Federal Court of Appeal  Cour d'appel fédérale

Date: 20230724

Dockets: A-280-21
A-281-21
A-284-21

Citation: 2023 FCA 163

CORAM: **PELLETIER J.A.**
STRATAS J.A.
RIVOALEN J.A.

Docket: A-280-21

BETWEEN:

ROSEAU RIVER FIRST NATION

Appellant

and

THE ATTORNEY GENERAL OF CANADA, MANITOBA HYDRO and CANADIAN ENERGY REGULATOR

Respondents

Docket: A-281-21

AND BETWEEN:

LONG PLAIN FIRST NATION

Appellant

and

THE ATTORNEY GENERAL OF CANADA, MANITOBA HYDRO and CANADIAN ENERGY REGULATOR

Respondents

Docket: A-284-21

AND BETWEEN:

CHIEF JIM MAJOR on his own behalf and on behalf of ANIMAKEE WA ZHING #37 FIRST NATION

Appellant

and

ATTORNEY GENERAL OF CANADA and MANITOBA HYDRO

Respondents

and

CANADIAN ENERGY REGULATOR

Intervener

Heard at Winnipeg, Manitoba, on November 1 and 2, 2022.

Judgment delivered at Ottawa, Ontario, on July 24, 2023.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants each appeal from the judgment of the Federal Court (*per* McVeigh J.): 2021 FC 990. The Federal Court dismissed the appellants' applications for judicial review of Order in Council 2019-0784. The Order in Council directed the National Energy Board to issue a Certificate of Public Necessity and Convenience for the Project.

[2] The Project is an international transmission line crossing Treaty 1 territory. The appellants, Roseau River and Long Plain, are signatories to Treaty 1. The appellant, Chief Jim

Major on his own behalf and on behalf of Animakee Wa Zhing (hereafter Animakee Wa Zhing) is also affected by the Project. The appellants challenged the adequacy of Canada's consultation for the Project and the reasonableness of the Governor in Council's decision to make the Order in Council.

[3] The appellants now appeal to this Court, seeking, among other things, to set aside the judgments of the Federal Court and quash the Order in Council.

[4] For the following reasons, I would dismiss the appeals. These reasons shall be filed in A-280-21 and a copy shall be filed in each of A-281-21 and A-284-21.

[5] At all material times, Canada has acknowledged that it owed a deep duty to consult with potentially impacted Indigenous groups, including the appellants, before deciding upon the Project. Canada heavily relied upon a thorough National Energy Board process to satisfy the duty. That process, in turn, relied upon much of the evidence tendered in a parallel Manitoba review process conducted under provincial law.

[6] After the hearings before the National Energy Board, Canada engaged in supplemental consultations with Indigenous groups. Twice, the Governor in Council extended the statutory deadline for its decision on the Project so the consultations could continue. In the end, the National Energy Board imposed 28 conditions, as amended later by the Governor in Council. Many of these address Indigenous concerns raised during the consultation.

[7] Construction for the Project started in September 2019, was completed in July 2020, and the Project is now in operation.

A. The methodology in cases such as this

[8] In a number of cases, this Court has reviewed processes for consultation that culminate in a final administrative decision by the Governor in Council. This Court's methodology has been to review the Governor in Council's decision in two separate steps:

(1) Examining the Governor in Council's compliance with administrative law principles: *i.e.*, assessing for substantive defects under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 and assessing for procedural defects under *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

(2) Examining the Crown's compliance with duty to consult principles under section 35 of the *Constitution Act* and the honour of the Crown: *i.e.*, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

On (1), the issue of the existence or scope of the duty to consult is reviewed for correctness. In these appeals, the appellants do not raise any issues concerning the existence or scope of the duty to consult. On all other issues under (1), the standard of review is reasonableness: *Coldwater First Nation v. Canada*, 2020 FCA 34, [2020] 3 F.C.R. 3 at paras. 26-27.

[9] The appellant Animakee Wa Zhing submits that the adequacy of consultation should also be reviewed on a standard of correctness. On the basis of *Coldwater First Nation*, this submission cannot be accepted.

[10] Overall, on both issues, for the reasons that follow, I am substantially in agreement with the conclusions and reasons of the Federal Court.

B. Administrative law principles

[11] The Federal Court properly found that the Order in Council was reasonable in an administrative law sense. The Order in Council was founded upon two statutes, the *National Energy Board Act*, R.S.C. 1985, c. N-7 (specifically s. 58.16) and the *Canadian Environmental Assessment Act*, S.C. 1993, c. 37 (specifically the finding that the Project is not likely to cause significant adverse environmental effects).

[12] In this Court, the appellants do not dispute that the Governor in Council had the statutory authority to issue the Order in Council nor do they suggest that the Governor in Council contravened any aspects of the legislative regimes. Instead, they contest the reasonableness of the Order in Council on its merits.

