Environmental Appeal Board

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DECISION NOS. 2011-WAT-005(c) and 2011-WAT-006(c)

In the matter of two appeals under the *Water Act,* R.S.B.C. 1996, c. 483.

BETWEEN:	Chief Richard Harry in his own right and on behalf of the Xwémalhkwu First Nation	**APPELLANT**
AND:	Assistant Regional Water Manager	**RESPONDENT**
AND:	Bear River Contracting Ltd.	**THIRD PARTY / LICENCE HOLDER**
AND:	Environmental Law Centre	**PARTICIPANT**
BEFORE:	Robert Wickett, Panel Chair	
DATE:	November 14, 15, 24, and 25, 2011. Concluded by written closing arguments on December 2, 2011	
PLACE:	Victoria, BC	

APPEARING:	For the Appellant:	Steven M. Kelliher, Counsel
	For the Respondent:	Livia Meret, Counsel
	For the Third Party:	Chuck Farrar, Luke Martin, Gordon Treswell
	For the Participant:	Chris Tollefson, Counsel

APPEALS

[1] These appeals are brought by Chief Richard Harry in his own right and on behalf of the Xwémalhkwu First Nation (the "FN"), also known as the Homalco Indian Band. The FN appeals the issuance of two conditional water licences issued on February 16, 2011 by Timothy Bennett, Assistant Regional Water Manager (the "Manager"), Ministry of Environment, now the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The Manager derives his authority from the provisions of the *Water Act*, R.S.B.C. 1996, c. 483.

[2] The conditional water licences were issued to the Third Party, Bear River Contracting Ltd. ("BRC"), and are appurtenant to property owned by BRC in Bute Inlet, adjacent to Bear Bay in the Coast District in the Province of British Columbia

(the "BRC Property"). Both of the licences authorize the diversion and use of water from the Bear River, which traverses the BRC Property.

[3] Conditional water licence C125900 (the "Domestic Water Licence") was issued for the purposes of fire protection and residential lawn watering.

[4] Conditional water licence C125901 (the "Commercial Water Licence") was issued for purposes described in the licence as industrial (bottling sales) and industrial (enterprise). In particular, it permits the bottling of water for sale.

[5] Both of the licences require BRC to make beneficial use of the water before December 31, 2014. In addition, the Commercial Water Licence terminates on December 31, 2014.

[6] The FN appealed the issuance of both licences. The FN possesses reserve lands on Bear Bay adjacent to the BRC Property. The FN appeals on the basis that the Manager failed to adequately consult the FN with respect to the potential infringement upon their Aboriginal rights and title, such rights and title being protected under section 35 of the *Constitution Act, 1982*. The FN also asserts that the Manager failed to comply with section 11 of the *Water Act* by failing to hold a hearing with the FN before issuing the licences. The FN requests that the Board set aside the licences, and issue certain directions to the Manager.

[7] After the appeal was filed, the Board granted an application by the Environmental Law Centre (the "ELC") to participate in this appeal, to address two specific issues of legal interpretation and policy. The ELC is a non-profit incorporated society and a public interest environmental law clinical program, operating since 1994 in partnership with the University of Victoria Faculty of Law.

[8] The Environmental Appeal Board has the authority to hear these appeals under section 92(1) of the *Water Act*. Section 91(8) of the *Water Act* provides that the Board may confirm, reverse or vary the water licences under appeal, send the matter back to the Manager with directions or make any order that the Manager could have made and that the Board considers appropriate under the circumstances. Also, under section 92(7) of the *Water Act*, the Board may conduct an appeal by way of a new hearing.

BACKGROUND

[9] At some time in 2000, BRC purchased the BRC Property. The Bear River flows through the BRC Property and discharges into Bear Bay, near the head of Bute Inlet.

[10] The FN holds title to Indian Reserve No. 8, which is surrounded on three sides by the BRC Property, and fronts onto Bear Bay. The Bear River flows from the BRC Property over one corner of Indian Reserve No. 8, and discharges into Bear Bay.

[11] BRC bought the BRC Property with the intention of logging it. BRC proceeded to log the BRC Property throughout 2001 and 2002. Logs were shipped out by a barge brought in adjacent to Bear Bay. After logging the BRC Property completely, BRC replanted the entire 35 acre plot. Since logging was completed in 2002, BRC

has attended to the BRC Property by continuing silviculture work, and brushing and weeding the site.

[12] In 2009, the principals of BRC, Luke Martin and Gordon Treswell, contemplated how they might make further use of the BRC Property. They recognized that there would be an opportunity to extract some of the clean, pristine water from the Bear River and sell it commercially. They also recognized that to undertake this use, BRC would be required to obtain a licence to construct a docking facility, and that it would be required to obtain a water licence authorizing the diversion of water from the Bear River for purposes of sale.

[13] BRC further contemplated that its main object in removing and selling water from the Bear River would be to utilize it for its own micro brewery, which it planned to construct at a later time.

[14] BRC also conceived that it would construct eight cabins on the BRC Property, which could then be used as a hunting or fishing camp. The proposed eight residential cabins gave rise to the need for the Domestic Water Licence.

[15] In furtherance of its business objectives, BRC made an application for a land tenure under the *Land Act*, to construct a docking facility on the Crown foreshore adjacent to the BRC Property. Concurrently, they made applications for two water licences under the *Water Act*. The first water licence application was for domestic purposes (lawn watering and fire suppression), which would become the Domestic Use Water Licence, and the other was for the bottling of water for sale, which would become the Commercial Water Licence.

[16] On February 18, 2009, the water licence applications were submitted by an agent acting on BRC's behalf. On February 24, 2009, the applications were received by Front Counter BC, an agency under the Integrated Land Management Bureau ("ILMB") of the Ministry of Agriculture and Lands, which was responsible for the receipt and initial processing of the applications. The licence applications proposed that BRC be permitted to install a submersible 8" intake pipe with a protective screen to protect aquatic life. In its application for the Commercial Water Licence, BRC proposed that it be permitted to draw 25,000 gallons per day from the Bear River, subject to seasonal water flows. That water would be transferred to a barge, which would dock at the docking facility and then transport the water off site.

