2016 No. 450765

Supreme Court of Nova Scotia

Between:

Sipekne'katik

Appellant

and

Nova Scotia (Minister of Environment)

and

Alton Natural Gas Storage LP

Respondents

**SUBMISSIONS OF THE RESPONDENT,
THE ATTORNEY GENERAL OF NOVA SCOTIA**

MOTION FOR STAY

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INDEX

FACTS.....1

PRELIMINARY POINTS.....9

ABORIGINAL AND TREATY RIGHTS.....10

1. **1752**.....10
2. **The Treaties of 1760 – 1761**.....11
3. **Aboriginal Title**.....12

THE DUTY TO CONSULT.....14

THE REQUEST FOR A STAY.....16

1. **The Test**.....16
2. **Jurisdiction**.....19
3. **Applying the Test for a Stay**.....21

Serious Question.....21

(a) **Procedural Unfairness?**.....21

(b) **Inadequate Consultation?**.....22

Irreparable Harm.....23

Balance of Convenience.....27

1. A preliminary motion in this matter is set down for hearing on June 22, 2016. The preliminary Motion is Sipekne'katik's claim for a stay of an Industrial Approval under the Nova Scotia *Environment Act*. The Nova Scotia Minister of Environment has been named as a Respondent in the matter, and is represented by the Attorney General of Nova Scotia. Alton Natural Gas Storage LP is the other Respondent.

2. The following submission is tendered by the Attorney General.

FACTS

3. The Nova Scotia *Environment Act* SNS 1994 – 1995 c. 1, is intended to "support and promote the protection, enhancement and prudent use of the environment" (s. 2). The statute lists a variety of goals including "maintaining environmental protection" (s. 2(a)), and "maintaining the principles of sustainable development" (s. 2(b)) and acknowledges, "the linkage between economic an environmental issues, recognizing that long-term economic prosperity depends upon sound environment management and that effective environment protection depends on a strong economy" (para. 2(b)(vi)). Accordingly, the statute enacts a robust regime for the protection of the environment while permitting sustainable economic development. It is a balancing act involving vigorous consultation, including consultation with Nova Scotia's Mi'kmaq community.

4. The proponent's project, has three components; salt caves for the storage of hydrocarbon which do not require *Environment Act* Industrial Approval, but are subject to regulation by the Department of Energy; pipelines which were subject to a separate Environment

Assessment approval; and a Brining facility. The project involves excavating salt caverns for the storage of natural gas, using river water, and returning the brine to the river.

5. The project was initiated in the mid – 2000's. In 2006 the Proponent commissioned a "Mi'kmaq Ecological Knowledge Study and subsequent to the registration of the project in July 6, 2007, notification was given to the Mi'kmaq KMK respecting the project (Record, Vol. 5, Tab 100).

6. Consultation was initiated with the Assembly of Nova Scotia Mi'kmaq Chiefs in October 11, 2007, (Record, Vol. 5, Tab 102) under the "Mi'kmaq – Nova Scotia – Canada Consultation Terms of Reference" (Record, Vol. 1, Tab 11). Consultation under those Terms of Reference proceeds, "through committees appointed by the reporting to the Assembly of Nova Scotia Mi'kmaq Chiefs" (Record, Vol. 1, Tab 11, para. 4). The Sipekne'katik Band was a signatory to and bound by provisions of the Terms of Reference until August 14, 2013 when the Assembly of Nova Scotia Mi'kmaq Chiefs advised that it did "not have the authority or mandate to represent the Indian Brook First Nation/Shubenacadie Band" (Record, Vol. 5 Tab 81).

7. The Appellant complains that there was no consultation after 2008, until "the last stage of the project" (Appellant's Brief, para. 14, 87). The Assembly of Nova Scotia Mi'kmaq Chiefs has taken no proceedings challenging efforts at consultation prior to August 2013.

8. On July 31, 2014 the Department of Environment wrote to Sipekne'katik to "continue consultation", prompted by the proponent's plan to begin construction of the natural gas storage facility and seek regulatory approvals (Record, Vol. 5, Tab 7 8). The Band respondent to "express its opposition to the project" (Record, Vol. 5, Tab 75, letter dated August 13, 2014).

9. The Record subsequent to August 13, 2014 through to early 2016 reflects a deep and concerted attempt to address the Band's concerns (Record, Vol. 5, Tab 74 through Vol. 3; the tabs are in reverse chronological order, with the most recent correspondence beginning in Volume 3). It is not the purpose of a motion such as this, to review the Record in detail. Nonetheless, the Band in this motion emphasizes concerns respect Striped Bass (Appellant's Brief, para. 115), salmon (Appellant's Brief para. 101) and vague concerns respecting the Shubenacadie River generally (Appellant's Brief, para. 99).

