PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Mi'kmaq of P.E.I. v. Province of P.E.I. et al.***, 2019 PECA 26

Date:20191113
Docket: S1-CA-1397
Registry: Charlottetown

BETWEEN:

THE MI'KMAQ OF PRINCE EDWARD ISLAND, CHIEF MATILDA RAMJATTAN, ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE LENNOX ISLAND FIRST NATION, AND CHIEF BRIAN FRANCIS, ON HIS OWN BEHALF AND ON BEHALF OF ALL OF THE MEMBERS OF THE ABEGWEIT FIRST NATION

APPELLANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF PRINCE EDWARD ISLAND, 9711864 CANADA INC., AND DONALD J. MCDOUGALL

RESPONDENTS

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:
David M. Rosenberg, Q.C., John W. Hennessey, Q.C., Naomi Moses, and David Moriarty, counsel for the Appellants

M. Lynn Murray, Q.C., Thomas Isaac and Arend Hoekstra, counsel for the Respondent, Province of Prince Edward Island

David W. Hooley, Q.C., and Jessica M. Gillis, counsel for the Respondents, 9711864 Canada Inc. and Donald J. McDougall

Place and Date of Hearing	Charlottetown, Prince Edward Island May 14, 15 and 16, 2019
Place and Date of Judgment	Charlottetown, Prince Edward Island November 13, 2019

Written Reasons by:
Chief Justice David H. Jenkins

Concurred in by:
Justice Michele M. Murphy
Justice John K. Mitchell

CONSTITUTIONAL LAW - Aboriginal peoples - Crown duty to consult - When duty to consult arises - Whether Province fulfilled duty - Standard of judicial review

The honour of the Crown is always at stake in government dealings with Aboriginal peoples. The duty to consult is grounded in the honour of the Crown. Where there is an unresolved Aboriginal land claim and contemplated government action that would transfer ownership and control of Crown land to the private sector, the duty to consult may be triggered.

The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title claimed and contemplates conduct that might adversely affect it. The three elements of this test are: (1) Crown knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

The content of the duty to consult and accommodate varies with the circumstances, is case-specific, and is informed by emerging case law. In general terms, the scope of the duty is proportionate to (1) a preliminary assessment of the strength of the case supporting the existence of the right or title claimed; and (2) the seriousness of the potentially adverse effect upon the right or title claimed.

Government decisions on whether the duty to consult is triggered and the required extent of consultation are subject to judicial review. Whether the duty is triggered, and if so the content of the duty, are typically questions of mixed fact and law that invoke a degree of deference to findings of fact of the initial adjudicator. This suggests reasonableness as the applicable standard of review. However, should government misconceive the seriousness of the claim or the impact of the infringement, such misconceptions are viewed as questions of law likely to be reviewed for correctness.

The Province intended to sell Crown land at Mill River comprising a golf course and resort. This would involve transfer of ownership and control of the property to the private sector. This contemplated Crown conduct raised the prospect of duty to consult. The Province consulted with the P.E.I. Mi'kmaq, and then completed the property transfer. The Mi'kmaq sought judicial review on the basis that the Province did not satisfy its duty to consult. A judge of the Supreme Court of Prince Edward Island dismissed the application for judicial review. The P.E.I. Mi'kmaq appealed.

Appeal dismissed. Review of the record of information that was available to the Province when it made its decision to transfer the property advises that the duty to consult was not triggered in this case. The reason the duty was not triggered is that the information or evidence produced or available did not show or suggest a potential or possibility that the Crown conduct may adversely affect the Aboriginal claim or

right. There was no evidence of a causal connection between the transfer of ownership and control of the property and a potential adverse impact on the Mi'kmaq pending claim for Aboriginal title. There was no Mi'kmaq use or interest in the property, either historic or present day, to be protected. As to Aboriginal title, there was very little information or evidence provided to support the Mi'kmaq repeated assertion that based on exclusive occupancy at the date of British sovereignty it has Aboriginal title to Prince Edward Island including the Mill River property. Alternatively, if the duty was triggered, then the Province satisfied its duty to consult because the consultation it initiated and carried out was appropriately focused and substantial, and exceeded the scope of consultation at the low end of the Haida spectrum advised by the proportionality test.

Authorities Cited:

CASES CONSIDERED: Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73; ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43; ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*** 2005 SCC 69; ***Agraira v. Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36; ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)***, 2017 SCC 54; ***Pimicikamak v. Manitoba***, 2018 MBCA 49; ***Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)***, 2013 ABCA 443; ***Blank v. Canada (Justice)***, 2016 FCA 43; ***Tefler v. Canada (Revenue Agency)***, 2009 FCA 23 ***Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)***, 2008 FCA 212; ***Tsilhqot'in Nation v. British Columbia,*** 2014 SCC 44; ***R. v. Peter Paul***, [1998] N.B.J. No. 20 (NBCA); ***Musqueam Indian Band v. Canada***, 2008 FCA 214 ("***Downtown Offices***"); ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550; ***Delgamuukw v. British Columbia***, [1997] 3 SCR 1010; ***R. v. Bernard***, 2003 NBCA 55; ***R. v. Marshall***, 2001 NSPC 2; ***R. v. Marshall***, ***R. v. Bernard***, 2005 SCC 43.

STATUTES CONSIDERED: Judicature Act, R.S.P.E.I. 1988, Cap. J.2-1, ss.5(1), 21; ***Judicial Review Act***, R.S.P.E.I. 1988, J-3, s.8; ***Crown Proceedings Act***, R.S.P.E.I. 1988, Cap. C-32.

TEXTS CONSIDERED: Robert Hamilton: "***After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces***", 67 U.N.B.L.J. 58 (2016); Bruce Ziff: **Principles of Property Law**, 7th Ed. (Thomson Reuters, 2018); **Canada's Smallest Province: A History of Prince Edward Island**, Edited by Francis W.P. Bolger (John Deyell Company, 1973); **Illustrated Historical Atlas of Prince Edward Island** by J.H. Meacham & Co., 1880 (P.E.I. Museum and Heritage Foundation, 2018).

Reasons for judgment:

JENKINS C.J.P.E.I.:

Summary of appeal decision

[1] Section 35 of the ***Constitution Act, 1982*** recognizes and affirms existing aboriginal and treaty rights of the aboriginal peoples of Canada. "*Aboriginal peoples of Canada*" includes the Indian peoples of Canada, of whom the P.E.I. Mi'kmaq are a part. The P.E.I. Mi'kmaq have asserted Aboriginal title to all of the lands and waters of Prince Edward Island, including adjacent areas and off-shore islands. Their claim is based on exclusive occupancy at the time of first contact with Europeans and at the assertion of British sovereignty. It is a corollary of s.35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This implies a duty to consult and, if appropriate, accommodate[1].

[2] In January 2017 the Province completed one aspect of its then five-year ongoing initiative toward divesting its provincially-owned golf courses, by approving the conveyance of the Mill River golf course and resort to a private sector company.

[3] Since the Mill River property was Crown land, and the P.E.I. Mi'kmaq had previously given notice to the Province that it intends to bring a claim for Aboriginal title to all of Prince Edward Island, the Government initiated consultation. Following the Throne Speech in April 2012, consultation occurred, commencing July 2012 and ending in January 2017. By the end, the Government decided the consultation was exhausted and was sufficient to meet and exceed its duty to consult. It approved the conveyance of the property without making any accommodation. The P.E.I. Mi'kmaq contended that the consultation that occurred was inadequate. They objected to the transfer of the property and challenged the validity of the Orders-in-Council that approved conveyance of the property.

[4] Where government's conduct is challenged on the basis that it failed to discharge its duty to consult and accommodate pending resolution of a claim

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[1] ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, at ¶20.

for Aboriginal title, the matter may go to the courts for review[2]. The P.E.I. Mi'kmaq brought an application for judicial review before the Supreme Court of Prince Edward Island. They sought declarations that the Province failed to adequately consult and/or accommodate and that the Orders-in-Council approving transfer for the properties, namely EC2017-6 and EC2017-12, are invalid and set aside.

[5] The reviewing judge assessed the record of the consultation process and dismissed the application for judicial review. Reasons for judgment are published in ***Mi'kmaq of P.E.I v. Province of P.E.I. et al***, 2018 PESC 20. The reviewing judge found that since consultation occurred he did not need to decide the threshold question of whether the duty arose or was triggered. He reviewed the government consultation and decisions. His reasons for judgment follow the framework established by the Supreme Court of Canada for assessing the scope and content of the duty. Generally stated, the duty is proportionate to the strength of the case supporting the existence of the Aboriginal title based on a preliminary assessment, and the seriousness of the potentially adverse effect upon the right or title claimed[3]. The reviewing judge found (i) assuming the duty to consult was triggered, the scope and content of the duty was at the low end of the ***Haida*** spectrum because the P.E.I. Mi'kmaq brought forward little evidence or information beyond assertion to support the existence of Aboriginal title to the Island or the property, and did not raise any prospect of appreciable, non-speculative adverse effect on their interests of conveyance of the property; and (ii) the Province met and more than satisfied its duty to consult.

[6] The P.E.I. Mi'kmaq appealed. They reiterate their contention that the Province's consultation process was deficient, inadequate and insufficient. They also assert the reviewing judge made numerous errors. They challenge his finding that the Province's determination that adequate consultation occurred was reasonable. They cite various errors made in interpreting and applying the framework established by the Supreme Court of Canada: (i) to their claim for Aboriginal title to Prince Edward Island; (ii) to their interest in the Mill River property; and (iii) regarding the potential adverse impact of conveyance of Crown land to the private sector on their claim or right.

[7] On an appeal from a decision on judicial review, the role of the

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2 ***Haida, supra***, at ¶60.

3 ***Haida, supra***, at ¶39.

appellate court is to determine whether the reviewing judge identified the appropriate standard of review and applied it correctly[4]. Performance of this role involves the appeal court effectively stepping into the shoes of the reviewing judge. The focus is on the executive action and decision under review. The action or conduct in issue is the consultation process itself. The decision in issue is the determination that the consultation process was at an end and that it had met or satisfied any duty it had to consult. The core question is the same as it was on judicial review: namely, whether or not the consultation process that the Province designed and carried out satisfied the Crown's constitutional law duty to consult the P.E.I. Mi'kmaq before transferring the Mill River property to the respondent McDougall and his company.

[8] The determinative question in this appeal is whether the government acted reasonably in its dealings with the P.E.I. Mi'kmaq in designing and carrying out consultation and in deciding that the consultation that occurred was sufficient in the circumstances. In these reasons, I answer that question in the affirmative.

[9] I also respond to the request of the primary parties for an opinion as to whether the government's duty to consult was triggered in the circumstances. I conclude the duty was not triggered. In brief summary, the duty to consult, being grounded in the honour of the Crown, must always be recognized and fulfilled appropriately to the circumstances. The inquiry on judicial review is evidence-based. In this case, the duty to consult principles all apply and are applied. The Mi'kmaq did not meet the low threshold for triggering the duty. When the government made its decision, there was no evidence or information before the government of a causal connection between transfer of ownership control of the property to the private sector and a potential adverse impact on the Mi'kmaq's pending claim for Aboriginal title. There was no Mi'kmaq use of the property, either historic or present day, to be protected pending proof of the Mi'kmaq claim.

[10] As to Aboriginal title, there was very little information or evidence provided in support of the assertion that based on exclusive occupancy at the time of British sovereignty it had Aboriginal title to all of Prince Edward Island or the property.

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[4] ***Agraira v. Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, at ¶45.