The application referral process

[17] Upon receipt of the two water licence applications, and in accordance with its standard procedure, Front Counter BC referred the licence applications to various ministries and interested parties. In particular, on May 5 and 12, 2009, respectively, the applications for the Domestic Water Licence and the Commercial Water Licence were referred to the FN. On the same dates, similar referral letters were also sent to several other potentially interested parties, including Fisheries and Oceans Canada, and the Ministry of Environment's Environmental Stewardship Division. The referral letters state that they were sent "on behalf of Ministry of Environment by Front Counter BC", and that the referral was from Aman Ullah of the Water Stewardship Division.

[18] By a letter dated May 19, 2009, Sheldon Reddekopp, of the Ministry of Environment's Environmental Stewardship Division, advised that his Division had "no objections" to the proposed licences, subject to certain conditions. Specifically, he requested that BRC adhere to best management practices for in-stream works, that fish screens be placed on the water pump intake to prevent fish and wildlife from entering the works, and that adequate flow be maintained in the stream as determined by the Water Stewardship Division.

[19] The FN submits that it had a vital interest in the subject licence applications, as its Indian Reserve No. 8 is surrounded on three sides by the BRC Property, and the proposed water licences, and the associated docking facility that was the subject of a separate tenure application under the *Land Act*, had the potential to impact the FN's Aboriginal rights and title, as well as the FN's common law property rights with respect to ingress and egress to its lands.

[20] There is no dispute that the FN's Indian Reserve No. 8 has not been occupied on a full time basis by members of the FN in recent years, but historically, it was occupied from time to time, and has been used periodically as a base from which to catch and process fish and seafood from Bute Inlet. In addition, the only deep water access to Indian Reserve No. 8 is on a portion of its Bear Bay frontage immediately adjacent to the BRC Property. The remainder of its frontage onto Bear Bay is too shallow to accommodate marine vessels.

[21] Following receipt of the referral requests, Robert Harry, then the Treaty Coordinator for the FN, replied to Mr. Ullah in two virtually identical letters dated June 10, 2009, advising that:

> … We wish to advise you that your proposed activities may significantly impact our lands and resources with resulting infringement on our Aboriginal Rights and Title. Further [to] this, your development plans are situated in our core area. We wish to advise that the Xwémalhkwu First Nation cannot support or approve your request at this time.

The letter further advised that Mr. Ullah should speak with the FN's counsel, Steven Kelliher, if he had any further questions.

[22] In response, Mr. Ullah, then a Water Power Engineer with the Ministry, wrote a letter dated October 1, 2009 to Robert Harry, seeking further information from the FN with regard to how the water licence applications could impact its Aboriginal rights and title. The letter sought a response within thirty days, and failing that, the Ministry would proceed with completing its review of the applications.

[23] No response was received within the requested thirty days.

[24] Thereafter, the Ministry's Water Stewardship Division continued to process the licence applications. During this process, various communications with the FN were exchanged.

[25] In addition, the principals of BRC contacted the FN. As a consequence, two meetings occurred wherein BRC attempted to allay the FN's concerns.

[26] During this process of communication between the FN, the Water Stewardship Division, and BRC, the FN's main objections to the water licences

became apparent. In particular, the FN objected to the commercialization of water, and took the preliminary position that the diversion of water from Bear River for commercial purposes could impact its Aboriginal right to fish and would have other long-term environmental consequences.

[27] The process of communication with the FN with respect to the water licence applications culminated with an August 27, 2010 letter sent by Rachel Eedy, a Water Stewardship Technician in the Ministry's Water Stewardship Division, to Mr. Kelleher, and to Robert Harry, the FN's Treaty Coordinator. That letter summarized Ms. Eedy's understanding with respect to the licence applications and their potential impact on the FN. The letter set out Ms. Eedy's preliminary assessment of the FN's interests in the affected area, and the potential impacts of the proposed water licences on the FN's interests. The letter states, in part, as follows:

> On the basis of this preliminary assessment, we are taking under consideration that … [the FN] may have claims of rights and title and other interests near the mouth of Bear River in the review of these applications. Although the potential environmental impacts of the application[s] are considered to be low, the affected site could be of considerable interest to … [the FN].

[28] Ms. Eedy concluded the letter by requesting more specific comments on how the proposed water use and works might infringe on the FN's rights and title. Ms. Eedy sought a response to her letter within 45 days (October 15, 2010), failing which, she advised that the Ministry intended to proceed with its review "leading to a final decision."

[29] Ms. Eedy received no response to her August 27, 2010 letter.

The Ministry's technical report

[30] As Ms. Eedy received no response, she continued with her review of the applications, which eventually resulted in the completion of a technical report addressed to the Manager. Ms. Eedy signed the technical report on February 9, 2011, and recommended that the two water licences be issued.

[31] The technical report summarized all of the information that Ms. Eedy had gathered and considered. Under the heading "Water Balance", the technical report states that the mean annual discharge at a diversion point located two kilometers upstream of BRC's diversion point was "around 19 m3/s [cubic metres per second] with seasonal low flows around 5 m3/s occurring in winter." The technical report also states that the discharge at BRC's diversion point "would likely be higher since it is farther downstream." Under the heading "Environmental Concerns", the technical report states that the in-stream works are "small in size and the pipeline would be located largely in previously disturbed areas." It also states that "The potential impacts are considered to be small if withdrawal rates are limited … the proposed withdrawal rate of 0.14 m3/s… represents around 5% of this estimated seasonal low flow." The technical report also notes that, although environmental values for the area "could be high", BRC did not provide an opinion on environmental impacts from a "qualified environmental professional."

[32] In respect of the FN, the technical report notes that it had objected to the water licence applications, but had not provided any specific comments regarding how their rights and title would be affected. In regard to the potential effects on the FN's interests, the technical report concludes that the proposed licences would have "low potential" to infringe on the FN's rights, because: the environmental impacts were expected to be small; the main place of use is privately owned by the applicant; the instream work would not prevent traditional use of the mouth of the river for activities such as fishing; and Bute Inlet is largely undeveloped with other nearby areas that could be used for traditional activities. The technical report also concludes that the FN's strength of claim at that location is "strong in terms of rights and significant in terms of title." Further, it states that the Ministry provided an opportunity for "a normal level of consultation including allowing over a year for Homalco to provide more specific comments."

[33] On February 16, 2011, the Manager accepted the recommendations contained in the technical report, and issued the two water licences.

The Licences

[34] The Domestic Water Licence authorizes the withdrawal of water from the Bear River at a diversion point located on the BRC Property, with a maximum withdrawal of 2,946 cubic metres per day for fire protection and 2,467 cubic metres per year for residential lawn watering, at a rate not to exceed 30 cubic metres per day.

