ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 21, 2005

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 and section 115 of the *Water Act,* R.S.A. 2000, c. W-3.

-and-

IN THE MATTER OF a Notice of Appeal filed by the Mikisew Cree First Nation with respect to Licence No. 00190012-00-00 issued under the *Water Act* to TrueNorth Energy L.P. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Mikisew Cree First Nation* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *TrueNorth Energy L.P.* (21 April 2005), Appeal No. 02-142-D (A.E.A.B.).

BEFORE: William A. Tilleman, Q.C., Chair.

PARTIES:

Appellant: Mikisew Cree First Nation, represented by Mr. Donald P. Mallon, Prowse Chowne LLP.

Director: Mr. Kem Singh, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

Licence Holder: TrueNorth Energy L.P., represented by Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval and Licence under the *Water Act* to TrueNorth Energy L.P. The Licence authorized the construction of a proposed water intake at SE 11-96-11-W4M in the Municipality of Wood Buffalo, Alberta.

The Board received a Notice of Appeal from the Mikisew Cree First Nation, appealing the Licence. At issue in this decision was whether the matters had been adequately dealt with at a hearing held by the Alberta Energy and Utilities Board ("AEUB").

The Mikisew Cree First Nation, initially participants in the AEUB process, withdrew their letter of concern and did not participate in the oral hearing. After reviewing the issues raised by the Mikisew Cree First Nation, the Board determined all the matters had been adequately dealt with by the AEUB, and Mikisew Cree First Nation had the opportunity to participate in the review.

Therefore, according to the *Environmental Protection and Enhancement Act*, the Board must dismiss the appeal of the Mikisew Cree First Nation.

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I. BACKGROUND

[1] On December 30, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Approval No. 00151636-00-00 (the "Approval")[1] and Licence No. 00190012-00-00 (the "Licence"), under the *Water Act*, R.S.A. 2000, c. W-3, to TrueNorth Energy L.P. (the "Licence Holder"). The Approval authorizes the development of the Fort Hills Oil Sands Processing Plant and Mine, and the Licence authorizes the construction of a water intake at SE 11-96-11-W4M (the "Project" or the "Fort Hills Oil Sands Project") in the Municipality of Wood Buffalo, Alberta.

[2] On February 12, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from the Mikisew Cree First Nation (the "Appellants" or the "MCFN"), objecting to the entirety of the Licence issued. The Board wrote to the Appellants, the Licence Holder, and the Director (collectively the "Parties") acknowledging receipt of the appeal. In addition, the Board requested the Director to provide a copy of the records (the "Records") relating to the Licence. In response, the Director requested that, prior to the Records being forwarded, the Board determine if the Alberta Energy and Utilities Board (the "AEUB") had conducted a hearing into the matter, and the Appellants had appeared before the AEUB at the hearing. The Director advised: "As this is an extensive document, its reproduction will involve substantial effort. If the Board wishes further documentation prior to deciding upon its jurisdiction, please advise."[2]

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the AEUB asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative. The AEUB provided documents to the Board on March 11 and 19, 2003, with respect to the Fort Hill Oil Sands Project.

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1 The Board dismissed the appeal in relation to the Approval for being filed after the legislated timeframe and special circumstances did not exist to warrant an extension of the time limit. See: *Mikisew Cree First Nation* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *TrueNorth Energy L.P.* (21 April 2005), Appeal No. 02-141-D (A.E.A.B.).

2 Letter from the Director dated February 18, 2003.

[4] On February 21, 2003, the Board received some of the Records from the Director. The documents provided related to the AEUB hearing and the Appellants' participation in the process. On February 25, 2003, the Board wrote to advise the Parties that:

> "...it has come to the Board's attention that the above matter may have been subject to a review under the *Canadian Environmental Assessment Act* .... Section 95(5)(B)(ii) of the *Environmental Protection and Enhancement Act* states:
>
> '95(5) The Board
>
> (b) shall dismiss a notice of appeal if in the Board's opinion
>
> (ii) the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all the matters included in the notice of appeal.'"

[5] In response to the Director's motion, the Board set a schedule to receive submissions from the Parties on the issue of whether the Appellants had the opportunity to participate in a process before the AEUB in this matter and whether all of the matters included in their Notice of Appeal were adequately dealt with by the AEUB.[3] The Board also requested submissions on whether the matters had been heard under the *Canadian Environmental Assessment Act,* S.C. 1992, c. 37 ("CEAA"). The Board received the Parties' submissions between March 12 and April 2, 2003.

[6] On September 9, 2003, the Board notified the Parties that the appeal was dismissed, as the AEUB had adequately dealt with the matters included in the Notice of Appeal. The following is the Board's reasons.

II. CEAA ISSUE

A. Appellants' Submission

[7] The Appellants submitted their appeal should not be dismissed pursuant to section 95(5)(b)(ii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") for a number of reasons.

[8] The Appellants argued they were not provided notice of any review under CEAA and were not asked to participate in any hearing. In the alternative, if they had been notified,

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[3] See: Board's Letter, dated February 24, 2003.

"...they failed [to participate] because of their lack of sophistication to recognize the process or their role in it. For this reason and others, they were entitled to a separate and distinct process from that provided to other stakeholders."[4] They continued by stating that the Federal Court of Canada has determined that the consultation process for First Nations "...is to be distinct and public participation is different...."[5] According to the Appellants, it is doubtful that section 95(5)(b)(ii) of EPEA applies to them, and therefore, cannot be used as a basis to dismiss their appeal.

[9] The Appellants stated the withdrawal and use of the water from the Athabasca River as proposed in the application has the potential to cause great harm to the environment in which the Appellants live and are dependent on for the necessaries of life.[6] They argued there is a lack of scientific certainty regarding the effects that would occur with that amount of water being withdrawn from the Athabasca River. They were unaware of any joint review process with the AEUB, and if there was, the "...process obviously failed to include them. It was therefore not truly a 'public review.'"[7]

[10] The Appellants submitted: "Any review of the environment issues surrounding this project could not have possibly dealt with all the concerns delineated in the MCFN appeal without their participation."[8] [Emphasis in original.]

B. Licence Holder's Submission

[11] The Licence Holder stated it was unaware of the Government of Alberta participating in any review under CEAA with respect to the Fort Hills Oil Sands Project.

C. Director's Submission

[12] The Director submitted that he was not relying on section 95(5)(b)(ii) of EPEA to dismiss the appeal, as Alberta Environment is not currently participating, nor is it anticipating to participate further, in the CEAA review process that is currently ongoing.

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4 Appellants' Submission, dated March 12, 2003.