[11] I have reviewed the full record of the Crown consultation process and the affidavit evidence of events that was admitted into the judicial review proceeding. I have also considered the reviewing judge's reasons for judgment, paying particular attention to those reasons that address the appellants' listed issues on the appeal. I have scrutinized the determination that if the Province's duty to consult was triggered, the content of that duty was at the low end of the ***Haida*** spectrum, and the duty was satisfied. If the duty to consult was triggered, then the Province clearly satisfied its duty. The Province's process was reasonable. It appropriately identified the content of its constitutional law duty to consult, and it carried out a substantial and meaningful consultation process that satisfied its duty. The process that occurred was as complete and effective as it could be in the circumstances. In my assessment, the Province made a reasonable decision in determining that it had satisfied its duty to consult.

[12] The interest to be protected was the ability to obtain the benefit of the P.E.I. Mi'kmaq yet unproven claim to Aboriginal title to all of P.E.I. including the Mill River property. The Province provided the Mi'kmaq with timely and appropriate information regarding its general intention to divest its four golf course properties, and then regarding its specific or particular intention to convey the Mill River property to Mr. McDougall and his company. The Province requested information and evidence in support of the Mi'kmaq claim to Aboriginal title and as to its concerns over potential adverse effect of the proposed conveyance.

[13] Consultation is a two-way street. The Mi'kmaq provided little by way of evidence or information to show how its asserted title claim would be eventually proven or as to its historic connection with the property. The information P.E.I. Mi'kmaq did provide in response to the Province's requests was not of a kind that would provide significant support for its title claim, sufficiency of occupation of the Island generally, or any historic presence on the property at the date of British sovereignty. The information provided was mainly repeated assertions with general statements of entitlement to title that did not materially contribute to an evidence-based assessment. As a result, the sum total of information and evidence that was before the Province in support of the P.E.I. Mi'kmaq's claim to Aboriginal title was scant, and the Mi'kmaq claim as presented to the Province was tenuous. I come to the conclusion that the strength of the case supporting Aboriginal title was weak[5].

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[5] "*Weak*" is a term of measure in the ***Haida*** spectrum. In ***Haida Nation, supra***, McLachlin C.J.C. developed the concept of a spectrum. She stated: "*At one end of the*

[14] I also conclude there was no information or evidence provided to show potential or possible infringement/adverse impact on identified Mi'kmaq interest or association with the property as a result of conveyance of the property. No substantial evidence was provided to show a causal connection between the transfer of ownership and control of the Mill River property by itself and potentially adverse effect upon the title claim. There obviously would have been no present use or enjoyment, as the Mi'kmaq were not in present occupation of the property. But neither was there any information or evidence to show or raise the prospect of any past presence or interest to be preserved.

[15] Performance of the evidence-based proportionality test in ***Haida Nation*** reveals there was very little evidence before the Province to support the preliminary assessment of strength of title element of the test and no substantial evidence to support the second element. In my view, the claim presented to the Province comes within the category of "*tenuous*[6]." If the duty to consult was triggered in this case, the scope of the duty was at the low end of the ***Haida*** spectrum. Measured against that benchmark, the consultation being found to have been substantial and conducted in good faith, the Province clearly satisfied its duty to consult.

[16] Since the Province satisfied any duty that arose to consult, no questions regarding accommodation or remedy arise. However, in response to the parties' request for guidance regarding remedy, in my opinion this would not in any event be a case for injunctive relief. The appellants did not show any association, present day or historic, or any special bond with the property. There was no evidence that would tend to show potential for irreparable harm, or harm that could not be compensated by an award of damages should the P.E.I. Mi'kmaq eventually prove their claim to all or some part of Prince Edward Island including the property.

[17] Accordingly, I would dismiss the appeal and the application for judicial review. I would uphold the Province's consultation process and its decision that it fulfilled its duty to consult. It follows that the appellants' request for declarations that the Province failed to fulfill its duty to consult and that the

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spectrum lie cases where the claim to title is weak, ...".

[6] McLachlin C.J.C. stated in ***Haida Nation, supra***, at para.37, that a "*dubious or peripheral"* claim, or a "*tenuous*" claim will fall at the low end of the ***Haida*** spectrum.

ensuing Orders-in-Council are void would be dismissed.

[18] I will now set out more detailed reasons on the legal principles regarding duty to consult, standard of review, the consultation process that occurred, whether the Province satisfied any duty that arose, the proportionality test, and whether in the circumstances the duty to consult was triggered.

The grounds of appeal

[19] The P.E.I. Mi'kmaq Notice of Appeal asserts that the reviewing judge made errors within these categories: (i) failing to find the transfer of the property could have an adverse effect on the claimed Aboriginal title to the property; (ii) employing erroneous methodology in the analysis of adequate degree of consultation; (iii) erroneously applying the legal test for Aboriginal title rather than the test on judicial review of whether the Crown satisfied its duty to consult; and (iv) confusing the test for "*infringement*" under s.35 of the Charter with the test for whether the transfer of the property could have an adverse effect on the P.E.I Mi'kmaq. Their appeal factum distills and consolidates its view of the legal errors as:

A) concluding that the transfer of the land would have little or no adverse impact on the P.E.I. Mi'kmaq claimed Aboriginal title;

B) concluding that the P.E.I. Mi'kmaq had a weak claim for Aboriginal title;

C) finding that the Crown's duty to consult fell on the low end of the ***Haida*** spectrum;

D) concluding that if the Crown had a duty to consult in this case it fulfilled its duty.

[20] Issue "D" in this final list of issues is the core in this case. The ultimate issue is whether the Province satisfied its duty to consult. Determination of other listed issues "A, B and C" affects determination of the core question.

Legal principles regarding duty to consult

[21] In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. This is required to achieve reconciliation of pre-

existence of Aboriginal societies with the sovereignty of the Crown. The duty to consult is a constitutional obligation that flows from the honour of the Crown. Consultation must be conducted in good faith, must be meaningful, and the obligation must be met. Failure to adequately consult is actionable on its own; without any supporting application for injunctive relief[7].

[22] Where, as here, there is notice of a claim for Aboriginal title that is yet unproven, the Crown's duty to consult may well be triggered. The law understands that proving rights or title may take time, sometimes decades. In the meantime, consultation, and where applicable, accommodation is designed as a means of addressing the unproven interests. Upon receiving notice that a claim for aboriginal title is being seriously pursued, through consultation the Crown acts honourably by respecting the potential, but yet unproven, interests. At the same time, the Crown is not rendered impotent in pursuing its societal objectives, and accordingly may continue to manage the resource or land in question pending claims resolution. Depending on the circumstances, the honour of the Crown may require consultation, and where applicable, reasonable accommodation, in order to protect Aboriginal interests pending resolution of their claim.

[23] The duty to consult and accommodate is viewed as part of the process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The requirement of consultation before claims are proven ameliorates the risk of the unfortunate consequence of the Aboriginal claimant reaching the distant goal of proof of title only to then find that their land has been changed and denuded. Such an undesirable consequence would be neither reconciliation nor honourable[8].

[24] Where notice has been given of a claim for Aboriginal right or title that is yet unproven, the Crown cannot know that the right or title exists. This presents a challenge, as some idea of the core of the right in issue in its modern scope would be needed in order to meaningfully discuss justification of the right claimed and accommodation. In ***Haida Nation***, Chief Justice McLachlin addressed this situation. Notwithstanding this formidable challenge, it will frequently be possible, short of final judicial determination or settlement, to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate.

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7 ***Haida Nation v. British Columbia, supra***, at ¶10-17.

8 ***Haida Nation v. British Columbia, supra*** at ¶26-33.

[25] The judgment in ***Haida Nation*** provides a framework for consultation. To facilitate the determination, a claimant should outline its claims with clarity, and focus on the scope and nature of the asserted Aboriginal rights and on the alleged infringements. That kind of information enables the government (and the courts on judicial review) to make a preliminary evidence-based assessment of the strength of the claim to Aboriginal title and potential adverse effects[9].

[26] This raises two questions: one, when does the duty to consult arise? and two, what is the scope and content of the duty to consult? Within these two questions, distinction is made in a particular case between (1) knowledge sufficient to trigger a duty to consult, and if appropriate, accommodate, and (2) the content of the scope of the duty.

[27] The Supreme Court of Canada has provided directions for determination of the first question. The first statement was in ***Haida Nation***: "*Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate*." In a subsequent judgment, ***Rio Tinto***[10], Chief Justice McLachlin, again writing for the court, clarified and modified the test:

> [31] The Court in ***Haida Nation*** answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). **This test can be broken down into three elements**: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) **the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.** I will discuss each of these elements in greater detail. ...
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> [Emphasis added.]

[28] In the judicial review in the present case, it was common ground between the main parties that the first two elements of this test were satisfied. Through notices given during 1997-1999 by P.E.I. Mi'kmaq Chiefs to the Premier of the day, the Crown had actual knowledge of asserted Aboriginal title and rights. Regarding the second element, Crown contemplated conduct,

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9 ***Haida Nation v. British Columbia, supra*** at ¶36.

10 ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43, at ¶31.

the Government contemplated transfer of the Mill River property. Initially the Province received proposals, and later on they proposed to transfer the property to Mr. McDougall and his company. Only the third element of the ***Rio Tinto*** test was at issue in this case. An underlying question on judicial review and in this appeal is whether the contemplated Crown conduct of conveying the Mill River property to the private sector had the potential of adversely affecting the P.E.I. Mi'kmaq asserted claim for Aboriginal title to all of Prince Edward Island including the Mill River property. Although it consulted, the Province's position is that in the circumstances of this case its duty to consult was not triggered.

[29] The second question pertains to the content or scope of the duty in a particular case. The framework designed by the Supreme Court directs that the content of the duty to consult is case-specific and varies with the circumstances. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The Supreme Court recognized that being a common law creation, the law is capable of differentiating between "*tenuous claims, claims possessing a strong prima facie case, and established claims*."[11] This framework contemplates that the precise duties that arise in a particular situation will be defined as the case law in this emerging area develops. Chief Justice McLachlin, writing for the Court, provided overriding instruction and guidance in the form of a proportionality test:

> [39] The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. **In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.** [Emphasis added.]

Application of this proportionality test is the central function of this judicial review and appeal.

[30] The Supreme Court provided guidance tailored to pre-proof claims. While it is not useful to classify situations into water-tight compartments, different situations requiring differing responses can be identified. In all cases the honour of the Crown requires that the Crown act in good faith to provide meaningful consultation appropriate to the circumstances. In discharging this

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[11] ***Haida Nation v. British Columbia, supra***, at ¶37.

duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law. At all stages good faith on both sides is required. The Crown must intend to substantially address Aboriginal concerns, and to that end employ a meaningful process; sharp dealing is not permitted. However, there is no duty to agree. Rather, the commitment is to a meaningful process of consultation. Aboriginal claimants have obligations too:

> ... As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached [citations omitted]... [12]

[31] As mentioned, distinction is made between knowledge sufficient to trigger a duty to consult and the content or scope of the duty. The threshold for triggering the duty is low. Upon the threshold being achieved, difficulties associated with absence of proof and definition of claims are to be addressed by assigning appropriate content to the duty, not by denying the existence of a duty[13]. In ***Mikisew Cree First Nations***[14] Binnie J. stated: "*The flexibility lies not in the trigger ('might adversely affect it') but in the variable content of the duty once triggered.*"

[32] Regarding the content of the duty, the Supreme Court developed the concept of a spectrum for consideration of the kind of duties that may arise in different situations. The purpose of this is to indicate what the honour of the Crown may require in particular circumstances. McLachlin, C.J.C. stated the considerations at play in the circumstances of a particular case:

> [43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, **the concept of a spectrum** may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. **At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor**. **In such cases, the only duty on the Crown may be to give notice, disclose information, and**

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[12] ***Haida Nation v. British Columbia, supra***, at ¶40-42.

[13] ***Haida Nation v. British Columbia, supra***, at ¶37.

[14] ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, at ¶34.