[35] The Commercial Water Licence authorizes the withdrawal of water from the Bear River at the same diversion point as the Domestic Water Licence, to a maximum of 25,000 gallons per day for bottling sales and 4,000 gallons per day for industrial enterprise use. The Commercial Water Licence also provides that the diversion rate from the Bear River for both purposes shall not exceed 0.15 cubic metres per second or 1% of the instantaneous pre-diversion stream flow at the point of diversion, whichever quantity is less.

[36] Both of the licences state that BRC must make beneficial use of the water before December 31, 2014, and that the licensed diversion of water "may be restricted or prohibited at any time by an Order in writing of an Engineer under the Water Act in order to prevent any unacceptable impacts to fish, other aquatic life and/or other licensees." In addition, both of the licences state that the installation of the licensed works "must occur in previously disturbed areas to minimize disturbance of vegetation as outlined" in a description and sketch provided to the Ministry by one of the owners of BRC on October 31, 2010.

[37] The Commercial Water Licence also contains a number of other conditions that are not found in the Domestic Water Licence. The Commercial Water Licence states that it terminates on December 31, 2014, and BRC has the option to apply prior to termination to extend the term. It also states that the licensed works "must be inspected by an independent and appropriately qualified environmental professional who shall prepare a report describing whether or not the licensed works are in working order and any environmental concerns" and the report must be provided to the Manager within six months of completion of the works.

The Appeals

[38] On April 5, 2011, the FN appealed both licences to the Board. The FN's Notice of Appeal lists several grounds for appeal, including that the Ministry failed to provide adequate notice of the licence applications or the extent to which the FN's rights would be impaired, failed to give sufficient or any weight to the FN's interests in granting the licences, and failed to adequately consult with or accommodate the FN as required by law. In summary, the FN asserts the licences, and in particular the Commercial Water Licence, have the potential to infringe their Aboriginal rights and title, and that it has neither been properly consulted nor accommodated with respect to this potential infringement.

[39] The FN also submits that the Manager failed to comply with section 11 of the *Water Act* by failing to hold a hearing with the FN before issuing the licences. Section 11 of the *Water Act* provides that certain categories of persons (licensees, riparian owners, or applicants for licences) who consider that their rights would be prejudiced by the granting of a licence, may file an objection to the granting of the application, and if an objection is filed, a regional water manager has authority to decide whether or not the objection warrants a hearing.

[40] The FN also applied for a stay of the licences pending a decision from the Board on the merits of the appeals. In a decision dated June 10, 2011, the Board denied the stay application (Decision Nos. 2011-WAT-005(a) and 2011-WAT-006(a)).

[41] During the hearing on the merits of the appeals, the FN abandoned its objection to the issuance of the Domestic Water Licence (Appeal No. 2011-WAT-005). As a consequence, the appeal of the Domestic Water Licence (Appeal No. 2011-WAT-005) is dismissed as abandoned, and the Panel will not consider the matter further.

[42] The FN submits that, as a consequence of both the failure to consult and accommodate the FN's Aboriginal rights and title, and the failure to comply with section 11 of the *Water Act, th*e Commercial Water Licence should be set aside, until such time as the FN has been properly consulted and accommodated with respect to its rights and title.

[43] The FN also seeks a non-binding ruling from the Panel stating that any proposed decision relating to the issuance of a water licence to a third party in the FN's traditional territory should, as a matter of course, be referred to the Treaty Table, and not be adjudicated in isolation.

[44] By an order made on October 27, 2011 (Decision Nos. 2011-WAT-005(b) and 2011-WAT-006(b)), the ELC was given participant status by the Board, and was allowed to advance two public interest issues, as follows:

- whether the Ministry was under an obligation to consider the cumulative environmental effects of future commercialization of the adjacent watershed and region; and

- the role of Qualified Environmental Professionals in the oversight of project approvals, and the need for adequate information before water licences are issued.

[45] In addition, the Board ordered that the ELC's participation was limited to providing only opening and closing submissions. The ELC was not permitted to introduce evidence or cross-examine witnesses.

[46] However, at the appeal hearing, the ELC provided submissions on two slightly different issues, as outlined below, and the Panel allowed the ELC to present those submissions:

1. Did the Manager have the legal authority to decide the application for a Commercial Water Licence in light of a ministerial reorganization of the provincial government which occurred in October of 2010; and
2. Did the Manager unlawfully rely on future investigation and reporting from a "qualified" environmental professional (QEP) as a condition of the Commercial Water Licence.

[47] In particular, the ELC submits that the Manager acted without authority in granting the Commercial Water Licence, having failed to re-refer the application to the Ministry of Environment to consider the potential cumulative environmental effects of the licence. By way of background on this issue, in October 2010 the provincial government reorganized its ministries, resulting in the placement of the Manager and his staff into a new Ministry of Natural Resource Operations ("MNRO") pursuant to Order-in-Council 652 ("OIC-652"). The time between BRC's submission of the Commercial Water Licence application and the issuance of the licence encompassed a period both before and after the ministerial reorganization. The ELC submits that, as a result of the ministerial reorganization occurring in the midst of the Manager's consideration of the Commercial Water Licence application, the Manager lost the authority to carry on activities or make decisions in accordance with the Ministry of Environment's core purpose, as defined in section 4 of the *Ministry of Environment Act*, R.S.B.C. 1996, c. 299.

[48] The ELC also submits that the Manager erred in law in issuing the Commercial Water Licence, having failed to impose upon BRC the obligation to retain a qualified environmental professional ("QEP") to provide a report with respect to environmental impact of the licence.

ISSUES

[49] The Panel has identified the following issues in this appeal:

1. Whether the Manager fulfilled the Crown's duty to consult with, and if necessary, accommodate, the FN before he issued the Commercial Water Licence.

[50] This issue engages a number of subsidiary issues, as follows:

(a) What is the strength of the FN's claim to Aboriginal rights and title in the area affected by BRC's water bottling proposal?

(b) What is the seriousness of the potential impact of the Commercial Water Licence on the FN's asserted Aboriginal rights and title, and in particular:

(i) Was the Manager obliged to consider the Commercial Water Licence application in the context of the entire water bottling proposal (including the associated land tenure application for a docking facility)?

(ii) Was the Manager required to consider the overall impact of the water bottling proposal upon the FN's asserted Aboriginal rights and title?

(c) In light of the forgoing, what is the nature and scope of the Crown's duty to consult with the FN in this case, and did the Manager fulfill that duty?