10. The original Environmental Assessment Approval in 2007 provided as a condition for monitoring plans for fish and fish habitat, and consequent modification and mitigation plans including; an Effects Monitoring Plan, for sedimentation, salinity and flow; monitoring of discharge salinity levels into the estuary; A plan to gather baseline information on water temperature and presence of Atlantic Salmon, Striped Bass, and Atlantic Sturgeon eggs and larvae; and a long term monitoring program for Atlantic Salmon, Striped Bass and Atlantic Sturgeon eggs and larvae.

11. In September, 2014, the Crown delegated certain aspects of consultation to the proponent, Alton Natural Gas Storage (Record, Vol. 5, Tab 73).

12. Subsequent meetings in the fall of 2014 led to the Band's letters of October 23 and 31, 2014 (Record, Vol. 5, Tab 66, 64). Mistaken references in those letters were not addressed such that on March 17, 2015 the Department of the Environment wrote, "we have been waiting to receive the revised letters from Sipekne'katik since November, 2014. Given the lack of response, it is unclear whether Sipekne'katik is interested in participating in the consultation process on the Alton Gas Project" (Record, Vol. 4, Tab 52).

13. The Band revised its letter on April 23, 2015 (Record, Vol. 4, Tab 48) raising a number of questions respecting brine, and striped bass. The Department of Environment provided a comprehensive reply dated June 29, 2015 (Record, Vol. 4, Tab 37) including responses to each question raised by the Appellant.

14. In the meantime, the Province, the Assembly thr'ough the KMK Negotiation office, and the Band discussed the terms of reference for an independent Third Party Review of the environmental data relating to the river. In February 2015, the Band confirmed it "has decided not to participate in the independent third party review process" (letter dated March 13, 2015, Record, Vol. 4, Tab 51). The other parties proceeded with the review.

15. The Third Party Review by "Conestoga – Rovers" dated July 2015 (also known as "CRA report", Record, Vol. 7, p. 347). The Report noted that the tidal nature of the

Shubenacadie River and estuary regularly exposed the fish in the river to a change in salinity of 0 – 30 ppt "therefore many of the fish species in the river had to (sic) ability to adapt to changes in salinity and may be unaffected due to changes in salinity" (p. 7). With respect to salmon and the concern expressed by the Appellant that the project could "alter the spawning ground for Atlantic Salmon because salmon smell their home streams" (Applicant's Brief, para. 109), the Third Party Report states that "the contribution of brine to the bouquet of smells at the mouth of the estuary will likely be negligible since the brine will make up such a tiny proportion of the water at the mouth … As with many rivers discharging to the ocean, the bouquet of smells at the mouth of the Shubenacadie estuary will vary dramatically from time to time" (p. 9). Further, the Report notes that the matter of salmon smelling their way back to their natal tributary "is a hypothesis" (p. 8)… "recent analysis suggests that salmon use a combination of homing methods – magnetic fields for migration in the ocean to the mouth of the estuary, and once in the natal estuary, olfaction to determine the natal tributary. If this latter theory is true, potential effects on anadromous fish will be non-existent" (p. 9). The Report concluded that "project related impacts on [Atlantic Salmon and Atlantic Sturgeon] are quite unlikely" (p. 11).

16. With respect to Striped Bass, the Band argues (para. 117) that despite a seven year study pursuant to the 2007 Environmental Assessment Approval, the "proponents were not able to make significant gains with respect to understanding the recruitment of the Striped Bass population". The Third Party Report address the issue of bass recruitment:

> The now fairly extensive information suggests that total egg released and fertilized may be affected by the weather. Near term survival of the fertilized eggs and of early larvae is probably largely dependent on subsequent rainfall and run-off" (p. 10).

17. The apparent dependence of bass recruitment on weather events meant "recruitment success is both very sporadic and currently difficult to predict" (p. 10). Accordingly, "without understanding why recruitment failed, it would be difficult to require significant changes to the project or even what those changes should be" (p. 10). The Report noted that this datagap "cannot be filled easily" and recommended that a more useful approach would be to "better understand brine ionic composition", to "help dismiss brine discharges as a significant cause of bass mortality" (para. 10).

18. Four other recommendations included studying bass eggs and larvae for the effects of diluted brine, monitoring egg and fry "entrainment in the channel", defining "peak spawning events" in the river, when brine discharge is to be discontinued, and monitoring natural variances of striped bass recruitment in the river, and monitoring to prevent, sedimentation (p. 12 - 13).

