-Wendat regarding the documents submitted, discuss them and, if necessary, discuss accommodations. Counsel for the applicant replied through two letters dated April 23, and May 6, 2013. They stated that Canada's refusal to offer satisfactory protection to Nionwentsïo was a complete negation of their duty to negotiate in good faith, but did not provide a formal reply to Canada's invitation.

[43] Canada replied to counsel for the applicant on June 11, 2013, specifying that the end of the Discussion Table did not change in any way Canada's commitment to comply with its duty to consult before concluding a final agreement with the Innu. Then, in a letter to Grand Chief Sioui dated June 14, 2013, Canada reiterated its commitment to comply with its duty to consult before concluding a final agreement with the Innu and reiterated its invitation of March 20, 2013. On July 12, 2013, Grand Chief Sioui rejected the invitation, complaining that the consultation process was generic and was addressed to all First Nations who were claiming rights on the territory covered by the APGN with the Innu. The Grand Chief said he felt [TRANSLATION] "betrayed" by the decision to not try to obtain a formal mandate to negotiate the renewal of the Treaty of 1760 and added that [TRANSLATION] "it was difficult not to conclude that Canada's objective when it agreed to join the Discussion Table was to delay or avoid legal proceedings and an assessment by the courts of the federal Crown's conduct, rather than to find real and mutually satisfactory solutions".

[44] On September 25, 2013, the applicant filed an amended application for judicial review in which it sought new declarations. The relief sought now reads as follows:

> 18. The Applicant seeks the following relief:

a. A Declaration that section 91(24) of the *Constitution Act, 1867* directs that in Canada treaty-making with Aboriginal people and treaty implementation is federal in nature and that the Crown Respondent has a positive duty to act accordingly;

b. A Declaration that the Crown Respondent has and continues to have a duty to act honourably and in good faith towards the Applicant in order to ensure that the Applicant is able to actively exercise its treaty rights on its traditional territory of Nionwentsïo;

c. A Declaration that the Crown Respondent owes a duty to the Applicant as its treaty partner to protect its treaty protected rights, in accordance with the precautionary principle, in Nionwentsïo as required by the honour of the Crown;

d. A Declaration that the Crown Respondent owes a duty to the Applicant to ensure the continuing viability and utility of the British-Huron Treaty if necessary through active confirmation and renewal;

e. A Declaration that the Crown Respondent acted illegally and breached the Crown's duty of protection and its duty to act honourably and negotiate in good faith by taking the position that the Applicant would lose funding needed to ensure the necessary contemporary confirmation and renewal of the British-Huron Treaty of 1760 should the Applicant choose to seek relief from this Court to accomplish those ends;

f. A Declaration that the Crown Respondent breached the Crown's fiduciary duty to negotiate in good faith by refusing to consider the concerns of the Applicant regarding the necessary contemporary confirmation and renewal of the British-Huron Treaty of 1760 until such time as the Applicant had formally filed a "comprehensive land claim" as contemplated by Crown Respondent's own policies established unilaterally and involving complete discretion on the part of the Crown Respondent;

f.i. A Declaration that the Crown Respondent breached the honour of the Crown by concluding an Agreement in Principle (AIP) as a part of treaty negotiations with certain Innu communities covering Nionwentsïo without having engaged directly with, consulted, accommodated, and received the consent of the Applicant;

g. A Declaration that the inclusion of non-derogation language in the Innu AIP does not absolve the Crown Respondent from its positive duties toward the Applicant, including but not limited to its duty of care toward its long-standing treaty partner and its duty

to negotiate in good faith towards a contemporary confirmation and renewal of the British-Huron Treaty of 1760 in the form of a just settlement for the Applicant in its traditional territory Nionwentsïo;

g.i. A Declaration that the assertion by the Crown Respondent that there exists no link between the "discussion table process" regarding the confirmation and renewal of the British-Huron Treaty of 1760, on the one hand, and the present proceedings, on the other hand, reveals a disrespect towards this Court and its Order of 8 October 2010, a disregard for the honour of the Crown with respect to both this Court and the Applicant, a breach of good faith towards the Applicant, and a clear case of the Crown Respondent's "sharp dealing";

g.ii A Declaration that the Crown Respondent's request to meet with the Applicant to hold discussions so as to be made aware of the Applicant's preoccupations with regards to the Innu AIP after having been made aware of these preoccupations through the present proceedings, entered into an agreement with the Applicant with the goal of resolving these proceedings, and engaged in two (2) years of discussions constitutes bad faith, a breach of the honour of the Crown, and a clear case of "sharp dealing";

h. An Order in the nature of Mandamus requiring the Crown Respondent to comply with its constitutional duties towards the Applicant by:

i) Confirming and renewing the Crown's commitment to the British-Huron Treaty of 1760 and the resulting treaty relationship of allies pledging mutual support;

ii) Entering immediately into good faith negotiations with the Applicant with the object of providing within two (2) years the confirmation and renewal referred to in i) above in the form of a just contemporary treaty settlement for the Applicant in Nionwentsïo;

iii) Ensuring respect for and implementation of the Applicant's existing treaty protected rights in Nionwentsïo consistent with the Crown Respondent's honour and its duty to protect the Applicant in order to ensure the effectiveness of a final decision of the Courts in this matter of the conclusion of a treaty settlement referred to in subparagraph ii);

iv) Ensuring that any treaty or other arrangement with the First Nations of Mamuitun and Nutashkuan will not extend into or

> over Nionwentsïo and will not affect the Applicant's treaty protected rights and interests therein without the consent of the Applicant;
>
> i. An Order that this Court retain jurisdiction, including a supervisory role, until the required confirmation and renewal through treaty settlement for the Applicant's territory has been concluded;
>
> j. An Order of Solicitor-Client Costs to the Applicant; and
>
> k. Such other relief as this Court deems just.

II. Issues

[45] The parties have raised several issues in this application for judicial review. After reviewing the record, I believe that these issues may be helpfully stated as follows:

1. Does the Federal Court have jurisdiction to hear this matter and make the orders sought, and is judicial review the appropriate vehicle?
2. Did the respondent breach her duty to consult or did she contravene the honour of the Crown and her fiduciary duty?

[46] Before reviewing these substantive issues, the Court must also rule on the admissibility of an affidavit filed by the interveners in support of their arguments. On April 7, 2010, the applicant filed a notice of motion to strike the affidavit of Denys Delâge, expert witness for the interveners, on the ground that Mr. Delâge allegedly had access to confidential or privileged information when he worked for the Huron-Wendat Nation and would thus be in a conflict of interest.

III. Analysis

A. *Motion to strike the affidavit*

[47] Mr. Delâge, Professor Emeritus, Department of Sociology at Laval University, is a specialist in Amerindian history. In this regard he has studied a number of Aboriginal Nations from Quebec and the Great Lakes region, including the Huron-Wendat Nation. He was hired as a consultant by several government agencies as well as by the Huron Wendat Nation Council during the 1990s and 2000s.

