IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Fort Nelson First Nation v. BC Oil and Gas Commission,* 2017 BCSC 2500

Date: 20171215
Docket: S176712
Registry: Vancouver

Between:

The Fort Nelson First Nation and Chief Sharleen Gale on her own behalf and on behalf of all members of the Fort Nelson First Nation

Petitioners

And

BC Oil and Gas Commission and Rockyview Resources Inc.

Respondents

Corrected Judgment: The front page of the judgment was corrected on February 15, 2018.

Before: The Honourable Madam Justice Gerow

Oral Ruling

In Chambers

Counsel for the Petitioner:	F.M. Kirchner N.E. Hume
Counsel for the BC Oil and Gas Commission:	C.G. Robb A.E. Jarman
Counsel for Rockyview Resources Inc.:	R. Williams L. Dineley A.G. Visser
Place and Date of Hearing:	Vancouver, B.C. November 28-30, 2017 December 1, 2017
Place and Date of Ruling:	Vancouver, B.C. December 15, 2017

[1] **THE COURT:** The petitioners, Fort Nelson First Nation and Chief Sharleen Gale on her own behalf and on behalf of all members of the Fort Nelson First Nation, seek orders quashing or setting aside decisions of the BC Oil and Gas Commission (the "Commission") permitting Rockyview Resources Inc. to construct and operate a pipeline and a storage facility in the Fort Nelson's traditional territory. I will refer to the pipeline and the storage facility as the "Project."

[2] The petitioners also seek a number of declarations concerning the decisions. The petitioners take the position that the decisions contravene the honour of the Crown and the Crown's duty to consult and accommodate the petitioners.

[3] The Commission opposes the granting of the orders and declarations sought by the petitioners. The Commission concedes it had a duty to consult with the Fort Nelson First Nation regarding the applications for the permits prior to making its decisions. It takes the position that it acted in good faith and fulfilled its obligations to consult and accommodate the petitioners prior to making the impugned decisions. The Commission asserts that the decisions are reasonable in the circumstances and ought not to be quashed.

[4] Rockyview also opposes the orders and declarations sought by the petitioners, and adopts the Commission's position. Rockyview submits the petitioners were fully and extensively consulted about the project and provided with of all relevant information, and that the approvals meet all statutory and legal requirements. Rockyview says that it made significant modifications to the Project to minimize the adverse effect of the Project on the petitioner's treaty right to hunt caribou. In the alternative Rockyview takes the position that if the petitioners are entitled to any relief, it should be granted only on terms sufficient to ensure Rockyview retains its right and ability to proceed with the Project.

[5] During the course of the hearing I was advised that both respondents took the position that the permits granted were valid and that Rockyview was intending to proceed with construction in December 2017 and/or January 2018 in order to meet the permit requirement that the construction not take place between March and July.

Rockyview says that it has invested significant funds into the Project and will suffer damages if it cannot proceed as scheduled. I put an interim stay in place prohibiting the use of the permits pursuant to s. 10 of the *Judicial Review Procedure Act*, R.S.B.C.1996, c. 241, pending delivery of these reasons.

[6] These are the reasons on the petition. I reserve the edit these reasons by adding to or subtracting from them, including adding citations, but the result will not change.

[7] The issues are: did the Commission comply with its duty to consult with and accommodate the petitioners? If the Commission did not comply with its duty, what relief, if any, is appropriate?

[8] As noted the Commission concedes it had a duty to consult with the Fort Nelson First Nation about Rockyview's applications. The issue is whether the consultation was reasonable and adequate to discharge the Crown's duty. The focus is not on the outcome of the consultation, but the process. There is no duty to agree, and the Fort Nelson First Nation concedes it does not have a veto over the Project.

[9] The relevant background facts are as follows. The Fort Nelson First Nation is a "band" as defined by the *Indian Act*, R.S.C. 1985, c. I-5, and are signatories to Treaty No. 8. Fort Nelson First Nation has approximately 941 members and is governed by an elected chief and council.