19. The Proponents response to the Third Party Report was to accept its five recommendations (Record, Vol. 4, Tab 33). Indeed, the series of meetings and Reports in the fall of 2015 were in further response to the Band's concerns flowing from the Third Party Report. In addition to the several meetings involving the Band (Record, Vol. 5, Tab 29 - October 2 meeting, Tab 26 - October 27 meeting, Tab 25 - November 6 meeting,

Tab 24 - November 10 meeting; Chief Copage's letter dated September 29, 2015 (Record, Vol. 4, Tab 30) was responded to in detail by letter dated December 3, 2015 (Record, Vol. 3, Tab 20).

20. The Province's December 3, 2015 letter responds to the many concerns raised by Chief Copage on September 29, and, in particular, responds to those issues advanced now by the Appellant in this motion:

- With respect to the "homing" issue; the Department of environment noted that "the changes in water quality at the Alton site, however, will be extremely small changes in the salinity and be well within the natural variability of salinity from both an osmoregulation and homing perspective" (p. 2).

- Brine exposure. The letter references a Dalhousie University report, "Aquatic Species of the Shubenacadie Estuary and their interaction with the Alton Natural Gas Project". The study "will determine the lethal limits of brine concentration for Striped Bass eggs" (p. 2).

- Datagap respecting bass recruitment/spawning; the Province agreed there was "much unknown". "...however, there is a significant understanding on when eggs and larvae are present near the project site and requirements for shutdown during this period as well as maintaining thresholds of salinity at or below natural variability during the rest of the year will mitigate impacts to Striped Bass... eggs and larvae will not be exposed to brine during the most sensitive period..." (p. 2).

21. Among the other materials generated as a consequence of discussions following the Third Party Report was the "Exposure Pathway Assessment Framework for Aquatic and Non-Aquatic Species" which examined the profiles of the many species inhabiting the Shubenacadie River including saline tolerances. The repeated conclusion including for salmon (p. 19) was, "the brine poses no known risk" (Record, Vol. 3, Tab 17).

22. The Alton Natural Gas Storage River Site Monitoring Plan, dated December 10, 2015, details the "Monitoring required for industrial approval", and includes reference to those adjustments consequent on discussions with native groups (Record, Vol. 3, Tab 17) and includes provisions for shut down by reference to bass spawning.

23. These latter two documents, among others, are "Reference documents" under the January 20, 2016 Industrial Approval, pursuant to which the facility is approved to operate (Record, Vol. 3, Tab 11).

24. On January 6, 2016, the Deputy Minister of Aboriginal Affairs wrote to the Band's Chief, Chief Copage, and noted that, "all of the substantive issues raised through these technical meetings have been addressed in the final draft of the Industrial Approval and the Proponent's Monitoring Plan". The Deputy Minister asked if this Band had, "any new substantive comments" (Record, Vol. 3, Tab 16).

25. Chief Copage's reply, dated January 18, 2016, complains that the Band "was not engaged until July 31, 2014 "and that consultations were "not truly meaningful". The letter makes

no reference to any remaining concerns respecting salmon. The letter references Striped Bass (Record, Vol. 3, Tab 14).

PRELIMINARY POINTS

26. At the outset, two preliminary points need mention. First, the Sipekne'katik claim for a stay is set out in its Notice of Appeal dated April 28, 2016, as follows:

> Stay of proceedings or other interim remedy
>
> The Appellant will make a motion for a stay of the Industrial Approval No. 2008 – 061384 – A03, under appeal in order to permit the Crown to comply with its duty to the Appellant under Section 35 of the Constitution Act…(emphasis added)

27. On the face of the Notice of Appeal, the request for a stay appears to be a request that the stay endure until such time as the Crown complies with certain asserted constitutional duties to consult that have allegedly been breached. In contrast, the Sipekne'katik's brief to this Court dated June 7, 2016, requests a stay "pending final disposition of Sipekne'katik's appeal" (Appellant's Brief, para. 1). That appeal is scheduled for August 17 and 18, 2016, less than two months from now. This request for a stay is not consistent with what is requested in the Notice of Appeal.

28. The second preliminary point is that while the request for a stay is referenced as a request "for a stay of the Industrial Approval No. 2008–061384–A03", there should be no doubt as to the effect of the request. The Industrial Approval No. 2008-061384-A03, is

> … for the following activity
>
> Operation of a Brine Storage Pond, and associated works, at or near Fort Ellis, Colchester County…
>
> (Record Vol 3, Tab II)

29. Accordingly, it should be clear that the effect of the request is to seek injunctive relief restraining the co-Respondent, Alton Natural Gas Storage LP, from carrying on its business.

ABORIGINAL AND TREATY RIGHTS

30. At para. 5 – 7, 76 – 84, and 122 of its Brief, Sipekne'katik relies upon certain allegedly "established" treaty rights and a claim to an interest in "all lands, water and air in the Province of Nova Scotia" (para. 7).