5 Appellants' Submission, dated March 12, 2003.

6 See: Appellants' Submission, dated March 12, 2003.

7 Appellants' Submission, dated March 12, 2003.

8 Appellants' Submission, dated March 12, 2003.

[13] He further provided information on the harmonization agreement entered into by Alberta Environment and Environment Canada to coordinate an environmental impact assessment. The Director stated that the "...environmental impact assessment report that was prepared by TrueNorth Energy L.P. addressed the information needs of both the provincial and federal governments,"[9] and it culminated in the decision of the AEUB, the Director's approval under EPEA, and the Director's decision on the Approval and Licence under the *Water Act*.

D. Discussion

[14] Section 95(5)(b)(ii) of EPEA provides:

> "The Board ... shall dismiss a notice of appeal if in the board's opinion ... (ii) the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all of the matters included in the notice of appeal."

[15] All of the Parties agreed the Government of Alberta had not participated in any review process under the CEAA. The Director and the Licence Holder did not argue section 95(5)(b)(ii) of EPEA as a basis for dismissing the appeal.

[16] The Board accepts the statements of the Parties that the Government of Alberta did not participate in a review held under CEAA with respect to this Project. Therefore, section 95(5)(b)(ii) of EPEA does not apply in this appeal. The Board will assess whether it retains jurisdiction to hear the appeal with respect to section 95(5)(b)(i) of EPEA.

III. AEUB ISSUE

A. Appellants' Submission

[17] The Appellants submitted the Crown has a fiduciary duty to consult with First Nations, and the Director did not "...adequately or properly consult..." with the Appellants prior to the issuance of the Licence. Therefore, according to the Appellants, they "...were in effect denied the opportunity to meaningfully participate in the hearings or reviews that were part of the determination and approval process."[10] The Appellants stated that because they were

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9 Director's Submission, dated March 19, 2003.

10 Appellants' Submission, dated March 12, 2003, at paragraph 8.

continuing with the consultation process with Alberta Environment at the time the Licence was issued, they did not expect the Director to issue the Licence.[11]

[18] The Appellants argued they were unaware that by failing to fully participate in the AEUB process, they might be unable to appeal or provide input in the issuance of the Licence under the *Water Act*.

[19] The Appellants further argued that the AEUB did not adequately deal with their concerns regarding the "...cumulative and long term impact on the environment, and especially water flow, water quantity and water quality...."[12] They stated they have inhabited the lands downstream of the Project for over 8,000 years, and they continue to use the areas for hunting, trapping, and fishing. Therefore, according to the Appellants, they "...require adequate water flow and quality to ensure the continuation of their way of life."[13]

[20] In the alternative, the Appellants argued that section 95(5)(b)(i) of EPEA is overridden by the Crown's duty to consult with the Appellants. The Appellants submitted that a more extensive process is required in order for the Crown to fulfill its duty to consult First Nations. They continued, stating that the "...substance of the public process and participation cannot be applied in similar fashion to First Nations people and is not sufficient to discharge this duty."[14] The Appellants submitted that it was doubtful that section 95(5)(b)(i) of EPEA applies to the MCFN based on the facts of this case, and therefore it cannot be used to dismiss their appeal.

[21] According to the Appellants, they stated a number of concerns in their September 12, 2001 letter to Alberta Environment and further expressed that they possessed:

> "(a) limited knowledge of the process;
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> (b) limited capacity to deal with these type of issues;
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> (c) limited resources to deal with these types of issues; [and]

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11 See: Appellants' Submission, dated March 12, 2003, at paragraphs 24 to 29 and 35 to 36. The Appellants stated they met with Alberta Environment in October 2002 and a further meeting, scheduled for December 2002, was adjourned until January 23, 2003. The Licence was approved on December 30, 2002.

12 Appellants' Submission, dated March 12, 2003, at paragraph 9.

13 Appellants' Submission, dated March 12, 2003, at paragraph 18.

14 Appellants' Submission, dated March 12, 2003, at paragraph 10.

(d) inability to be involved sooner as a result of these limitations."[15]

[22] The Appellants argued the Director was aware that the Appellants were "unsophisticated and under funded," and therefore, extra effort should have been made to consult with the MCFN, enabling them to understand and participate meaningfully in the decision making process.[16] The Appellants stated the duty to consult is on the Crown, not the Licence Holder, and thus the Crown had an ongoing obligation to ensure their best interests were accommodated, and the obligation existed prior to and after the signing of the community partnership agreement and the AEUB hearing, and prior to the issuance of any licence or approval.[17]

[23] The Appellants argued that they "...could not partake in the substance of the [A]EUB hearing or meaningfully participate, without knowledge of the process, alternatives and consequences of their actions or inactions."[18]

[24] The Appellants submitted that the AEUB heard only a "...scant amount of evidence regarding the cumulative and long term effects of all current and proposed industrial projects utilizing the Athabasca River."[19] They argued that some of the needed scientific data was not available to the AEUB and would not likely be available until 2005, and therefore the AEUB needed to hear from those directly affected by the Project. They stated that without the benefit of the Appellants' unique knowledge of the area, "...it is impossible for the [A]EUB to have adequately dealt with all the matters that are the subject of their appeal before this Board."[20]

[25] The Appellants' final argument was that the issues brought forward by the Appellants are a serious matter, as deterioration of water quantity and quality may have serious adverse effects on the MCFN, and thus, the application of the precautionary principle should be applied.[21]

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15 Appellants' Submission, dated March 12, 2003, at paragraph 21.

16 See: Appellants' Submission, dated March 12, 2003, at paragraph 30.

17 See: Appellants' Submission, dated March 12, 2003, at paragraphs 37 and 38.

18 Appellants' Submission, dated March 12, 2003, at paragraph 40.

19 Appellants' Submission, dated March 12, 2003, at paragraph 42.

20 Appellants' Submission, dated March 12, 2003, at paragraph 45.

21 See: Appellants' Submission, dated March 12, 2003, at paragraph 54. The Appellants quoted paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development (1990) to define the precautionary principle:

B. Licence Holder's Submission

[26] The Licence Holder stated that the AEUB confirmed that a public hearing was held regarding the Fort Hills Oil Sands Project between July 2 and 10, 2002. It submitted the Appellants did have the opportunity to participate in the AEUB hearing.

[27] The Licence Holder provided a letter from the MCFN advising the AEUB that "...as a result of extensive discussions between Mikisew Cree and TrueNorth there is no longer any need for the Mikisew Cree to participate in the AEUB hearing."[22] The Licence Holder also provided a copy of the Community Partnership Agreement that was entered into by the Appellants and the Licence Holder. According to the Licence Holder, this indicates the Appellants received notice of and had the opportunity to participate in the AEUB hearing.