[10] The Fort Nelson First Nation's treaty rights are protected under s. 35(1) of the *Constitution Act* 1982. Their traditional territory is located in the northeast corner of British Columbia within the area covered by Treaty 8.

[11] In Treaty 8 the First Nations who are signatories surrendered lands to the Crown in exchange for certain benefits, including the right to "pursue their usual vocations of hunting, trapping and fishing throughout the area." That right was subject to the following exception: “except for tracks as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

[12] The ancestors of the Fort Nelson First Nation signed Treaty 8 in 1910.

[13] Caribou have traditionally been hunted by Fort Nelson First Nation and their right to hunt them is a treaty right. Fort Nelson First Nation is concerned about the decline in the caribou population in its territory. The evidence is that Fort Nelson First Nation's members have suspended all hunting of caribou if their territory until the herds have recovered to a point where they believe the herds can be sustainably harvested.

[14] The Commission was established in 1998 as a Crown corporation and has the task of regulating oil and gas operations in British Columbia. The Commission's responsibilities include: reviewing and assessing applications for oil and gas exploration and extraction processing and transmission activity; consulting with First Nations about applications for oil and gas activities; adjudicating applications for permits, authorizations, and approval for oil and gas and related activities; and ensuring industry compliance with provincial legislation and regulatory requirements, including compliance with permits and conditions of the permits.

[15] Rockyview is an oil and gas exploration company with headquarters in Calgary, Alberta, and natural gas production assets in north eastern British Columbia.

[16] The Commission's decisions permit Rockyview to construct the Project on lands in an area known as the Fortune Core in the Maxhamish Range, which is located in the Fort Nelson First Nation's territory.

[17] The area is populated by the Maxhamish caribou herd and is designated an ungulate winter range for boreal caribou under s. 31 of the *Environmental Protection and Management Regulation*, BC Reg 200/2010, which I will refer to as the "*Regulation*." The Maxhamish Range and the Fortune Core in particular is identified as "critical habitat" for boreal caribou in Environment Canada's 2012 Recovery Strategy for Woodland Caribou.

[18] Rockyview applied to the Commission for the permit authorizing construction of the pipeline on January 17, 2017, and for the permit authorizing construction of a storage facility related to the pipeline on February 23, 2017.

[19] The proposed pipeline is between 32 and 39 kilometres long and will take up approximately 78 hectares or 192 acres of land within the Fortune Core area. Approximately 45.18 hectares or 112 acres will be new cut and the rest constructed on previously cut seismic lines that are in various stages of recovery. The storage facility will take up a further 9.17 hectares of land, approximately 23 acres, of which most will be new cut.

[20] The Commission's mandate includes responsibilities in relation to environmental protection associated with oil and gas activities. The *Regulation* is one of the key regulations under the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36. The *Act* applies to the proposed pipeline and storage facility.

[21] In accordance with s. 6 of the *Regulation*, if a proposed project is within an ungulate winter range, the Commission must carry out as part of the review of the project application an analysis of whether a project will have a "material adverse effect on the ability of the wildlife habitat within the ungulate winter range to provide for the survival, within the ungulate winter range, of the ungulate species for which the ungulate winter range was established." The Commission must also carry out an analysis of the time and manner of the oil and gas activities in relation to high priority wildlife, which includes boreal caribou.

[22] There is telemetry data that suggests boreal caribou in the Maxhamish Range use the area through which the proposed pipeline will pass during all seasons, including during the critical spring calving season.

[23] The Commission is responsible for ensuring that the Province's duty to consult with the Fort Nelson First Nation is fulfilled in regards to Rockyview's applications. The Commission acknowledges it has a duty to consult with Fort

Nelson First Nation about the potential adverse impacts of the Project on their Treaty 8 rights to hunt, trap, fish and, in particular, hunt caribou.

[24] Rockyview engaged directly with Fort Nelson First Nation prior to the approval of its applications. Rockyview first contacted Fort Nelson First Nation in November 2016 and met with the chief in council on January 24, 2017, to outline their proposed project.