> **discuss any issues raised in response to the notice**.
> "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
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> [44] **At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.** In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
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> [45] **Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually**. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. **The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake**. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
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> [Emphasis added.]

[33] Having been the first case on pre-proof consultation decided by the Supreme Court, in ***Haida Nation*** the Court chose to limit its task to establishing a general framework for the duty to consult in the circumstances. In doing so, it contemplated that in the age-old tradition of the common law courts across Canada on hearing judicial reviews and appeals would be called upon to fill in the details of the duty to consult and accommodate[15].

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15 ***Haida Nation v. British Columbia, supra***, at ¶11.

[34] The circumstances of the present case permit full determination upon application of these established principles and directions on duty to consult. There is no gap in the law calling for any new or supplementary jurisprudence. It appears to me that the Province understood these legal principles that direct its duty to consult. The determinative feature of this case is the absence of information or evidence to support the Mi'kmaq claim that transfer of the property might or potentially would adversely affect its interests.

Standard of review

[35] The duty to consult framework contemplates that governments and Aboriginal claimants will first seek to resolve questions of whether a duty was triggered, and if so the required content of the duty, and whether the government met the requirement. Should the parties be unable to agree on those matters, courts can assist through the judicial review process. A claimant with a pending land claim can challenge a government's conduct for failure to discharge its duty to consult, and upon such a challenge the matter may go to the courts for judicial review[16].

[36] Judicial review is conducted within boundaries that respect the separation of power among branches of government. Decisions and actions of the executive branch acting as a statutory delegate of the legislative branch and affecting the rights of a person are subject to judicial review. This protection of rights of persons exists pursuant to the prerogative of the courts to review executive action for legality, fairness, and reasonableness. In judicial review, the courts supervise the process. Courts exercise restraint, and thereby respect that the legislature has assigned to the government the executive decision-making function; and so the courts do not engage in reviewing the merits of the underlying government decision.

[37] In this scenario, the expectation is present that administrative law judicial review principles would apply. The Supreme Court of Canada confirmed this expectation in ***Haida Nation***. McLachlin C.J.C. stated that this gives rise to these directions on applicable standard of review:

> [61] On questions of law, a decision-maker must generally be correct: for example, ***Paul v. British Columbia (Forest Appeals Commission),*** [2003] 2 S.C.R. 585, 2003 SCC 55. **On questions of fact or mixed fact and law, on the other hand, a reviewing body**

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[16] ***Haida Nation v. British Columbia, supra***, at ¶37 and at ¶60.

> **may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate**. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20; ***Paul, supra***. **Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness**: ***Canada (Director of Investigation and Research) v. Southam Inc***., [1997] 1 S.C.R. 748.
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> [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.
>
> [Emphasis added.]

[38] The Supreme Court of Canada also provided directions on the role of a court of appeal on an appeal from a decision of a reviewing judge. The role of an appellate court is to decide whether the reviewing judge identified the appropriate standard of review and applied it correctly. This means that a court of appeal steps into the shoes of the reviewing judge. The focus of the

appellate court is, in effect, once again on the administrative decision[17]. Effectively, the appeal is a second hearing of the judicial review. The appellate court is not restricted to asking whether the reviewing judge committed a palpable and overriding error in his or her application of the appropriate standard[18]. This approach is applied by our Court of Appeal[19]. As a result the focus is again on the decisions of the Province's decision-maker as to the required level of consultation, the process of consultation, and the decision to end the consultation and proceed with the transfer of the property.

[39] It seems to me that these Supreme Court of Canada statements provide full direction for judicial review of government decisions on duty to consult (as of the date of this judgment). The Province must be correct in its conception of the seriousness of the P.E.I. Mi'kmaq claim and the impact of the infringement caused by its actions. Misconception on this fundamental issue appears to be viewed as a question of law[20]. Beyond that, in reviewing the decisions made in this case, reasonableness comes into play as the applicable standard of review because each decision involved a question of mixed fact and law[21].

[40] The questions of whether the duty is triggered in particular circumstances, and if so, the content of the duty to consult would be expected to be questions of mixed fact and law. A reviewing judge is called upon to perform two functions: first, to correctly identify and follow applicable legal principles, and second, to consider and assess the context or factual matrix. On review of such questions of mixed fact and law, it follows that deference will be in order. This results in the applicable standard of review being reasonableness, subject to exception for extricable errors of law, regarding which the standard of correctness would apply. The question of the sufficiency of the consultation process itself is reviewable on the standard of reasonableness. Reasonable efforts to inform and consult suffice to discharge

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17 ***Agraira v. Canada, supra***, at ¶45-48.

18 ***Tefler v. Canada (Revenue Agency)***, 2009 FCA 23, at ¶18; adopted in ***Agraira***, at ¶45.

19 ***P.E.I. Music and Amusement Operators Assn. Inc. v. Prince Edward Island***, 2015 PECA 8, at ¶14.

20 ***Haida Nation***, at ¶63, first sentence; and ¶61, third sentence.

21 ***Haida Nation***, at ¶63, second sentence; and ¶61, sentences 2, 4, 5 and 6.

the duty.

[41] In this case, there was no government decision as to whether the duty to consult was triggered. The government consulted. It gave notice of its intended action and it carried out consultation with the Mi'kmaq. The only government decisions that are reviewable pertain to sufficiency of the consultation. In my opinion, these decisions are reviewable on the standard of reasonableness. The government's decision that the consultation process was adequate and sufficient to meet its obligation is entitled to deference[22].

[42] The reviewing judge dealt with standard of review. He referred to the Supreme Court directions in ***Haida Nation***, and then expressed his opinion essentially consistent with my analysis in the previous paragraph. He adopted the view that reasonableness would apply to those questions, depending on the circumstances of each case[23]. He then turned his attention to a Federal Court of Appeal case ***Ahousaht Indian Band***, which the Province had referred to the court as authority for the proposition that determination of the existence and extent of the duty to consult or accommodate is a question of law and hence reviewable on a standard of correctness[24]. All counsel submitted this divergent course be followed, and the reviewing judge adopted that consensus.

[43] I respectfully decline to follow the ***Ahousaht Indian Band*** statement on standard of review to the extent it departs from the Supreme Court direction in ***Haida Nation***. The reasons for judgment state that the author draws the above mentioned proposition from the aforementioned prescription in ***Haida Nation***: *"thus the determination of existence and extent of the duty to consult is a question of law and hence reviewable on a standard of correctness*." But the reasons in ***Ahousaht Indian Band*** do not appear to take into consideration the rest of the Supreme Court of Canada statement, which is this critical qualification: *"However, it is typically premised on an assessment of the facts. It follows that a degree of deference..."*. In my view, there is no need in this judicial review to depart from the Supreme Court directions. Even if there was

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[22] ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)***, 2017 SCC 54, at ¶77; applied in ***Pimicikamak v. Manitoba***, 2018 MBCA 49, at ¶134.

[23] Reasons for judgment of reviewing judge, at ¶62.

[24] ***Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)***, 2008 FCA 212, at ¶33-34.

a question of whether the duty was triggered for review, which there is not, reasonableness would be the applicable standard because absent an error of law the analysis is driven by assessment of the factual matrix. Whether a duty is triggered, i.e. "*existence,*" and the content of any duty that arises, i.e. "*extent*," are questions of mixed law and fact. Absent decision-maker error on legal issues (***Haida***, at ¶61), the standard will likely be reasonableness. The deference of respect acknowledges that the decision-maker would generally be in a better position than a reviewing court to evaluate the issue.

[44] Any difference of opinion or approach on applicable standard of review did not in any event affect the outcome of the judicial review. Neither the Province nor the reviewing judge had to decide or decided whether the duty to consult was triggered; the Province voluntarily engaged in consultation. While the reviewing judge made a determination on where the duty fell on the ***Haida*** spectrum, nothing turned on that determination. The determinative decision on judicial review was that the Province carried out a reasonable consultation process and fulfilled its duty to consult. The reviewing judge found the conduct of the consultation process by the Province and its decision that it had satisfied its duty to consult were reasonable and that the Province more than satisfied its duty to consult. Ultimately, there was no over-employment of the correctness standard.

[45] Accordingly, the reviewing judge applied the correct standard of review to the questions in issue. Whether the reviewing judge applied the applicable standard of review correctly involves a review of the reviewing judges' reasons on the correctness standard. This really does entail the Court of Appeal stepping into his shoes and again reviewing the actions and decisions of the government decision-maker based on the applicable standard of review.

Identification of the right in issue

[46] There have been quite a few duty to consult cases decided by Canadian courts over the course of the last 15 years. However, this case is the first duty to consult judicial review in Prince Edward Island. This is the first occasion where there was intended government action and knowledge of an unproven P.E.I. Mi'kmaq claim that might need to be protected from potential adverse effects of the contemplated Government action. Therefore, all involved in the consultation process will hopefully learn and benefit from this first experience. Hopefully this judicial review and appeal will make a constructive contribution toward better understanding in the future of expectations for participation in the process. Without detracting from my opinion that the consultation that occurred was sufficient, I offer these comments regarding the

issues that have arisen. I believe the source of the P.E.I. Mi'kmaq dissatisfaction in this case is that they did not clarify their claim, or marshal their participation to match their claim or their rights within a consultation process.

[47] For me, an underlying challenge in conducting this review has been to identify the core of the right in issue. Various statements of the Mi'kmaq claim refer interchangeably to "*rights*" and "*Aboriginal title*;" but they are not the same thing. In ***Haida Nation***, the Supreme Court advised that to facilitate the determination of duty to consult, claimants should outline their claims with clarity. This involves focusing on the Aboriginal rights they assert, and on the alleged potential infringements that concern them. The Mi'kmaq communications with the Province were equivocal. They often speak of rights and Aboriginal title together. This probably left the Province with uncertainty as to how to respond and how to calibrate the consultation. This perhaps explains why the Province employed a bifurcated approach to responding to Mi'kmaq request or requirement for (i) government to address its site-specific concerns about transfer of ownership and control of the Mill River property, and (ii) for government to "*negotiate*" regarding the Mi'kmaq claim for Aboriginal title to all of P.E.I. Left to identify the dimensions of the Mi'kmaq claim, the courts on judicial review and appeal have had to grapple with identifying what is being claimed when evaluating whether the duty to consult was triggered and the content or scope of the duty.

[48] The initial letter from Chief Jack Sark to Premier Binns December 18, 1997, primarily addresses aboriginal rights. It refers to the ***Paul*** case in New Brunswick that recognized the right to cut trees on Crown land. The letter also refers to the British Columbia case ***Delgamuukw*** as an extremely important case respecting Aboriginal rights where there are no land treaties. Chief Sark's letter requests a meeting to discuss those cases, and objects to a recent transfer of 400 acres of Crown land to the private sector and any further diminution of Crown resources. Chief Sark then states that the Aboriginal people of this province have never ceded title to this island and now the Supreme Court of Canada has set clear parameters to aid in the determination of their rights with respect to the land. He advises that, relying on the Supreme Court decision in ***Delgamuukw***, the P.E.I. Mi'kmaq intend to pursue a claim for their rights with respect to the land.

[49] Chief Charlie Sark corresponded with Premier Binns on July 20, 1999. This letter appears to have been inspired by the Supreme Court decision in ***Delgamuukw***. His emphasis was on Aboriginal title and the incidents thereof of exclusive use and occupation. He advised of an intention to pursue a

comprehensive land claim. He stated that the P.E.I. Mi'kmaq have never ceded any of P.E.I. through sale, bargain, treaty or any other means; and that the P.E.I Mi'kmaq continue to assert title to all of present-day Prince Edward Island. He stated it is therefore important that the provincial government consider this fact when dealing with Crown lands.