[13] The Order in Council approving the Project is founded upon a public interest determination based on wide considerations of policy. In making the Order in Council, the Governor in Council assessed polycentric, subjective, amorphous and indistinct criteria, applying

its view of economics, cultural considerations, and societal costs and benefits. The Governor in Council is "'to a unique degree the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation' and, by convention, it attempts to represent different geographic, linguistic, religious and ethnic groups" so it is well placed to assess the public interest and has a broad discretion in doing so: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 at para. 77 citing Norman Ward, *Dawson's The Government of Canada*, 6th ed. (Toronto: University of Toronto Press, 1987) at 203-204; Richard Schultz, Orest M. Kruhlak and John C. Terry, eds., *The Canadian Political Process*, 3rd ed. (Toronto: Holt Rinehart and Winston of Canada, 1979) at 393-394; see also *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418. Such an administrative decision by this sort of decision-maker is often called "quintessentially executive in nature" and "very much unconstrained": *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 at para. 28, aff'd 2022 SCC 30, 471 D.L.R. (4th) 391 at paras. 142-143.

[14] In words apposite to the reasonableness of the Order in Council before us, this Court stated:

> …[B]y vesting decision-making in the Governor in Council, Parliament implicated the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government. And by defining broadly [the nature of this decision]…literally anything relevant to the public interest…Parliament must be taken to have intended that the decision in issue here be made on the broadest possible basis, a basis that can include the broadest considerations of public policy.

(*Gitxaala Nation* at para. 144.)

[15] The Governor in Council took into account a variety of information and recommendations loaded with economic, social, Indigenous, environmental, cultural and other diffuse, fuzzy, polycentric, and policy-laden considerations: *Gitxaala Nation* at paras. 148-149; *Canada v. Kabul Farms Inc.*, 2016 FCA 143, 13 Admin LR (6th) 11 at para. 25. It concluded that "the Project would increase electricity market efficiency, add greater flexibility to Manitoba's electricity system operator to meet changing energy needs, improve power system reliability, and provide benefits to Indigenous, local, regional and the provincial economy". Given the large margin of appreciation we must accord to the Governor in Council when it makes this sort of public interest decision, the Order in Council must be found reasonable on its merits. The outcome, expressed and explained in the Order in Council itself, the reasons of the National Energy Board, and the Crown-Indigenous Consultation and Accommodation Report—totalling hundreds of pages—shows justification, transparency and intelligibility. The outcome was open to the Governor in Council.

[16] It was reasonable for the Governor in Council to rely upon the process before the National Energy Board to consult and, where warranted, accommodate Indigenous groups.

[17] It is well-established that the Governor in Council and, more widely, the Crown, may rely on steps undertaken by a regulatory agency to fulfil its duty to consult in whole or in part and, where possible and appropriate, accommodate. This assumes that the regulatory agency to which the Crown delegates responsibility has the ability to exercise functions under its governing legislation that will fulfil what the duty to consult requires in the circumstances: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 at paras. 30-34;

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650 at paras. 55 and 60.

[18] This was the case here.

[19] However, the involvement of an agency does not relieve the Crown or entities such as the Governor in Council from their obligation to assess the adequacy of the consultation: *Clyde River* at para. 22; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 at para. 493. The Governor in Council was aware of the nature of the National Energy Board's process and had the reasons of the National Energy Board before it, but the Governor in Council had to make its own assessment of adequacy.

[20] It is well-established that the National Energy Board's process can fulfil much of the duty to consult due to its procedural powers, its technical expertise, and its remedial powers to make accommodation a reality where warranted: *Clyde River* at paras. 20-34; *Bigstone Cree Nation v. Nova Gas Transmission*, 2018 FCA 89, 16 C.E.L.R. (4th) 1 at para. 50; *Tsleil-Waututh Nation* at para. 491.

[21] In this case, the National Energy Board process provided a forum for all potentially impacted groups to participate, receive and test information, receive funding, and make submissions about their concerns and how their concerns could be accommodated. The Governor in Council had no indication that the National Energy Board process was deficient or that the Board was not attentive to the issues before it. Far from it. Among other things, at the end of its

reasons the Board set out a lengthy summary of Indigenous concerns and its responses to them. It also imposed 28 conditions on the Project.

[22] When assessing the administrative law acceptability of the Order in Council in this case, this Court must be satisfied that the Governor in Council properly considered the Indigenous interests and the adequacy of the consultation and accommodation up to the date of the Order in Council. The Order in Council itself shows that Indigenous interests and the adequacy of the consultation and accommodation were front and center in the Governor in Council's consideration:

> Whereas the Governor in Council, having considered Indigenous concerns and interests identified in the Crown's consultation report…is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated, including by amending some of the terms and conditions set out in Appendix III of the Board's Report…

[23] The words of this Court in *Bigstone Cree Nation* at para. 67 are apposite here. It considered similar text in an order in council and found that there was "no room for ambiguity": the Governor in Council "considered its obligation to consult and, if necessary accommodate" and concluded that "it has fulfilled that obligation".

[24] This case is very similar to *Coldwater First Nation* where the Governor in Council engaged in a thorough review and assessment following a thorough review and assessment by the National Energy Board. As in *Coldwater First Nation*, its assessment that the Crown had

fulfilled the duty to consult is reasonable. The appellants have failed to persuade me that the Governor in Council unreasonably considered the duty to have been fulfilled.

[25] Overall, for the foregoing reasons, the Governor in Council's decision to enact the Order in Council was reasonable in an administrative law sense. This conclusion is bolstered by the analysis that follows.