[48] In 1994, Mr. Delâge was mandated by the Huron-Wendat Nation Council to prepare an additional expert's report further to the one prepared by Dr. Cornelius Jaenen, specifically on the following subjects: the Treaty of 1760, the exact boundaries of the Huron-Wendat territory for hunting, fishing and trapping in the 17th, 18th and 19th centuries, the type, location and use of buildings used by the Huron-Wendat and the agreements of the 17th, 18th and 19th centuries between the Huron-Wendat and other First Nations likely to apply in this territory. Moreover, Mr. Delâge has been an expert witness on several occasions in cases involving members of the Huron-Wendat Nation, including in 1995 (*Québec (Sous-ministre du Revenu) c Sioui*, [1995] RJQ 2105, [1995] JQ No 2249), in order to defend the Huron-Wendat Nation on subjects related to this application for judicial review.

[49] In 2001, Mr. Delâge was chosen by the applicant and DIAND jointly to produce a research and analysis report on the history of the Seigneurie de Sillery. It is located in the northern part of Nionwentsïo, and the territory it covers is also part of the territory being

discussed in this case. The joint research protocol signed in 2001 between the applicant and the respondent contains a confidentiality clause and stipulates that the intellectual property rights will be shared between Canada and the Huron-Wendat Nation.

[50] The relationship of trust between the Huron-Wendat Nation and Mr. Delâge deteriorated in 2006 when the Huron-Wendat Nation Council learned that the doctoral thesis of the senior historian on the multi-disciplinary team assigned to the joint project regarding the Seigneurie de Sillery claim, which was supervised by Mr. Delâge, had been accepted and thus could enter the public domain. The relationship broke down completely in December 2007 during a meeting between representatives of the Council, Mr. Delâge and Michel Lavoie, to discuss ownership of intellectual property rights in the file for the Seigneurie de Sillery claim. The relationship became bitter when the Council subsequently learned that Mr. Lavoie's thesis would be published before the Huron-Wendat Nation had completed and filed its application regarding the Seigneurie de Sillery in accordance with the federal *Specific Claims Policy*. Indeed, the thesis was published on March 23, 2010, with the support of Mr. Delâge.

[51] In the affidavit he filed in support of the interveners' position in this case, Mr. Delâge questions several statements by Jean François Richard and Cornelius J. Jaenen in the affidavits they provided in support of the applicant's position. In particular, Mr. Delâge criticizes them for not providing specific data or information concerning how often the applicant frequented the territories it was claiming, not considering numerous studies on the prior presence of the Montagnais (Innu) on these territories in relation to the presence of the Hurons, exaggerating the Huron's area of influence and not taking into account the fact that the Hurons and the

Montagnais had a very different relationship with the land in that the Hurons were more firmly involved in a market economy, which led them to travel considerable distances to carry out commercial and diplomatic activities, whereas the Montagnais were primarily hunter-gatherers who had closer ties to their land.

[52] The applicant maintains that Mr. Delâge's affidavit should be struck for essentially two reasons. First, it claims that he cannot act as an expert on behalf of the interveners, given his long professional relationship with the applicant, and that in doing so he breaches his duty of loyalty and places himself in a conflict of interest. Relying on provisions of the *Civil Code of Québec* regarding contracts for services, the applicant submits that Mr. Delâge broke the trust relationship underlying such a relationship by acting as an expert for the interveners after having had access to confidential documents of the Huron-Wendat Nation. The applicant is also of the opinion that Mr. Delâge's behaviour does not meet the ethical standards applicable to historians conducting research on Aboriginal peoples, as defined by the Canadian Historical Association, and that these ethical rules are also part of his contractual obligations. Last, the applicant maintains that Mr. Delâge acted in bad faith, breaching his duty of loyalty and confidentiality.

[53] Even if Mr. Delâge were bound by a contract for services with the applicant, the motion to strike is not the appropriate remedy to enforce the duty of loyalty that would ensue. Although the Court of Appeal of Québec has recognized that the obligation of loyalty under article 2088 of the *Civil Code of Québec* in an employment contract may also apply to a contract for services (*Stageline Mobile Stage inc c Richard*, 2002 CanLII 20406 at para 10, [2002] JQ No 4688(CAQ)), the contractual remedy for a breach of such a duty does not fall under the

jurisdiction of the Federal Court. The relief sought by the applicant falls under the jurisdiction of the Quebec courts and can be granted only through proceedings specifically involving the implementation of the right to performance of contracts, in the context of a proceeding against the co-contractor alleged to have breached the contract. It is a distinct remedy that is not closely linked to an application for judicial review involving the conduct of the federal Crown. Consequently, this Court does not have jurisdiction to make findings based on the rules applicable to contracts under Quebec civil law and, moreover, against a person who is not a party to this proceeding.

[54] Furthermore, I would note that Prothonotary Tabib dismissed the motion to strike filed by the applicant on June 4, 2010. By allowing the applicant to raise this issue again before the hearing judge, the Prothonotary specified that the parties and the interveners could file memoranda that exceeded 30 pages on the condition that the additional pages (a maximum of 10) dealt only with [TRANSLATION] "the issue of the admissibility of Mr. Delâge's affidavit on the ground of conflict of interest". Thus, that is the only argument that the Court can consider and moreover, the only one that is relevant to assessing the admissibility of the expert witness' testimony (other than the relevance and qualification as an expert, which the applicant does not challenge).

[55] It is well established that an expert is not the property of a party; the expert is authorized to testify only in order to help the Court ascertain the truth: *Harmony Shipping Co SA v Davis*, [1979] 3 All ER 177 (CA) at pp 180, 182, (sub nom *Harmony Shipping Co SA v Saudi Europe Line Ltd*), [1979] 1 WLR 1380. The courts have even determined that a party could retain the

services of an expert who had access to confidential information from the opposing party through a prior mandate: *Labee v Peters*, [1996] AJ No 809, 10 CPC (5th) 312 (Alta QB); *Watson c Sutton*, [1990] RDJ 175, EYB 1990-57021 (CAQ); *149644 Canada Inc. c Saint-Eustache (Ville de)*, [1996] RDJ 401 (CAQ), (*sub nom R c 149644 Canada Inc*), [1996] JQ No 1499. In that situation, however, the expert cannot be questioned on the confidential information he received, the opinion he gave to counsel for the opposing party or the litigation strategy developed by the other party.

[56] The appearance of a conflict of interest is not enough to have an expert disqualified. There must be an objective review of the facts and circumstances of each case, analyzing in particular the following factors:

> The proper approach to determine whether or not to an expert should be disqualified must consider the facts and surrounding circumstances of each case and:
>
> - whether the expert knew he or she was receiving confidential information, with the expectation that the information would be maintained in confidence;
>
> - the nature of the confidential information;
>
> - the risk of the confidential information being disclosed;
>
> - the risk of prejudice arising to either the party challenging the expert or to the party seeking to retain the challenged expert; and
>
> - the interests of justice and public confidence in the judicial process.
>
> (*Abbott Laboratories v Canada (Minister of Health)*, 2006 FC 76 at para 19, 46 CPR (4th) 166).

[57] In this case, the applicant has not established that Mr. Delâge received confidential information, let alone that he used that information in preparing his affidavit. It is not enough to state, as Grand Chief Sioui did in his affidavit dated April 7, 2010, that Mr. Delâge had access to [TRANSLATION] "archived documents, confidential information, strategic information, their policy direction, information about the progress of historical research on the occupation and use of Nionwentsïo", that he was [TRANSLATION] "informed of the Huron-Wendat Nation Council's strategies" or even that [TRANSLATION] "[h]e attended and participated in numerous meetings and discussions with members of the Council and other employees of the Council regarding the approach and strategy of the Huron-Wendat Nation involving subjects related to the application for judicial review" (at paragraph 15 of the affidavit). The affidavits of Mr. Richard and Simon Picard are not that much more specific and do not provide us with more details about the nature of the "confidential" information.