[50] On July 23, 1999, Chief Francis Jadis informed Premier Binns of the intention to pursue a comprehensive land claim for all of Prince Edward Island. He noted that Aboriginal title to the lands that were neither ceded nor sold are protected under **Belcher's Proclamation** and the **Royal Proclamation 1763**. He asked that this assertion of title be taken into consideration when dealing with issues concerning Crown lands.

[51] By the time the government gave the notice in 2012 that started the consultation, the P.E.I. Mi'kmaq had not proven or established any claim for either Aboriginal title or rights. When the Province made its decision in January 2017 that the consultation that had occurred was as complete as could be and was sufficient to satisfy its duty, the P.E.I. Mi'kmaq had not yet taken any steps to prove or establish their claims or commence a legal proceeding.

[52] The P.E.I. Mi'kmaq communications during the consultation period 2012-2017 continue to speak in the same breath of both rights that "*may be negatively impacted by any Crown decision*" and assertion of Aboriginal title to all of Prince Edward Island.

[53] The Province states that from the very outset of the process government intended to listen and respond to any and all P.E.I. Mi'kmaq expressed concerns. However, it must have been confounded when the Mi'kmaq would not respond to its repeated requests for them to provide information on how the proposed divestiture of the Mill River property may affect the Mi'kmaq "*established and asserted Aboriginal and treaty rights*."

[54] I discern that the P.E.I. Mi'kmaq claim is for Aboriginal title to all of Prince Edward Island, not for some lesser rights. I discern the asserted potential adverse impact caused by conveyance of Crown land comprising the Mill River property is on the future exercise of the right itself. In other words, transfer of ownership and control could affect their ability to reclaim this land if Aboriginal title is proven.

If the duty to consult was triggered, did the Province fulfill its duty? (Ground of Appeal "D")

[55] The record of the consultation process was filed on the application for judicial review. This involved mainly correspondence between officials of the Government and the P.E.I. Mi'kmaq, plus three meetings specifically dealing with the Mill River property. The record was supplemented by affidavit evidence of representatives of all parties. The Province's Deputy Minister Neil Stewart deposed that the combination of the record and affidavit evidence provides a full and fair account of the consultation process that occurred. I have reviewed all of this information. I have also read and critically evaluated the reasons for judgment on judicial review. These reasons describe in detail the communications and exchanges that took place between the parties regarding the Province's contemplated action, the reason for it, the claims and statement of potential adverse impact of conveyance of the property, the interests to be addressed, and the views of the Province and the Mi'kmaq on appropriate and required level and content of consultation.

[56] The reviewing judge's reasons contain a full and fair description of the record of the consultation that occurred, from its beginning in July 2012 to its end in January 2017. There is no need to repeat the reviewing judge's description of those events. The list of consultation activities (at ¶178) appears accurate. My independent review of the record confirms that the reviewing judge accurately stated: (i) the principles that govern and frame the consultation process (at ¶108), and (ii) the information that was before the Province or known by the Province when it made its decision on the scope of its duty to consult. The Province gave notice, disclosed information, requested input, and discussed all issues raised by the Mi'kmaq in response to the notice and disclosure.

[57] From 1997 onward, the Province acknowledged the P.E.I. Mi'kmaq correspondence by which they advised they assert title to all of Prince Edward Island. Prior to 2012, it entered into a non-binding consultation agreement. In 2012 the Province notified the Mi'kmaq of its intention to entertain expressions of interest for its four golf courses and associated resorts. It provided information as to the societal purpose and economic objectives it was seeking to achieve. It offered to consult. The P.E.I. Mi'kmaq responded that they required consultation regarding that initiative and regarding all steps toward conveyance of those Crown lands. Over the course of the next four plus years, the Government informed the P.E.I. Mi'kmaq of material developments in a timely way. The Province asked for input in support of the Mi'kmaq claim for Aboriginal title, and for information and particulars on potential adverse effects on any interests they had in the Mill River property that could be caused by transfer of ownership. Once the Province commenced working toward agreement with Mr. McDougall and his

company, it informed the Mi'kmaq of that fact, and then responded meaningfully to their requests for information and engaged in discussion about the transaction, its decision-making process, and their identified interests.

[58] The Province asked the P.E.I. Mi'kmaq to provide information in support of their contention that they have a credible claim to Aboriginal title to Prince Edward Island including the Mill River property, and for information in support of its particular interests, either historic or present, in the Mill River property itself and of potential adverse effects on their interests that might be caused by conveyance of the property.

[59] The Province's consultation process is reviewable on the standard of reasonableness, based on the information that was before the Province or of which it would be reasonably perceived to have been aware when it made its decision. Government was aware from the Chiefs' correspondence to Premier Binns 1997-1999 that the P.E.I. Mi'kmaq asserted title to Prince Edward Island. It knew the Mi'kmaq were undertaking further research regarding their interests, and that they objected to Government taking action or decisions affecting Crown resources in the meantime. The Province informed the Mi'kmaq that to its knowledge there was an absence of historic Aboriginal contact with the property. It outlined its intention that the current use of the property as a golf course and resort would continue. It responded to Mi'kmaq correspondence by addressing specific assertions of presence of archeological sites and traditional uses of the Mill River property and in the local area. It stated that to its knowledge no archeological sites were located within a five kilometer radius of the property. Government asked the Mi'kmaq to provide any detailed archeological information in their hands that might assist with the inquiry. It asked for explanation as to how the transfer of the property would adversely impact any Aboriginal or treaty right given that the property had been developed and used as a golf course and resort for the past 35 years and would continue to be used for that purpose.

[60] The P.E.I. Mi'kmaq did not provide very much additional information to support their claim for Aboriginal title or to identify potential adverse impact. The reviewing judge concluded:

> [131] In summary, the Province had been advised of some past Aboriginal traditional activities in the general area, but the only archaeological or other information it had with respect to the specific 325 acres of land in question failed to disclose any significant past presence. **That does not mean one can conclude there was no past activity, but it does affect an evidence-based preliminary assessment of the strength of the claim to title. No**

> **current traditional uses were identified.** The Province knew the Lands had been used for a golf course and resort complex for the past 3 ½ decades. The Province also knew such use was not going to change after the contemplated transfer. **No other adverse impacts of its contemplated transfer were identified.** [Emphasis added.]

[61] By the end of 2016, the Province formed the view that despite several requests it had not received any information that contradicted its 1984 professional systematic archaeological survey as to potential and traditional uses of the Mi'kmaq or any information as to how the continued use of the property as a golf course, campground and hotel accommodation, albeit with a different owner/operator, "*would affect established and asserted treaty rights*.[25]" The Province then informed the P.E.I. Mi'kmaq that it had given due consideration to all of the information exchanged over the four plus years of consultation and decided to proceed with its decision to convey the property.

[62] One aspect of the Province's communication merits critical examination. In the midst of the consultation, the P.E.I. Mi'kmaq requested negotiation in furtherance of their assertion of Aboriginal title to all of P.E.I. The Province chose to apportion their interactions. It explained that consultation regarding the Mill River transaction would be confined to that transaction, and that the Province's Aboriginal Affairs Secretariat would address the broader matter of negotiation separately. Contemporaneously, the Secretariat advised it had experienced a change of Ministers, which necessitated postponement of initiation of any process of negotiation. It appears no such negotiation process occurred. The appellants submit this shows that meaningful consultation did not occur. I would not draw such an inference. Viewed in context, it does not appear to me that this turn of events diminished the process of consultation regarding the proposed property transaction. As counsel for both parties pointed out, the only issue in this case is duty to consult; this is not a title case. This judicial review is not concerned with the grand question of the Mi'kmaq claim for Aboriginal title to the whole Island, or whether or not the Province should engage in negotiation. Consultation involved the Province responding to expressed concerns about potential impact of the conveyance on the Mi'kmaq's yet unproven claim of Aboriginal title. In any event, as to the expressed concern over logistics, consultation is not reviewed for perfection. The record shows that notwithstanding this separation of roles, meaningful and effective communication sufficient to flesh out the interests at play occurred. There was

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[25] Affidavit of Neil Stewart, Deputy Minister, sworn June 1, 2017, at ¶99, 100.

substantial correspondence subsequent to the mentioned separation of functions. This was complemented by three in-person meetings; one meeting involved the P.E.I. Mi'kmaq stating their case to the full Executive Council.

[63] The consultation process also involved an exchange of differing views between the parties as to the content of consultation, proper process, and rights and expectations of the parties. It is the Government's prerogative to establish and follow a reasonable process of consultation[26]. So long as government proceeds in good faith and makes every reasonable effort to inform and consult such efforts would suffice[27].

[64] Various positions taken by the P.E.I. Mi'kmaq had the effect of limiting the consultation. They stated their claims in very general terms that left ambiguity as to the precise rights claimed. They declined to participate in accordance with the protocols established by the Supreme Court of Canada. They provided little information about any historic connection with the property, and did not respond substantively to requests as to how the conveyance would affect the rights and interests they claimed. They misapprehended or in any event misstated the respective roles. They asserted, in error: (i) they had no duty to provide information; (ii) Government had the sole duty to obtain information; (iii) their consent was required for the conveyance; and (iv) negotiation was required before any conveyance. The duty to consult is reciprocal. The Crown duty includes providing notice and information on the project and consulting regarding concerns raised. The obligations on the Aboriginal group include defining the claim with clarity, not frustrating the Crown's good faith attempts, and not taking unreasonable positions to thwart the Crown from making decisions where despite meaningful consultation agreement is not reached[28].

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[26] ***Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)***, 2013 ABCA 443, at ¶12:

> [39] In our view, the duty to consult is described in very general terms and there is significant flexibility in how the duty is met. The Crown has discretion as to how it structures the consultation process. As noted by Garson JA (dissenting in the result) in ***West Moberly First Nations***, the consultation process requires compromise, and compromise is a "difficult, if not impossible, thing to assess on a correctness standard": at para 197. ...

[27] ***Haida Nation v. British Columbia, supra***, at ¶62.

[28] ***Ktunaxa, supra***, at ¶80; applied in ***Pimicikamac, supra***, at ¶16-17.

[65] Consultation does not confer a veto power over what can be done with Crown land pending final proof of an Aboriginal title claim. The Mi'kmaq overstated their situation. They informed the Province that since it was their position that the Mi'kmaq have Aboriginal title to all of P.E.I., following the ***Tsilhqot'in*** judgment of the Supreme Court of Canada any conveyance of Crown land *"would require the 'consent' of the Mi'kmaq of P.E.I. before it could proceed;"* and before consent could be obtained, it would require substantial accommodation[29]. That is not the law. The jurisprudence on duty to consult speaks of "*consent*" only in the context of cases involving a proven claim (and regarding rights only in cases of established rights), and then by no means in every case. What is required in a pre-proof consultation is a process of balancing the interests of protecting unproven claims and carrying on government in pursuit of societal objectives. This involves a process of give and take[30].

[66] I do not subscribe to the appellants' framing of events. Counsel asserts that due to the differing perspectives the Province did not effectively engage in consultation, and the process amounted to "*two ships passing in the night*." I find that the Province understood the process and carried it out. The process permitted and called for joint participation in consultation regarding a pre-proof claim for Aboriginal title. Instead of responding to requests for information that would advance effective evaluation of their claim, the P.E.I. Mi'kmaq overstated their position and appear to have focused on an end goal of some form of accommodation. They erroneously treated their claim as proven and presumed their consent thereby was required.

[67] My conclusions on review are that the consultation that occurred was as complete as it could be in the circumstances, and that it was sufficient. In my opinion, the Province acted reasonably in performing its duty, and its decision that it fulfilled its duty was reasonable.

Application of the proportionality test (addressing appellants' grounds "B" and "A")

[68] Assessment of the extent and scope of the duty involves application of the proportionality test in ***Haida Nation***. In general terms the scope of the

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[29] Affidavit of Donald MacKenzie, Q.C., Executive Director, sworn December 6, 2017.