[25] Prior to the meeting with the Chief and Council, Rockyview met with Lana Lowe, the Fort Nelson First Nation's Director of the Department of Lands and Resources, and Glenn Saganace, the Fort Nelson First Nation's Vice President of Business Development and outlined the Project. Ms. Lowe and Mr. Saganace indicated the Fort Nelson First Nation were concerned about the impact the pipeline would have on the local caribou population. On January 16, 2017, Rockyview provided Ms. Lowe with a detailed overview of the Project. At the meeting on January 24, 2017, the Fort Nelson First Nation expressed again concern about Rockyview's caribou management plan.

[26] On January 17, 2017, James Waterman, Manager and First Nation’s liaison for the Commission, referred Rockyview's pipeline application to the Fort Nelson First Nation indicating that the engagement level for the consultation would be "normal". The application package included a number of documents, including construction plans and a caribou management plan prepared for Rockyview. Mr. Waterman requested a response from the Fort Nelson First Nation by February 17, 2017.

[27] On February 17, 2017, Ms. Lowe wrote to Mr. Waterman providing Fort Nelson First Nation's initial response. The Commission and the Fort Nelson First Nation then engaged in further correspondence.

[28] On June 5, 2017, Mr. Waterman wrote a letter on behalf of the Commission to the Fort Nelson First Nation stating that the consultation was concluded. On June 7,

2017, Rockyview's permit application to build the storage facility was granted. On June 23, 2017, Rockyview's permit application to build the pipeline was granted.

[29] The interpretation of the Fort Nelson First Nation's position and the Commission's position on consultation as set out in the correspondence is in issue. Both Fort Nelson First Nation and the Commission take the position that it was the other side who failed to reasonably consult about the Project.

[30] As stated earlier, Rockyview has indicated that it intends to commence construction of the Project in December 2017 or January 2018, and the construction phase is expected to last for six weeks.

[31] I now turn to the applicable law. There is no dispute between the parties regarding the legal principles that apply in regards to the duty to consult or the standard of review. As stated earlier the Commission acknowledges it has a duty to consult with the Fort Nelson First Nation about the Project regarding potential adverse impacts on their Treaty 8 rights to hunt, trap, fish and, in particular, to hunt caribou prior to making the determination of whether it should permit the Project.

[32] The issue is whether the consultation was reasonable. As stated earlier, the focus is not on the outcome of the consultation but the process. There is no duty to agree and the Fort Nelson First Nation concedes it does not have a veto over the Project.

[33] As set out in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 16, the government's duty to consult with and accommodate first nations is grounded in the honour of the Crown. In applying treaties “the Crown must act with honour and integrity, avoiding even the appearance of sharp dealing". The Court stated the public standard of review for the process of consultation is reasonableness, noting:

> 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As

> stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
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> 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[34] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, involved a decision by the federal government to build a winter road in the territory covered by Treaty 8. In *Mikisew*, the Crown stated the process outlined in *Haida* should be used when the government wants to take up Treaty 8 land. The process is dictated by the duty of the Crown to act honourably. The Court noted that the Crown's right to take up surrendered lands for a project is subject to its duty to consult with the first nations about the impact the project will have on the first nation's treaty rights and, if necessary, to accommodate first nations' interests. The content and duty to consult is determined by context.

[35] In *Mikisew* the Court found the Crown's duty lay at the lower end of the spectrum and went on to state what was required of the Crown at the low end of the spectrum at para. 64.

> The Crown was required to solicit and to listen carefully to the Mikisew's concerns and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge its obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, at paras. 159 to 160:
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> > The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
> >
> > The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that

> their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

[36] The Court noted that there is a reciprocal onus on the first nations to make their concerns known, respond to the Crown's attempt to address their concerns and try to reach a solution. The Court stated that the consultation process does not give the first nations the right to a veto.