[28] The Licence Holder submitted that the issues raised in the Appellants' Notice of Appeal were adequately dealt with in the AEUB proceedings, including the hearing. It argued the issues, including surface water hydrology, amount of water, cumulative effects, and in-stream flows, were addressed in the Environmental Impact Assessment, in the written submissions, and though direct evidence and cross-examination during the AEUB hearing. The Licence Holder stated the AEUB specifically dealt with the issues of water management and water withdrawal issues in its decision.

[29] The Licence Holder argued the appeal must be dismissed, and "...[f]airness, efficiency and certainty dictate that Mikisew Cree should not be allowed to proceed with this appeal which is related to matters that it could have advanced during the AEUB proceedings and which in fact were advanced by other parties to the AEUB proceedings."[23]

[30] As the Appellants argued section 95(5)(b)(i) of EPEA should not apply in this case, the Licence Holder provided submissions on the arguments regarding the precautionary principle and the Crown's duty to consult. The Licence Holder submitted that the precautionary

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"In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

22 Licence Holder's Submission, dated March 26, 2003.

23 Licence Holder's Submission, dated March 26, 2003.

principle "...does not stand for the proposition that a statutory body, such as the Board, may ignore provisions contained in its enabling statute, EPEA, which mandate that the Board do something....."[24] The Licence Holder further argued there was nothing in the precautionary principle that allows it to override section 95(5)(b)(i) of EPEA, and if it did, any rules in respect to the environmental regulatory process would be meaningless.

[31] With respect to the Crown's duty to consult, the Licence Holder noted "...no allegations have been made that TrueNorth failed to engage in consultation with Mikisew Cree."[25] It submitted that the concerns raised by the Appellants "...ought to be adjudicated by a court created pursuant to section 96 of the *Constitution Act, 1867*."[26]

C. Director's Submission

[32] The Director stated the Project required approvals from both Alberta Environment and the AEUB and therefore a protocol was agreed to that provided joint notice to the public of the process under both agencies, and the AEUB proceeded to a hearing.

[33] The Director argued that the Appellants were aware of the AEUB process and did participate, as they submitted a statement of concern, and when asked to provide more details regarding their environmental concerns, they provided a further submission. According to the Director, the Appellants' concerns were regarding the potential effects on water quality and the resulting effect on their fishing resource, the need for the whole watershed to be scoped, and the effects on air and water quality that affect their hunting and trapping resources.

[34] The Director further submitted that the issues raised by the Appellants, as well as issues relating to First Nations, were considered in the Environmental Impact Assessment undertaken by the Licence Holder. The Director explained that, in the application submitted by the Licence Holder to the Director and the AEUB, the Licence Holder responded to specific questions raised by the Appellants. The Director also made reference to the partnership agreement between the Appellants and the Licence Holder. The Director submitted that all of

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24 Licence Holder's Submission, dated March 26, 2003.

25 Licence Holder's Submission, dated March 26, 2003.

26 Licence Holder's Submission, dated March 26, 2003.

these factors clearly indicate the Appellants were aware of and did participate in the AEUB process.

[35] The Director summarized the issues raised in the Appellants' Notice of Appeal as the following:

> "• The Mikisew Cree First Nation objects to the amount of water to be diverted and the allocated amount.
> • The Mikisew Cree First Nation object to the entirety of the decision to issue [the Licence].
> • Concern with respect to the cumulative effects of all water licences issued in the Regional Municipality of Wood Buffalo.
> • Concern with respect to in stream flows and winter withdrawal."[27]

[36] The Director stated the Environmental Impact Assessment and the report prepared by the Licence Holder included discussions on the issues of water quantity, cumulative effects, and in-stream flows. According to the Director, these specific issues were also addressed in testimony during the AEUB hearing process. The Director further stated the AEUB addressed the issues of water management and water withdrawal in its final decision.

[37] The Director submitted that the appeal must be dismissed pursuant to section 95(5)(b)(i) of EPEA, and he stated:

> "The matters raised in the notice of appeal were before the [A]EUB and the [A]EUB specifically addressed them in its decision report with due regard for the public interest including environmental effects and the evidence before it. Review by the Environmental Appeal Board would be duplicative. The matters raised in the notice of appeal have been adequately dealt with by the [A]EUB."[28]

[38] In response to the Appellants' submission, the Director stated it was "...clear that there is no issue related to consultation." He continued by stating that the Appellants had participated fully in the statutory process that is prescribed by EPEA and the *Water Act*. The Director explained the Licence Holder was required, as part of the Environmental Impact Assessment process, to meet with and consult with directly affected First Nations, including the Appellants. The Director provided a copy of the partnership agreement that was completed between the Appellants and the Licence Holder. He continued: "It could be argued that if there

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27 Director's Submission, dated March 25, 2003.

were a duty to consult, the MCFN waived any need to further consultation by withdrawing the MCFN intervention in the [A]EUB hearing."[29]

[39] The Director submitted that, if the Board required further clarification with respect to the duty to consult, the Board could allow the Appellants to "...file the necessary proceedings with the Court of Queen's Bench to prove any entitlement that arises separate and apart from the express language of the legislation."

[40] In response to the Appellants' arguments regarding the duty to consult and the reference to the decision of the *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage and the Thebacha Road Society*, [2001] F.C.T. 1426, the Director distinguished the case, as it dealt with federal government powers and fiduciary duties and that it "...does not represent the law in Alberta respecting consultation between the Provincial Crown and a First Nation."[30] The Director further argued the Appellants "...did participate in the [A]EUB consultation process that culminated in its request to formally withdraw its letter of concern."[31] The Director submitted that the AEUB decision was not made until after consultation with the Appellants had been satisfactorily completed.

[41] With respect to the Appellants' arguments regarding the precautionary principle, the Director argued that no authority can be found for the proposition that the Board has the jurisdiction to ignore the language of EPEA, specifically section 95(5)(b)(i), and proceed directly to a hearing. The Director submitted that he applied the precautionary principle in the conditions contained in the Licence.

[42] The Director concluded by stating:

> "The [A]EUB as a public interest decision maker, is charged with making decisions with the information that has been presented to it. The [A]EUB undertakes that function and if the MCFN feels that the decision is improper, then their remedy is to have the [A]EUB decision reviewed in accordance with the requirements of that legislation."[32]

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28 Director's Submission, dated March 25, 2003.