2. Whether the Manager failed to comply with section 11 of the *Water Act* by failing to hold a hearing with the FN before issuing the Commercial Water Licence.

3. Did the Manager have the legal authority to decide the Commercial Water Licence application in light of a ministerial reorganization which occurred in October 2010, and given that the Manager did not make a re-referral to the Ministry of Environment for its comments with respect to the licence?

4. Did the Manager unlawfully rely on future investigation and reporting from a QEP as a condition of the Commercial Water Licence?

5. If any of the grounds for appeal succeed, what is the appropriate remedy in the circumstances?

RELEVANT LEGISLATION

[51] The following sections of the *Water Act* are relevant to this decision. Other relevant legislation is reproduced where it is referenced in the text of this decision.

Objections to applications

11(1) A licensee, riparian owner or applicant for a licence who considers that his or her rights would be prejudiced by the granting of an application for a licence may, within the prescribed time, file an objection to the granting of the application.

(2) The comptroller or the regional water manager has authority to decide whether or not the objection warrants a hearing, and he or she must notify the objector of his or her decision.

(3) If the comptroller or the regional water manager decides to hold a hearing, the applicant and objectors are entitled to be notified, to be heard and to be notified of his or her decision following the hearing.

Powers of comptroller or regional water manager respecting applications

12(1) With respect to an application, whether objections to it are filed or not, the comptroller or the regional water manager may

(a) refuse the application,

(b) amend the application in any respect,

(c) grant all or part of the application,

(d) require additional plans or other information,

(e) require the applicant to give security for the purposes and in the amount and form the comptroller or the regional water manager considers in the public interest, and

(f) issue to the applicant one or more conditional or final licences on the terms the comptroller or the regional water manager considers proper.

(1.1) An applicant must comply with any order made under subsection (1) (d) or (e) within the time specified by the comptroller or the regional water manager.

(1.2) Without limiting subsection (1), the comptroller or the regional water manager may refuse an application or reject an application without consideration if

(a) the applicant fails to comply with any directions or requirements under subsection (1) (d) or (e) or section 10 (1), or fails to comply within the required time,

(b) the application is incomplete, or …

DISCUSSION AND ANALYSIS

The Parties' evidence

[52] A number of witnesses were called in this appeal to give evidence with respect to the nature and extent of the communication, consultation and accommodation of the FN prior to issuance of the Commercial Water Licence. Chief Richard Harry gave evidence on behalf of the FN, Luke Martin and Gordon Treswell gave evidence on behalf of BRC, and Rachel Eedy and the Manager, Tim Bennett, gave evidence on behalf of the Manager.

[53] It was apparent during the course of this evidence that there were few disputes about the facts, and in particular, with respect to the nature and extent of the consultation process. Rather, the disagreement between the parties is focused

on the consequences that should result from the degree of consultation afforded in this case. To put the duty to consult and potential impacts of the water licencing decision in context, it is necessary to review the evidence given by each of the three parties, as their perspectives or interpretations regarding agreed facts and history vary dramatically.

Chief Richard Harry

[54] Chief Richard Harry is Chief Counselor of the FN, whose headquarters are in Campbell River, British Columbia. The FN's traditional territory, and in Chief Harry's view its core, is in Bute Inlet stretching to the Coast Mountain Range and north to the Discovery Islands.

[55] Over the past many years, the FN has received many consultation referrals from various decision makers within government with respect to proposed development projects within the FN's traditional territory.

[56] The FN deals with these referrals in the context of its limited resources and capacity. The FN assigns people to handle referrals but it has no budget or specific expertise to deal with referrals. In past years, governments (federal and provincial) would offer funds to the FN to assist in assessing a particular project, but this form of funding no longer exists.

[57] Chief Harry testified that the Commercial Water Licence has the potential to impact not only the FN's Aboriginal rights and title within its traditional territory, but also the FN's use of, and access to, its Indian Reserve No. 8. Chief Harry testified that access to Indian Reserve No. 8 is crucial, because it is surrounded on three sides by the BRC Property.

[58] Chief Harry testified that the particular property concern with respect to the Commercial Water Licence was that once the *Land Act* permit was granted in support of the dock facility associated with the Commercial Water Licence, the resulting docking facility would restrict the FN's access to the deep water channel adjacent to Indian Reserve No. 8.

[59] Chief Harry testified that he did not understand why the Commercial Water Licence was issued. He explained that, by saying this, he meant that he had no knowledge of the "big picture" as it related to the commercialization of the water. He testified that he saw no business plans or impact studies that would have informed him as to the anticipated long-term implications to the FN of the construction of a dock facility, and the diversion and removal of water for sale.

[60] At the time of the water licence application referrals from the Water Stewardship Division, Chief Harry was not on council, and so Chief Harry did not have personal contact with either the Manager or BRC in this regard. He testified that, once he became Chief, he did not fully familiarize himself with this particular file as he had neither the capacity nor the resources to do so. Chief Harry testified that the FN's general position is that it is the government's duty to fully present all information relating to a project, and to satisfy the FN as to its Aboriginal rights and title. In Chief Harry's view, the FN did not have any duty to seek information; rather, the duty is upon government.

[61] Chief Harry noted that the FN's lack of financial resources was particularly acute at the time of this water licence referral in 2009, as the FN was dealing with a deficit of two million dollars in its operating account. He testified that the FN, therefore, had no funds to retain any experts to look at the overall impact of the Commercial Water Licence and the associated dock facility upon its rights and title.

[62] Chief Harry advised that the FN is engaged in stage 4 treaty discussions with the provincial and federal governments, and that the use of, and access to, water is a substantial component of these treaty negotiations. The FN's position is that the water resources in its traditional territory belong to it, and it is seeking a treaty that provides that the fresh water discharging into Bute Inlet is vested in the FN.

[63] In contrast to the process engaged in respecting these water licence applications, Chief Harry referred to the process that the FN engaged in to reach an agreement with respect to the Plutonic Hydro Inc. hydroelectric facility to be constructed far upstream in the Bear River valley. That agreement, which entailed significant negotiations and consultation with the FN, resulted in the provision of extensive benefits to the FN as compensation for the utilization by Plutonic of water within the FN's traditional territory for power generation. Chief Harry stated that, although the Plutonic project contemplated the construction of a barge facility in Bear Bay, that facility is to be located far from Indian Reserve No. 8, and therefore, it will create no issue of access to Indian Reserve No. 8.