31. Each of these claims will be discussed in turn.

1. 1752

32. *Simon v. The Queen* [1985] 2 SCR 387, was one of the early treaty right cases in Nova Scotia. While the Court gave effect to the Treaty of 1752, it noted that the evidence necessary to show termination of the treaty had not been led, "…the evidentiary requirements for proving such a termination have not been met" so "the Court is unable to resolve this historical question" (para. 34).

33. In subsequent cases, the Crown has adduced such evidence, and courts have consistently found that the treaty of 1752 was terminated by hostilities shortly after 1752. In *R. v. Johnson* 1990 NSJ No. 465, MacDougall Prov. Ct. J. concluded that "The treaty of 1752 was terminated by the Parties" (para. 31); followed in *R. v. Francis* 2003 NSPC 20 at para. 9 per Batiot Prov. Ct. J. In *Pictou v. Canada* 2003 FCJ No. 33 the Federal Court of Appeal held that the Treaty of 1752, "seems not to have survived subsequent hostilities" (para. 9). In *Newfoundland v. Drew* 2003 NJ No. 177, Barry J. of the Newfoundland and Labrador Supreme Court, after a thorough review of the evidence (para. 726 – 746) concluded that the 1752 Treaty was "terminated by subsequent hostilities... repudiated by subsequent hostilities..." (para. 1033); aff'd 2006 NLCA 53 at para. 88, 90.

34. In sum, the courts have held the Treaty of 1752 did not survive. The Applicants have no claim to rights under it.

2. The Treaties of 1760 - 1761

35. The Applicant says that *R. v. Marshall* [1999] 3 SCR 456 affirmed that "the Mi'kmaq have a treaty right to continue to obtain necessaries through hunting and fishing under the Mi'kmaq treaties of 1760 – 61" (Applicant's Brief, para. 6). It is true that in *R. v. Marshall*, Justice Binnie, for the Court, accepted that all Nova Scotia Mi'kmaq had similar treaties (para. 5), but on its facts the case dealt only with Cape Breton Mi'kmaq, and subsequent case law has overtaken the 1999 *Marshall* decision.

36. Importantly, Nova Scotia was not involved in *R. v. Marshall.* Nova Scotia was involved in the subsequent case of *R. v. Stephen Marshall* 2005 2 SCR 220 (the undersigned was counsel for Nova Scotia). *R. v. Stephen Marshall* dealt with Mi'kmaq claims to log commercially under Mi'kmaq treaties of 1760 – 1761, and with Mi'kmaq claims to aboriginal title to Nova Scotia. In *R. v. Stephen Marshall*, the summary conviction Appeal Court referenced the evidence that not all Mi'kmaq bands in Nova Scotia had a Treaty like that dealt with in *Marshall*; per Scanlan J. 2002 NSJ No. 98 at para. 12, 13. At the Supreme Court of Canada, Chief Justice McLachlin for the majority noted that "different treaties were made with different groups" 2005 SCJ No. 44, para. 7. The nature of these "different treaties" is discussed by Scanlan J. *supra*.

37. It is far from clear that, even if the 1999 *Marshall* decision is rightly decided, which Nova Scotia does not admit[1], the Applicants here have treaty rights of the nature considered in that case.

3. Aboriginal Title

38. The Applicant refers to a Mi'kmaq claim to "all lands, water and air in … Nova Scotia" (Applicant's Brief, para. 7). In *R. v. Stephen Marshall* the Mi'kmaq similarly claimed "aboriginal title to all of Nova Scotia" (per Curran Prov. Ct. J., 2001 NSJ No. 97, para.

[1] In *R. v. Stephen Marshall* Nova Scotia argued unambiguously, at the Supreme Court of Canada, that *R. v. Marshall* was wrongly decided and that there is no treaty right to hunt, fish and gather and trade for necessaries. In rejecting the Native claim, the Court did not address this point.

3). The Courts rejected that claim. Curran Prov. Ct. J. said that Mi'kmaq in Nova Scotia likely had aboriginal title around some bays and rivers (para. 5(b)). He listed the areas in Nova Scotia where the Mi'kmaq lived at in 1713, the "date of sovereignty", which is the relevant date for the purposes of determining aboriginal title. He listed nine such areas (para. 127). Shubenacadie is not mentioned. Justice Curran's analysis of the claim of aboriginal title in the case was endorsed at the Supreme Court of Canada, per McLachlin J. at para. 37 – 83.

39. Presumably, the claimants have an aboriginal right to fish in the Shubenacadie River for food, social and ceremonial purposes, but the Courts have rejected the Mi'kmaq claim to title to all of Nova Scotia. Moreover, after an exhaustive review of the historical evidence, *R. v. Stephen Marshall* does not countenance a native claim to aboriginal title in the Shubenacadie area.