[37] In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, the Court of Appeal considered the government's duty to consult and accommodation West Moberly First Nations, a Treaty 8 first nation, concerning two decisions made by the government officials at the request of First Coal Corporation. The decisions permitted First Coal to obtain a 50,000-ton coal sample and engage in 173 drill-hole five-trench exploration program. The Mikisew took the position that the decisions were made without proper consideration of their right to hunt caribou in the affected areas. The respondents and the intervenors took the position that the cumulative effects of the project on the overall sustainability of the caribou in the area were outside the statutory duties of the decision makers and would compel them beyond their statutory mandate.

[38] The Court rejected the argument stating:

> [106] With respect, I do not consider this position to be tenable. MEMPR was not limited by its statutory mandate, so far as its duty and power to consult were concerned. It is a well established principle that statutory decision makers are required to respect legal and constitutional limits. The Crown's duty to consult lies upstream of the statutory mandate of decision makers: See *Beckman* at para. 48 and *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII), 64 B.C.L.R. (3d) 206 at para. 177.
>
> [107] In other words, in exercising its powers in this case, MEMPR was bound by, and had to take cognizance of, Treaty 8 and its true interpretation. B.C. says that such a view of the decision maker's position is unreasonable. With respect, I disagree. There is nothing in the legislation creating and governing MEMPR that would prevent that body from consulting whatever resources were required in order to make a properly informed decision. A statutory decision maker may well require the assistance or advice of others with relevant expertise, whether from other government ministries, or from outside consultants.

[39] The Court went on to consider the scope of the duty to consult and dismissed an argument that the scope on consultation should be limited to the impact of the particular project without a consideration of what had gone on before or might occur subsequently.

[40] The Court noted that in light of the substantive nature of the duty to consult and potentially accommodate, consultation cannot proceed on the assumption that the proposed project will proceed and that some sort of mitigation plan will suffice to address the first nation's concerns. The Crown is required to recognize a full range of possible outcomes from the outside, including the possibility that the first nation's concerns or the treaty right might have to be preferred over a project.

[41] Depending on the importance of the right at stake and the significance of the potential infringement, the decision maker may be required to provide written explanations to show that the aboriginal group's concerns were considered and to reveal the impact those concerns had on the decision: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 41.

[42] The Crown is required to fulfill its duty to consult before a decision maker gives its approval to a project, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 78.

[43] I turn then to the analysis. The Fort Nelson First Nation and the Commission disagree about the interpretation that should be placed on the correspondence between them as to whether the Commission met its duty to consult. The Fort Nelson First Nation takes the position that the Commission restricted the consultation process in an unreasonable manner and did not fulfill its duty to consult prior to the decisions being made. The Commission takes the position that the consultation provided was reasonable in the circumstances.

[44] On January 17, 2017, the Commission referred the pipeline application to the Fort Nelson First Nation. The Fort Nelson First Nation responded on February 17, 2017, stating that its treaty rights were or potentially could be impacted by the

Project and then identified a number of concerns that required consultation, including:

- The proposed pipeline intersects and is proximate to important areas for their people.
- The area is an important harvesting area and in particular contains important habitat for caribou.
- The Project intersects an ungulate winter range.
- The Project has the potential to further threaten the Maxhamish caribou herd.
- They identified concerns regarding Rockyview's caribou management plan. An expert report reviewing the Rockyview's proposed caribou management plan was attached to the letter.
- Concerns about the cumulative impact of the Project to the Fort Nelson First Nation's treaty right to hunt caribou in light of the existing impacts in the area.
- That a comprehensive review of the situation and in the Maxhamish Range, including the Fortune Core and Project area should be undertaken before boreal caribou in the area are subject to further risk of exportation.
- The Fort Nelson First Nation had not meaningfully been consulted with respect to the proposed revision to the BC Caribou Implementation Plan.
- The potential impacts on the riparian areas in the area of the Project.