[58] In contrast, Mr. Delâge stated in a second affidavit sworn on May 5, 2010, that he did not agree to a confidentiality clause with or cede his rights to the Huron-Wendat Nation Council, that the information gathered under his mandates from the applicant was already in the public domain, that he was not involved in the development or implementation of policy or legal strategies related to these mandates or the Council's litigation, that he did not refer to the Huron archives when drafting his first affidavit and that he did not carry out his mandates by consulting the documentation that the Hurons kept on their premises. Mr. Delâge was not cross-examined on his affidavit.

[59] Moreover, the applicant did not specify what parts of Mr. Delâge's affidavit were allegedly based on confidential information. A plain reading of the affidavit dated February 15, 2010, reveals that all of the sources cited by Mr. Delâge or that the affidavit relies upon are public historical or scientific sources, which are based on general knowledge and shared Canadian history. Mr. Delâge added that he did not rely in any way on the work and research results in the Seigneurie de Sillery file to draft his affidavit, because the purpose of the study is quite distinct and in no way involves the territories frequented, presence on the territory or the use of the resources.

[60] In short, I find that the applicant did not prove that there was a conflict of interest based on the confidential information that Mr. Delâge allegedly used in drafting his affidavit. On the one hand, the applicant did not specify the nature of the information or the documents that Mr. Delâge had access to that would be considered confidential. In any case, it was not proven that Mr. Delâge used any confidential information whatsoever in preparing his affidavit of February 15, 2010. The evidence in the record does not demonstrate a sufficient connection between the various mandates undertaken by Mr. Delâge on behalf of the Council and this case, and it has not been proven that he had access to any information regarding the litigation strategy.

[61] On the other hand, Mr. Delâge's affidavit provides helpful details about the Hurons' presence on the territory at issue here. He raises questions about some of the hypotheses of the applicant's experts and identifies what seems to him to be some methodological failings in their approach. He offers alternative explanations and notes, in passing, the omission of several relevant studies in the affidavits of Messrs. Richard and Jaenen. In doing so, he carries out his

expert role by relying on public sources and following the purest academic tradition. The applicant cannot object to Mr. Delâge producing an affidavit or writing scientific articles for the sole reason that it could adversely affect its position or the rights it is claiming.

[62] The Court can certainly understand the applicant's frustration in learning that Mr. Delâge, with whom it had had a professional relationship for about fifteen years, had filed an affidavit in support of the interveners' position. It is even possible that the conflict between Mr. Delâge and the applicant in the context of the mandate he received regarding the Seigneurie de Sillery is not unrelated to Mr. Delâge's decision to swear an affidavit at the interveners' request. However, that would not be enough to strike his affidavit if there is no clear evidence that he was in a conflict of interest.

(1) Does the Federal Court have jurisdiction to hear this matter and make the orders sought, and is judicial review the appropriate vehicle?

[63] In her written submissions, the respondent argued that the Court did not have jurisdiction to hear this application for judicial review because the resolution of the issues it raises could have an impact on the rights of the provincial Crown and Quebec's exercise of its legislative powers. Indeed, the determination of the nature and the scope of the rights under the Treaty of 1760 would necessarily affect the use of land and resources on the territory and would have an impact on the provincial Crown's authority, powers and ownership rights with respect to part of its territory. The interveners supported that argument. The Attorney General of Quebec, who had

filed a motion for leave to intervene and raise the same argument, withdrew his motion on May 28, 2013.

[64] The Attorney General of Quebec and the interveners also contended that judicial review was not the appropriate vehicle for the applicant to obtain the results it was seeking. It was argued that the applicant was trying to indirectly receive a declaratory judgment on the territorial scope of the Treaty of 1760 by relying only on affidavits, which would contravene the standards of evidence identified in land claim jurisprudence.

[65] It is undisputed that this Court does not have jurisdiction to make declarations or apply remedies that involve the rights of a province: see, *inter alia*, *Vollant v Canada*, 2009 FCA 185 at paras 5-6, [2009] FCJ No 699; *Sylvain v Canada (Agriculture and Agrifood)*, 2004 FC 1474, [2004] FCJ No 1814; *Joe v Canada*, [1986] 2 SCR 145, [1986] SCJ No 51. Under subsection 17(1) of the *Federal Courts Act*, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. However, section 2 of that Act clearly states that the Crown referred to is the federal Crown.

[66] That being said, the applicant is primarily seeking determinations regarding the Crown's duty to consult it, accommodate it and obtain its consent prior to signing a final agreement with the Innu interveners and Quebec. Moreover, this is how the purpose of the application for judicial review has been interpreted in the various interlocutory decisions that preceded the hearing on the merits. In particular, this is seen in Justice Bédard's judgment of September 30, 2011, regarding a motion for interim orders:

> [TRANSLATION]
> The debates over establishing the terms of the interveners' interventions have led the applicant to clarify the nature of its application for judicial review. The judgments from Prothonotary Tabib and Justice Tremblay-Lamer indicate that the application for judicial review is not intended to have the Court rule on the applicant's substantive rights under the Treaty of 1760 or establish the exact territory covered by the Treaty of 1760. Rather, the applicant's proceeding seeks the recognition of procedural rights that it claims to have under the Treaty of 1760. The applicant is asking the Court to declare that the respondent breached her procedural duties that she has towards the applicant by signing the APGN without consulting it and without providing accommodations with respect to the encroachment on Nionwentsïo. In additions, it is asking the Court to force the respondent to comply with her obligations in the negotiations to conclude a treaty with the interveners, i.e. to consult and accommodate it before concluding a treaty that is likely to breach the substantive rights that could arise from the Treaty of 1760. At the same time, the applicant is asking the Court to force the respondent to begin discussions with it regarding the renewal of the Treaty of 1760.
>
> *Huron-Wendat Nation of Wendake c Canada, (September 30, 2011), Ottawa T-699-09, 2011 CF 1124 at pp 6-7.*

[67] Thus, the relief sought by the applicant is essentially procedural in nature and does not involve the provincial Crown in any way. It is true that determining the Crown's duties requires to a certain extent first identifying the applicant's rights arising from the Treaty of 1760. That exercise would then require determining the nature and scope of the rights arising from the Treaty of 1760 and specifying its territorial basis, which cannot be done without considering the provincial Crown's occupation of the land. However, the applicant was very careful to state that it was not seeking a declaration on the territorial scope of the Treaty of 1760 and that the procedural rights it was claiming relied rather on a *prima facie* demonstration of its claims involving the territory covered by the APGN.

[68] Thus, I am of the opinion that the Court has jurisdiction to hear this application for judicial review and that it is the appropriate proceeding under the circumstances. The declarations and relief sought by the applicant involve primarily the federal Crown and thus fall under this Court's jurisdiction pursuant to section 17 of the FCA. Moreover, I would note that *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 (*Tlingit*), *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 (*Haida Nation*) and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 (*Mikisew*) are also illustrations of cases where a government's duty to consult was raised in an application for judicial review.