C. The duty to consult

[26] Notwithstanding the reasonableness of the Order in Council in an administrative law sense, this Court must now assess whether the Crown satisfied the duty to consult based on the honour of the Crown and section 35 of the *Constitution Act, 1982*.

[27] Canada's duty to consult is grounded in a key principle: the honour of the Crown. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Indigenous right or title that is protected by s. 35 of the *Constitution Act, 1982* and contemplates conduct that might adversely affect those matters: *Haida Nation* at para. 35.

[28] The duty to consult varies according to the strength of the asserted claim and the seriousness of the potential adverse impact of the contemplated conduct: *Haida Nation* at para. 39. The duty has both informational and response components.

[29] At the upper end of the duty, which Canada acknowledges is owed here, the informational component requires the Crown to provide timely notice to Indigenous groups and engage directly with them so they have a chance to express their interests and concerns: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 64. The Crown must make a genuine effort to ascertain and take into account their key concerns. It must also provide information about what the Crown knew to be their interests and what the Crown anticipated might be the potential adverse impact on their interests.

[30] The response component requires the Crown to allow Indigenous groups to formally participate in the decision-making process, solicit and listen carefully to the groups' concerns and attempt to minimize the adverse impacts. In doing this, it must consider and sometimes agree to accommodations or, alternatively, give reasons on why accommodations will not be made: *Haida Nation* at paras. 44-47; *Coldwater First Nation* at para. 76. This can lead to further consultation: *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099 at para. 60.

[31] In fulfilling these duties, the Crown is not held to a standard of perfection: *Coldwater First Nation* at para. 54.

[32] As well, obligations exist on both sides. The process is a "two-way street": *Haida Nation* at para. 48; *Coldwater First Nation* at para. 58; *Pimicikamak et al v. Her Majesty the Queen in Right of Manitoba et al*, 2016 MBQB 128, 267 A.C.W.S. (3d) 751 at para. 44. Indigenous groups must carry out their end of the consultation, make their concerns known, respond to the

government's attempt to meet their concerns and suggestions, and try to reach some mutually satisfactory solution: *Mikisew Cree First Nation* at para. 65. Indigenous groups fall short when they fail to engage in good faith, refuse to meet, unreasonably impose conditions during the consultation process, make unreasonable refusals, engage in tactical delays, consult only on their own terms, or maintain intractable or confrontational positions: *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 at paras. 39, 45 and 50-55; *Coldwater First Nation* at para. 55; *R v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 at para. 39; *Bigstone Cree Nation* at para. 43. Indigenous groups are not entitled to a one-sided process. Nor are they entitled to a "veto": *Haida Nation* at paras. 62-63; *Coldwater First Nation* at paras. 53-55; *Gitxalla Nation* at para. 179; *Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350 at para. 56. Overall, a process of give and take is required: *Coldwater First Nation* at para. 58.

[33] In this case, much of the consultation took place within the National Energy Board process. As mentioned above, this was a satisfactory way to proceed in fulfilment of the duty.

[34] Overall, the Court must view the consultation process as a whole to see if there were reasonable efforts to inform, consult, and accommodate: *Haida Nation* at para. 62; *Bigstone Cree Nation* at paras. 34 and 76. The focus is on the process and whether reasonable efforts were made, and not on the substantive outcome: *Coldwater First Nation* at paras. 29 and 53. Similarly, it is not for the court to delve into the often scientific and technical task of determining whether accommodations will be effective. Rather, accommodations should be seen as "settlement[s] or

compromise[s]" that try to "harmonize conflicting interests and move further down the path of reconciliation": *Haida Nation* at para. 49.

[35] Perfection is not required and some errors and omissions in the fulfilment of the duty can be tolerated: *Haida Nation* at para. 62; *Bigstone Cree Nation* at paras. 34 and 49.

[36] I will now examine in considerable detail the consultation involving each of the appellants.

(1) Animakee Wa Zhing

[37] The evidence shows that the informational and response components of the duty to consult with Animakee Wa Zhing were fulfilled in accordance with the above principles.

[38] On January 19, 2016, Animakee Wa Zhing first received information about the consultation in a letter sent by Manitoba. The letter informed Animakee Wa Zhing of the nature of the project, Manitoba and Canada's respective roles in the project, and the plan for the Crown consultation process, which included information sharing: Tab 49, Vol. 2, Exhibit 61 of Labelle Affidavit, Appeal Book, Tab F, pp. 7447-7449.

[39] On June 13, 2017, the National Energy Board sent a letter to Animakee Wa Zhing providing additional information on the potential impacts of the Project and the Participant

Funding Program: Tab 51, Vol 2, Exhibit 64 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7512-7516.

[40] On July 7, 2017, Manitoba Hydro provided Animakee Wa Zhing with a project description, a map of the proposed project route, and a notice that all relevant documents from the province, including transcripts, were filed with the National Energy Board and were available on the Board's website: Tab 73, Vol. 2, Exhibit A of the Major Affidavit, Appeal Book, Tab E, pp. 295-306.