[30] ***Haida Nation v. British Columbia, supra***, at ¶48.

duty is proportionate to a preliminary assessment of (i) the strength of the case supporting the existence of the Aboriginal title and (ii) the seriousness of the potentially adverse effect upon the right or title claimed. I will consider these two criteria separately, although there are some overlapping features.

- **Strength of case supporting Aboriginal title: Did the P.E.I. Mi'kmaq present the Province with a weak case for Aboriginal title (appellants' ground of appeal "B")?**

  – *Summary on preliminary assessment*

[69] The Province informed the Mi'kmaq of its contemplated conduct that might adversely affect the Mi'kmaq claim of Aboriginal title, and requested input in response. The P.E.I. Mi'kmaq then had the evidentiary burden of bringing information and evidence to the consultation process that would tend to support or demonstrate the basis of their case for Aboriginal title based on exclusive occupancy at the date of British sovereignty[31]. In their response, the P.E.I. Mi'kmaq did not provide much evidence or information in support. Instead, they mainly repeated their assertion of pre-sovereignty and pre-contact exclusive occupation of the whole Island. They needed to provide information to show how they would prove their claim once they commence their action. They needed to indicate available information that would tend to show sufficiency of their pre-sovereignty occupation. The criteria for sufficiency of occupation is in accordance with the territorial test in ***Tsilhqot'in Nation***. Such information would address the particular historic scenario of Île St. Jean leading up to and around the date of assertion of British sovereignty. Such information or evidence would have enabled the Province, and the reviewing judge, to make the requisite preliminary assessment of strength on their claim of Aboriginal title. In view of the limited information provided, it is reasonable to categorize the claim as weak.

  – *Appropriate methodology*

[70] I do not subscribe to the appellants' submission that the reviewing judge should not have made an assessment as to the strength of the Mi'kmaq claim for Aboriginal title. He was obliged to place the expected level of consultation on the ***Haida*** spectrum. The appropriate methodology includes carrying out a preliminary assessment of the strength of the P.E.I. Mi'kmaq case

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[31] ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44, at ¶25, 26, 37, 38, 39.

supporting the existence of Aboriginal title[32].

-- *Aspects of proof*

[71] Professor Bruce Ziff encapsulates the rules of recognition of Aboriginal title into a single requirement[33]:

> The rules for the recognition of Aboriginal title boil down to a single requirement: proof of first occupancy of land at the time of the initial assertion of Crown sovereignty. This simple idea can be broken down into three related sub-topics: (i) required *sufficiency* of occupation; (ii) the evidential relevance of *continuity* of occupation; and (iii) the requisite *exclusivity* of occupation.

[72] The P.E.I. Mi'kmaq did not engage in challenges to proof: (i) sufficiency of occupation of a large geographical area by a small population; (ii) exclusivity; (iii) the particular circumstances of the Island preceding and at the time of assertion of sovereignty; (iv) absence of land surrender and necessary implication; (v) lack of extinguishment. They did not address the unique circumstances of pre-sovereignty occupancy and British assertion of sovereignty in Prince Edward Island from the British expulsion of the Acadians and the Mi'kmaq to the Crown land grants of substantially all the Island as vacant land.

– *Historical accounts of events around date of assertion of British sovereignty*

[73] The appellants referred to historical events. They relied on reports by Dr. Robert Hamilton[34] and by Tammy MacDonald, Consultation/Negotiation Coordinator and Historical Researcher for the Mi'kmaq Confederacy of P.E.I. Inc.

[74] This excerpt from Dr. Hamilton's paper is interesting:

> Historical Occupation

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32 ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44, at ¶33.

33 Ziff, Robert: **Principles of Property Law**, 7th Ed. (Thomson Reuters).

34 Robert Hamilton: "**After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces**", 67 U.N.B.L.J. 58 (2016)

> Aboriginal title is established with reference to Indigenous occupation of the territory in question at the date of the British assertion of sovereignty. That date was determined by the courts to be 1713 for mainland Nova Scotia, 1759 for New Brunswick, and 1763 for Cape Breton and Prince Edward Island. Assessing the existence of Aboriginal title in the Maritime Provinces, then requires assessing whether the Aboriginal peoples of the region exclusively occupied given territories to the extent required to establish title at those dates. Again, it is clear following ***Tsilhqot'in*** that title claims will be assessed on a territorial/exclusive occupation standard, ...
>
> ...
>
> The Mi'kmaq were also present on pre-sovereignty Prince Edward Island which was unquestionably an important part of their traditional territory. While the Mi'kmaq undoubtedly occupied the island before European arrival, the extent of their occupation at the time of the British assertion of sovereignty is more difficult to peg with precision. After the fall of Louisbourg on 26 July 1758, the British decided to evacuate the Acadians and Mi'kmaq from Prince Edward Island, though about 200 of each remained on the island. As of the 1830s there were about 500 Mi'kmaq on the island. An 1838 petition from Oliver Thomas LeBone, Chief of the Prince Edward Island Mi'kmaq, stated that "they were but 'a skeleton' of 'our once numerous tribe'." Prior to the British acquisition of sovereignty, however, there was a French presence on the island, with many Acadians being expelled from the island following the fall of Louisbourg.

[75] At the outset of this paper, Dr. Hamilton informs the reader that he argues that Aboriginal title existed in the region of the Maritime Provinces at the time of assertion of British sovereignty. He concludes "*that title undoubtedly existed in the region*." He qualifies that he stops short of "*attempting to determine <u>where</u> it may have existed, for such a determination would require a depth of research not possible here*." I wish to limit comment on this paper to note that care needs to be taken in drawing any conclusion applicable to title to P.E.I. Cases in neighbouring provinces referred to by Dr. Hamilton considered questions about Aboriginal title to Crown land in other areas of the region. For example, ***R. v. Bernard***, 2003 NBCA 55, a rights case that included a title defence, dealt with land in the Sevogle area of the "*Northwest Miramichi watershed*" in northern New Brunswick: one judge declared Aboriginal title, one refrained from answering the question; and one deferred to the trial judge, who had found that sufficiency of occupation was not proven. In ***R. v. Marshall***, 2001 NSPC 2, a rights case in Nova Scotia, the trial judge commended Mi'kmaq Chief Augustine for his dignity in saying the Mi'kmaq "*had not had exclusive occupation of Nova Scotia at the time of British sovereignty*." I also note from my review of the author's sources it appears to me that no court has conclusively determined the date of the British

assertion of sovereignty for P.E.I.[35]

[76] This excerpt from the evidence of Tammy MacDonald[36] is interesting:

> **Early Prince Edward Island History**
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> ...
>
> Through a series of land grants in the mid 1600's to the early 1700's, P.E.I., or Île St. Jean as it was then known, was given to various ambitious men of France to use as a fishing station during the summer months. Despite the summer usage by the French, however, the endless wars between Britain and France, and the relative military insignificance of this small territory, meant that it was basically left alone most of the time.
>
> It was not until 1720, that the Acadians were strongly urged to move to Île St. Jean, and away from Acadia, so Île St. Jean could be used as a resource to grow food for the inhabitants of the Fortress of Louisbourg. ...
>
> There are many oral stories, as well as some documents, in both the Acadian and Mi'kmaq communities on Île St. Jean, that indicate the interaction between these two cultures. One can almost picture the Acadians arriving on Île St. jean, confronted with a seemingly endless amount of backbreaking work to even produce enough food to live – being befriended by the Mi'kmaq and helped to survive.
>
> The French military outpost of Port La Joye, located on the other side of what is now the Charlottetown, PEI, harbor, was the scene of annual celebrations and giving of presents between the French and the Mi'kmaq celebrating their alliance. These celebrations took place from 1726 to 1754, excluding the years 1746-47, as Île St. Jean was then under the rule of the British government. The celebrations would include Mi'kmaq from all over Acadia, as well as those from Île St. Jean ....
>
> Even though there was a small population of Acadians on Prince Edward Island, there were no big attempts to colonize PEI until mid-1700 (de la Roque; Census). Even, *La Grand Dérangement*, the Acadian Expulsion, [in Nova Scotia] begun in 1755 by the British, which resulted in over 2,000

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[35] ***R. v. Marshall***, ***R. v. Bernard***, 2005 SCC 43, was an appeal of both cases. McLachlin C.J.C., writing for five judges, provided a historical perspective of the immediately pre-sovereignty period (¶7), the date of sovereignty in N.B. and N.S., but not P.E.I. (¶71), and why aboriginal title was not proven (¶78-106).

[36] Affidavit of Tammy MacDonald, Director of Research, Mi'kmaq of P.E.I., sworn February 7, 2017.

Acadians fleeing to the French occupied Île St. Jean, did not increase the European population too greatly. This was good for the Mi'kmaq as they were able to maintain their traditional way of life. Nicholas Denys, former grantee of Île St. Jean, writes in his *Description and Natural History* that the Mi'kmaq had hunted the caribou on Île St. Jean so extensively that there were few still found there (Denys: 209).

British Colony

In 1758, the French Fortress of Louisbourg fell to the British, changing the course of history and, ultimately, the lives of all the Acadian and Mi'kmaq inhabitants of Île St. Jean. Quickly realizing the strategic importance of Île St. Jean, the British government moved to seize control of Île St. Jean and establish a military outpost at the former French site of Port la Joye. France ceded what is now known as Cape Breton Island, New Brunswick, and Prince Edward island to British in the Treaty of Paris in 1763. They were annexed to the Nova Scotia Colony, with the political power residing in Nova Scotia.

In 1764, Capt. Samuel Holland was tasked with surveying the Island. He divided the land into sixty-seven lots of about 20,000 acres each. **As well, the Acadians and Mi'kmaq living on St. John's Island, as it was now known, were not consulted either then or during the subsequent Land Lottery**. This Lottery, held in London, distributed all but one of these lots, the smallest, to individuals or small groups. Typically, the new owners were military, political, or commercial persons who had performed services during the war with France, or who had good connections to those in office. Some of the islands off the coast of St. John's Island, including Lennox Island, were neither attached to the lots, nor sold to the new proprietors.

In 1769, St. John's Island became a separate colony, independent from Nova Scotia. **In 1772, Lennox Island, one of the traditional, historical campsite locations for the Mi'kmaq was attached to Lot 12 and given to Sir James Montgomery, the proprietor, who allowed the Mi'kmaq to continue to live there**.

During this time, the British turned their eyes towards Île St. Jean and began to colonize it in greater numbers. The resultant population explosion threatened the Mi'kmaq way of life. Game became scarce, access to traditional areas where they had for thousands of years freely hunted, fished, camped and gathered were now blocked off by the new English settlements. ....

[Emphasis added.]

[77] Those are two historical accounts, presented by the appellants[37]. There are many more historical accounts to which reference could be made. The Province would have been familiar with these and others when it made its decision. For instance, the Centennial book **Canada's Smallest Province - A History of P.E.I.**[38] opens with a fulsome and fascinating account by Dr. John H. Maloney of "*Micmac*" presence in pre-contact and pre-sovereignty P.E.I. Dr. Maloney provides insight into the advent of the "*Micmac*" and Maliseet presence in Acadia and their way of life. These accounts makes clear there was a significant "*Micmac*" presence on the Island between the time of European contact and assertion of British sovereignty. However, they leave open legal questions pertinent to sufficiency and exclusivity of occupation at the time assertion of British sovereignty that would inform a preliminary view of the strength of the case for Aboriginal title.

[78] The British campaign to expel of the Acadians and the Mi'kmaq from P.E.I. occurred in 1758. According to Dr. Hamilton's paper, that event preceded sovereignty. The date of sovereignty is not settled. This may become important. In any event, when sovereignty occurred, it was manifested by British acts of settlement and alienation whereby the Crown had Samuel Holland survey the Island, and then divided the Island into 67 lots and granted all those lots to private property interests. It can be inferred that this alienation of lands occurred without regard for any Mi'kmaq right or title, as if the land was vacant. There was an expulsion, no treaty, and no accommodation, grant or reserve. It seems to me that all of these circumstances will be relevant to proof of the required sufficiency of occupation to prove Aboriginal title.