[69] As for the five years between the signing of the APGN (March 31, 2004) and the filing of this application for judicial review (April 30, 2009), it does not seem to be an obstacle under the circumstances. The signing of the APGN did not end the territorial negotiation process involving the applicant, quite the contrary, and the applicant cannot be criticized for trying to raise its concerns with the respondent before turning to the courts. The Crown's duty to consult and accommodate is ongoing, and as Justice Lemieux wrote in *Tzeachten First Nation v Canada (Attorney General)*, 2007 FC 1131 at para 27, [2007] FCJ No 1467, "no extension of time is required here when the object of the litigation is to obtain relief in a case where the duty to consult and accommodate reserve and aboriginal interests is engaged".

[70] Obviously the Court must refrain from making any findings against Quebec and does not intend to rule on the extent of the territory that the applicant could claim based on the Treaty of 1760. To the extent that some of the declarations added to the relief sought in the amended notice (particularly paragraphs 18(c), h(ii) and h(iv)) could be interpreted as an attempt to determine

substantive rights on a specific territory designated as Nionwentsïo, the Court will disregard them.

(2) Did the Respondent breach her duty to consult or did it contravene the honour of the Crown and her fiduciary duty?

[71] The issue raised in this application for judicial review should be addressed in two steps. First the Court must determine whether the Crown had any duty to consult and, if so, what was the scope or extent of that duty. Second, the Court must review to what extent the process that led to the conclusion of the APGN complied with the requirements of that obligation, as delineated in the circumstances of this case. As part of the review of these issues, the Court must first identify the appropriate standard of review.

[72] It is not necessary to conduct an exhaustive analysis of the last issue because the jurisprudence has already satisfactorily determined the level of deference required for each of the two questions. In *Haida Nation*, above, the Supreme Court determined that the decision-maker must make a correct decision on questions of pure law that can be isolated from the issues of fact. On the other hand, the Court must show deference on questions of fact or mixed fact and law. Consequently, the existence or extent of the duty to consult or accommodate must be subject to a thorough review to the extent that they involve questions of law. However, as the Supreme Court indicated, "[the legal question] is typically premised on an assessment of the facts" and thus the appropriate standard of review may be reasonableness if both types of questions are "inextricably entwined": *Haida Nation*, at para 61.

[73] Nevertheless, with respect to the process itself, there is no doubt that the review should be in accordance with the standard of reasonableness. In this context, perfect satisfaction is not required. As the Supreme Court indicated in *Haida Nation*, at para 62, "[t]he government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty."

[74] That analysis was subsequently followed *in Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212 at paras 33-34, [2008] FCJ No 946; *Conseil des Innus de Ekuanitshit v Canada (Attorney General)*, 2013 FC 418 at paras 96-98, [2013] FCJ No 466; *Sambaa K'e Dene Band v Duncan*, 2012 FC 204 at paras 71-78, [2012] FCJ No 216, (*Sambaa K'e*). I see no reason therefore to stray from the case law, particularly since the applicant did not make any submissions on the issue.

[75] The history of relations between Aboriginal peoples and non-Aboriginal peoples in Canada has not always been rosy, as Justice Binnie acknowledged in *Mikisew*. In this context, the Supreme Court has recognized that an interlocutory injunction is not always the appropriate remedy for Aboriginal people when they seek to be heard and have their rights respected: *Haida Nation*, at paras 12-15. In certain circumstances, the government may have the duty to consult Aboriginal peoples and accommodate their interests. As the Supreme Court stated more recently in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 33, [2010] 2 SCR 650 (*Rio Tinto*):

> The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation and seek interlocutory injunctions to halt the

> threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

[76] This duty, which is grounded in the honour of the Crown, infuses all relationships with Aboriginal peoples: *Haida Nation*, at paras 12-15, 19. It applies not only when the Crown is contemplating an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*), but also when making and implementing treaties (*Mikisew*, at para 51 and *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73, [2013] 1 SCR 623).

[77] The Supreme Court has recognized that honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement, even before the existence of their rights has been definitively proven. The Crown must respect these potential, but yet unproven, interests otherwise the Aboriginal peoples may find themselves in the unfortunate situation whereby, when they have finally proven their claim, they will have been dispossessed of their land and their resources will have been denuded: *Haida Nation*, at para 33.

[78] The Supreme Court noted that the existence of a duty to consult and accommodate should not be confused with the scope of the duty. As to when a duty to consult arises, the Court stated that the Crown must have knowledge, "real or constructive", of the potential existence of the Aboriginal right or title: *Haida Nation*, at para 35. The duty is triggered at a low threshold, as the Supreme Court acknowledged in *Mikisew*, at para 55. What is required is a credible claim, not proof that the claim will succeed: *Rio Tinto*, above, at para 40.

[79] Of course, the duty to consult does not arise only when the Crown has knowledge of a potential Aboriginal claim or right. The Crown's action or decision must be likely to have an adverse impact on an Aboriginal claim or right. In this respect, a broad interpretation is necessary regarding what may be considered government action, as the Supreme Court stated in *Rio Tinto*, at para 44:

> … government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights...

[80] Similarly a generous, purposive approach is in order when determining whether a government action may affect an Aboriginal claim or right. The adverse effect must however "be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice": *Rio Tinto*, at para 46.

[81] The content of the duty to consult will vary depending on the circumstances and cover a broad spectrum:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice....
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of

> written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision....
>
> *Haida Nation*, at paras 43-44

[82] In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 68, 153 DLR (4th) 193 (*Delgamuukw*), the Supreme Court went so far as to say that in some cases, the duty to consult may even require the full consent of an Aboriginal nation, "particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands". The Court, however, qualified this statement in *Haida Nation*, at paragraph 48, by specifying that this consent is appropriate only in cases of established rights, "and then by no means in every case". What is always required is that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances: *Haida Nation*, at para 41. This duty is ongoing and continues until the claim is settled: *Haida Nation*, at para 45.

[83] In this case, the applicant submits that its rights on the territory of Nionwentsïo were recognized by the Treaty of 1760 and thus are constitutionally protected. By concluding an agreement in principle with the interveners that covers a large portion of this territory without consulting the applicant, the respondent allegedly breached her duties required by the honour of the Crown.

[84] There is no doubt in this case that the Crown was aware of the existence of the Treaty of 1760. Not only is the Crown presumed to be aware of a treaty that it has concluded with an Aboriginal nation (*Mikisew*, at para 34), but the Supreme Court clearly recognized, in *Sioui*, that the document of September 5, 1760 is a treaty within the meaning of s. 88 of the *Indian Act*,

RSC 1985, c I-5. The Court arrived at this conclusion by taking into account the historical context and evidence prior and subsequent to the signature of this document, which demonstrate that the parties intended to make peace and guarantee it by creating mutually binding obligations.

[85] Moreover, the chronology described above demonstrates that both the government of Canada and the government of Quebec began discussions with the applicant following the Supreme Court decision in *Sioui*. One of the purposes of the discussions between the applicant and the respondent was in fact to renew the Treaty of 1760. Furthermore, on several occasions, the respondent funded anthropological and historical research to define and identify the rights and customs arising from the Treaty.

[86] Thus, it would be quite inappropriate of the respondent to feign ignorance of the Treaty, and moreover, she explicitly recognized its existence in her memorandum of fact and law dated September 13, 2010. However, she submits that it is not possible to infer either from *Sioui* or the decision of the Court of Appeal of Québec in *R c Savard*, [2003] 4 CNLR 340, [2002] JQ No 5538 (*Savard*) all of the rights protected by the Treaty of 1760 or their content, how they may be exercised or the territory where they may be exercised. Moreover, the respondent claims that the signature of the APGN does not cause any adverse effects for the applicant. I will now review each of these two assertions.