[64] Chief Harry stated that his main concern with respect to the Commercial Water Licence is with respect to the commercialization of the water, over which the FN asserts ownership, and secondarily, he is concerned that the dock facility to be constructed by BRC will impede deep water access to Indian Reserve No. 8.

[65] There were a number of meetings between Chief Harry, and other members of the FN, with representatives of BRC. In the context of those discussions, a letter was sent dated December 4, 2009 from Phillip Morris, a Land Technical Officer with the ILMB of the Ministry of Agriculture and Lands, who was charged with dealing with the *Land Act* tenure application regarding the dock facility. In that letter, addressed to Robert Harry, Mr. Morris indicated that BRC was prepared to conduct a preliminary field reconnaissance archeology study to assist the FN in assessing whether there would be any impact upon the rights and title of the FN. Chief Harry testified that he had not seen that letter prior to the appeal hearing before the Board, and he had no knowledge of whether the offer had been replied to. In this regard, Chief Harry testified that he had not read or reviewed any of the file material before appearing as a witness in this appeal proceeding.

Rachel Eedy

[66] Ms. Eedy is a Water Stewardship Officer with the Water Stewardship Division, formerly of the Ministry of Environment. When the appeal was heard, she was with the MNRO (now the Ministry of Forests, Lands and Natural Resource Operations). Ms. Eedy's primary job function is to conduct technical reviews of applications for water licences. She specializes in applications for water licences for proposals other than large hydro power projects, and in-stream use applications for short-term water use.

[67] Ms. Eedy became involved in BRC's water licence applications in 2010, when she assumed conduct of the technical review and became responsible for making a recommendation to the Manager to either issue or refuse the subject water licences. One important component of her job was to liaise between BRC and various government ministries, and to make decisions about who would receive referral applications with respect to the water licence applications.

[68] Ms. Eedy testified that, after she reviewed BRC's water licence applications, she spoke to BRC to assure herself that the commercial water use proposed by BRC would not involve water leaving British Columbia in contravention of the *Water Protection Act*.

[69] Ms. Eedy testified that she reviewed the Ministry's files to ensure that the appropriate parties and government ministries had received standard form referral letters from Front Counter BC with respect to BRC's licence applications. She noted that one of the referral letters was addressed to the FN.

[70] In addition to the FN referral, Ms. Eedy noted that the water licence applications had been referred to the Strathcona Regional District, Timberwest Forest Corporation (re: undersurface rights), the Ministry of Environment (Environmental Stewardship Division), Fisheries and Oceans Canada, Transport Canada (Navigable Waters Protection Division) and to Plutonic Hydro Inc.

[71] Apart from the FN, the only objection to these water licence applications was from the Strathcona Regional District, which indicated that the BRC Property is not zoned to permit the bottling and selling of water, and that a rezoning application would be required. Other than this objection, the only comment received from one of the referral agencies was from the Environmental Stewardship Division of the Ministry of Environment, which had no objections subject to certain conditions, such as installing intake screening on the water diversion pipe within the Bear River to protect fish.

[72] The referral letter to the FN was sent in May 2009. Ms. Eedy testified that she received and reviewed the response letter dated June 10, 2009 (referred to in the Background) from Robert Harry, advising that the FN objected to the issuance of the Commercial Water Licence on the basis that it may significantly impact the lands and resources of the FN, resulting in infringement of its Aboriginal rights and title.

[73] In response to that letter, Ms. Eedy wrote to Mr. Kelliher, counsel for the FN. In addition, she left a voice message with Robert Harry. She advised both that she wished to speak with them about their concerns. The only reply she received was from Mr. Kelliher on June 7, 2010, indicating that he would "get back to her shortly," and advising that the government should take no action until he had an opportunity to respond. Ms Eedy testified that no further communication was ever received from Mr. Kelliher. Further, Ms. Eedy received neither any specifics regarding the FN's objection, nor a request to hear objections.

[74] As a consequence of the failure of the FN to communicate its specific concerns, Ms. Eedy decided to undertake her own investigation with respect to the FN's asserted Aboriginal rights and title, and the implications to the FN's interests of granting BRC's water licences.

[75] In this regard, Ms Eedy testified that she undertook background research. This research consisted of reviewing a number of government information sources with respect to the history of the FN and its traditional use of land and water within the Bute Inlet area. In particular, Ms. Eedy testified that she checked the following sources for information regarding FN interests:

(a) internal water licence application file data, and up-stream water licence applications;

(b) *Land Act* applications;

(c) some online searches of internal government records;

(d) the March 2004 Johnstone-Bute Coastal Plan, including some of the historical and ethnographic studies; and

(e) the federal Indian and Northern Affairs website.

[76] In summarizing this research, Ms. Eedy determined that the potential for impact of BRC's water licences on the FN's Aboriginal rights and title was as follows:

(i) no permanent impact – if water use stopped, flow levels could be restored and the pipeline could be removed by the BRC;

(ii) re: size of impact – the downstream section of Bear River is wide and the area directly affected by the intake works is relatively small;

(iii) re: significance of location – this is important to the FN as the works were adjacent to their Indian Reserve No. 8;

(iv) re: nature of interference with Aboriginal interests. Ms. Eedy noted potential interference with hunting, fishing and river use. She also noted that, although the water licences could result in interference, the licences enabled an ongoing business operation to flourish (cabins and bottling of water and presence of barge on inlet), which was likely to increase the use and development of the area, thereby affecting potential use of the area for other activities;

(v) re: other areas available for FN use – Ms. Eedy notes that Bute Inlet has a low level of development, and therefore is available for use by the FN for its traditional activities.

[77] Following completion of this self-directed research, Ms. Eedy then prepared and sent the letter dated August 27, 2010 to Mr. Kelliher and Robert Harry. In that letter, Ms. Eedy summarized her understanding of the potential impact of BRC's licences upon the FN's Aboriginal rights and title, and she sought further input from the FN with respect to the licences. The letter states, in part, as follows:

> I have completed a preliminary assessment of the potential impacts on Xwémalhkwu (Homalco) First Nation's interests, as summarized below. I hope that the following information will provide a starting point for discussion of the Xwémalhkwu First Nation's specific concerns.

The environmental impacts of the proposed water use and works are expected to be minimal given that the volume of water is small compared to the stream flow and the works are relatively small in footprint size. For example, 25,000 imperial gallons per day, which was requested for bottling purposes, is equivalent to 1.3 litres per second if water is drawn continuously. Based on flow information from farther upstream, we expect there to be more than 5 000 litres per second (5 m^3/s) of stream flow available during seasonal low flow.