[45] On March 1, 2017, Mr. Waterman replied on behalf of the Commission in a letter in which he set out a number of items that the Commission had determined, including that the proposed pipeline would:

- Not increase the density of linear features within the Fortune Core or the ungulate winter range;

- Not substantially increase overall disturbance answer in the Fortune Core or the ungulate winter range:

- Avoid impacts to wet lands and riparian areas to the extent practicable;

- Be carried out at a time and manner that would limit the potential to adversely impact caribou or other high priority wildlife.

[46] The March 1st letter set out that the Commission had considered s. 6 of the *Regulation* and was satisfied that the Project would not cause a material adverse effect on the ability of the wildlife habitat within the ungulate winter range to provide for the survival of boreal caribou within the ungulate winter range.

[47] The letter went on to indicate that the Commission would not comment on the expert report provided by the Fort Nelson First Nation as they did not want to debate caribou population health or mitigation options not enforceable under their regulatory framework. Nor would the Commission discuss the adequacy of Rockyview's caribou mitigation plan or comment on the Fort Nelson First Nation's expert report. The Commission acknowledged that the proposed Project would involve widening sections of existing seismic lines and removal of vegetation, which would increase the risk of predation to the caribou, but stated that recommended permit conditions would mitigate against those problems.

[48] The letter concluded with the following summary of the Commission's position on consultation:

> The Commission recommends that any further discussion between FNFN and the Commission and as necessary involving Rockyview regarding the proposed pipeline pertain to the following:
>
> - Preferred locations of use for treaty rights exercising intersecting or adjacent to the proposed right-of-way, including cabins and/or camp sites, preferred timing of use and preferred access routes to those locations.

- Locations of traditional use trails intersecting the proposed right-of-way or shooflies.

- Wet land crossings (e.g. boring wet lands where open cut construction has been proposed).

- Opportunities to further avoid or limit mulching and clearing, including opportunities to further reduce the right-of-way width.

- Restoration methods and measurement of restoration success.

[49] In an e-mail dated March 9, 2017, Mr. Waterman reiterated the Commission's position on the scope of the issues it was willing to consult on stating:

> As indicated in my March 1st letter, I will not be discussing broad provincial initiatives such as BCIP revisions, assessments or interpretations of items such as linear density and caribou population health or how the Commission consults with FNFN or other First Nations generally. Discussions should focus on the proposed Project, the potential adverse impacts to treaty rights, exercise associated with the proposed Project specifically and options for mitigating potential impacts.

[50] The Fort Nelson First Nation responded on March 15, 2017, indicating that the unilaterally imposition of what could and could not be discussed was an unacceptable and unlawful approach to consultation with the Fort Nelson First Nation regarding how this pipeline will impact boreal caribou in the Fortune Core and the Fort Nelson First Nation's treaty rights.

[51] By letter of March 22, 2017, Mr. Waterman on behalf of the Commission confirmed that the Commission was not willing to discuss in the consultation process the assessment and/or interpretations of boreal caribou population health and linear density, the BCIP revision, the adequacy of Rockyview's caribou management plan and the rationale for that position.

[52] The Fort Nelson First Nation responded on April 3, 2017, indicating that it was difficult to understand how the Commission reached the conclusion that the pipeline would not cause a material adverse effect within the area without examining the

existing state of caribou in the area and existing disturbance, including linear density.

[53] Mr. Waterman responded on behalf of the Commission on April 19, 2017, reiterating the Commission's position that Rockyview's caribou management plan was reviewed in the conjunction with the details of the proposed pipeline and the available information concerning the Maxhamish caribou herd and was determined satisfactory as the proposed Project would not result in any material adverse impact as set out in the March 1st, 2017 letter. The letter went on to state that the Commission considers the mitigation measures in Rockyview's plan in the context of the Commission's knowledge of the Maxhamish caribou herd, the specifics of the proposed project, the applicable regulations and other guidelines that can be included in any permit issues. In the letter Mr. Waterman states that the consultation with the Fort Nelson First Nation cannot positively affect their treaty rights to hunt caribou as the potential for the Project to further reduce the Fort Nelson First Nation's ability to hunt caribou within the Maxhamish Range was relatively low.