[79] The Supreme Court of Canada stated that proving Aboriginal title involves identifying how pre-sovereignty rights and interests can properly find expression in modern common-law terms[39]. This would involve identifying the date of sovereignty, as that is the date of crystallization for determining the extent, if any, of the Mi'kmaq Aboriginal title to the Island or any part thereof. The particular, and probably unique, scenario of Mi'kmaq pre-sovereignty presence during the first half of the eighteenth century, in alliance with the French presence and settlement, the British forcible possession of the Island

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[37] I mention for completeness that all of these historical accounts would of course be subject to qualification of source and verification of information in a trial.

[38] Edited by Francis W.P. Bolger (John Deyell Company, 1973).

[39] ***Tsilhqot'in Nation v. British Columbia,*** at ¶50.

and expulsion of the Acadians and the Mi'kmaq in 1758, the British assertion of sovereignty and acts of exclusivity[40], present tangible issues that remain for judicial determination of a Mi'kmaq claim for Aboriginal title.

[80] Supreme Court of Canada Justice Binnie cautions[41] that courts have attracted a certain amount of criticism from professional historians for what these historians see as the occasional tendency on the part of judges to assemble a "*cut and paste*" version of history. The basic objection is that judicial selection of facts and quotations is not always up to the standard demanded of the professional historians, which is said to be more nuanced. Binnie J. explains the tension, and why trial judges ultimately need to decide with finality, notwithstanding that stable academic consensus awaits. The reviewing judge properly acknowledged and considered the historical perspectives raised by the appellants. In a trial, those and many more would be considered. For the limited assessment of this stage, I will refrain from cutting and pasting other historical perspectives. Many are available from case law in other jurisdictions and academic writings. It is sufficient at this stage to observe that there are substantial historical events yet unaddressed that would come into focus in a trial of a claim for Aboriginal title.

-- ***Royal Proclamation 1763***

[81] The appellants rely on the **Royal Proclamation 1763**. In my view, whether or not the **Royal Proclamation** would assist the Mi'kmaq case for Aboriginal title to Prince Edward Island is an open question that remains for trial. The focus of the **Royal Proclamation 1763** is on other territory, namely

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[40] **Illustrated Historical Atlas of Prince Edward Island** by J.H. Meacham & Co., 1880 (P.E.I. Museum and Heritage Foundation, 2018), historical sketch of the Province of Prince Edward Island, pp.3-6. This provides a synopsis of settlement and life on the Island during the eighteenth century. It acknowledges Mi'kmaq presence, but makes no assessment of sufficiency or exclusivity. It pinpoints the British possession of the Island to Col. Rollo taking a small French garrison at '*Port Joy*' in 1758 "*and thus the Island passed under British rule.*" As to the date of sovereignty, Meacham's Atlas states: *"Though the Island was actually in possession of the English since the fall of Louisburg in 1758, it was not until the fall of Quebec in 1759, and the capture of other minor forts in the following year, deprived France of her last foothold in Canada, that it was formally ceded to England by* ***The Treaty of Fontainbleau*** *which was executed in 1763. 1763, then, is the date from which the civil history of this Island, as a British possession, begins. .."*

[41] In ***R. v. Marshall***, [1999] 3 S.C.R. 456, at ¶36, 37.

British acquisitions in North America comprising Quebec, west of the Labrador coast and the Saint John River; East Florida; West Florida; and Granada. The only reference to Île St. Jean is a recital in the preamble that the British had thought fit to annex "*the Islands of St. John's and Cape Breton, or Isle Royale, with the lesser Islands adjacent thereto, to our Government of Nova Scotia.*" The operative provisions do not state they apply to the expanded Nova Scotia colony. The operative provisions state they apply to Quebec and the other three identified territories. They address lands that were at that time occupied by Aboriginal people and not then alienated by the Crown to fee simple land owners[42].

[82] I believe I understand the Mi'kmaq submission they have consistently protested the taking of their lands. However, the question in issue being the sufficiency of occupation at the time of sovereignty, this general statement is not particularly probative.

-- *Establishing Aboriginal title is a major undertaking*

[83] Litigation experience in other Canadian jurisdictions shows that proof of a title claim is a very substantial undertaking, and that the result is certainly not assured. It is a major undertaking to establish Aboriginal title. ***Tsilhqot'in Nation*** in 2014 was the first Supreme Court of Canada case in which Aboriginal title was proven. That case demonstrates the magnitude of proof involved. The claim involved a remote valley area in central British Columbia bounded by rivers and mountains where the Tsilhqot'in people had lived for centuries. They had repelled invaders and set the terms for European traders who came into their lands. The claim involved only 5% of the land area the Tsilhqot'in people considered their traditional territory. The trial of their claim for Aboriginal title exhausted 339 court days over the course of five years, and involved evidence from elders, historians and experts[43]. Proving rights takes time, sometimes a very long time[44]. The appellants' Executive Director Donald MacKenzie, Q.C., informed the court that in many cases it takes decades for Aboriginal groups to prove their title to lands. By the end of the consultation,

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[42] Incidentally, ***R. v. Marshall***, ***R. v. Bernard***, 2005 SCC 43, judgment of McLachlin C.J.C. contains an interpretation of how the **Royal Proclamation** may apply to Nova Scotia (¶85-96), reasons conclude there was no basis for finding title in the **Royal Proclamation** or **Belcher's Proclamation** (¶94, 106).

[43] See Reviewing judge's reasons for judgment, pp.97-98.

[44] ***Haida Nation***, at ¶26.

the P.E.I. Mi'kmaq had not yet advanced to giving formal notice that it was going to proceed with its claim. Only afterwards, by letter from their legal counsel February 28, 2017, did they give notice to the Province under the ***Crown Proceedings Act***, R.S.P.E.I. 1988, Cap. C-32, that they intend to commence proceedings against the Crown for a declaration of Aboriginal title to all the Island. The basis of their claim is exclusive occupation and the practice of their rights before assertion of sovereignty and to this present day.

-- *Sufficiency of occupation*

[84] The appellants identify the Mi'kmaq as the historic rights-bearing community that exclusively occupied what is now known as Prince Edward Island. They claim their traditional territory encompasses all the Island, adjacent areas, waters and off-shore islands. There is of course evidence of Mi'kmaq presence, but that does not address the crux of the issue for Aboriginal title, which is proof of occupancy of the Island or parts thereof at the time of initial assertion of sovereignty. Key information for preliminary assessment of title pertains to sufficiency of occupation at the time of sovereignty.

[85] To ground Aboriginal title, occupation must be sufficient, continuous (where present occupation is relied on, which it is not in this case) and exclusive. All three criteria must be satisfied. The element of sufficiency is the focus in this case. The appellants justifiably rely on the Supreme Court of Canada directions in ***Tsilhqot'in Nation v. British Columbia***. Occupation can be established for the purpose of proving title by showing regular and exclusive use of sites or territory. This supplants the narrower test based on proof of historic site-specific occupation. In my preliminary assessment of the Mi'kmaq strength of case supporting the existence of Aboriginal title, I followed and applied the ***Tsilhqot'in Nation*** principles and directions. I considered the Mi'kmaq evidence and assertions of use and passage over lands and waters in its best light. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. It remains that the claimant bears the onus of establishing Aboriginal title.

[86] Aboriginal title flows from occupation in the sense of regular and exclusive use of the land. Sufficiency of occupation is determined by reference to the Aboriginal culture and practices, comparing them in a culturally sensitive way with common law requirements for establishment of title on the basis of occupation. Occupation sufficient to ground Aboriginal title may extend beyond specific sites of settlement to tracts of land that were regularly and exclusively used for hunting, fishing or otherwise exploiting

resources and over which the claiming group exercised effective control at the time of assertion of British sovereignty. However, not every passing traverse or use is sufficient to ground title. Chief Justice McLachlin provided this explanation of sufficient occupation:

> [34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (***Delgamuukw***, at para. 147); see also ***R. v. Van der Peet***, [1996] 2 S.C.R. 507.
>
> [35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (***Delgamuukw***, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 758, quoted with approval in ***Delgamuukw***, at para. 149.
>
> [36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.
>
> [37] **Sufficiency of occupation is a context-specific inquiry**. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (***Delgamuukw***, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.
>
> [38] **To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just**

> **discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land.** Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[39] In ***R. v. Marshall***, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135-38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, Common Law Aboriginal Title (1989), at pp. 198-200:

> > **What, then, did one have to do to acquire a title by occupancy? ... [I]t appears ... that ... a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose,** which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". **There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred.** Significantly, the acts and intention had to relate only to the occupation - it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone... .
>
> > Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used. [Underlined emphasis added in original.]

. . . . .

> [41] **In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question - its laws, practices, size, technological ability and the character of the land claimed - and the common law notion of possession as a basis for title.** It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession - which requires an intention to occupy or hold land for the purposes of the occupant - must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.
>
> [Bolded emphasis added.]

[87] In this case, the object of the preliminary assessment of strength of claim is the Mi'kmaq claim for Aboriginal title. The Mi'kmaq are claiming title, not lesser intermediate rights, such as license to hunt or fish, rights of passage, or other usufructuary rights to Crown land or land in private fee simple ownership. It is easy in this inquiry to fall off track and mix rights jurisprudence into a title case. The Mi'kmaq Chiefs' letters to the Premiers speak somewhat interchangeably of usufructuary rights and title. The initial letter refers to a rights case ***Thomas Peter Paul***[45], which involved a criminal law charge for the removal of birds eye maple logs from New Brunswick forest that was leased to a private company.

[88] In this case, the Mi'kmaq required consultation in pursuit of protection of its interests so that the property in issue would be available upon its eventual proof of claim for Aboriginal title to Prince Edward Island. The Mi'kmaq are not seeking to prove lesser rights, nor did they inform the Province they rely on any treaty reserving such rights.

[89] Aboriginal title entails the right to use and control the land and to reap the benefits flowing from it. In ***Tsilhqot'in Nation*** McLachlin C.J.C. summarized:

> [14] The principles developed in Calder, Guerin and Sparrow were consolidated and applied in the context of a claim for Aboriginal title in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010. This Court confirmed the sui generis nature of the rights and

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[45] ***R. v. Peter Paul***, [1998] N.B.J. No. 20 (NBCA).

> obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession before the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise afterward. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.
>
> [15] The Court in ***Delgamuukw*** summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (ibid.) - that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[90] The preliminary assessment of strength of title is viewed with sensitivity through this lens. Information and evidence that would be probative of sufficiency of occupation for Aboriginal title may be over a broad range, and is assessable in the context of the purpose for which it is proffered. An activity, such as passage, fishing or hunting, may be probative of title, or may be of such a nature that it would only support a usufructuary right. It depends on context. For instance, pre-sovereignty Mi'kmaq population, relative to the overall area of the Island, 1.2 million acres of land plus waterways, and the Mi'kmaq way of life, would be a factor for consideration. The record indicates no tangible evidence was presented to the government of a strong Mi'kmaq presence over the whole Island or on the Mill River property. That is not to say whether such evidence could be produced, only that it was not before the Province when it made its decision in this case.

[91] The appellants urge upon the court the precedential value of other case law, especially British Columbia cases. These are instructive, but they are to be viewed with care. Because the analysis is contextual, case precedents have limited value. Cases such as ***Tsihqot'in Nation*** are not comparable. There, the land for which Aboriginal title was proven was definitive, and was plainly occupied. In the present case, no substantial evidence of sufficiency of occupation upon which to ground a claim for Aboriginal title was presented.