I have done a preliminary assessment of the Xwémalhkwu First Nation interests in the affected area based on available written information accessible to me. Please note that this preliminary assessment is not exhaustive in nature and is intended only to inform our water licence review, not other reviews or negotiations involving the BC provincial government.

The following key findings are shared for your consideration:

- Xwémalhkwu First Nation occupied Bute Inlet at the time of contact and had main village sites at locations including Homathko and Southgate rivers,
- Xwémalhkwu First Nation reports that the mouth of Bear River is "a traditional dwelling site used during herring harvesting and processing times". The bay area has also been used for hunting and other types of fishing (2004 submission to Johnstone–Bute Coastal Plan),
- There is limited written documentation on historical use of the Bute Inlet area by Xwémalhkwu First Nation,
- Xwémalhkwu First Nation's legal counsel provided a response for different applications in Bute Inlet reporting that potential impacts to wildlife values and salmon migration would be of interest as topics for consultation (May 18, 2004 letter, Water Files 2002675 and 70),
- The Bute Inlet area was also used and occupied by other First Nations. Xwémalhkwu First Nation had a close relationship with Klahoose and Sliammon First Nation,
- The applicant's lot, the place of the proposed water use, is located next to a Xwémalhkwu First Nation reserve (Bear Bay 8),
- Xwémalhkwu First Nation is currently in stage 4 treaty negotiations (Negotiation of Agreement in principle) and the site is within the Statement of Intent area,
- I understand that although Xwémalhkwu First Nation retains interest in this area, the Bear Bay Reserve is currently unoccupied or infrequently occupied. Current or recent activities in the Bute Inlet include guiding bear tours. I

understand that Xwémalhkwu First Nation is currently based in Campbell River.

- Correspondence on these applications from the Xwémalhkwu First Nation includes letters and email (June 10, 2009 letter, Nov. 26, 2009 letter and June 7, 2010 email)

On the basis of this preliminary assessment, we are taking under consideration that Xwémalhkwu First Nation may have claims of rights and title and other interests near the mouth of Bear River in the review of these applications. Although the potential environmental impacts of the application are considered to be low, the affected site could be of considerable interest to Xwémalhkwu First Nation.

The responses received from Xwémalhkwu First Nation have communicated at a high-level concern that the water licence applications could result in an infringement on Xwémalhkwu First Nation rights and title. In order to better consider those concerns during the application review process, specific comments on how the proposed water use and works might infringe on rights and title would be appreciated.

You are invited to contact me to discuss this application by phone and/or to provide further written comments. If we do not hear from you within 45 days (before October 15, 2010), the intention is to proceed with review leading to a final decision.

[78] Despite the request for further consultation contained in the August 27, 2010 letter, the FN did not respond.

[79] Ms. Eedy testified that, as she awaited a response to the August 27, 2010 letter, she continued collecting information regarding the Bear River. She also undertook a review of references to deal with some of the details regarding the size of the pipe to be used to divert water. Thereafter, Ms. Eedy had a conversation with the Manager. Upon receipt of direction from the Manager, she commenced the drafting of her technical report.

[80] One of the sources cited by Ms. Eedy in her research leading up to the August 27, 2010 letter was a review of historical and ethnographic sources in relation to the Xwémalhkwu First Nation prepared by the then Ministry of Attorney General, Legal Services Branch, in March 2007. That report was prepared for the Ministry of the Attorney General to provide historical, ethno-historical and archeological data useful to a preliminary assessment of an Aboriginal rights and title claim. That particular document was eventually provided to the FN on April 20, 2011, after granting BRC's licences.

[81] As previously noted, the technical report drafted by Ms. Eedy summarized the research undertaken by her, and the responses received from each of the persons or entities who received referrals.

[82] With respect to First Nations considerations, the technical report states:

12. FIRST NATIONS INFORMATION

> COMMENTS BY REPORT WRITER
> Homalco First Nation object to this application, but have not provided specific comments on why they feel their rights would be affected. The proposed licences are considered to have low potential to infringe on First Nations rights for the following reasons: the environmental impacts are expected to be small, the main place of use is privately owned by the applicant, the instream work would not prevent traditional use of the mouth of the river for activities such as fishing, and Bute Inlet is largely undeveloped with other nearby areas that could also be used for traditional activities.
>
> Homalco First Nation's strength of claim at this location is considered to be strong in terms of rights and significant in terms of title. The appurtenant lot is next to a Homalko reserve that was a traditional dwelling site used during fishing activities. Homalco have recommended in other reviews that shell middens near the mouth of Bear River not be disturbed.
>
> Based on the nature of the application and the area, we have provided an opportunity for a normal level of consultation including allowing over a year for Homalco to provide more specific comments. See Aug. 27, 2010 preliminary assessment letter, Oct. 1, 2009 letter and decision letter to Homalco First Nation on file for details.
>
> Also note that there was earlier communication between the applicant and Homalco, including meetings, related to the applicant's nearby land tenure applications for the same projects (records from the applicant are on file). The applicant's comments suggest that they are not aware of any site-specific issues beyond those above. Homalco First Nation was invited to visit the site at the Applicant's expense, but did not do so.

[83] In preparing the technical report, Ms. Eedy made the following significant comments with respect to environmental considerations relating to the water bottling proposal contemplated by BRC:

> … It is not clear if the applicant would be able to use water for bottling or enterprising purposes as proposed, in compliance with local government zoning bylaws, within a reasonable timeframe. The SRD [Strathcona Regional District] is resistant to changes in zoning that would allow this proposed water use. Furthermore, I question if the applicant would complete the required rezoning application process and launch the proposed bottling and other business ventures within a few years. The applicant has generally been very slow to complete this water licence application process and seemed reluctant to provide more than a minimal amount of information in support of their application.
>
> The Water Act and our mandate and policies support beneficial use of water (and minimizing water rights not in use). For example, water licences can be cancelled due to 3 successive years of non-beneficial use.

> I have considered how to balance the importance of giving the applicant a fair opportunity to make beneficial use of water and the risk of allocating a large volume of water under a licence that might not be used and could be very difficult to cancel. (The site is remote with no road access and water use would not be continual). I have recommended that the authorization for bottling and enterprise purposes be granted for a term of approximately 4 years (terminating Dec. 31, 2014) under conditions that focus responsibility on the applicant for documenting beneficial use.