[41] A July 2017 letter from Manitoba Hydro was the first of a long series of letters, voicemails, and emails between that entity and Animakee Wa Zhing. In the Federal Court, Manitoba Hydro provided a detailed summary detailing dates, modes of communication, and the substantive issues discussed, including general and site-specific concerns raised by the First Nation in the course of that correspondence: Tab 50, Vol. 2, Exhibit 63 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7501-7511.

[42] Manitoba Hydro made funding available to Animakee Wa Zhing and set up a traditional knowledge study, which Animakee Wa Zhing acknowledges that they received in April 2018: Tab 72, Vol 2, Major Affidavit, Appeal Book, Tab H, p. 265, para. 39.

[43] On January 31, 2018, Animakee Wa Zhing applied to become an intervener in the National Energy Board process: Tab 53, Vol 2, Exhibit 66 of the Labelle Affidavit, Appeal

Book, Tab F, pp. 7521-7524. The Board granted the application in a letter filed February 14, 2018: Tab 47, Vol. 2, Exhibit 49 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7004-7008.

[44] On May 4, 2018, Canada notified Animakee Wa Zhing that it was relying on the Board process to satisfy the duty to consult: Tab 54, Vol. 2, Exhibit 64 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7525-7530. The National Energy Board informed Animakee Wa Zhing of that reliance in two letters: Tab 66, Vol. 2, Exhibit 236 of the Labelle Affidavit, Appeal Book, Tab F, pp. 9797-9799; Tab 67, Vol. 2, Exhibit 238 of the Labelle Affidavit, Appeal Book, Tab F, pp. 9804-9805. These satisfied the notice requirement in *Chippewas* at para. 44, *Clyde River* at para. 23, and *Bigstone Cree Nation* at para. 50.

[45] Animakee Wa Zhing received $80,000 as a part of the National Energy Board's Participant Funding Program: Tab 37, Vol. 2, Labelle Affidavit, Appeal Book, Tab F, p. 5293, para. 102.

[46] On June 11, 2018, Animakee Wa Zhing made written submissions to the National Energy Board asking for review and variance of a project-related ruling: Tab 58, Vol. 2, Exhibit 79 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7686-7698. Though the Board ruled against the variance, it provided Animakee Wa Zhing with the opportunity to cross-examine witnesses in the hearing: Tab 71, Vol. 2, Exhibit 2, Board Hearing Transcript, Appeal Book, Tab H, pp. 12045-12067. Animakee Wa Zhing had further opportunities to present written arguments to the Board on relevant issues: Tab 60, Vol. 2, Exhibit 83 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7810-7815. The Board's process concluded only after Animakee Wa Zhing had ample

opportunity to engage with the issues. This accorded with the standards set out in *Mikisew Cree First Nation*, above.

[47] On August 14, 2018, Canada started a process of supplemental consultation. It offered funding, starting at $9,000, to support First Nations participation. Canada followed up with numerous calls and emails. See Tab 37, Labelle Affidavit, Appeal Book, Tab F, paras. 119-144; Tab 61, Vol. 2, Exhibit 86 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7827-7830.

[48] On November 8, 2018, Animakee Wa Zhing replied to Canada's invitation, reiterating concerns that it had expressed through the National Energy Board's process, expressing concern over the scope of the process, appending its list of outstanding issues, and proposing future meeting dates: Tab 62, Vol. 2, Exhibit 88 of the Labelle Affidavit, Appeal Book, Tab F, pp. 7822-7887.

[49] Canada engaged directly with Animakee Wa Zhing throughout the supplemental consultation. It has provided a detailed consultation log, noting where two issues of concern to Animakee Wa Zhing—moose and Lake of the Woods water levels—were discussed: Tab 37, Labelle Affidavit, Appeal Book, Tab F, paras. 119-144; Tab 38, Vol. 2, Exhibit 87, Appeal Book, Tab F, pp. 7868-7881.

[50] On March 22, 2019, Animakee Wa Zhing received a draft Annex of the Crown-Indigenous Consultation and Accommodation Report, and was afforded the opportunity to

provide final comments. It did so by May 17, 2019: Tab 38, Vol. 2, Exhibit 87, Appeal Book, Tab F, pp. 7868-7881, consultation log entries 862 and 1403.

[51] Of particular concern to Animakee Wa Zhing is the effect of the Project on the treaty right to hunt moose. In this Court, Animakee Wa Zhing disputes the adequacy of the Crown consultation on the treaty right to hunt moose. Before the National Energy Board, Animakee Wa Zhing presented traditional evidence.

[52] The Board examined the concern that the Project would impact on asserted and established treaty and Indigenous rights, including hunting and trapping, and concluded that "[p]roject impacts on the interests, including rights, of affected Indigenous peoples are not likely to be significant and can be effectively addressed": Tab 39, Vol. 2, Exhibit 103 of the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 8023; Board Reasons section 8.7.10. The Board noted that Manitoba Hydro scheduled Project construction outside of sensitive time periods to limit the risk of disturbance to wildlife species.