40. In sum, while the Applicant claims aboriginal title and treaty rights, the law does not support such claims, in respect of title at Shubenacadie and rights under the 1752 Treaty, and casts considerable doubt on claimed rights under the Treaties, 1760 – 1761. This motion is an interlocutory motion in a statutory appeal and does not, of course, engage the Court in determining treaty rights or title of this Band. Those are matters that require vase amounts of historical evidence. For example, the Stephen Marshall case involved some 25,000 pages of exhibits, two months of trial, and expert evidence. But the law canvassed above is relevant to the claimed violation of the duty to consult advanced by the Applicant in support of its demand for a stay.

THE DUTY TO CONSULT

41. In *Haida Nation v. British Columbia*, 2004 SCJ No. 70, McLachlin CJ. writing for the Supreme Court of Canada, first elaborated the duty to consult. The Court noted that proof of aboriginal or treaty rights can be a difficult and time consuming process (para. 26). In the meantime, the Crown, "cannot cavalierly run roughshod over Aboriginal interests where claims affecting those interests are being seriously pursued" (para. 27).

> To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource.

42. Accordingly, "the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim." (para. 27).

43. However, "The content of the duty to consult and accommodate varies with the circumstances" (para. 39). "A dubious or peripheral claim may attract a mere duty of notice" (para. 37). "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" (para. 39).

44. Chief Justice McLachlin went on to invoke the "concept of a spectrum" (para. 43):

> ...At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.

> **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.
>
> **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.

45. McLaughlin J. reiterated that, "This process does not give aboriginal groups a veto over what can be done with land pending final proof of the claim" (para. 48).

46. There is, of course, an obvious note of caution to be sounded in Nova Scotia, respecting the "duty to consult". *Haida* was a British Columbia case, and the cases elaborating the duty all arise from Provinces further west. How the duty applies, if at all, to Nova Scotia, where there is a significantly different history and treaty relationship, has not been dealt

with by the Courts of this Province. This case, a review of a Minister's decision on reasonableness grounds, may not be the one to elaborate the law in this Province.

THE REQUEST FOR A STAY

1. The Test

47. The Appellant applies for a Stay under Rule 7.28 in the Civil Procedure Rules (Appellant's Brief, para. 37).

48. In *Manitoba (AG) v. Metropolitan Stores* [1987] SCJ No. 6, Beetz J., for the Court, noted that "a stay of proceedings and an interlocutory injunction are remedies of the same nature" (para. 29) and have "sufficient characteristics in common" so that the courts "have rightly tended to apply to the granting of an interlocutory stay the principles which they follow with respect to interlocutory injunctions" (para. 29).

49. In *Metropolitan Stores*, Beetz J. went on to set out the test for a stay.

50. First, a claimant needs to show a "serious question" to be tried. In *RJR – MacDonald Inc. v. Canada (AG)* 1994 SCJ No. 17 the Court clarified that the judge on the applicant must make, "a preliminary assessment of the merit of the case" (para. 49). "Once satisfied that the application is neither frivolous of vexatious "the motions judge should consider the second and third parts of the test (para. 50).

51. The second part of the test is the requirement that the claimant show that it would suffer irreparable harm unless the injunction is granted (*RJR - MacDonald Inc.* para. 57).

52. The third part of the test is the "balance of convenience, and which ought to be called more appropriately the balance of inconvenience". This is "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction" (*Manitoba v. Metropolitan Stores* at para. 35).

53. Importantly, "in all constitutional cases the public interest is a "special factor" which must be considered" in assessing the balance of convenience: *RJR – MacDonald,* para. 64).

54. In particular, the Court in *RJR MacDonald* quoted the following from a Lower Court,

> When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm. (para. 69)

55. The Court went on to say this:

> **71** In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, **the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.**
>
> **72** A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well,

> since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> ...
>
> **80** The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. **When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so.** In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

56. In *Harper v. Canada (AG)* 2000 2 SCR 764, McLachlin CJ, for the majority, elaborated on the presumption that legislation promotes the public interest. In that case, McLachlin CJ cited the foregoing paragraph (80) from *RJR MacDonald,* and said, "it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed" (para. 9). Justice McLachlin went on to say this:

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (para. 9).

2. Jurisdiction

57. As noted above, the Supreme Court of Canada in *Metropolitan Stores*, confirmed (para. 29) that a stay and an injunction were remedies of the same nature. The Appellant's appeal under s. 237 of the *Environment Act*, is an appeal against the decision of the Minister, and therefore the present motion for a stay is a motion to stay (or enjoin) the Minister from acting.

58. The Nova Scotia *Proceedings Against the Crown Act* (s. 16 (2), (4)) precludes injunctive relief against the Crown, but permits declaratory orders in lieu of injunctions.