[84] Later within the technical report, Ms. Eedy states as follows:

> The application does not include a significant amount of information on environmental values. However, information from other sources suggest that environmental values could be high, for example, since the region has low levels of development and is used for fishing. The applicant did not provide an opinion on environmental impacts from a qualified environmental professional or photos as requested (August 18, 2010). Ongoing record-keeping of actual water use and a single report from a QEP are required as conditions for a bottling and enterprise licence.
>
> Ecosystems recommended that we consider instream flow requirements and require the use of best management practices for instream works, and fish screening. Related conditions have been added to the licences.

[85] It should also be noted that, the technical report's description of the works to be authorized refers to a screened intake, submersible pumps, two pipelines, and storage tanks. It does not mention the docking facility, although it states that the water for bottling "would be transported off-site by barge." In addition, with regard to whether any permits over Crown land were needed, the technical report indicates that no such permits were required for the water licences, but it states that "the applicant states that they have tenures over the foreshore area for barge access."

[86] In her evidence, Ms. Eedy referred to the June 3, 2010 letter from the FN to Andrea Cowgill of the ILMB, regarding BRC's application for tenure under the *Land Act*. The letter states, in part, as follows:

> We wish to advise you that further consultation with Xwémalhkwu First Nation will be required. The following points need to be addressed as they are serious concerns to Xwémalhkwu First Nation.
>
> ...
>
> - Homalco has raised concerns since first being informed by Luke Martin of Bear River Contracting that they were planning to apply for a foreshore lease to build a float and barge grid and apply for a water licence to provide water to the wharf for bottling plant operation[s].
> - We did respond with a letter to ILMB raising our concerns that a commercial lease for a commercial barge grid would infringe on Homalco's rights and title.
>
> ...

- We did not object to a private boat moorage, however [we] were adamant that a commercial water lease would infringe on Homalco's aboriginal rights and title.
- We also stated that we were in the process of updating our Traditional Use Study and would be able to provide additional TUS/Archaeological information at that time.

Once the above list is addressed, this will give us an opportunity to determine the complexity of the matter and anticipate our requirements for further consultation.

[87] Ms. Eedy testified that she had not seen this letter prior to giving evidence in the appeal hearing. She agreed that the information contained in this letter would have been relevant to the water licence decision-making process, had she seen it before the Commercial Water Licence was issued. She commented that, when the Commercial Water Licence was issued, there was no procedure in her office to share information between various branches of government. She testified that she had been taught that she should look at files from other departments for background references only. She also testified that there have now been changes in the consultation process. She noted that now, particularly on larger projects, government departments bundle and coordinate their consultation process, and share information. She also testified that this process of sharing information was not standard practice when the Commercial Water Licence was issued.

[88] With respect to estimating in-stream flow requirements, Ms. Eedy testified that there was no mandatory process that she was required to follow or consider. Internal policy required her to seek advice from other staff in the Water Stewardship Division, as in-stream flows can be considered a legitimate factor in deciding whether to issue a water licence.

[89] With respect to cumulative environmental impacts, she testified that a standard aspect of licence application reviews is to consider the total quantity of water to be licenced on the river. She did not assess whether the licences would have impacts on marine resources, as this was regulated under other legislation, and not the *Water Act*. In this regard, she testified that the requirement in the licence that the BRC provide a report from the QEP relates only to the withdrawal of water from the river, in accordance with the licence. She testified that her mandate did not require a QEP to provide an assessment of BRC's entire project, in terms of the impact of a commercial water bottling enterprise, with the associated docking facilities, on the FN's rights.

[90] Ms. Eedy stated that she understood that the FN might view the consultation process differently, and might contemplate that the Commercial Water Licence had a broader impact upon their rights, but she testified that she did not have regulatory authority over the docking facility, and she contemplated that there was a separate regulatory review within which those broader questions would be asked.

[91] Ms. Eedy testified that, in general, she did not consider it her obligation, in the context of the consultation process, to provide copies of all information in her file to the FN. For example, there were many communications between her and BRC that were not provided to the FN. She testified that she did not consider this

to be a legal requirement. However, she stated that, if the FN had indicated an interest in this particular licence application, she would have provided the information.

[92] In particular, Ms. Eedy sent a letter dated August 18, 2010 to BRC, which sought further information from BRC. In that letter, Ms. Eedy states, in part:

- Information on proposed water use, water works and site conditions should be reviewed by an appropriately qualified environmental professional (QEP). The QEP is to provide a professional opinion on the nature and extent of potential impacts and recommend appropriate mitigation measures (e.g. guidance on fish screening, installation, etc). Note that the area in question is subject to First Nations claims associated with traditional resource use (e.g. fishing and hunting). Therefore, careful consideration of potential impacts and environmentally responsible planning are of high importance.

[93] And later, in the same letter:

- I understand that current Strathcona Regional District (SRD) zoning does not allow use of the property for bottling, enterprise or agricultural activities. Water Stewardship Division requests evidence of progress towards potential rezoning to support future beneficial use of water as proposed. Specifically, an application to SRD should be made in the next 30 days to enable their review of associated issues.
- Comments from Xwémalhkwu (Homalco) First Nation are being taken under consideration. Additional information may be requested from Bear River Contracting to support this aspect of our review depending on the outcome of communications with XFN.

[94] This letter was not provided to the FN, as Ms. Eedy did not consider it relevant to the consultation process.

[95] In summary, Ms Eedy testified that, in her opinion, the FN's failure to engage in a discussion regarding the Commercial Water Licence confirmed her independently formed view that the Commercial Water Licence would have no impact on the FN's rights and title, and that the question of accommodation did not arise.

Tim Bennett

[96] Tim Bennett, the Manager, was responsible for reviewing and eventually approving the two water licences.

[97] The Manager testified that he reviewed the technical report prepared by Ms. Eedy, and issued the two water licences in reliance upon that report. Prior to completion of the technical report, he worked fairly closely with both Mr. Ullah, and later Ms. Eedy, as they worked their way through the water licence application process, including the process of consultation with the FN.

[98] The Manager testified that he had received training with respect to First Nations consultation, and that, in directing Ms. Eedy, he believed that he was following the consultation process as recommended by government policy. In this

regard, he knew that an effort to engage the FN in addressing the key issues raised by the Commercial Water Licence application was essential. He believed that he was fulfilling this obligation by his review and authorization of Ms. Eedy's letter of August 27, 2010 to the FN, requesting further specifics.