[87] A simple reading of the Treaty of 1760 reveals that the land where the conferred rights may be exercised is not defined. Before the Supreme Court, the applicant maintained that the Treaty of 1760 gave it the right to exercise their customs and religion on the territory that the

Hurons frequented at that time, specifically the region bordered by the St. Lawrence River, the Saguenay River and the Saint-Maurice River. The Attorney General of Quebec, however, maintained that the free exercise of these customs should be limited to the Lorette territory. Last, the Attorney General of Canada was of the opinion that the Treaty of 1760 does not link the freedom of exercise of religion, customs and trade with the English to any territory.

[88] Writing for the Court, Justice Lamer rejected both approaches on the ground that neither one succeeded in deducing the common intention of the parties from the historical context. From this perspective, he came to the conclusion that the Hurons' exercise of their customs was protected over the entire territory frequented, so long as that exercise was not incompatible with the particular use made by the Crown of this territory: *Sioui*, at p 1071 (above, at para 7 of these reasons). The Court did not say anything further regarding the territory that may be considered to have been frequented by the Hurons in 1760. At most, it may be deduced that Jacques Cartier Park was part of this territory, to the extent that it was found that the occupation of this territory by the Crown (who turned it into a park) was not incompatible with the exercise of Huron rites and customs that the respondents were charged with in that case.

[89] Furthermore, in *Savard*, the Court of Appeal of Québec noted the admission by the Attorney General of Quebec that moose hunting was included in the customs protected by the Treaty of 1760 and that the Laurentians wildlife sanctuary was part of the territory where the Hurons pursued this activity in 1760.

[90] On the basis of these two decisions, the applicant is asking the Court to recognize its existing rights on large portions of Nionwentsïo as well as a strong presumption of treaty rights on what remains, since it should be presumed that the territory that runs between the Wendake reserve on one side and the Laurentians wildlife sanctuary and Jacques-Cartier Park on the other was also frequented by the Huron-Wendat in 1760.

[91] In my opinion, it would be risky and premature to accept the applicant's claims based only on these two decisions. The Supreme Court did not determine the substantive content of the rights arising from the Treaty of 1760 or their territorial basis. Moreover, the Court was careful to state that the territory frequented by the applicant was not fixed in time and could evolve according to its occupation by the Crown. Furthermore, this is why the applicant is requesting the renewal and confirmation of the rights conferred by this instrument and seeking such findings in its application for judicial review. However, the admission by the Attorney General of Quebec in *Savard* does not bind the respondent or the interveners, who were not parties to that dispute and who are making concurrent claims. Moreover, it should be noted that the Attorney General of Quebec was a party to an administrative agreement with the applicant involving the Laurentian wildlife sanctuary.

[92] The affidavit evidence submitted by the applicant is clearly insufficient to establish the rights claimed. Furthermore, it is contradicted in several respects by the expert for the interveners, as mentioned above. Before we can find that the applicant has established rights on a specific territory, it will have to provide more extensive proof in light of the historical and cultural context of the treaty and by relying on extrinsic evidence, as necessary. That is also the

reason why these types of questions are normally considered in an action rather than on a judicial review: see *Soowahlie Indian Band v Canada* (2001), 200 FTR 21 at para 6, [2001] FCJ No 105 (FC), *MacMillan Bloedel Ltd v Mullin and al* (1985), 61 BCLR 145 at p 151, [1985] BCJ No 2355 (BCCA); *Barlow v Canada (2000)*, [2000] FCJ No 282 at para 78, 186 FTR 194 (FC); *Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33 at paras 27-39, [2001] 1 SCR 911.

[93] In short, I am not of the opinion that the applicant's claim is on the highest end of the spectrum described by the Supreme Court in *Haida Nation*, but it should not be considered weak either. It is one of many mid-spectrum cases where the level of consultation required is not the highest and certainly does not require the applicant's consent, but where the Crown cannot merely give notice to the parties in order to comply with its duties and preserve its honour.

[94] We can now move on to the alleged adverse effects resulting from the signature of the APGN. It is undisputed that the members of the Huron-Wendat Nation have a special relationship with their territory. Since the Wendake reserve is located 10 kilometres from Québec, it is obvious that practising traditional activities such as hunting, gathering, fishing and trapping as well as religious and spiritual rites is a crucial part of transmitting customs, culture and religion to future generations. The affidavits of Grand Chiefs Sioui, Picard and Gros-Louis are eloquent in this regard.

[95] Canada has adopted a comprehensive land claim policy, the most recent version of which is from 1993. Comprehensive land claims are based on the principle of non-extinguished

Aboriginal rights that have not been settled by treaty or any other legal means. The negotiations are not intended to define the rights of an Aboriginal group or their scope, but rather to establish clarity and certainty with respect to the rights that the Aboriginal group may exercise once a final agreement is reached. As stated in the *Federal Policy for the Settlement of Native Claims*, the objective of comprehensive land claim settlements is not to determine the rights that could have been exercised in the past, but to come to an agreement for the future:

> The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title. ... The comprehensive claims process is intended to lead to agreement on the special rights Aboriginal peoples will have in the futures with respect to lands and resources. It is not an attempt to define what rights they may have had in the past.
>
> Negotiated comprehensive claims settlements provide for the exchange of undefined Aboriginal rights over an area of traditional use and continuing occupancy, for a clearly defined package of rights and benefits codified in a constitutionally protected settlement agreement. The objective is to negotiate modern treaties that provide a clear, certain and long-lasting definition of rights to land and resources.
>
> Exhibit 2 to the Affidavit of Christian Rouleau, Respondent's Record, vol 1, p. 29.

[96] There are generally several steps in the negotiation process:

i. Submission of a comprehensive land claim by an Aboriginal group accompanied by historical studies on the group's use of the land claimed;

ii. Acceptance or rejection of the claim by the government of Canada;

iii. Where necessary, preliminary negotiations to develop a framework agreement that would set out the parties' intentions regarding the process to be followed, the parameters of the negotiations, the topics of negotiation and a work plan;

iv. Negotiation and conclusion of an agreement-in-principle that sets out the main points that would serve as a basis for the parties to negotiate a final agreement

v. Negotiation and conclusion of a final agreement accompanied by an implementation plan;

vi. Ratification of the final agreement;

vii. Passing of an implementation act that will give effect to the final agreement.

[97] The APGN is clearly a policy document and is intended to establish "the structure, the general direction and the principles that shall guide the drafting of the Treaty" (art. 3.1.1). Articles 3.1.3 and 3.1.4 set out the obligations and rights created by the agreement for the parties to it and third parties:

> 3.1.3 This agreement does not create legal obligations binding the Parties, nor does it infringe on the obligations or existing rights of the Parties and shall not be construed so as to abrogate, derogate or recognize any aboriginal, treaty or any other right.
>
> 3.1.4 This Agreement-in-principle was negotiated and concluded without prejudice to the rights of the Parties and nothing in this agreement can be construed as changing the legal situation of either Party or modifying the legal relationship between Canada, Quebec and the First Nations prior to the conclusion of the Treaty and the coming into force of the implementation legislation.
>
> …
>
> 3.3.19 The Treaty shall not recognize nor confer rights pursuant to section 35 of the Constitution Act, 1982 to an aboriginal First Nation other than the First Nation referred to in the Treaty; it shall not affect in any way the existence or exercise of such rights on Nitassinan.