[54] Following that letter on May 1, 2017, the Commission sent a revised caribou management plan prepared by Rockyview to the Fort Nelson First Nation and reiterated the areas it was prepared to discuss with Fort Nelson First Nation.

[55] On May 4, 2017, the Fort Nelson First Nation wrote to the Commissioner indicating that there was a problem as to how the Commission was approaching consultation about the Project, including the Commission's unwillingness to discuss the Fort Nelson First Nation's expert's report, the adequacy of Rockyview's caribou management plan, or the current state of caribou in the area and the existing disturbance.

[56] On June 5, 2017, the Commissioner responded and referred the Fort Nelson First Nation back to Mr. Waterman regarding consultation about the Project.

[57] On June 5, 2017, the same day, Mr. Waterman wrote to Fort Nelson First Nation on behalf of the Commission indicating that the Commission was closing

consultation. In the letter Mr. Waterman on behalf of the Commission stated that the Commission had sufficient information about the Fort Nelson First Nation's concerns and preferred decision regarding the applications. The letter states that the information and recommendations gathered would be provided to the decision maker along with the Commission's present knowledge of the proposed Project, its present knowledge of the Maxhamish herd and its range, and the present provincial direction regarding boreal caribou and the boreal caribou implementation plan revision, including new accommodation options and their implementation and the applicable regulatory responsibilities. The letter goes on to state that the opportunity to discuss the consultation process with respect to the proposed Project was offered to Fort Nelson First Nation as outlined in its previous correspondence.

[58] The Commission takes the position that the consultation process was accessible, adequate and provided Fort Nelson First Nation with an opportunity to participate in a meaningful way. The Commission says that the Fort Nelson First Nation were directly provided with information regarding the Project and invited to engage with the Commission regarding any concerns. The Commission submits that it made efforts to be flexible in its approach to consultation as to give Fort Nelson First Nation the opportunity to participate in a meaningful way.

[59] The Commission points to *Louis v. British Columbia (Energy, Mines and Petroleum Resources)*, both 2011 BCSC 1070 at paras. 226-227, and 2013 BCCA 412 at paras. 116-117, as an example where the first nation was unresponsive to the government's good-faith efforts to consult with them. However, the facts in that case are quite different. As noted by the trial judge in *Louis*, the first nation was given many opportunities to consult with the ministry and other provincial ministries to provide their comments, but did not particularize their concerns other than objecting to the initial mine opening in 1965. The first nation's correspondence seemed to indicate they felt they had a veto in that case.

[60] The Commission takes the position that by refusing to engage with Mr. Waterman regarding a flexible approach to consultation and the refusal to

provide Project specific information, the Fort Nelson First Nation was unreasonable and unresponsive to the commission's good-faith efforts to consult with them.

[61] However, it was the Commission, not the Fort Nelson First Nation, who sought to limit the topics that would be addressed, and indicated from the outset that it was the Commission's determination that the Project would not have a material adverse effect on the ability of the wildlife habitat within the ungulate winter range to provide for the survival of boreal caribou within the ungulate winter range. That was the very issue that the Fort Nelson First Nation wanted to consult on, as indicated by their letter of February 17, 2017.

[62] The Commission says that its position to limit the scope of consultation to Project-specific concerns was appropriate, and the broad consultation requested by the Fort Nelson First Nation went beyond the potential impacts of the Project and was not consistent with the case law.

[63] However, it is clear from the case law that while the duty to consult is not triggered by historical impact and is not a vehicle to address historical grievances, it may be impossible to understand the seriousness of the impact of the Project on treaty rights without considering the larger context. The cumulative impacts of the Project on treaty rights and historical context may inform the scope of the duty to consult as set out in *West Moberly* at paras. 117 to 119, and approved of in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at paras. 41-42.

[64] There is no indication that the Fort Nelson First Nation was seeking a veto right over the Project. However, they were interested in consulting on the overall impact the Project would have on caribou health and their treaty right to hunt caribou in the Fortune Core area of the Maxhamish Range.