[53] The Board also examined the concern that the Project would impact the current use of lands and resources for traditional purposes, including hunting, fishing, gathering, and trapping. It concluded that "the potential adverse effects of the Project on the current use of and [*sic*] resources for traditional purposes by Indigenous Peoples are temporary and not likely to be significant": Board Reasons sections 8.7.7, 8.7.8. The Board imposed Condition 11, which required Manitoba Hydro to submit a plan for completing Indigenous Knowledge Studies and describing how Manitoba Hydro revised its CEPP as a result of those studies. See Tab 39, Vol. 1,

Exhibit 9 of the Labelle Affidavit, Appeal Book, Tab F, p. 5725; Board Reasons sections 8.7.7, 8.7.8.

[54] The National Energy Board found that Manitoba Hydro's methodology in its Environmental Impact Statement, including its selection of valued components, accorded with provincial and federal guidance documents: Tab 39, Vol. 1, Exhibit 9 of the Labelle Affidavit, Appeal Book, Tab F, p. 5724; Board Reasons section 8.7.5.

[55] The Board examined Manitoba Hydro's Environmental Protection Program in granular detail and imposed Condition 10 (requiring Manitoba Hydro to file an updated Program) and Condition 23 (requiring Manitoba Hydro to file post-construction monitoring reports with the Board annually): Tab 5, Vol. 1, Exhibit 9 of the Labelle Affidavit, Appeal Book, Tab F, pp. 5720-21, 5732. The Board did not impose additional informational requirements for the Program because "the mitigation measures to be implemented for the Project are based on extensive assessment of the Project's potential adverse environmental effects, learnings from past projects, are sufficiently detailed to ensure that the environment will be adequately protected, and include measures and processes to address most concerns raised by participants": Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5683.

[56] During supplemental consultation, Animakee Wa Zhing expressed concern regarding the impact of the Project on the struggling moose population and requested accommodations in the form of a Moose & Moose Habitat Management Plan, an assessment of the potential impacts of

the Project on moose, and economic compensation: Tab 39, Vol. 2, Exhibit 103 of the Labelle Affidavit, Appeal Book, Tab F, pp. 8035-40.

[57] In the Crown-Indigenous Consultation and Accommodation Report, Canada rejected Animakee Wa Zhing's proposed forms of accommodation. In particular, the Crown noted:

> (1) the adverse effects of the Project on moose and moose habitat were found not to be significant;
>
> (2) the federal Crown did not have jurisdictional authority to impose a Moose & Moose Habitat Management Plan on Manitoba Hydro;
>
> (3) the Board found Manitoba Hydro's selection of valued components in its Environmental Impact Statement to be satisfactory; and
>
> (4) there are no outstanding economic impacts because the potential Project impacts to moose and moose habitat will not be significant.

(Tab 39, Vol. 2, Exhibit 103 of the Labelle Affidavit, Appeal Book, Tab F, pp. 8035-40).

[58] The Crown-Indigenous Consultation and Accommodation Report also explained that Natural Resources Canada "will establish a terrestrial and cultural studies initiative to support Indigenous-led studies to improve understanding of land-based issues such as harvesting plants

on the land, hunting of land-based animals, and cultural impacts of changing the landscape and resources": Tab 39, Vol. 2, Exhibit 103 of the Labelle Affidavit, Appeal Book, Tab F, p. 8036.

[59] Another issue important to Animakee Wa Zhing is the environmental impact of the Project on the Lake of the Woods.

[60] Animakee Wa Zhing challenges the adequacy of the Crown consultation on its reserve land and territory on Lake of the Woods. There, Animakee Wa Zhing engages in traditional activities such as harvesting of rice, fishing, trapping, and hunting. It expressed a number of concerns before the Board and argues in this Court that the level of disclosure concerning the environmental impacts on Lake of the Woods was neither "deep" nor "full": Animakee Wa Zhing's memorandum of fact and law at paras. 68-70.

[61] Animakee Wa Zhing alleged that Manitoba Hydro's Environmental Impact Statement was improperly scoped and should have included the upstream effects of the Project, including the effects of the Project on the water levels on Lake of the Woods. The Board examined this. It noted that "the socio-economic and environmental impacts of water level fluctuations were ruled out of scope in the Board's Ruling 4": Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5582.

[62] The Board accepted Manitoba Hydro's evidence that the Project would not impact the water levels on Lake of the Woods: Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5641. It further noted that "water levels on Lake of the Woods are regulated by the Canadian Lake of the Woods Control Board, which the Board understands operates under legislation that describes the

operating limits for Lake of the Woods": Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5724; Board Reasons sections 3.3.4, 8.7.5. It encouraged the Canadian Lake of the Woods Control Board "to continue to seek input from all people who are affected by the water levels, both upstream and downstream of the dam, including the Indigenous communities that participated in this hearing": Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5641.

[63] The Board made three suggestions to the Governor in Council and other agencies about issues that were outside the scope of the Project but were nevertheless worthy of consideration. It suggested that "[t]he federal and provincial Crowns, together with the appropriate water boards, should assess the impact on communities and wild rice producers affected by the fluctuating water levels of Lake of the Woods": Tab 49, Vol. 2, Exhibit 61 of the Labelle Affidavit, Appeal Book, Tab F, Table 1 p. 8056.