29 Director's Submission, dated March 25, 2003.

30 Director's Submission, dated March 25, 2003.

31 Director's Submission, dated March 25, 2003.

32 Director's Submission, dated March 25, 2003.

D. AEUB Hearing

[43] Section 95(5)(b)(i) of EPEA provides:

> "The Board ... shall dismiss a notice of appeal if in the board's opinion (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board [(AEUB)] at which all the matters included in the notice of appeal were adequately dealt with...."

[44] To determine whether an appeal meets the requirements of section 95(5)(b)(i), three conditions must be met. They are:

a) Was there a hearing or review regarding the matter appealed by the AEUB?

b) Did the appellants

   i) receive notice of the hearing, or

   ii) participate in the hearing, or

   iii) have an opportunity to participate in the hearing?

c) Were all the matters included in the Notice of Appeal adequately dealt with?

1. Was there an AEUB Hearing?

[45] All of the Parties agreed the AEUB held a hearing with respect to the Fort Hills Oil Sands Project. The AEUB provided a copy of its decision to the Board, and in its covering letter it stated:

> "...TrueNorth Energy (TrueNorth) applied to the Alberta Energy and Utilities Board (the Board) in Application No. 1096587 for approval to construct and operate an oil sands mine and bitumen extraction facility, the Fort Hills Oil Sands Project. True North (*sic*) also applied in Application No. 2001202 for approval to construct and operate an electrical power plant and a transmission substation located at the project site. Under a coordinated application process adopted by Alberta Environment and the [A]EUB, TrueNorth filed a joint application and environmental impact assessment.
>
> A notice of hearing was advertised in May 2002 and TrueNorth's applications were considered by the Board at a public hearing in Fort McMurray, Alberta between July 2-10, 2002. The Mikisew Cree First Nation was not a

> participant at the hearing, having formally withdrawn its letter of concern on June 14, 2002."[33]

[46] The Appellants' argument was not based on whether a hearing was held by the AEUB, but more with respect to the Crown's duty to consult and whether all the issues in their Notice of Appeal were adequately dealt with by the AEUB.

[47] Therefore, the first requirement of section 95(5)(b)(i) of EPEA has been met, as the AEUB held a hearing regarding the matter appealed.

2. Participation

[48] The second requirement deals with the Appellants receiving notice of the hearing and whether they participated in, or had the opportunity to participate in the AEUB hearing.

[49] There is no doubt the Appellants received notice of the hearing. In fact, they submitted a Statement of Concern regarding the project to the AEUB and the Director.[34] The concerns expressed by the MCFN were with respect to the watershed and the possible adverse effects and cumulative impacts of the developments in the area on their traditional lands. On January 28, 2002, the Appellants provided additional information to the Director on how they are affected by the Project. This was in response to a telephone conversation and a letter from the Director allowing additional time to provide their specific environmental concerns.

[50] One significant fact that was submitted to this Board was the June 14, 2002 letter addressed to the AEUB from the Appellants. In this letter the Appellants state:

> "This letter is a formal request from the Mikisew Cree First Nation to Alberta Energy and Utilities Board to withdraw our previous letter of concern for the above [Fort Hills Oil Sands] project.
>
> As a result of extensive discussions between Mikisew Cree First Nation and TrueNorth Energy L.P. we have entered into a Community Partnership Agreement and Socio-economic Action Plan....
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> In light of the above, we no longer believe that any formal intervention in the [A]EUB July 2nd Hearing for the Fort Hills Oil Sands Project is required."[35]

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33 AEUB Letter, dated March 11, 2003.

34 See: Appellants' Letter to AEUB, dated September 12, 2001, in Director's Submission, dated February 18, 2003.

35 Appellants' Letter to AEUB, dated June 14, 2002, in Director's Submission, dated February 18, 2003.

[51] In the AEUB Decision, it is noted the MFCN provided a written submission but did not appear at the hearing.[36]

[52] As part of the Community Partnership Agreement, the MCFN and the Licence Holder agreed that the "...scope of this agreement includes the requirement for consultation on environmental aspects of the Fort Hills Oil Sands Project impacting the Mikisew Cree of Fort Chipewyan. The types of impacts considered include, but are not limited to, impacts on air quality, water quality, aquatic systems, wildlife, vegetation, and land-use."[37]

[53] The main areas of concern listed in the Community Partnership Agreement with respect to aquatic resources were: "...basal water management, mine proximity to the river, low flow withdrawals from the Athabasca River and end pit lakes."[38] The MCFN and the Licence Holder agreed to work cooperatively to identify methods of mitigating the effects of the Project on water quality and quantity and on aquatic resources.

[54] The Appellants had provided a Statement of Concern and were aware of their ability to participate in the AEUB hearing. It was their decision to withdraw from the hearing process after the Community Participation Agreement was entered into by the MCFN and the Licence Holder.

[55] Section 95(5)(b)(i) of EPEA does not require that the party participate in the hearing. What is required is that the parties have received notice of the hearing *or* participated in *or* had the opportunity to participate in the hearing. Only one of the three alternatives are required to satisfy this condition. In these appeals, all of the Parties, including the Appellants, agree the MCFN did receive notice of the AEUB hearing. In addition, the MCFN did participate in the hearing. They provided a written submission, and although they did not actually appear in front of the AEUB at the public hearing, they did have the opportunity to participate, and chose not to be involved, in the oral submissions. Therefore, all three alternatives of the second condition of the test have been met.

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[36] See: AEUB Decision 2002-089 at page 4.

[37] Mikisew Cree First Nation – TrueNorth Energy L.P. Community Partnership Agreement at page 4, in Director's Submission, dated February 18, 2003.

[38] Mikisew Cree First Nation – TrueNorth Energy L.P. Community Partnership Agreement at page 4, in Director's Submission, dated February 18, 2003.

3. Issues Adequately Dealt With

[56] Perhaps the most contentious of the conditions is whether "all the matters included in the notice of appeal were adequately dealt with" by the AEUB. The Appellants argued that without proper consultation, it would not be possible to have the issues properly dealt with at the AEUB hearing. They argued that without all of the scientific reports before the AEUB, the AEUB needed to hear from those directly affected by the Project. The MCFN stated they have unique knowledge of the area and without them presenting this knowledge, "...it is impossible for the [A]EUB to have adequately dealt with all the matters that are the subject of their appeal before this Board."