59. There are exceptions to the prohibition, in particular, in cases involving illegal conduct of the Crown agent sought to be enjoined. But in a case involving contested facts, illegality that would support such an injunction cannot be assumed. In *Novopharm Ltd. v. BC* 2008 BCJ No. 100, the claimant's demand for interlocutory injunctive relief was dismissed, in part, on the following reasoning:

> 23 On the material before me, Novopharm's allegations of illegality appear to be based on little more than speculation and conjecture. At this preliminary stage of the proceedings, of course, I do not have a full evidentiary record before me. The affidavits filed by the plaintiff and those filed on behalf of the defendants are inconsistent with respect to many significant facts. In the circumstances, a determination of illegality sufficient to provide a basis for the granting of an injunction must be deferred to trial. In this regard, I agree with the decision of Davies J. in *Te'Mexw Treaty Assn. v. W.L.C. Developments Ltd.*, [1998] B.C.J. No. 1833 (S.C.), where, on hearing a similar application, he held at para. 8:
>
> > 8 In our province I believe it to be settled that no injunction will lie against an officer of the Crown acting lawfully in the performance of his duties: *The Chiefs and other*

> *members of The Musqueam Indian Band, supra*. Therefore, to obtain an injunction the plaintiffs must show that the government and/or a Minister is acting illegally. In this case they would have to show that the new procedure now implemented by the Province to market surplus Crown lands is unlawful. I do not believe that such a determination should be made at this stage of the action. This is an issue which must be decided at trial when there can be a thorough investigation of all of the facts.
>
> [Underlining added.]

24 To similar effect is the decision of Saunders J. in *Cosens Bay Property v. Canada (Minister of Environments Lands & Parks)*, [1993] B.C.J. No. 1061 (S.C.), at para. 21:

> In the case at bar the defendants, officers of the Crown, were acting lawfully if, as they assumed, Cosens Bay Road is not a highway. In order for me to conclude they were acting unlawfully, which is the test referred to in *The Musqueam Band* case, I must first assume or find the road was a public highway, an assumption or determination which is not appropriate on an interim application where the facts are disputed. In these circumstances section 11(4) does not give me jurisdiction to grant an interim injunction and the alternative relief suggested in section 11(4), a declaration, is not available as a remedy on an interim basis.
>
> [Underlining added.]

60. In the present case, it is not admitted that there was any breach of any duty to consult.

61. The Appellant cites several cases where injunctions are said to be available "in cases where constitutional rights are at issue" (Appellant's Brief, para. 40). With respect, this is overstated. The cases cited by the Appellant all predate the Supreme Court of Canada decision in *Haida*, and all appear to deal with claims that legislation is unconstitutional.

62. This is not such a case. There is no argument advanced in argument that the *Environment Act* is unconstitutional. The suggestion is, rather, that a duty to consult under s. 35 was not met.

63. In *Haida*, Chief Justice McLachlin clearly distinguished (at para. 14) between injunctions and the duty to consult under s. 35. Injunctions, she said, are, "all or nothing". In contrast, she said consultation is closer to the aim of reconciliation which lies at the heart of s. 35.

64. Since s. 35 is not part of the *Charter*, the only relief that can follow from a violation of it is a declaration (in contrast to the range of remedies available under s. 24 for a *Charter* violation). It would, it is respectfully submitted, be strange and inconsistent if a constitutional "right" whose only final remedy is a declaration, were to be enforced on an interim basis by an injunction. Put another way, an injunction is not consistent with the aim of reconciliation that is "at the heart" of s. 35, and the declaratory relief relating to it.

3. Applying the Test for a Stay

Serious Question

(a) Procedural Unfairness?

65. The Appellant's claim of procedural unfairness (Appellant's Brief, para. 48 – 59) is not persuasive. In *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment)* 2011 NSJ No. 178 Robertson J. held that the Minister's decision under s.

137 was "not judicial but administrative", "did not obligate the Minister to solicit input from the appellant before making his decision", "did not require the Minister to hold hearings", and involved a "well established practice of soliciting upon staff's advice and recommendations" (para. 56).

66. Here, the Appellant filed a lengthy submission with its Notice of Appeal (Record, Vol. 1, Tab 1), and filed several affidavits (Supplementary Record, Tab 2; Record, Vol. 1, Tabs 6, 7, 8; and Supplementary Record, Tab 7 and 8). Those materials were reviewed in detail in the staff report to the Minister (Record, Vol. 1, Tab 3). The fact that a submission was also received from the Office of Aboriginal Affairs is not unfair. The Appellant's protest that it should have received copies of submissions and the staff report, with an opportunity to reply (Appellant's Brief, para. 59) presupposes that the procedure was judicial rather than administrative.

(b) Inadequate Consultation?