[98] Relying on those clauses, the respondent submits that the APGN is only a statement of the parties' intent and a policy document that cannot change the legal situation of the parties to it or third parties before the final conclusion of a final treaty and the coming into force of the

implementing legislation: see also *Kruger Inc c Première nation des Betsiamites*, 2006 QCCA 569 at paras 12-13, [2006] JQ No 3932. Furthermore, the respondent argues that section 35 of the *Constitution Act, 1982* provides constitutional protection to existing rights (Aboriginal and treaty rights) of the Aboriginal peoples of Canada, such that even if a treaty were eventually made and legislation enacted, the rights protected by that constitutional provision could not be infringed.

[99] I agree with the respondent that the non-derogation clauses such as the type found in the APGN are far from being without effect, as the applicant submitted, and may provide effective protection to Aboriginal groups who are not signatories to a final agreement. The case law in this respect is unequivocal: see, for example, *Fond du Lac Band v Canada (Minister of Indian and Northern Affairs)*, [1993] 1 FC 195 at paras 51, 54, [1992] FCJ No 933 (TD); *Paul v Canada*, 2002 FCT 615 at paras 126 et seq, [2002] FCJ No 824; *Tseshaht First Nation v Huu-ay-aht First Nation*, 2007 BCSC 1141 at para 25, [2007] BCJ No 1691; *Cook v British Columbia (The Minister of Aboriginal Relations and Reconciliation)*, 2007 BCSC 1722 at paras 196-199, [2007] BCJ No 2556.

[100] The applicant used the affidavit of Grand Chief Glen Williams of the Gitanyow Nation in British Columbia to support its claim that the non-derogation clauses have no legal effect. According to Grand Chief Williams, similar clauses to the ones found in the APGN are also found in the treaty signed by the respondent with the Nisga'a in 2000. Yet, despite the promises of the federal government and the presence of such clauses in the final treaty, the Gitanyow are

still fighting to have their rights recognized, and the government policies always favour the treaty rights of the Nisga'a over the undefined Aboriginal rights of the Gitanyow.

[101] This affidavit does not seem sufficient to me to set aside the case law cited above. Moreover, the applicant did not refer the Court to any court decision to support its claims that the non-derogation clauses are useless and have no true legal effect. Although I do not doubt the sincerity of Grand Chief Williams, his affidavit describes only his view of the situation and does not take in to account the viewpoint of the governments of Canada and British Columbia or of the other Aboriginal parties.

[102] That being said, it seems wrong to claim that the harm alleged by the applicant is hypothetical or even non-existent. Although the Supreme Court stressed the need to show an actual causal relationship between the government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights, it also recognized that a "generous, purposive approach" must be taken towards this requirement. As mentioned above, government action does not have to have an immediate impact; a potential for adverse impact suffices: *Rio Tinto*, at paras 44 et seq. Thus, the duty to consult may extend to "strategic, higher level decisions": *Rio Tinto*, at para 44; see also *Haida Nation*, at para 76.

[103] In this case, there is no doubt that the signature of an agreement-in-principle creates a certain dynamic and raises expectations. Indeed, it would be surprising if the interveners, after long negotiations over this agreement-in-principle with the governments, were to agree to sign a final treaty that was substantially less generous than the agreement. Moreover, I note that article

3.1.2 of the APGN provides that "[i]t is agreed that the Treaty shall not be limited to the provisions of this agreement but shall remain substantially in conformity with this agreement" Furthermore, the APGN provides that transitional measures will come into force upon the signature of the agreement. Article 19.1 stipulates, for example, that Canada and Quebec shall take "the transitional measures considered necessary to prevent any infringement of the rights and interests provided for in this agreement according to the various land allocations and socio-economic development measures agreed upon, and to prepare for the implementation of the Treaty".

[104] The applicant also contends that the signature of the APGN had had immediate repercussions and resulted in a series of negative consequences for the Huron-Wendat Nation. Accordingly, the applicant submits that the respondent had immediately consulted the Innu communities involved before authorizing the transfer of land apparently required by a request to expand Wendake, and that Quebec allegedly refused to consult it regarding a forest management unit on the ground that it was included in the territory covered by the APGN. The applicant also alleges that the signature of the APGN had hardened relations between the Huron-Wendat and Innu and increased the number of conflicts between the two Nations with respect to moose hunting in the Laurentian wildlife sanctuary. The applicant also contends that the practice of its traditional activities is hindered because the government of Quebec allegedly will not do anything to enforce the hunting agreement that the two parties concluded in 2002 and refuses to finalize a trapping agreement.

[105] Although the evidence adduced by the applicant in support of its claims is sparse and essentially relies on the affidavits of Grand Chiefs Sioui, Picard and Gros-Louis, it is completely credible. Indeed, it would not be surprising if the intervener Nations, based on the agreement-in-principle made with the respondent, demonstrate greater confidence in their claims and wish to ensure a greater presence on the territory covered by the APGN. Although the respondent is not responsible for the alleged actions of the provincial Crown or the Innu interveners, the fact remains that the signature of the APGN could have, at least indirectly, caused changes in behaviour. As my colleague Justice Mactavish recognized in *Sambaa K'e*, the inevitable impact that the conclusion of an agreement-in-principle between Canada and the interveners will have on ongoing negotiations between Canada and the applicant is one of many circumstances to be considered in determining the degree of the duty to consult.

[106] In light of the foregoing, I am of the view that the Crown had the duty to consult and accommodate the applicant before signing the APGN, given that the Crown knew of the existence of the Treaty of 1760 and was aware of the impact that the agreement-in-principle could have on the rights claimed by the applicant. The respondent also conceded the existence of the duty to consult before the signature of an agreement-in-principle similar to the APGN in its memorandum of April 7, 2014, thus acknowledging the judgment of my colleague Justice Mactavish in *Sambaa K'e*.

[107] That being said, this duty was not at the highest end of the spectrum described in *Haida Nation* and certainly did not result in a requirement to obtain the applicant's consent before the agreement could be signed. Not only are the limits of the territory covered by the Treaty of

1760 that might be infringed by the APGN not yet defined, but the resultant adverse impact on the applicant is also far from being irreversible. Contrary to the situation where specific projects implemented or proposed by a government could directly infringe a right (such as road construction or logging, which were at issue in *Mikisew* and *Haida Nation*), the negotiation of an agreement-in-principle does not cause irreparable harm.

[108] Nevertheless, I find that the duty to consult does not lie at the other end of the spectrum either and is not limited to the simple requirement to give notice and disclose information. Although the territory covered by the Treaty of 1760 is not yet defined, the actual existence of the Treaty and the rights it confers is not challenged. Moreover, the potential impact that a final agreement with the interveners could have on the applicant is significant, given the considerable overlap of the territories claimed by both sides. Thus, we find ourselves between the two ends of the spectrum, and the issue to be settled is whether, in light of all the circumstances of this case, the Crown has met its duty to preserve its honour by taking into account not only the interests of the community and those of the Aboriginal peoples, but also by reconciling the opposing interests of the applicant and the interveners.