[57] The issues identified in the Notice of Appeal include:

> "•....the water licence does not address the growing cumulative effects of all water licences issued for developers in the Regional Municipality of Wood Buffalo....
>
> • True North's (*sic*) Fort Hills project was officially shelved indefinitely in mid-January. In early December 2002 we were advised that the Alberta Environment would be fast-tracking the issue for this projects (*sic*) water licence.
>
> Question: are licences issued based on economics?
>
> • In stream flow rate and winter withdrawal are of major concern.
>
> • Recognizing the importance of living within capacity, in the near future water may very well be as marketable commodity in Alberta as oil. The Oil Sands industry's reliance on water makes it a prime candidate for scrutiny when it comes to water consumption. The province does not know how much ground water is available, nor do they know how much oil and gas industry uses. We don't know how much industry uses for sure and yet at the same time the province is issuing more licences all the time.
>
> Question: what if each company began using 100 percent of its licence?"[39]

[58] The Appellants listed the following as steps the Board could take to resolve their appeal:

> "• Water withdrawals are managed (flow)
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> • Water release are regulated and managed (quality-flow)
>
> • Regional management systems are designed and implemented
>
> • Interim agreement on in-stream flow rate is implemented

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[39] Appellants' Notice of Appeal, submitted February 12, 2003.

- Regional monitoring programs are fast-tracked to address winter flow monitoring
- Water licenses address more specific water withdrawal from the Athabasca River during low-flow in winter
- Water licenses implement a clause or agreement on usage rule during low-flow between the companies."[40]

[59] In the AEUB Decision, the AEUB reviewed the submissions of the applicant, interveners, and Alberta government departments[41] regarding the use of the basal aquifer and the rate of water withdrawal.

[60] In the portions of the transcript of the AEUB proceedings provided to the Board in the Director's submission, it appears the AEUB did hear evidence on the withdrawal of water from the Athabasca River and the rate of the withdrawal. Interveners to the AEUB hearing stated similar concerns as those included in the Appellants' Notice of Appeal. Representatives from Alberta Environment also discussed their concerns with respect to water withdrawals, especially during low-level periods and the possible effects on the surrounding areas as a result of water withdrawal from the Athabasca River and the basal aquifer.

[61] In its submission to the AEUB, one intervener, the Oil Sands Environmental Coalition (the "OSEC"), raised the matter of postponing the construction of the Project until after the Cumulative Environmental Management Association (the "CEMA") process had completed the "...development of management objectives and implementation of a comprehensive environmental management system."[42] This correlates to the Appellants' concern regarding the availability of scientific data on the watershed and the outstanding report on the watershed.

[62] During oral submissions to the AEUB, the Licence Holder stated that water management had been a priority to regulators, stakeholders, and the Licence Holder during the development of the Project. It also recognized the concerns of the regulators and stakeholders about the cumulative effects of water withdrawal from the Athabasca River during winter low flows.[43]

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40 Appellants' Notice of Appeal, submitted February 12, 2003.

41 The government departments represented at the AEUB hearing were Environment, Sustainable Resource Development, and Health and Wellness ("Alberta Departments").

42 OSEC Submission to the AEUB, at paragraph 7, in Director's Submission, dated March 25, 2003, at Tab 2.

43 See: Transcript of AEUB hearing July 2, 2002, vol. 1 at pages 105 and 106.

[63] The Licence Holder, in its statements to the AEUB, recognized the results of the CEMA study could ultimately restrict the low flow water withdrawal. It also proposed a water management plan be initiated by Alberta Environment, and in particular the plan would need to review water allocations, study cost-effective regional options for flow stabilization during low flow periods, and the potential to improve water quality in the lower Athabasca River.[44]

[64] During the AEUB hearing, the Licence Holder acknowledged the concerns expressed regarding low flow withdrawals. It stated that it had agreed to a low-flow restriction until January 1, 2005, and would then abide by Alberta Environment policies developed in response to the CEMA study.[45] The interveners cross-examined the Licence Holder further on the issue on withdrawals during low flow periods.[46]

[65] During cross-examination of the Licence Holder's witnesses, the interveners asked whether one of the issues to be studied would be how much water the existing operators are licenced to take from the Athabasca River.[47]

[66] During direct evidence, the panel speaking on behalf of the Oil Sands Environmental Coalition presented its concerns in relation to the water withdrawal and the potential impacts during periods of low flow. They also brought up the issue of a lack of scientific information.[48] The OSEC made three requests of the AEUB:

> Firstly, we request that this project not be approved until the in-stream flow needs subgroup of CEMA surface water working group has established a protective in-stream flow management level for the Athabasca River....
>
> Secondly, should the [A]EUB grant an approval to TrueNorth, we request that their approval restrict water withdrawal at periods of low-flow as determined by the Tennant-Tessman methodology currently used by Alberta Sustainable Resource Development until the results of the IFN group are applied....
>
> Lastly, should the [A]EUB grant an approval to TrueNorth, we request that the Board place a condition in the approval that would limit withdrawals of 6,469 cubic metres per hour to only when necessary as per the two operational scenarios

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44 See: Transcript of AEUB hearing July 2, 2002, vol. 1 at page 107.

45 See: Transcript of AEUB hearing July 2, 2002, vol. 1 at page 108.

46 See: Transcript of AEUB hearing July 2, 2002, vol. 1 at page 151.

47 See: Transcript of AEUB hearing July 2, 2002, vol. 1 at pages 148 and 149.

48 See: Transcript of AEUB hearing July 5, 2002, vol. 4 at page 993.

outlined in Section 4.2 of Volume 5 of the Fort Hills application and EIA."[49]

[67] During its examination-in-chief at the AEUB hearing, the Director stated that one of the significant issues with respect to the Project was water management. He also recommended to the AEUB that, if the Project was approved, to include conditions in the approval to ensure environmental protection goals, including maintaining water quality and lake water levels for waterfowl use.[50]

[68] In its submission before the AEUB, Alberta Environment presented its concerns with the original management plan proposed in the environmental impact assessment. They stated a "...more intensive and flexible form of water management is needed for this project than for most of the existing oil sands mines in this region."[51] According to the submission, the Licence Holder agreed with Alberta Environment and "...proposed that an ongoing process of research, planning, and adaptive water management will be implemented so as to achieve the [integrated resource plan] objectives."[52] Alberta Environment agreed with this approach in general and stated that further investigations of the physical environment were needed.

[69] In its submission to the AEUB, Alberta Environment stated its concerns with respect to the cumulative impact of the mines in the area and the potential for impacts on the aquatic environment during low-flow periods.[53] They stated that provisions exist in the *Water Act* licences of existing mines that allow for the establishment of low-flow diversion requirements. They reiterated that a low-flow cutoff level may be established for the Athabasca River based on the CEMA study and recommendations.

[70] In its decision, the AEUB referred to the concerns as stated by the interveners and Alberta Environment. The AEUB recognized there may be impacts on the aquatic environment of the Athabasca River during low-flow periods, and as a result, recommended the Director

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49 Transcript of AEUB hearing July 5, 2002, vol. 4 at pages 994 to 996.