67. While the threshold to show a serious question is admittedly low – a question that is not frivolous or vexatious – it needs to be recalled that the Appellant's claims are tenuous. Courts have held that the Treaty of 1752 was terminated by hostilities. It cannot be a source of treaty rights. As to the Treaties of 1760 – 1761, quite apart from the fact that Nova Scotia's position is that *Marshall* was wrongly decided, the Supreme Court of Canada has said that "different treaties were made with different groups" (*Stephen Marshall*, para. 7). There is nothing here to suggest that a treaty as described in *Marshall*

applied to the Shubenacadie Band. As to aboriginal title, the Courts have rejected title claims to the whole of Nova Scotia and identified areas of the Province where title might exits. Those specific areas do not include Shubenacadie. So the Appellant is limited to an aboriginal right to fish for food, social and ceremonial purposes. Aboriginal rights are "not absolute" and can be infringed. Only "unreasonable" infringement has to be justified (*R. v. Gladstone* [1996] 2 SCR 723 at para. 47) and infringement can be in the pursuit of economic goals: *Delgamuukw v. British Columbia* 1997 3 SCR 1010 para. 160 – 161. In *Haida*, McLachlin C.J. described consultation at one end of the spectrum "Where the claim to title is weak, the Aboriginal right is limited" (para. 43). With respect, the present case falls into this end of the spectrum. At the same time, the Record discloses very substantial consultations with the Band, as well as accommodations. For example, the independent Third Party Review led to recommendations which were accepted by the Proponent and monitoring plans particularly designed to prevent harm to the fish. With very great respect, the Appellant has not raised a serious question.

Irreparable Harm

68. The Appellant proposes that "a breach of the duty to consult may result in irreparable harm" since consultation "must occur before the impugned activity takes place" (Appellant's Brief, para. 90, 63). It is clear as a matter of law that an allegation of inadequate consultation does not necessarily constitute irreparable harm: *Musqueam Indian Band v. Canada* 2008 FCA 214 (Fed CA) para. 52. That aside, the consultation in

the present case was prior to approval of the Proponent's brining operation, and was timely.

69. The major thrust of the Appellant's irreparable harm argument is two-fold. First, the suggestion is made that the test for irreparable harm is a "reasonable likelihood of harm" (Applicant's Brief, para. 64, citing *Tilcho Government v. Canada* 2015 NWTSC 9). Second, the Appellant argues that "knowledge gaps and uncertainties remain with respect to potential impacts on the river and on Striped Bass and Atlantic Salmon", such that there is a "reasonable likelihood" of harm (Applicant's Brief, para. 93). In short the Appellant equates a "knowledge gap", with harm. With respect to salmon, a possibility that "the brine could make the river smell for the salmon" thereby interfering with migration, is characterized as a "real likelihood" of harm (Appellant's Brief, para. 109).

70. It is the same with the Striped Bass. The "recruitment" of Striped Bass is not well understood, and the proponent's seven year study was "not able to make significant gains with respect to understanding recruitment" (Appellant's Brief, para. 117). It follows, argues with the Appellant, that the Alton Gas Project "has the potential to affect the spawning grounds of the Striped Bass population because there remain knowledge gaps with respect to recruitment" (Appellant's Brief, para. 119). Once again, a "potential" - in other words, a proposed possibility - is characterized as "irreparable harm".

71. With respect, this analysis of irreparable harm is flawed. First, a claimant alleging irreparable harm needs evidence. In *Buctouche First Nation v. New Brunswick* 2014 NBJ

No. 266 Larlee JA said, "Evidence of irreparable harm cannot be inferred and must be clear and not speculative" (para. 14). The judge went on to add this at para. 18:

> ...Where harm has not yet occurred, the higher standard for *quia timet* (he or she fears) injunctions applies since the Court is asked to predict that harm will occur in the future: Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2013) (loose-leaf), ch. 1 at 31-32. **To award an injunction in such circumstances there must be a high degree of probability that harm will occur.** (para. 59) (emphasis added).

72. Similarly, "Any prediction of risk" in respect of a claim for an interlocutory injunction, "must be based upon evidence that is reliable and relevant. Speculation, assumption and fear cannot provide the foundation for such an Order. **The evidence must establish the probability that harm will occur**": *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* 2007 OJ No. 1841, para. 156 – 157.

73. The Appellant has not adduced evidence showing a "high degree of probability" that harm will occur. Their submission is purely speculative, suggesting the because of certain "knowledge gaps", there might be harm to bass and salmon. But not only is their submission speculative, it ignores the evidence-based approach of the Crown and the Proponent in responding to the scientific deficiencies in understanding bass and salmon. So, for example, the Department of Environment agreed there is a knowledge gap respecting bass, but its response was to calibrate the approval so that operations cease during spawning so risk of harm is avoided; "there is significant understanding on when eggs and larvae are present near the project site and requirements for shut down during

this period as well as maintaining thresholds for salinity at or below natural variability for the rest of the year will mitigate impacts to Striped Bass", while a, "toxicity study will provide additional information for future management" (Record, Vol. 3, Tab 20, p. 3). Detail respecting shut down for bass spawning is found in the "River Site Monitoring Plan" (Record, Vol. 3, Tab 17).