[109] While acknowledging its duty to consult when she concludes an agreement-in-principle with an Aboriginal nation, the respondent invited the Court to consider the state of the law at the time of the signature of the APGN on March 31, 2004. The respondent argued that the seminal Supreme Court decisions on consultation, and particularly *Haida Nation* and *Tlingit*, had not yet been handed down. I cannot agree with that argument.

[110] The duty to consult is grounded in the honour of the Crown. This is not a new principle and it has been an underlying concept governing treaty interpretation for many years: *Mikisew*, at para 51. It is true that *Haida Nation* set out with greater precision the extent and scope of the duty to consult. However, in doing so the Supreme Court was not establishing a new concept, but did so based on what it had already written on the subject in decisions such as *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385, *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658 and *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648, discussed in *Haida Nation* at paras 20-23. Indeed, the key components of the principles that emerged from *Haida Nation* had already been anticipated in *Delgamuukw*, specifically at paragraph 168:

> ... Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue - In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[111] Thus, I believe that the Crown's duties when the APGN was signed were sufficiently known and explicit for the Crown to be bound by them, and that the subsequent decisions of the Supreme Court in this area did not radically change the applicable law. Consequently, it is in

light of all the Supreme Court jurisprudence that I will review the applicant's submissions that the Crown failed in its duty to consult and accommodate.

[112] In its amended application dated September 25, 2013, the applicant alleges that the respondent failed to meet its obligations on three occasions: (1) by refusing to consult, accommodate and obtain the applicant's consent before the APGN was signed; (2) by refusing to begin meaningful negotiations following the order of this Court dated October 8, 2010; and (3) by refusing to issue a negotiation mandate for the renewal or contemporary confirmation of the Treaty of 1760. I will now address each of these claims.

[113] As mentioned in the chronology of events that preceded this application for judicial review, it is undeniable that there were many negotiations between the applicant and the respondent regarding land claims and self-government of the Huron-Wendat Nation during the 1990s and 2000s. In contrast, no evidence was adduced of any consultation with the applicant prior to the signing of the APGN. Moreover, the respondent did not try to claim the contrary, and merely asked the Court not to grant the declaration sought by the applicant at paragraph 18.f.i of its amended notice of application, specifically a declaration stating that the Crown breached the honour of the Crown by concluding the APGN without consulting, accommodating and receiving the consent of the applicant (this claim for relief is reproduced at paragraph 44 of these reasons). I will discuss this aspect of the issue further below. For the moment, it is enough to note that the respondent clearly did not meet the minimal duty that lies on the Crown when the claim is weak or the risk of infringement is very low, specifically the duty to inform the applicant, disclose information and discuss any questions raised by the APGN with it. Under

these circumstances, I cannot find that the Crown acted honourably and in such a way that took the applicant's concerns into consideration. In fact, I could go so far as to conclude that the applicant was misled or, at least, given a false sense of confidence by a map published by the Department of Natural Resources entitled "Treaties and Comprehensive Land Claims in Canada", which makes no mention of the south-west portion of the territory covered by the APGN.

[114] It is true that the applicant took almost five years before filing its application for judicial review, and that it still has not filed its comprehensive land claim, despite a large amount of funding from the respondent to enable it to carry out historical and anthropological research. Nevertheless, this is not enough to absolve the failings of the Crown. Moreover, Grand Chief Wellie Picard wrote to the Minister on July 22, 2004, informing him of his concerns and requesting a meeting to discuss them, and it was clearly not unreasonable to try negotiations for a certain amount of time before turning to the Courts. The applicant probably would have helped its cause by moving more quickly on the renewal of the Treaty of 1760, but that does not justify the total lack of consultation before the APGN was signed.

[115] Now we will address the period following this Court's order of October 8, 2010. The least that can be said is that the parties clearly had a different understanding of the context for the granting of the *sine die* adjournment of the hearing on the merits of this application for judicial review that was supposed to begin on October 12, 2012, and of the commitments that were allegedly made at the time.

[116] The applicant, through the affidavit affirmed by Grand Chief Sioui on June 27, 2013, contends first of all that it was forced to agree with a motion to stay the proceedings before any discussions with the respondent would be held. It also alleges that the engagement process regarding the Treaty of 1760 was [TRANSLATION] "grounded" in the order of October 8, 2010, and that Canada's failure to recognize a link between the stay of the hearing and the engagement process regarding the Treaty in itself brings dishonour upon the Crown.

[117] A careful review of the correspondence prior to the stay of the hearing and the exchanges and discussions that occurred in the subsequent two years does not validate this interpretation of the events. Not only is it incorrect to claim that the federal government insisted that the proceedings be stayed in order to begin discussions, but it does not seem that the respondent had already decided on the actions that would eventually be chosen and implemented to find an alternative method to resolve the dispute that is the subject of the judicial review. In response to the applicant's offer to stay the proceedings in order to commence negotiations, the Senior Assistant Deputy Minister for Treaties and Aboriginal Government wrote the following:

> [TRANSLATION]
> ... Thank you for proposing a negotiation process. However, we are not able at this time to respond to it as you propose in your letter of August 27, 2010, since in the federal government, the Cabinet retains the prerogative to approve mandates to negotiate rights protected by section 35 of the *Constitution Act, 1982*.
>
> Moreover, Canada prefers holding discussions or negotiations without the constraints imposed by a legal proceeding and without prior conclusions on the results of the process. Accordingly, Canada would be ready to meet with you to better understand the nature of your interests and to discuss processes associated with our programs and policies.
>
> We are aware that the issue of the overlap of the claimed territories will have to be reviewed before a treaty is concluded with the Conseil tribal Marmuitun mak Nutakuan. In this regard, Canada is

> ready to facilitate discussions between the Huron-Wendat Nation and the Conseil tribal Mamuitun mak Nutakuan regarding overlapping territories between the two Nations. We would also like to reiterate that Canada will comply with its duty to consult and that a possible treaty with the Conseil tribal Mamuitun mak Nutakuan will not change the rights claimed by the Huron-Wendat Nation.
>
> However, Canada is not ready at this point to agree to exclude Nionwentsïo, or any part of it, in negotiations with the Conseil tribal Mamuitun mak Nutakuan, since that would imply a presumption that the boundaries and the nature of the rights on this territory have already been agreed upon with the Huron-Wendat Nation, and thus exclude any residual right, or even any activity, that the Conseil tribal Mamuitun mak Nutakuan could wish to negotiate on a part of the Nionwentsïo territory.

[118] Thus, I cannot allow the application for a declaration that the Crown breached its duty of good faith towards the applicant based only on the fact that she refuses to acknowledge a link between the stay of the proceedings and the creation of a Discussion Table. The only commitment made by the respondent was to meet with the applicant in order to better understand the nature of its interests and to discuss the processes associated with her programs and policies.

[119] Moreover, I am not convinced that the respondent engaged in sharp dealing during the discussions that were held until she decided to end them in December 2012. First, I agree with the respondent that the Discussion Table was established to deal with issues that had clearly been separated from the debate in this application for judicial review: identifying the substantive rights arising from the Treaty of 1760, as well as the territory that those rights apply to. The objective was [TRANSLATION] "to develop a common perspective on the meaning of the Treaty of 1760 and its current application" (Memorandum of Understanding, Exhibit 5 to the affidavit

of Martin Desrosiers, Respondent's Supplementary Record regarding the applicant's amendments).