50 See: Transcript of AEUB hearing July 9, 2002, vol. 5 at pages 1383 and 1384.

51 Transcript of AEUB hearing July 9, 2002, vol. 5 at page 1391.

52 Transcript of AEUB hearing July 9, 2002, vol. 5 at page 1391.

53 See: Transcript of AEUB hearing July 9, 2002, vol. 5 at page 1393.

evaluate the option of on-site water storage or temporary water diversion from another source during the low-flow periods, subject to the approval of the Director and the AEUB.[54]

[71] The AEUB also recommended the Director consider limiting the amount of water withdrawn from the Athabasca River while maintaining some flexibility during the commissioning of two extraction trains.[55]

[72] The AEUB directed the Licence Holder to "...submit for approval a new water management plan, including plant and site-wide water balances, an evaluation of possible environmental impacts, and an evaluation of impacts on the mine plant." These plans are to be provided as various issues are resolved, including "...instream flow needs and need for on-site temporary water storage, and implementation of recommendations from the MLWC [McClelland Lake Wetland Complex] sustainability committee."[56]

[73] All of these references indicate the issues identified by the Appellants had been raised, discussed, and considered by the AEUB at its hearing.

[74] With respect to the Appellants' argument that it has unique knowledge with respect to the area, the Board accepts that the Appellants, having lived in the region and off the land for centuries, are very knowledgeable about the area. The Board does note, however, that the interveners who appeared at the AEUB hearing included representatives from other First Nations and First Nations organizations, such as the Fort MacKay First Nation, Wood Buffalo First Nation, the Metis Local Number 122, and the Cree Burn Lake Preservation Society.[57] These groups would, in all likelihood, have a similar knowledge base as the Appellants, and as these groups did appear before the AEUB, the AEUB did hear the First Nations perspective of the Project and its potential effect on the area.

[75] The Board notes the Licence Holder does participate in the CEMA.[58] This will provide additional information regarding the management of the area.

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54 Alberta Energy and Utilities Board, Decision 2002-089, at section 9.2.3.

55 Alberta Energy and Utilities Board, Decision 2002-089, at section 9.2.3.

56 Alberta Energy and Utilities Board, Decision 2002-089, at section 9.2.3.

57 See: Transcript of AEUB Hearing, Fort Oil Sands Project.

58 See: Transcript of AEUB hearing July 2, 2002, vol. 1 at page 107.

[76] The Legislators included section 95(5)(b) of EPEA to prevent different tribunals making different decisions on the same issues. They did not want individuals playing one tribunal against another, as this would create uncertainty within industry and with the public. The Board's role is to ensure the requirements of the *Water Act* and EPEA are followed, and it cannot decide to ignore any section when it best suits a party. The Board is required to follow and apply the acts as they are written.

[77] The three requirements of section 95(5)(b)(i) have been met, as the Appellants had the opportunity to participate in an AEUB review where all of the issues identified in the Notice of Appeal were adequately considered by the AEUB. Therefore, the Board must dismiss the appeal.

E. Does the Duty to Consult Override Section 95(5)(b)(i) of EPEA?

1. Discussion

[78] The Board notes that the Appellants' main arguments were with respect to the Director's duty to consult. Although these may be valid arguments, the Board is not in a position to determine the matter. Before this Board can consider any substantial issues, we must have jurisdiction. As stated above, the Board cannot hear issues that have been heard and adequately dealt with by the AEUB.

[79] However, the Appellants submitted the alternative argument that the Crown's duty to consult is separate and distinct from other stakeholders, and therefore, the public process and participation is insufficient in meeting the Crown's obligation. They argued section 95(5)(b)(i) of EPEA does not apply if the Crown fails in its duty to consult with First Nations.

[80] The Appellants submitted that section 95(5)(b)(i) is overridden by the Crown's duty to consult. The Appellants referred to the decision of the Supreme Court of Canada, *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage and the Thebacha Road Society*, [2001] F.C.J. No. 1877, to support this position. However, the Board does not support this interpretation of the Court's decision. Laws, including the *Water Act*, are there not only to protect the environment, but also to provide certainty. The courts can, and will, overturn laws if they are found to be in contravention of the *Constitution Act, 1982*. However, the duty to consult is a procedural matter and cannot override the *Water Act* in these circumstances.

[81] The Appellants stated that they were in consultation with the Director at the time the Licence was issued, and they had been "...provided with the standard information, communication and consultation that were provided to other stakeholders."[59] Based on the Appellants' submissions, what they are concerned about is the timing of the issuance of the Licence and the Director's failure to inform them that by not participating in the AEUB hearing process, their right to appeal or provide input into the Licence may be affected. The Appellants questioned the issuance of the Licence as they were in consultation with the Director at the time. According to the Appellants, they believed the process was still ongoing and they were still participants.

[82] The Appellants are asserting a claim to a constitutionally entrenched aboriginal and treaty right. It is a right that, if established, would fall under section 35(1) of the *Constitution Act, 1982*. This sections provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[83] Before deciding the existence, scope, or breach of an alleged duty of consultation, one must first determine the existence and infringement of the asserted aboriginal rights.[60]

[84] The Appellants do not see the processes normally undertaken by the Director under EPEA as being the appropriate way for the Crown to fulfill its duties towards them. Instead, they argue the Crown's fiduciary duty calls for a *separate* process, and without undertaking the separate process, the Director did not receive all of the relevant information on which to base the Licence. The Appellants did not say that the Director failed to consult as a part of the statutory approval process, but that the statutory approval process is insufficient to satisfy the duty to consult and protect the Appellants' broader rights.

[85] The Appellants believe they have a right to be separately consulted and not, therefore, to be constrained by the statutory procedures EPEA imposes. The Appellants do not accept that their right of appeal can be dismissed on the basis of section 95(5)(b)(i) if the Director failed to provide the required consultation.

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[59] Appellants' Submission, dated March 12, 2003, at paragraph 46.

[60] See: *Taku River Tlingit First Nation* v. *Tulsequah Chief Mine Project*, [2002] BCCA 59, [2002] B.C.J. No. 155; but see *Ontario (Minister of Municipal Affairs and Housing)* v. *TransCanada Pipelines Ltd.* (2000), 186 D.L.R.

[86] The Board must determine whether the Appellants are correct in their argument that the duty to consult can override a section in EPEA, in this case section 95(5)(b)(i). A finding that the Board *can rule* on such issues (assuming its jurisdiction in the matter is not exclusive) does not mean that it *should rule* on such issues if another forum can provide a fuller or fairer process. These are administrative and constitutional law issues rather than aboriginal rights issues.