[64] During supplemental consultation, Animakee Wa Zhing raised concerns regarding the Project's impact on water regulation and levels in the Lake of the Woods and requested accommodations in the form of: proof that the Project will not impact water regulation and levels on the Lake of the Woods, funding for an advisor to help Animakee Wa Zhing participate in meetings of the Lake of the Woods Control Board, and compensation and mediation with Manitoba Hydro should the Project impact the water regulation or levels on Lake of the Woods: Tab 39, Vol. 2, Exhibit 103 of the Labelle Affidavit, Appeal Book, Tab F, p. 8055.

[65] In the Crown-Indigenous Consultation and Accommodation Report, the Crown rejected Animakee Wa Zhing's proposed forms of accommodation because it concluded that the Project

would not impact the water levels in the Lake of the Woods. The Crown also noted it would respond to the Board's suggestion "in the spirit of reconciliation with Indigenous communities." Finally, the Crown proposed that Environment and Climate Change Canada would assess the process and context of water level regulation in the Lake of the Woods, including leading a "participative approach […] to examine and identify potential improvements to the Lake of the Woods Control Board engagement and decision-making processes": Tab 39, Vol. 2, Exhibit 103 of the Labelle Affidavit, Appeal Book, Tab F, pp. 8055-56.

[66] Overall, the evidence shows that the informational and response components of the duty to consult were fulfilled. By no means were the concerns and interests of Animakee Wa Zhing completely accommodated. But its concerns and interests were taken on board, genuinely considered through two-way dialogue, and some accommodation was made. Animakee Wa Zhing remains dissatisfied but the jurisprudence does not give it a right to a perfect outcome or a right to veto the Project. In my view, the duty to consult was fulfilled.

(2) Long Plain and Roseau River

[67] It is convenient to deal together with the appellants, Long Plain and Roseau River.

[68] The evidence shows that the informational and response components of the duty to consult with Long Plain and Roseau River were fulfilled in accordance with the above principles. Indeed, the evidence shows that Canada's consultation with these parties was comprehensive, meaningful and robust.

[69] Although Long Plain chose not to be involved in the Board's process, the record before the Board incorporated information from the Clean Environment Commission process and the Environmental Impact Statement, and thus captured the concerns of Long Plain. The Crown-Indigenous Consultation and Accommodation Report also engaged with those concerns.

[70] Roseau River was aware that Canada was relying on the Board's process, as much as possible, to fulfil its duty to consult. It was an intervener during that process and, as a result, had many opportunities to voice its concerns about potential impacts of the Project on its interests. The Board's process was thorough and detailed. But Canada also engaged in supplemental consultation after the Board's process had completed.

[71] The evidence shows that Roseau River's concerns and interests were carefully considered and, where appropriate, mitigated through commitments made by Manitoba Hydro and conditions imposed by the Board. The Crown-Indigenous Consultation and Accommodation Report engaged with the concerns and interests of Roseau River.

[72] Both Long Plain and Roseau River also made independent submissions to the Governor in Council. They both raised two concerns: impact of the Project on treaty land entitlement and economic participation and compensation. The former was reasonably accommodated through Crown land offset measures and Condition 22 while the latter was reasonably accommodated through Conditions 3 and 15, which require Hydro Manitoba to report on its compliance with Indigenous financial participation in the Project.

[73] A summary of the key evidence as it relates to Long Plain and Roseau River showing that these components of the duty to consult were met follows.

[74] On August 14, 2013, Manitoba Hydro identified Long Plain as a community that might have interest in the project. It sent a letter to Long Plain informing the First Nation of the Project and invited its participation. Long Plain expressed a willingness to engage. On April 25, 2014, Long Plain and Manitoba Hydro met to discuss engagement needs. In this meeting, treaty land entitlement effects were identified as an area of need and Long Plain sought relevant information: Appeal Book, Tab F, pp. 5981, 5985-5986.

[75] Long Plain was engaged with Manitoba Hydro through the First Nations and Métis Engagement Process and the Monitoring Committee for the Project. It participated in the Clean Environment Commission's process through participation in the ATKS Management Team, a group created by various First Nations for a joint Aboriginal traditional knowledge study, and the Southern Chiefs Organization, an organization of southern Manitoba First Nations, including Long Plain and Roseau River. Although Long Plain did not participate in the Board process as an intervener, it engaged with Canada during the supplemental consultation, relying on Manitoba Hydro and Major Projects Management Office funding: Tab 87, Vol. 3, Labelle Affidavit, Appeal Book, Tab F, pp. 5310-5311, paras. 151-152.

[76] Roseau River was engaged with Manitoba Hydro from the beginning of the consultation process through the First Nations and Métis Engagement Process and the Monitoring Committee for the Project. It participated in the Clean Environment Commission's process as a Board

intervener, participated in supplementary consultation, and received funding from all of these sources to support its involvement: Tab 115, Vol. 4, Labelle Affidavit, Appeal Book, Tab F, p. 5365, paras. 364-365. All interveners were funded, and the Board provided total funding of over $850,000: Tab 99, Vol. 3, Exhibit 9, Appeal Book, Tab F, p. 5607.

[77] On June 13, 2017, Long Plain and Roseau River were invited to the Board's process by way of letter. These letters included project summaries, discussed possible impacts on Aboriginal interest, proposed mitigation measures, and offered participant funding: Tab 97, Vol. 3, Exhibit 166, Appeal Book, Tab F, pp. 8897-9028; Tab 123, Vol. 4, Exhibit 311, Appeal Book, Tab F, pp. 10563-10567.