[120] Furthermore, there is nothing that would lead us to believe that the initiative to set up the Discussion Table was taken in bad faith or that the representatives of the Crown played a [TRANSLATION] "passive role" in the engagement process. The parties agreed on a work plan, $100,000 in funding was granted to the applicant to enable it to effectively participate in the process and about twenty meetings were held between the summer of 2011 and December 2012. It is not possible to reveal the content of the discussions given the confidentiality undertakings made by both parties, and thus we must rely on the actions during the process to assess the good faith of the parties. In this regard, nothing would lead us to believe that the respondent did not fulfil its obligations seriously and diligently. Consequently, I cannot allow the applicant's application for a declaration that the respondent acted in bad faith when participating in these discussions (paragraph g.ii of the amended notice of application).

[121] It is true that the respondent had acknowledged that the work resulting from the Discussion Table could [TRANSLATION] "enable Canada, if necessary, to begin the process of obtaining a formal negotiation mandate to resolve the issues related to the Treaty" (Memorandum of Understanding, Exhibit 5 to the affidavit of Martin Desrosiers) and considered the exercise to be of real and significant importance. Nevertheless, we cannot deduce from the respondent's refusal to begin the process of obtaining a formal negotiation mandate that she breached her duty. The duty to consult does not imply a duty to reach agreement as the Supreme Court noted in *Tlingit* at paras 2 and 22. If it were otherwise, the Aboriginal group would be

given indirectly a right to veto: *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 29, [2013] 2 SCR 227; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 81-88, [2010] 3 SCR 103. The respondent could legitimately come to the conclusion that it was premature to begin the process of obtaining a formal negotiation mandate since the positions of the parties were too disparate with respect to the significance and scope of the Treaty. It is settled law that neither the Crown nor an Aboriginal group is obliged to participate in a treaty negotiation process. This process is voluntary, it has policy considerations and cannot be ordered by a court: *Ross River Dena Council v Canada (Attorney General)*, 2012 YKSC 4 at para 157, [2012] 2 CNLR 276; *Mohawks of the Bay of Quinte v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669 at para 48, [2013] FCJ No 741; *Aundeck Omni Kaning v Canada* (January 17, 2014), 2014 SCTC 1 at para 87, on-line: SCTC ‹http://www.sct-trp.ca›.

[122] Finally, I note that the governments of Canada and Quebec sent an invitation to Grand Chief Sioui on March 20, 2013, to discuss a process for consulting the First Nations who are claiming rights on the disputed territory and who would suffer adverse impacts following the conclusion of a treaty (Exhibit 7 to the affidavit of Nathalie Aubin, Respondent's Supplementary Record regarding the applicant's amendments, p 125). That invitation was reiterated in the letters of June 11 and 14, 2013 (Exhibits 9 and 10 to the same affidavit), which is evidence that the Crown still wanted to discuss accommodations and also wanted to encourage the Aboriginal Nations to discuss among themselves to find common ground. The applicant has the right to refuse to participate in that process since it puts it on equal footing with the other Nations that could be affected, but in doing so it makes it difficult for it to attack the respondent's good faith, even more so since it also refused an offer to conclude a self-government agreement.

IV. Conclusion

[123] For the reasons set out above, I am of the view that the respondent breached the honour of the Crown by signing the APGN with the interveners without truly consulting or accommodating or even informing the applicant. The applicant is entitled to obtain a judicial declaration to that effect, as long as it is not moot.

[124] This obviously does not mean that the APGN *per se* will be declared invalid, since it is an agreement-in-principle and a political commitment without legal effect. Article 3.1.3 explicitly states that this agreement does not create legal obligations binding the parties. Moreover, the applicant did not request this relief..

[125] That being said, the Crown's duty of good faith extends to all the steps in the process that may lead to the conclusion of a treaty with the interveners. The level of consultation and accommodation required will vary depending on the circumstances and will naturally increase as the parties get closer to signing an instrument that has legal effect and that might adversely impact the applicant. As the Supreme Court wrote in *Haida Nation*, at para 45, "the level of consultation required may change as the process goes on and new information comes to light".

[126] It does not follow that there is an obligation of result. In its amended application for judicial review, the applicant seeks in particular an order in the nature of *mandamus* to prevent the conclusion of a treaty or any other agreement between the respondent and the interveners, as

well as the First Nation of Nutashkuan, involving the territory claimed by the applicant, without the applicant's prior consultation and consent (para 18(h)). No such order is warranted.

[127] We are not in one of the exceptional circumstances that the Supreme Court referred to in *Delgamuukw*, where the rights of an Aboriginal nation are clearly established and the proposed action would undeniably have adverse and irreversible effects. The Supreme Court has often repeated that the duty to consult and accommodate does not mean that an agreement has to be reached:

> ... Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached…. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.
>
> *Haida Nation*, at para 42.

[128] It would be unacceptable to allow the applicant to thwart almost 30 years of negotiations between the respondent and the interveners and veto the conclusion of a treaty for the sole reason that the territory on which it claims rights was not completely excluded from the scope of the treaty. After all, the respondent also has duties towards the interveners. What is most important is that the applicant's positions be considered, that true consultations be held and that sincere efforts be made to reach a compromise that is acceptable to all parties. In this respect, the respondent may properly encourage the applicant and the interveners to hold discussions in order to seek common ground; these discussions between Aboriginal Nations, although desirable, cannot, however, relieve the Crown of its duty to act in good faith by ensuring that the rights and

interests of all the parties are carefully reviewed and that every effort is made to accommodate them.

[129] However, many of the declarations sought by the applicant actually involve recognizing rights arising from the Treaty of 1760. In this respect, the applicant seeks a declaratory judgment on the territorial scope of the Treaty of 1760 and even asks the Court to issue a *mandamus* against the respondent to force her to confirm and renew the Treaty (see paras 18(b), (d), (e), (f), (g), (h) and (i)). These types of declarations would not be appropriate in the context of an application for judicial review. These issues must be settled under the *Comprehensive Land Claims Policy*.

[130] Last, the applicant seeks costs on a solicitor and client basis. Such costs are awarded only in exceptional situations, where one party has displayed reprehensible, scandalous or outrageous conduct . The applicant has not adduced any evidence of that in this case. The fact that the respondent disagrees with the applicant's position on the level of consultation and accommodation required by the honour of the Crown is not the type of behaviour that an award of solicitor-client costs is intended to sanction. Consequently, I find that the applicant is entitled only to costs in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

THIS COURT DECLARES, ORDERS AND ADJUDGES AS FOLLOWS:

1. This application for judicial review is allowed in part, in that Canada did not meet its duty to consult and accommodate the Huron-Wendat Nation before signing the APGN with the interveners and the government of Quebec on March 31, 2004;
2. Canada must commence without delay meaningful and substantial discussions with the applicant in order to reconcile, to the greatest extent possible and in a manner consistent with the honour of the Crown, the differences between the Huron-Wendat Nation and the First Nations of Mashteuiatsh and the Innu of Essipit regarding the territory that the APGN should cover. The applicant must also participate in these discussions in good faith by avoiding conduct that would unduly delay the conclusion of a treaty between the respondent and the interveners;
3. The other relief sought by the applicant is dismissed.
4. The applicant is entitled to its costs in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98-106.

"Yves de Montigny"
Judge

Certified true translation
Monica F. Chamberlain, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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