[65] The Commission pointed to some statements in its letter of March 22, 2017, in support of its position that it was inviting further discussion regarding Fort Nelson First Nation's concerns. However, it is clear from the correspondence that the

Commission was intransigent regarding its position that it would not discuss caribou health and linear density in the area, or the adequacy of the caribou management plan prepared by Rockyview or the expert report prepared for Fort Nelson First Nation.

[66] As noted in *Mikisew*, even at the low end of consultation found in that case, the Crown is required to solicit and listen carefully to the First Nations' concerns and to attempt to minimize the impacts of a project on their treaty rights. It is also clear from the case law, including *Mikisew*, that there was a reciprocal onus on the Fort Nelson First Nation to respond to the Commission's attempts to address their concerns and attempts to reach a satisfactory solution.

[67] Had the consultation process gone ahead in this case, it would not have given the Fort Nelson First Nation a veto over the construction of the pipeline or the storage shed, and would not necessarily have led to accommodations that were different than those proposed by Rockyview and the Commission.

[68] However, when the Commission's initial response to their concerns is to tell the Fort Nelson First Nation it will not discuss them, and that the Commission is satisfied that the Project will not have a material adverse effect on the ability of wildlife within the ungulate winter range to provide for the survival of boreal caribou within it, it cannot be said that the Commission was willing to engage in consultation. Although the Commission argues that the decision regarding whether the Project would have a material adverse effect on the ability of the boreal caribou to survive in the ungulate winter range had not been made at the time because Mr. Waterman was not the decision maker, Mr. Waterman reiterated the Commission's position in subsequent letters.

[69] It is apparent from the comments in the March 1st, 2017 letter and the subsequent correspondence that the Commission was not prepared to discuss the Fort Nelson First Nation's concerns regarding the cumulative impact on the Project on their treaty rights or the specific impact that the Project could have on the health

of the caribou population or linear density. As a result of the Commission's response of March 1, 2017, the consultation process in this case never got off the ground.

[70] This is not a case of the Fort Nelson First Nation's failing to avail itself of opportunities for consultation. The Commission points to the fact that Mr. Waterman continuously invited the Fort Nelson First Nation to contact him to arrange a meeting to discuss the consultation process. While Mr. Waterman does state in his letters that the consultation should proceed and they should have a conference call, he was at the same time limiting the agenda and advising the Fort Nelson First Nation that the Commission was satisfied the Project would have no material adverse effect on the caribou, and the caribou plan prepared by Rockyview was sufficient.

[71] Faced with the position that the Commission would not consult with them about their concerns, and apparently had determined the key issues, including that the impact of the Project on their treaty rights was low, it is no surprise that the Fort Nelson First Nation did not avail themselves of the opportunity to meet with Mr. Waterman. Instead they communicated with the Commissioner, who referred them back to Mr. Waterman on June 5, 2017, the same day the Commission closed the consultation process.

[72] In my view the evidence establishes that it was the Commission who failed to meet its duty to consult by soliciting and listening carefully to the Fort Nelson First Nation's concerns prior to issuing the permits.

[73] The Commission submits that a review of the Fort Nelson First Nation and their expert caribou report shows that the Fort Nelson First Nation's position was that there could be no meaningful consultation without a plan which would address past impact on the caribou. However, Fort Nelson First Nation never indicated they had a veto and, in fact, acknowledged that do not have a veto over the Project. I agree with Fort Nelson First Nation that the fact they put forward the position there should be a comprehensive recovery plan for the Fortune Core before the Project was approved does not offend the duty to consult.

[74] The Fort Nelson First Nation put forward information on matters that were important to them about the impact of the Project on their treaty rights and were faced with the Commission's refusal to discuss the concerns they had identified, including the cumulative impact of the Project on their treaty rights.

[75] As noted in *Chippewas* at paragraph 42, cumulative effects of an ongoing project, and historical context, may inform the duty to consult. It may be necessary to recognize an existing state of affairs and address the consequences of what could result from a project.