[78] Roseau River's site-specific and general concerns were summarized by Manitoba Hydro in a document detailing its responses, including plan modifications. This document was filed with the Board. On April 26, 2018, Manitoba Hydro sent Roseau River a document clarifying and explaining Project contracting strategy in light of the concerns the First Nation had expressed: Tab 122, Vol. 4, Exhibit 301, Appeal Book, Tab F, pp. 10458-10465.

[79] On August 15, 2018, Canada reached out to all Indigenous participants, including Long Plain and Roseau River, invited these groups to participate in supplemental consultation following the closure of the Board process, and included information about further funding: Tab 95, Vol. 3, Exhibit 137, Appeal Book, Tab F, pp. 8767-8770.

[80] On November 16, 2018, the Major Projects Management Office advised Long Plain of the release of National Energy Board's Reasons, and a number of subsequent meetings were held between the Office and a number of the participant groups to discuss the Reasons: Tab 87, Vol. 3, Labelle Affidavit, Appeal Book, Tab F, pp. 5318-5334, paras. 179-258. Further meetings emphasized funding: Tab 87, Vol. 3, Labelle Affidavit, Appeal Book, Tab F, p. 5320, para. 186.

[81] An exchange of letters focused on treaty land entitlement followed from May to November 2019: Tab 102, Vol. 3, Exhibit 191, Appeal Book, Tab 4, pp. 9157-9177; Tab 102, Vol. 3, Exhibit 206, Appeal Book Tab F, pp. 9312-9316.

[82] On March 22, 2019, the Major Projects Management Office provided the preliminary draft annexes to the Crown-Indigenous Consultation and Accommodation Report to Long Plain and Roseau River: Tab 97, Vol. 3, Exhibit 166, Appeal Book, Tab F, pp. 8897-9028; Tab 127, Vol. 4, Exhibit 337, Appeal Book, Tab F, pp. 10828-10858. The Office then solicited written submissions from the First Nations in order to ensure that their comments were reflected in the final versions that would be circulated to the relevant Ministers. On June 4, 2019, the final updated Crown-Indigenous Consultation and Accommodation Report was circulated to Long Plain and Roseau River: Tab 89, Vol. 3, Exhibit 194, Appeal Book, Tab F, pp. 9189-9249; Tab 117, Vol. 4, Exhibit 362, Appeal Book, Tab F, pp. 11077-11117.

[83] The final annexes to the Crown-Indigenous Consultation and Accommodation Report include a comprehensive list of issues raised by First Nations and Crown Responses: Tab 90,

Vol. 3, Appeal Book, Tab F, p. 6313, Table 2; Tab 118, Vol. 4, Appeal Book, Tab F, p. 6337, Table 4.

[84] I now turn to Canada's responses, in particular its attempts to address the adverse impacts on the treaty land entitlement issues raised by Long Plain and Roseau River.

[85] In this appeal, Roseau River and Long Plain raise outstanding treaty land entitlement interests: Roseau River's memorandum of fact and law at paras. 11-13 and 62; Long Plain's memorandum of fact and law at paras. 12-13, 62-64. Long Plain asserts an ongoing and outstanding treaty land entitlement interest in South Manitoba based on a settlement agreement dated August 3, 1994: Long Plain's memorandum of fact and law at para. 12. Roseau River signed a treaty land entitlement settlement agreement on March 27, 1996: Roseau River's memorandum of fact and law at paras. 11-12.

[86] Long Plain did not participate in the Board's proceedings. However, Long Plain is a member of the Southern Chiefs Organization Inc., which did participate in the proceedings. Long Plain participated in the supplemental consultation.

[87] Before the Board, Roseau River raised the concern that "building transmission lines through Crown lands reduces and encumbers lands available to fulfil [treaty land entitlements]": Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5618. The Board noted that no treaty land entitlements were crossed or directly affected by the Project route: Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5654. The Board also imposed Condition 22, which required Manitoba Hydro to

file a Crown Offset Measures Plan outlining how the permanent loss of Crown lands available for traditional use by Indigenous peoples would be offset: Appeal Book, Tab F, Vol. 2, Exhibit 9 at p. 5644.

[88] During supplemental consultation, Roseau River requested accommodations, including the appointment of a Crown negotiator, to help resolve issues related to the implementation of Roseau River's treaty land entitlements: Tab 117, Vol. 4, Exhibit 362 to the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 11097. Long Plain requested further accommodations, including Crown support for Long Plain and other Treaty 1 First Nations to acquire approximately 21,000 acres of Crown land to be converted into a national park and a ministerial review of the Additions to Reserve Policy to make the policy more efficient for the purposes of treaty lands entitlement implementation: Tab 89, Vol. 3, Exhibit 194 to the Labelle Affidavit, Appeal Book, Tab F, p. 9213.