-- *Sawicki survey*

[92] I grappled with the appellants' submission that the Province made a

mistake by relying on a 1984 archaeological survey, know as the Sawicki survey, for its determination that there was no evidence of Aboriginal sites or presence on the Mill River property. In essence, they submit there was a directional error in the survey or in reading the survey, so that the subject property was not included in the survey. The reviewing judge's assessment of this matter is set out in his reasons at paragraphs 129 and 131. I do not make a determination as to whether the Province's 1984 survey was right or wrong. Nor do I rely on the Province's present day use of the property. The question on review is whether there was archaeological evidence of historic use, which would be probative of sufficiency of occupation. The Province's survey put forward a negative proposition. The Mi'kmaq questioned it; the Province asked for information to the contrary; receiving none the Province retained its view. Assuming for consideration of the Mi'kmaq submission that the Government was wrong, the Mi'kmaq's limited assertions of past presence (as described by the reviewing judge) remain just that. The activities described would qualify in a territorial assessment. However, they are assertions, without supporting proof or indication of how they would be proven; and taking into account the total of the Mi'kmaq assertions of activities in the area[46], the only cited activity that took place on the land: "*camping took place directly on the subject parcels*," unaccompanied by any indication of time period of occurrence, frequency, duration, etc., has very limited probative value.

-- *'Preliminary assessment' and 'prima facie case' distinguished*

[93] The appellants' submissions refer to preliminary assessment and *prima facie* case interchangeably. Those terms are not interchangeable. The role of the court on judicial review is to make a preliminary assessment of the strength

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[46] Within the consultation, the Mi'kmaq corresponded with the Province as to historic presence:

- **In 2012**, that the property was located in an area where traditional activities of the Mi'kmaq had taken place.
- **In 2013**, that an abundance of traditional activities had taken place in the area.
- **In 2014**, there were archeological sites in the Mill River area and Cascumpec Bay area, as well as extensive historical uses of the area.
- **On March 12, 2015**, there were "*archeological sites near the land disposal areas, including 3 pre-Contact sites*."
- **April 2015:** there was historic campsites located directly on the property.

of a claim. *Prima facie* case is a potential result of the assessment. In this case, the reviewing judge did not, as the Mi'kmaq submit, make an error by not finding a *prima facie* case. In my view it is implicit there could be no finding made of a *prima facie* case.

– *Conclusion on preliminary assessment*

[94] All tolled, the P.E.I. Mi'kmaq presented only minimal evidence to show the basis of their title claim or how they would go about proving it. I agree with this summary written by the reviewing judge, which focusing on the claim for the Mill River property states:

> [123] The total of all information provided by the Mi'kmaq between July 10, 2012, and January 10, 2017, was set forth in the Mi'kmaq of PEI's assertions that the Mi'kmaq engaged in traditional activities such as camping, hunting, clay gathering and wild fruit gathering in the areas around the Lands, with the further assertion that camping took place directly on the subject parcels. They stated that they uncovered Mi'kmaq archaeological sites near the proposed disposal land area. They also asserted the Lands would have been used as part of the travel routes related to their traditional activities and as access to fishing areas, and that disposal of the lands could potentially have adverse impacts on their Aboriginal rights.
>
> [124] While several assertions were made and repeated, no information or evidence supporting those claims was provided other than as set out above. It is not expected or required that the asserted claim of title is to be proven during the consultation period. Nor is it expected or required that the title be proven during this judicial review process. However, as the court is now required to conduct a preliminary assessment of the strength of the case for title, it is compelled to examine the evidence provided in support of the assertions made. As for the Mill River area in general, and the Lands in particular, very little, other than assertions, was provided by the Mi'kmaq.

[95] The evidence of title amounted to little more than assertions. What is needed is evidence of sufficiency at the date of assertion of British sovereignty that would be probative of the kind of occupation described in ***Tsilhqot'in Nation***; evidence that on a culturally-sensitive view would tend to show presence on or over the land claimed, manifested in acts of occupation that could reasonably be interpreted as demonstrating the land belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.

[96] As to the first criteria of the ***Haida Nation*** proportionality test, my preliminary assessment is that the claim of Aboriginal title falls within the

"*weak*" category described by McLachlin C.J.C. in ***Haida Nation***, at ¶43.

- **Seriousness of potential adverse impact: Review of finding that the transfer of the Crown lands would have little or no adverse impact on the claimed Aboriginal title (appellants' ground of appeal "A")**

[97] The Mi'kmaq concern is that transfer of ownership and control of the property to the private sector has the potential to adversely affect its asserted Aboriginal title. In my view, no information was provided as to any potential adverse impact. Despite requests for information or explanation as to how the Government action might adversely affect their interests, none of any kind was provided. The Mi'kmaq needed to draw a causal connection between alienation of ownership and control of the property and any traditional or historical use or value to be protected that might be diminished or impeded.

[98] The aboriginal interests that may be infringed by conveyance of Crown land or granting rights over resources on Crown land are many and varied. They may be physical or spiritual, destructive or impeding, and may be based on historic uses, for instance a valued archeological site, or on a present use, for instance valued forest used or reserved by the claimant, clean water, a road travelled, or some or all. Those are mere examples. In any event, the Aboriginal claimant asserting a potential adverse effect on infringement bears the onus of informing government of its concern and demonstrating its interest in the property. The potential infringement or adverse effect has to be material; to have qualities of being appreciable, real, and non-speculative. This statement in the Musqueam Indian Band case in the Federal Court of Appeal known as ***Downtown Offices***[47] is instructive of the presence or absence of potential adverse impact:

> [58] Without commenting on the content of Musqueam's right to be consulted and possibly accommodated (since the merits of that case are to be heard after the current issue concerning injunctive relief is concluded) **it is helpful, for illustrative purposes, to compare the facts in this case with the rights at stake in the leading cases on the duty to consult**. In ***Haida Nation*** the decision to issue licences to cut trees on the Haida Gwaii could have deprived the ***Haida Nation*** of forests vital to their economy and their culture. As Chief Justice McLachlin stated at paragraph 7, "The stakes are huge. [...] Forests take generations to mature... and old-growth forests can never be replaced." In ***Mikisew Cree First***

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[47] ***Musqueam Indian Band v. Canada***, 2008 FCA 214 ("***Downtown Offices***").

> ***Nation v. Canada (Minister of Canadian Heritage)***, [2005] 3 S.C.R. 388, 2005 SCC 69, the building of a road through a reserve impacted a significant number of trappers and hunters. In ***Taku River***, the building of a road through Taku River Tlingit's First Nation territory passed through an area critical to their economy and could have had an impact on its continued ability to exercise its Aboriginal hunting, fishing, gathering, and other traditional land use activity rights. **In our case, there has been no allegation of an infringement of any aboriginal right that would or even may result from the disposition of the Properties**. **If there is no harm alleged in terms of an absolute rights analysis, how can the loss of a right to be consulted with respect to that right constitute irreparable harm?** ... [Emphasis added.]

[99] The theory of the Mi'kmaq claim is that since they assert Aboriginal title to all of Prince Edward Island, transfer of ownership and control of any Crown land to a third party "*would have a significant impact on their Aboriginal title*."[48] This position is based on the legal proposition that transferring ownership of Crown land to a third party could have adverse effects on their Aboriginal title. The government conduct is conveyance of the property. The protected interest is preservation of the property while the claim for Aboriginal title is pending. The question raised is whether the conveyance could have an adverse effect on the protected interest.

[100] I believe I understand the Mi'kmaq concern. A conveyance of Crown land to the private sector by itself does not cause any change to a property. However, such a conveyance transfers control, which could in turn result in a change of use of the property, and because the land would then be beyond government control, such other use could result in an adverse effect. There are many cases where that concern has been validated. For instance, in ***Haida Nation*** (forest), ***Mikisew Cree First Nation*** (road) and ***Taku River***[49] (resources), there were Aboriginal interests to be protected that could potentially be affected if the Crown no longer had control. Here, while no change of use is contemplated, the concern is that once out of government control, there will be no protection against change of use.

[101] In this case, the concern appears to be speculative. The property has been a golf course since 1983, and that is the planned continued use by the

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[48] See letter from Donald MacKenzie, Q.C., to the Province dated April 24, 2015.

[49] ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550.

purchaser. As a rural and riverside property already developed as a golf course and resort, present uses or agriculture are the apparent and identifiable uses. No spectre was raised of another use that might desecrate or denude the property. Any such change of use would be entirely speculative. More to the point though for the present case, the Mi'kmaq have not identified any historic interest in or attachment to the property that would be the object of protection.

[102] In addressing potential adverse effect, the appellants devoted a lot of attention to the nature of Aboriginal title and how it is distinguishable from fee simple. I understand their submission that a fee simple title holder has the right to develop or alienate property, and that unknown development could degrade or destroy the connection of an Aboriginal group with the property. Examples already cited involve deforestation, subdivision, mining, desecration of areas of cultural and ceremonial significance; the list is non-exhaustive. Because the competing Aboriginal and fee simple title both have the essential quality of exclusive use and occupation of the land including the right to exclude all others they cannot coexist[50]. According to the appellants' submissions, it follows that the act of conveyance of the Crown land to a fee simple land owner by itself creates a potential adverse impact.

[103] The law is not applied in a vacuum. There are three elements in the ***Rio Tinto*** test. A potential for adverse effect needs to be raised. There needs to be a nexus shown between the potential activity on or regarding the land and the interest sought to be protected. This is also called causal connection. For instance, there would be a nexus where a new owner may harvest or destroy timber that is used, saved, or sacred to a claimant, where limited land needed for housing may be developed for other purposes, where ancestral grounds may be desecrated, or the ability to negotiate for particular land would be lost, etc. The categories are non-exhaustive. However, for reasons already mentioned, my assessment is that in this case no nexus is shown. The circumstances comprising the context converge. As claimant, the Mi'kmaq have shown only minimal connection with the property, and have not identified any attachment to or interest in the property probative of Aboriginal title. Accompanying the preliminary assessment that the title claim is weak, there is no evidence of identifiable interests in the property that might potentially be affected. There is no historic association, structures, or archeological sites that need protection, nor is there any present use that might

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[50] ***Delgamuukw v. British Columbia***, [1997] 3 SCR 1010,m at ¶116-118; ***Tsilhqot'in Nation, supra***; Bruce Ziff: **Principles of Property Law**, 7th Ed. (Thompson Reuters, 2018), p.229.

be jeopardized. The land was not shown to be unique, to hold particular significance, to contain any special characteristics, to support cultural activities. In the absence of such an interest, there is no reason to think that following a successful claim for Aboriginal title to all or some part of the Island this particular land would be required in settlement or compensation. There is no Mi'kmaq negotiating position to be protected or adversely affected. In the end, there is simply no evidence or identification of any Mi'kmaq interest in the property to be protected. The evaluation could stop there.

[104] The Province and the reviewing judge went further and considered the availability of Crown remedies. This was not an error. The appellants cited their concern over potential adverse impact over exercise of the right itself, as the transfer could affect their ability to reclaim the land once title is proven. What is appropriate by way of remedy depends on the circumstances. The equation in this case follows a determination of little or no demonstrated claimant connection with this particular land, and a preliminary assessment of a weak case for Aboriginal title. In that scenario, conveyance of this particular Crown land does not create a potential adverse effect even if the Province couldn't get it back. If the appellants eventually prove their title claim, there is no basis for concern that the Mill River property would need to be made available because there is no Mi'kmaq connection to this particular property. On the other hand, the Province is shown to have ample means to satisfy any obligation that might be ordered by a court. There is no case shown for shortage of inventory of Crown land. When all factors are weighed, this Government transfer results in a *de minimus* reduction in the inventory of Crown land. I see no merit in the Mi'kmaq submission that transfer of the property is "*death by a thousand cuts*." Each government action can be considered based on relevant circumstances. The Province has the ability to acquire and transfer other land. As well, money is a form of compensation sometimes used in resolution of claims for Aboriginal title[51].