[76] In my view the Commission acted unreasonably in attempting to limit the consultation in the manner it did.

[77] The Commission and Rockyview both point to the fact that Fort Nelson First Nation's concerns were taken into consideration and appropriate accommodations were made as reflected in the permits and the timing of the construction of the Project. However, the Fort Nelson First Nation was not consulted about accommodations before they were made.

[78] Although Rockyview may have had some discussions with the Fort Nelson First Nation at the inception of the application process, the interactions they described are not relevant to whether the Commission fulfilled its duty to consult. In this case the Commission expressly stated it was responsible for carrying out the consultation required by the Crown.

[79] It follows that I have concluded the Commission failed to meet its duty to engage in a meaningful consultation regarding either the issuance of the permits or the appropriate accommodations that should be made if the permits were to be issued.

[80] I turn next to the appropriate remedy. As set out I have concluded that the Commission breached its duty to consult with the Fort Nelson First Nation about the

Project prior to making the decisions to issue the permits. The petitioners seek to have the decisions quashed.

[81] In *Clyde River*, the Court noted:

> [24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review.

[82] The Commission says the issue of remedy was not before the court in *Clyde River*, and the case does not stand for the proposition that a decision should be quashed in every case where there is inadequate consultation. The Commission points to s. 8 of the *Judicial Review Procedure Act,* in submitting that the remedy is discretionary.

[83] The Commission takes the position that the appropriate relief if it did not meet its duty to consult is to uphold the decisions to issue the permits and send the matter back for further consultation. Rockyview also submits that if the Commission is found to have breached its duty to consult, the proper remedy is to uphold the decisions to issue the permits but send them back for further consultation on condition 18 of the permit, which provides for mitigating the impact on the Project on the caribou.

[84] However, I have found there was inadequate consultation which did not comply with the Crown's duty to consult prior to the decisions being made to issue the permits for the Project. In the circumstances I am of the view that the statements set out in *Clyde River* have application. As noted in *Clyde River*, the appropriate remedy when a decision impacting first nation or treaty rights is not in compliance with the duty to consult, is to quash it.

[85] In my view to uphold the decisions permitting the construction of the Project when there has been inadequate consultation before the decisions were made and to limit the consultation to accommodation is not an appropriate remedy in the circumstances.

[86] Accordingly, I am making an order quashing the Commission's decision dated June 23, 2017, permitting Rockyview to construct and operate a pipeline in the Fort Nelson First Nation's territory and the Commission's decision made June 7, 2017, allowing Rockyview to construct a storage facility related to the pipeline.

[87] In their written submissions the petitioners did not seek the relief set out in paragraphs 2 to 4 of the Petition, but sought an order quashing the decisions.

[88] In paragraph 4 of the Petition, the petitioners are seeking injunctive relief for a future event. In *Blood Tribe v. Canada (Attorney General)*, 2012 ABCA 206 at para. 43, the court referred to *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, in finding that declaratory relief is not generally available for future speculative events.

[89] The declaration being sought in paragraph 4 of the Petition seeks interim injunctive relief over the actions of unspecified persons in regards to unspecified exercise of statutory decision making. I agree with Commission that the relief sought by the petitioners in this declaration is speculative, as the petitioners have not identified which further approvals may be required for the Project, nor the identity of the decision makers the petitioners seek to enjoin from acting. In my view giving any injunctive relief for future possible unidentified approval is inappropriate.

[90] In summary I am making an order granting the relief as set out in paragraph 1 of the petition under the heading "Orders Sought." The decisions of the Commission dated June 7, 2017, and June 23, 2017, are quashed. The relief sought in paras. 2 to 4 is dismissed. The petitioners are entitled to their costs of this petition.

[SUBMISSIONS ON COSTS]

[91] THE COURT: I will apportion the costs 80 percent to the Commission and 20 percent to Rockyview, and it will be joint and several.

“Gerow, J.”