2. Can the Board Rule?

[87] The Courts have ruled that some administrative tribunals do have the mandate to rule upon Charter and constitutional questions that arise in the course of their proceedings. They have established the test to determine when a tribunal's statutory authority is sufficient to vest it with the authority to decide a Charter matter.

[88] No administrative tribunal has an independent source of jurisdiction pursuant to section 52(1) of the *Constitution Act, 1982*.[61] The essential question facing a Court is whether the administrative tribunal, through its enabling statute, has been granted the power to determine questions of law. If a tribunal does have the power to consider questions of law, then it follows by the operation of section 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.[62]

[89] The question in this case is *not* directly about the constitutional validity of a provision of EPEA. EPEA can co-exist with the Appellants' position so long as no licences are granted until the Crown (in the fullest sense and not just the Director) has met whatever its constitutional obligation may be.

(4th) 403, [2000] O.J. No. 1066, [2000] 3 C.N.L.R. 153 (Ont. C.A.). See also: *Haida Nation* v. *British Columbia (Minister of Forests)*, [2002] BCCA 147, [2002] B.C.J. No. 378.

[61] Section 52(1) of the *Constitution Act, 1982* provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[62] See: *Douglas/Kwantlen Faculty Association* v. *Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358; and *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 ("*Cooper*").

[90] The Supreme Court of Canada in *Cooper*[63] said the following about an administrative tribunal's authority to consider Charter matters:

> "[45] In three previous cases, *Douglas College*, *supra*, *Cuddy Chicks*, *supra*, and *Tetreault-Gadoury*, *supra*, this Court has had the opportunity to address the principles underlying an administrative tribunal's jurisdiction to consider the constitutionality of its enabling statute. ... [T]he inquiry must begin with an examination of the mandate given to the particular tribunal by the legislature.
>
> [46] If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute. This principle was clearly enunciated by this Court in *Cuddy Chicks*, *supra*, at pp. 13-14.... There is no doubt that the power to consider questions of law can be bestowed on an administrative tribunal either explicitly or implicitly by the legislature. All the parties agree that there is no provision in the Act that expressly confers on the Commission a general power to consider questions of law. There being no such express authority, it becomes necessary to determine whether Parliament has granted it implicit jurisdiction to consider such questions. As stated in *Cuddy Chicks*, *supra*, at p. 14:
>
> > [J]urisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought.
>
> [47] In considering whether a tribunal has jurisdiction over the parties, the subject matter before it, and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. These practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature. At the same time there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, though such concerns can never supplant the intention of the legislature."

[91] The Courts have already considered whether this Board can rule on questions of law that properly arise in its proceedings.[64] While EPEA contains no express provision to that effect, the Courts have held it to be implicit in the Board's statutory mandate.[65]

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63 *Cooper* v. *Canada (Human Rights Commission),* [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 at page 45.

64 In *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Environmental Appeal Board*

3. The Duty to Consult

[92] If a duty of consultation exists, the duty is on the Crown itself. Even though the responsibility for the consultation itself involves the Crown in the fullest sense,[66] this does not mean the Director can ignore any duty to consult.

[93] As to authority over the subject matter, this Board has full jurisdiction to rule (or at least advise the Minister upon) the validity of the Licence. Our only claim to authority over the underlying question of whether a constitutionally protected aboriginal and treaty right to

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and McCain Foods (Canada) Ltd. (2000), 33 C.E.L.R. (N.S.) 258 (Alta. Q.B.), the Court held at paragraph 20 that:

> "The result of the pragmatic and functional analysis [as set out in Union des employes de service Loc. 298 v. Bibeault [1988] 2 S.C.R. 1048] leads to the conclusion that the Board does have the jurisdiction to consider and recommend to the Minister whether or not the Director acted within his jurisdiction in including the Condition in the approval. The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privitive clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal."

See also: *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.); *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 22 C.E.L.R.(N.S.) 141 (Alta. Q.B.); and *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 23 C.E.L.R.(N.S.) 165 (Alta. C.A).

[65] See: *Paul* v. *Forest Appeals Commission*, [2001] BCCA 411, [2001] B.C.J. No. 1227, [2001] 4 C.N.L.R. 210. In this case Mr. Paul cut three trees, possessed four trees, and claimed he had an aboriginal right to the trees. This cutting and possession was without authorization under the British Columbia Forest Practices Code. The British Columbia Court of Appeal reasoned that a determination of this question by the Forest Appeals Commission was unconstitutional because the Legislature cannot grant authority to determine matters under section 91(24) of the *Constitution Act, 1867*. This case determined that the Legislature of British Columbia had no constitutional capacity to confer upon the British Columbia Forest Appeals Commission (or the District Forest Manager or the Administrative Review Panel) the jurisdiction to decide questions of aboriginal rights and title, including questions of entitlement, infringement and justification, and past extinguishment when deciding appeals about alleged violations of the British Columbia Forest Practices Code. This case was determined on the question of the application of the Division of Powers under the *Constitution Act, 1867* rather than the scope of the quasi-judicial powers of the Forest Appeals Commission.

Section 91(24) of the *Constitution Act, 1867* provides: "...[It] is the hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, - ... 24. Indians and Lands reserved for Indians...." The Division of Powers refers to the division of authority to make laws between the federal and provincial governments as described in sections 91, 92, and 92A of the *Constitution Act, 1867.*

[66] In this respect, the Director in Alberta is in a different position than the officer involved in *Halfway River First Nation* v. *British Columbia (Ministry of Forests),* [1999] BCCA 470, [1999] 4 C.N.L.R. 1. See the Board's review of that case in Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation* Request for Reconsideration: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region,*

consultation exists, or has been breached, arises because that right may be a pre-condition to the issuance of a valid licence and the application of section 95(5)(b)(i) of EPEA. If the Board's authority extends to let us rule on this point, it does so only for the purpose of establishing the validity of the licence. We have no original jurisdiction over the question and certainly no exclusive jurisdiction to decide the matter. But for its impact on the Licence here and the application of EPEA, this would be a question to be decided in the Courts.

4. Should the Board Determine this Constitutional Question?

[94] Whatever jurisdiction this Board may possess to rule on the Appellant's position on its right to be consulted by the Crown, it is clear that jurisdiction is not exclusive. The Courts would clearly have jurisdiction over such a question at the instance of the Appellants or the Crown. Unlike the Board, the Courts are equipped to give a full range of constitutional and equitable remedies.