[105] The appellants did not present a case of insufficient land on their reserves or the need for more land to build homes. Such concerns were first raised in affidavit evidence that post-dated the end of the consultation process, and in any event were summary statements without substantiation, and regarding population in central Queens County, an area not in proximity of the property[52]. The Province should only be held to account for information that it

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51 ***Tsilquot'in Nation, supra***, at ¶89; ***Rio Tinto, supra***, at ¶37.

52 Affidavit of Chief Brian Francis, sworn February 17, 2017, at ¶19-22.

had before it or should reasonably have known at the time of consultation.

[106] The appellants rely on the ***Musqueam*** golf course case. In my view, the context is entirely distinguishable and that case does not assist. In the ***Musqueam*** case, it was common ground that the claimant had a strong *prima facie* case, had the best case among competing Aboriginal claims for exclusivity, and had a demonstrated housing need and an acute shortage of available land. In the present case, the claimants case for title is assessed on a preliminary assessment as weak, there was no evidence or information before the Province of a particular need or use (the housing need statement arose post-decision), the land is rural, with no particularly distinguishing features from which it might be suggested a change of use could threaten Aboriginal interests, and the amount of land involved is *de minimus* in relation to the total Crown land and the Island land mass[53]. The ***Musquesm*** golf course case recognizes that the assessment depends on the circumstances: *"If this was only a case where notice was required, the consultation may have been sufficient.*[54]*"* As the case precedents advise, the context drives the result.

[107] In my view, the appellants did not show practical or legal effects potentially resulting from conveyance of the Mill River property to private sector ownership. I agree with this statement by the reviewing judge:

> [125] Similarly, the Mi'kmaq did not advise of any adverse impact on its traditional uses of the land or its Aboriginal right or title as a result of the contemplated transfer of land other than by the act of conveyance itself. They expressed that such a conveyance would have an impact on the Crown's ability to address any future declaration of Aboriginal title, but did not disclose any impact on current traditional uses.

[108] I do not accept the appellants' submission that the Province did not appreciate or engage with their concern over potential adverse effect. The Province provided its best information, asked for Mi'kmaq input, stated its understanding as to why in the circumstances the conveyance did not result in a potential adverse impact, and invited further input. The Province asked, repeatedly, how the proposed divestiture would or may adversely impact an

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[53] The property area of 326 acres comprises approximately 0.02% of Prince Edward Island and 0.33% of the inventory of provincial Crown land.

[54] ***Musqueam Golf Course, supra***, at ¶95.

Aboriginal or treaty right[55].

[109] In summary, the review for potential adverse effects is based on the record. During the consultation, there was no information or evidence that would raise the spectre of infringement on current uses of the land, such as for example was the case in ***Haida Nation***, ***Taku River***, or ***Mikisew Cree First Nation***. This is understandable for the obvious reason the Mi'kmaq had no present day rights or use regarding the property. So the focus was appropriately on past uses or features and present-day need to preserve those features.

- *Conclusion on application of the proportionality test*

[110] Since I have found the Province engaged in consultation and satisfied its duty, the proportionality test is not determinative for this judgment. In any event, I conclude that the reviewing judge performed the proportionality test properly and without error. It has not been shown that the transfer of the Mill River property created a potential adverse effect on the P.E.I. Mi'kmaq claim for Aboriginal title, and on a preliminary assessment the claim for Aboriginal title is weak.

The Crown's duty to consult fell on the low end of the Haida spectrum (appellants' ground of appeal "C")

[111] In view of my conclusions on performance of the proportionality test, the indicated level of consultation lies at most at the low end of the ***Haida*** spectrum.

The threshold issue: was the Province's duty to consult triggered?

[112] Whether the duty to consult was triggered is a moot issue in this appeal. The Province voluntarily engaged in consultation and followed the Consultation Agreement[56]. The reviewing judge did not decide that issue. While a determination of that issue is unnecessary for disposition of the appeal, the principal parties request direction on this question. I will therefore

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[55] Affidavit of Deputy Minister Neil Stewart sworn June 1, 2017, at ¶70, 84 and 91.

[56] Voluntary Consultation Agreement among the Governments of Canada, Prince Edward Island and the Lennox Island First Nation and Abegweit First Nation.

provide my opinion.

[113] There will undoubtedly be situations in future where the question arises as to whether the Government's duty to consult is triggered. The Government will contemplate action regarding Crown property; the Mi'kmaq claim for Aboriginal title to P.E.I., being now only at the formal notice stage, will continue on as an unproven claim for some time, possibly a long time. In the meantime, as stated in ***Haida Nation***, government "*knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate*;[57]" and the trigger will remain as "*might adversely affect it*.[58]" The primary guidance is that there is a threshold. Not every government contemplated action triggers the duty; a potential to adversely affect the asserted Aboriginal title needs to be shown. The threshold for the trigger is low, but there is a threshold to achieve. Beyond that general advice, my opinion regarding the present case may be of limited utility in a future event because the factual matrix will always be different. Precedents do provide guidance, but duty to consult cases tend to be fact-specific. The Government action, the land in use, and information that the P.E.I. Mi'kmaq would provide regarding its title claim and interests to be protected, would never all be the same. However, some guidance may be taken as to how the honour of the Crown is respected where, as in this case, no causal relationship is shown between the Aboriginal title interest sought to be protected and the government action that is said to create potentially adverse effects.

[114] As previously discussed, the Province had actual knowledge of the Mi'kmaq claim Aboriginal title, and contemplated conduct of conveying the property. Therefore, the sole question is whether the third element of the ***Rio Tinto*** test was engaged – whether there is potential that the contemplated conduct may adversely affect the Mi'kmaq claim of Aboriginal title to the Island including the Mill River property.

[115] The Supreme Court judgment in ***Rio Tinto*** provides fairly detailed direction:

> (3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right
>
> [45] **The third element of a duty to consult is the possibility that the**

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[57] McLachlin C.J.C. in ***Haida Nation, supra***, at ¶37.

[58] Binnie J. in ***Mikisew Cree First Nation, supra***, at ¶34.

Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[46] **Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose**, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing ***Haida Nation***, at paras. 27 and 33). **Mere speculative impacts, however, will not suffice.** As stated in ***R. v. Douglas***, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, **there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right".** The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources. **For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown**. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see ***Haida Nation***, at paras. 72-73.

[48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. **The duty to consult is designed to prevent damage to Aboriginal claims** and rights **while claim negotiations are underway**: ***Haida Nation***, at para. 33. The duty arises when the Crown has knowledge, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": ***Haida Nation***, at para. 35 (emphasis added). This test was confirmed by the Court in ***Mikisew Cree*** in the context of treaty rights, at paras. 33-34.

> [49] **The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question.** Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult **if the present decision has the potential of causing a novel adverse impact on a present claim or existing right**. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in ***Haida Nation***, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. **To trigger a fresh duty of consultation - the matter which is here at issue - a contemplated Crown action must put current claims and rights in jeopardy**.
>
> [Emphasis added.]

[116] The question in this case is whether conveyance of the property, by itself, constitutes an adverse effect sufficient to trigger the duty to consult. The adverse effect must be real, appreciable, and non-speculative (***Rio Tinto***, at ¶40-46). The P.E.I. Mi'kmaq submit that it does; the Province submits it does not. Where no potential for an adverse effect is shown to exist, the duty to consult will not arise.

[117] In this case, no information or evidence was provided to show or suggest a causal relationship between conveyance of the Crown land and the Mi'kmaq pending claim for Aboriginal title. Taking a generous, purposive approach, one should ask what are the potential adverse effects. ***Haida Nation*** advises the honour of the Crown may require government to consult where there is risk that an Aboriginal claimant would be deprived of some or all of the benefit of the resource.

[118] I do not see how the Province's duty to consult would have been triggered in this case. There is a distinction between knowledge sufficient to trigger a duty to consult and the content of the duty to consult in a particular case[59]. However, the threshold question of whether the duty is triggered needs to be addressed. While the threshold is low, it needs to be satisfied by showing a potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[119] Throughout the consultation process, judicial review, and appeal, the P.E.I. Mi'kmaq firmly asserted that any transfer of Crown land to the private sector in and of itself necessarily has an adverse effect on the P.E.I. Mi'kmaq

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[59] The Supreme Court of Canada in ***Haida Nation*** at ¶37.

claim of Aboriginal title. That submission in effect says that given that the P.E.I. Mi'kmaq assert a claim to all of Prince Edward Island, any contemplated transfer of any Crown land would trigger the Province's duty to consult. That is not the law. That expansive proposition is not consistent with the framework prescribed by the Supreme Court of Canada for assessment of when the duty to consult is triggered. As the reviewing judge noted[60], that proposition cannot be accepted. The determination of whether the act of transferring land is viewed as having a potential adverse impact that triggers the duty to consult is made in the context of the factual matrix based on the information or evidence before the decision maker regarding potentially adverse effects of the government action on any protected Aboriginal interests.

[120] In this case, the Province's duty to consult was not triggered because there was no information or evidence of: (i) any historic interest, or (ii) any present-day interest, of the P.E.I. Mi'kmaq in the Mill River property that could potentially be adversely affected by the proposed change of ownership and control. Either kind of protected interest would suffice. However, the Mi'kmaq did not demonstrate any non-speculative, real, and appreciable historic attachment or present-day interest or use of the Mill River property that might be destroyed or denied by the contemplated Crown action.

Conclusion

- **Appeal and application for judicial review dismissed**

[121] I find that the Province fulfilled its duty to consult. Regarding the ancillary questions, I find no reviewable error in the reviewing judge's assessment and conclusion that the Government decisions regarding the extent or scope of its duty to consult were correct and that the consultation process carried out by the Province was reasonable. More importantly, stepping into the shoes of the reviewing judge, I find that the Government interactions and consultation with the Mi'kmaq between July 2012 and January 2017, reviewed on the standard of reasonableness, satisfied any duty the Government had to consult. Assuming a duty to consult was triggered, the content of the duty was at most at the low end of the ***Haida*** spectrum. Finally, I find that the duty to consult was not triggered in this case because the appellants did not provide any information or evidence to show how the Government action of transferring ownership and control of the property might adversely affect its asserted Aboriginal title.

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[60] Reviewing judge's reasons for judgment at ¶88.

[122] The P.E.I. Mi'kmaq application for judicial review seeking declarations that the Government failed to adequately consult and/or accommodate and to invalidate the Orders-in-Council authorizing the transfer and acquisition of the Mill River property should be dismissed.

- **Costs on the appeal**

[123] Costs are discretionary, but as a general rule costs follow the result. At the conclusion of the appeal hearing we asked counsel for submissions on costs. Counsel for the Province informed the Court they were instructed to make no submissions on costs. Counsel for the respondent McDougall and his company advised they were involved in the judicial review involuntarily, they had to appear, and accordingly they requested their costs. Responding to those submissions, counsel for the appellants asked for costs. In my view, the Court should follow the usual practice and order that costs follow the result.

[124] The respondents Government and Mr. McDougall and his company should have their costs of the appeal against the appellants P.E.I. Mi'kmaq on a partial indemnity basis. Costs can be fixed by the Court, subject to counsel for the parties first having opportunity to agree on costs. In the absence of agreement within 30 days, counsel for both respondents should make brief written submissions containing their proposed bills of costs and supporting information and argument within the next 30 days, and counsel for the appellants may respond in writing within 30 days after that.

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Chief Justice David H. Jenkins

I AGREE: _____
Justice Michele M. Murphy

I AGREE: _____
Justice John K. Mitchell