[89] In the Crown-Indigenous Consultation and Accommodation Report, the Crown rejected Roseau River's and Long Plain's proposed forms of accommodation because it found their concerns were already reasonably accommodated as a result of the Project's routing process and commitments, Condition 22, and the Crown's proposed amendments to Condition 22: Tab 117, Vol. 4, Exhibit 362 to the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 11102; Tab 89, Vol. 3, Exhibit 194 to the Labelle Affidavit, Appeal Book, Tab F, p. 9218.

[90] The Crown viewed the implementation of treaty land entitlements as an issue distinct from the consultation process of the Project. The Crown noted that, at the time the treaty land

entitlement agreements were entered into, all parties acknowledged that there was not enough Crown land to fulfill the outstanding demand. This meant that Roseau River and Long Plain received funding to purchase fee-simple land: Tab 117, Vol. 4, Exhibit 362 to the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 11101; Tab 89, Vol. 3, Exhibit 194 to the Labelle Affidavit, Appeal Book, Tab F, p. 9217.

[91] The Crown noted that Manitoba Hydro's First Nations and Métis Engagement Program process considered general routing preferences from Indigenous communities to avoid Crown land in order to protect treaty land entitlement opportunities, and the routing for the Project was selected because "no part of the Final Preferred Route crosses reserve lands or any [treaty land entitlement] selections": Tab 117, Vol. 4, Exhibit 362 to the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 11101.

[92] Roseau River expressed a desire to select provincial Crown lands along the Project route for treaty land entitlement purposes almost six weeks after Manitoba issued a Class 3 *Environment Act* licence for the Project: Tab 117, Vol. 4, Exhibit 362 to the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 11102. Long Plain expressed a desire to select provincial Crown lands along the Project route for treaty land entitlement purposes one week after Manitoba issued a Class 3 *Environment Act* licence for the Project: Tab 89, Vol. 3, Exhibit 194 to the Labelle Affidavit, Appeal Book, Tab F, p. 9217. The Crown-Indigenous Consultation and Accommodation Report explained that, pursuant to Roseau River's and Long Plain's treaty land entitlement agreements, Crown-Indigenous Relations and Northern Affairs and the Province of

Manitoba would work with the First Nations to determine the appropriate course of action: Tab 117, Vol. 4, Exhibit 362 to the Labelle Affidavit, Appeal Book, Tab F, Table 1, p. 11102.

[93] Overall, the evidence shows that the informational and response components of the duty to consult were fulfilled. Following this long process, Long Plain and Roseau River remain dissatisfied. But their concerns and interests were taken on board, genuinely considered through two-way dialogue, and some accommodation was made. In my view, just as the Federal Court found, the duty to consult was fulfilled.

D. Proposed disposition

[94] Therefore, for the foregoing reasons, I would dismiss the appeals with costs to the Attorney General of Canada and Manitoba Hydro.

"David Stratas"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-280-21, A-281-21 AND A-284-21

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MCVEIGH DATED SEPTEMBER 24, 2021, NO. T-1141-19, T-1150-19 AND T-1442-19

DOCKET:	A-280-21
STYLE OF CAUSE:	ROSEAU RIVER FIRST NATION v. THE ATTORNEY GENERAL OF CANADA *et al.*
AND DOCKET:	A-281-21
STYLE OF CAUSE:	LONG PLAIN FIRST NATION v. THE ATTORNEY GENERAL OF CANADA *et al.*
AND DOCKET:	A-284-21
STYLE OF CAUSE:	CHIEF JIM MAJOR on his own behalf of and on behalf of ANIMAKEE WA ZHING #37 FIRST NATION v. THE ATTORNEY GENERAL OF CANADA *et al.*
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	NOVEMBER 1 AND 2, 2022
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	PELLETIER J.A. RIVOALEN J.A.
DATED:	JULY 24, 2023

APPEARANCES:

Sean Tessarolo Melanee Bryniawsky	FOR THE APPELLANTS, ROSEAU RIVER FIRST NATION AND LONG PLAIN FIRST NATION
Luke Hildebrand Yana Sobiski Isabel Dávila Pereira	FOR THE APPELLANT, CHIEF JIM MAJOR on his own behalf and on behalf of ANIMAKEE WA ZHING #37 FIRST NATION
John Faulhammer Kelsey Desjardine	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA
Sacha R. Paul Deanna Hiebert Keira Hasensack	FOR THE RESPONDENT, MANITOBA HYDRO
Marian Yuzda Audrey Boctor	FOR THE RESPONDENT AND INTERVENER, CANADA ENERGY REGULATOR

SOLICITORS OF RECORD:

Clark Wilson LLP Vancouver, British Columbia	FOR THE APPELLANTS, ROSEAU RIVER FIRST NATION and LONG PLAIN FIRST NATION
Major Sobiski Moffatt LLP Kenora, Ontario	FOR THE APPELLANT, CHIEF JIM MAJOR on his own behalf and on behalf of ANIMAKEE WA ZHING #37 FIRST NATION
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA
Thompson Dorfman Sweatman LLP Winnipeg, Manitoba	FOR THE RESPONDENT, MANITOBA HYDRO
Manitoba Hydro Legal Services Winnipeg, Manitoba	

Canada Energy Regulator Calgary, Alberta	FOR THE RESPONDENT AND INTERVENER, CANADA ENERGY REGULATOR
IMK S.E.N.C.R.L./LLP Montreal, Quebec	