[95] There are obvious advantages to having a section 96 Court[67] deal with constitutionally sensitive and important issues such as the Crown's duty to consult and a First Nation's treaty rights. No case calls for judicial independence more than a case involving such fundamental rights. The scope of such rights, if established, impose broad duties on the Crown and can restrict or impede major third party interests. The resources, independence, and stature of the Courts create the most desirable forum for such complex adjudication. This is in no way counterbalanced by the Board's expertise in environmental issues.

[96] Whether in the Courts or before the Board, the threshold question of the Appellants' treaty and constitutional rights needs to be determined. The Board has no processes equivalent to the Rules of Court to handle such complex questions and proceedings. If the Appellants choose to do so, they could apply to the Courts to impose consultation obligations upon the Crown. This Board could and would be guided by any such order in exercising its powers under section 97 of EPEA and more generally.

Alberta Environment re: *Tri-Link Resources Ltd.* (28 September 2000), Appeal No. 99-009 (A.E.A.B.)).

[67] A section 96 Court is commonly known as a Superior Court, and includes the Alberta Court of Queen's Bench. Section 96 refers to the provision of the *Constitution Act, 1867* that provides: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

[97] Even if the Board needs to ultimately decide the constitutional question for its own purposes, the Courts can nonetheless exercise their inherent jurisdiction to assist an inferior tribunal like the Board by dealing with the question and interpreting the *Water Act* or EPEA in light of the Director's duty to consult.

[98] The Board stated in its previous decision, *Enbridge*,[68] that:

> "...requiring the Appellants to first assert its claimed constitutional and treaty rights in the ordinary Courts would:
>
> 1. Allow the Attorney General to be notified and to be present to represent the full interests of the Crown on this important constitutional question, the effect of which extends well beyond the office of the Director involved in this case.
> 2. Allow the Approval Holder to present its arguments in opposition to the application on the basis of the common law of injunctions, the scope of which extend beyond the simple power of a Stay given to this Board under, and only for the purposes of proceedings under, EPEA. If it is appropriate, the Courts can grant any injunction subject to terms beyond which this Board has the ability to consider or impose.
> 3. Leave the Board to carry out its assigned statutory mandate of advising the Minister on what the Director could or should have done without entering into an inquiry as to fundamental constitutional and treaty rights customarily and constitutionally the task of a section 96 Court."[69]

[99] The Board is of the opinion the Appellants can commence an action in the Courts to enforce those rights they are claiming, should they wish to do so. The Appellants may request the Courts to determine the extent the Director must consult in order to meet his obligations to consult with First Nations. This would not only guide the Board in its decisions, but it would also provide clarification to the Director and Alberta Environment.

[100] Section 95(5)(b)(i) of EPEA states the Board *shall* dismiss an appeal if all matters have been adequately dealt with by the AEUB. There is no discretion for the Board to decide otherwise, and if the three conditions are met, the Board is left with no alternative than to dismiss the appeal. This also indicates that the Board must apply this section strictly. It does not have

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[68] Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc.* (22 March 2002), Appeal No. 01-110-ID (A.E.A.B.) ("Enbridge").

[69] Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc.* (22 March 2002), Appeal No. 01-110-ID (A.E.A.B.)

the authority to ignore the requirements of this section. Nowhere is it written in EPEA that the Board has the authority or the obligation to apply this section only in certain circumstances. The Board is required to follow EPEA as worded, and the clear and simple way of interpreting this section requires the Board to assess each case to determine if the three conditions have been met. If the conditions are met, the Board does not have jurisdiction and the appeal must be dismissed.

[101] The Board has also had the benefit of reviewing the decisions of the Supreme Court of Canada cases of *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 and *Nova Scotia (Workers' Compensation Board)* v. *Martin,* [2003] 2 S.C.R. 504. While this case was decided prior to these decisions, the Board is of the view that these decisions do not change the Board's conclusion with respect to the question of whether it is required to apply the provisions of section 95(5)(b)(i) of EPEA and dismiss this appeal, because all of the matters within the jurisdiction of this Board were adequately dealt with by the AEUB.

F. Precautionary Principle

[102] The Appellants argued the precautionary principle should apply in these circumstances, as the issues raised by the Appellants are serious matters that need to be considered.

[103] The Board believes issues that affect the environment are serious matters, and when it can, it will take steps to ensure the environment is protected while remaining cognizant of the purpose of the *Water Act.*[70]

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at paragraph 48.

[70] Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
(b) the need for Alberta's economic growth and prosperity;
(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
(d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
(f) the important role of comprehensive and responsive action in administering this Act."

[104] The Licence allows the Director to amend the amount of water withdrawn at any time. Condition 5 of the Licence provides:

> "5. The Director may amend this licence with respect to:
>
> (a) monitoring systems and the annual monitoring information
>
> (b) rate of water diversion and quantity of water allocated, and
>
> (c) offstream storage or alternative sources of water supply,
>
> if, in the Director's opinion, an adverse effect has occurred, is occurring or may occur due to the operation of the diversion under this licence on
>
> (d) the Athabasca River
>
> (e) useable aquifers
>
> (f) other water users
>
> (g) instream objectives, or
>
> (h) the aquatic environment
>
> and the adverse effect has not been or cannot be remedied to the satisfaction of the Director."

[105] These conditions included in the Licence allow for flexibility in the Director's approach and are examples of precautionary steps being included in the Licence itself. If the CEMA study indicates a different withdrawal rate is warranted to prevent environmental degradation, the Director has the ability under the Licence to reassess the amount of water withdrawal the Licence Holder can use. Therefore, if the CEMA study determines there are concerns regarding the rate of withdrawal from the Athabasca River, from this Project as well as others in the area, the Director has the authority under the Licence to make the necessary changes.

[106] Under the Licence, the Licence Holder is required to investigate all written complaints relating to interferences of surface water and groundwater within 10 kilometres of the application area.[71] This allows for unforeseen issues to be dealt with by the Director.

[107] These conditions in the Licence appear to support the concept of the precautionary principle. The Director retains the right to revisit the terms and conditions of the Licence should circumstances warrant changes.

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[71] See: Licence No. 00190012-00-00, issued to TrueNorth Energy L.P. on December 30, 2002.

IV. CONCLUSION

[108] The Appellants did participate in the AEUB process, and they did not, at any time, question the consultation process. It was the MCFN that withdrew from the hearing. They were aware of Alberta Environment's participation in the AEUB hearing and the collaborative approach undertaken between the AEUB and Alberta Environment. The issues brought forward by the Appellants in their Notice of Appeal were adequately dealt with by the AEUB.

[109] Therefore, for the reasons provided and pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal of the Mikisew Cree First Nation.

Dated on April 21, 2005, at Edmonton, Alberta.

William A. Tilleman, Q.C.
Chair