74. With respect to salmon homing ability, the Third Party Review said the effect of brine on a bouquet "will likely be negligible" (Record, Vol. 7, p. 347 and p. 9). The Province noted that the changes in salinity would be "extremely small" and "well within the natural variability" at the site to which migratory fish are "well adopted" (Record, Vol. 3, Tab 20, p. 2). The Pathways Assessment stated "brine poses no known risk" (Record, Vol. 3, Tab 17).

75. In sum, the Province's evidence based analysis confirms the improbability of harm. The Appellant's argument to the contrary is speculation. With respect, that is not a basis for a finding of "irreparable harm".

76. One further point is necessary. While the Appellant's concern for the environment is laudable, it is just that; a concern for the protection of the environment which they seek to enforce in this Court, by reference to a common law standard of "irreparable harm". But at the same time, the Nova Scotia *Environment Act* is a statutory code for the protection of the environment in Nova Scotia. With great respect, there is little room for the operation of an interlocutory common law regime in the face of a detailed and complete

statutory regime. It is suggested respectfully that the common law regime should operate only in very clearly established cases.

Balance of Convenience

77. In *Haida,* Chief Justice McLachlin discussed the availability of interlocutory injunctions in the context of aboriginal rights cases, saying "the balance of convenience test tips the scales in favour of protecting jobs and government revenues" (para. 14).

78. The Alton Gas Project is a significant investment providing jobs and economic benefits to Nova Scotia.

79. Beyond this, the case-law discussed above confirms that a court should, "in most cases assume that irreparable harm to the public interest would result from the restraint" of a "public authority" (*RJR – MacDonald*, para. 71).

80. It is respectfully submitted on behalf of the Attorney General that an Order staying the Industrial Approval is tantamount to staying the provisions of the Environment Act pursuant to which the Industrial Approval was granted and in respect of which the "public interests in enforcing the law" weighs "heavily in the balance" (*Harper v. Canada,* para. 9, per McLachlin C.J.). As noted in *RJR – MacDonald*, "when a public authority is prevented from exercising its statutory powers" - in this case, the approval under the *Environment Act* – "the public interests of which that authority is the guardian, suffers irreparable harm" (para. 69).

81. A point to which the Appellant refers repeatedly – project splitting – is emphasized in their "balance of convenience" argument (Appellant's Brief, para. 130 – 135). The insinuation is made that it was somehow wrong to "separately consider" the pipeline and the storage aspects of the projects. There is nothing raised in the Appellant's Notice of Appeal raising "project splitting". No objection has been taken challenging the legality of the separate approach in respect of the component parts of the Alton Gas Project.

82. It is respectfully submitted that the Appellant's claim for a stay should be dismissed.

83. All of which is respectfully submitted.

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Halifax, Nova Scotia
June 14, 2016

AUTHORITIES

Cases:

1. *Buctouche First Nation v. New Brunswick* 2014 NBJ No. 266
2. *Delgamuukw v. British Columbia* 1997 3 SCR 1010
3. *Haida Nation v. British Columbia*, 2004 SCJ No. 70
4. *Harper v. Canada (AG)* 2000 2 SCR 764
5. *Manitoba (AG) v. Metropolitan Stores* [1987] SCJ No. 6
6. *Musqueam Indian Band v. Canada* 2008 FCA 214
7. *Newfoundland v. Drew* 2003 NJ No. 177; aff'd 2006 NLCA 53
8. *Novopharm Ltd. v. BC* 2008 BCJ No. 100
9. *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment)* 2011 NSJ No. 178
10. *Pictou v. Canada* 2003 FCJ No. 33
11. *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* 2007 OJ No. 1841
12. *R. v. Francis* 2003 NSPC 20
13. *R. v. Gladstone* [1996] 2 SCR 723
14. *R. v. Johnson* 1990 NSJ No. 465
15. *R. v. Marshall* [1999] 3 SCR 456
16. *R. v. Marshall* 2001 NSJ No. 97
17. *R. v. Marshall* 2002 NSJ No. 98
18. *R. v. Marshall* 2005 2 SCR 220
19. *RJR – MacDonald Inc. v. Canada (AG)* 1994 SCJ No. 17

20. *Simon v. The Queen* [1985] 2 SCR 387

Statutes and Legislation:

21. Nova Scotia *Environment Act* SNS 1994 – 1995 c. 1

22. Nova Scotia *Proceedings Against the Crown Act* R.S., c. 360, s. 1