[99] With respect to the technical report, the Manager testified that he took an active role in its preparation. In particular, he recalled giving directions to Ms. Eedy about a number of issues, including the issue of First Nations consultation.

[100] Mr. Bennett also noted that the bottling use sought in the application for the Commercial Water Licence was inconsistent with the Strathcona Regional District's position with regard to zoning. He recalls advising Ms. Eedy that the lack of appropriate zoning from the Strathcona Regional District would not prevent issuance of the Commercial Water Licence. He advised Ms. Eedy that, to address the zoning issue, a requirement should be inserted in the Commercial Water Licence providing that the Commercial Water Licence would expire within a fixed period of time if the necessary zoning was not achieved.

[101] With respect to consultation with the FN, the Manager was of the view that good faith efforts had been made to gather information about the FN's rights and title. He developed the opinion that the very small amount of water extraction authorized by the Commercial Water Licence would have no impact on the FN's rights or title. In particular, he believed that these licences could not, or would not, affect the FN's ability to fish, and that the placement of the necessary works on the BRC Property, and on the foreshore, would not impact hunting or any other Aboriginal rights. The Manager testified that, in his opinion, although the FN had declined to provide Ms. Eedy with any feedback in the consultation process, the precautionary terms he inserted in the Commercial Water Licence, such as screening the intake pipe to prevent damage to fish, construction of the works in previously disturbed areas so as to minimize environmental impact and, most importantly, the small amount of water to be withdrawn pursuant to the Commercial Water Licence, would ensure that there would be no impact on the FN's rights or title.

[102] The Manager recalled having discussions with Ms. Eedy about the potential impact of the dock facility. He advised Ms. Eedy that these were not matters for their consideration, as they had no jurisdiction over them. From the Manager's perspective, the application for the Commercial Water Licence was not related to, or dependent upon, the *Land Act* application for a permit to construct the dock facility.

[103] The Manager testified that, as a consequence, he did not put his mind to the environmental impact, broadly speaking, that could flow from the project as a whole. The Manager testified that he considered it his responsibility to consult with the FN with respect to the implications of the Commercial Water Licence, insofar as there were, or might be, environmental and other impacts directly resulting from the withdrawal of water and the installation of the associated water works.

[104] As a further consequence of this view, the Manager did not consider that accommodation of the FN's interests was necessary in relation to the water licences. He was of the view that the licences caused no infringement of the FN's rights and title, and therefore, no accommodation was necessary. Consequently,

he did not consider that there would be any obligation or need to refer the application for the Commercial Water Licence to the Treaty negotiation table, where the FN is negotiating a comprehensive treaty.

[105] Finally, the Manager testified that he did not consider it necessary to convene a hearing pursuant to section 11 of the *Water Act,* which provides that a regional water manager may hold a hearing if he or she considers that an objection received in response to a water licence application warrants such a hearing. In the Manager's view, the FN's failure to engage in discussion about the matter made it unnecessary to conduct a hearing under section 11.

Luke Martin and Gordon Treswell

[106] Messrs. Martin and Treswell are the principals of BRC. They testified together, and were questioned at the hearing by their consultant, Chuck Farrar.

[107] Messrs. Martin and Treswell testified that, after completion of the logging on the BRC Property in early 2003, BRC replanted the Property, and held the Property in contemplation of an appropriate future use.

[108] Eventually, Messrs. Martin and Treswell settled on a business concept that could make use of the BRC Property. They believed it would be economically viable to obtain a land tenure permit to install a dock facility, so as to facilitate the removal and sale of fresh water from the Bear River. They conceived that they would utilize the water in their own microbrewery, to be located elsewhere.

[109] They also recognized that they would have to seek a *Water Act* licence to allow them to remove water from the Bear River.

[110] They testified that, after they worked through a preliminary business plan, they initiated parallel licence application processes: one through the ILMB for the necessary land tenure permits to lay water pipe from the Bear River to the foreshore, where a dock facility would be constructed; and the other involving applications to the Manager to obtain the necessary water licences.

[111] Messrs. Martin and Treswell contemplated that an 8" pipe would be inserted into the Bear River to withdraw water. They contemplated the pipe would be located on previously disturbed ground, and buried adjacent to a logging road running from the Bear River to the foreshore. Their plan contemplated that the water pipe would be buried at a depth of 3' along a 450' length from the water extraction point to the foreshore. At the foreshore, they contemplated that there would be an offshore facility to tie up a barge, and that a small dock facility would be constructed. The small dock would be a floating dock anchored to rocks on the foreshore with pins. The floating dock would be connected to the beach by a movable ramp.

[112] Messrs. Martin and Treswell described the BRC Property as remote and without road access. They did note, however, that there is a lodge (Bear Bay Resort), within 300 metres of the property, which has a nine-person guest house. They noted that this facility has a docking facility and a barge ramp set-up.

[113] As the *Water Act* and *Land Act* processes engaged different departments of the provincial government, Messrs. Martin and Treswell were concurrently engaged with two different groups of officials, who were directing and responding to them in respect of each licence application. They dealt with Mr. Ullah and Ms. Eedy with respect to the Commercial Water Licence application, and with Mr. Morris and Ms. Cowgill of the ILMB with respect to the land tenure applications.

[114] Both Mr. Morris and Ms. Eedy obliged BRC to initiate discussions and consultations with the FN with respect to the potential impact of their project on the rights and title of the FN.

[115] With respect to the dock facility permit, Messrs. Martin and Treswell made efforts to contact the FN, specifically their representative Gordy Atkinson, and their then Chief and Treaty Negotiator, Robert Harry. Those efforts resulted in a meeting at the FN's offices in Campbell River, with Mr. Atkinson and with Chief Harry, in 2009. Messrs. Martin and Treswell testified that, at that meeting, they described the nature of the project that they were contemplating, and they sought the FN's feedback with respect to any potential issues or impacts upon the FN's rights and title. Messrs. Martin and Treswell testified that Chief Harry told them that the FN could not comment with respect to the project, because they had just recently undertaken a traditional land use study with respect to the area, and they wanted to receive the report before responding. The land use study had been funded by Plutonic Hydro Inc., in the context of its negotiations with the FN with respect to water access in the Bear River for the purpose of run-of-river power generation, upstream from the BRC Property.

[116] Following that meeting, no other meetings occurred between BRC and the FN. In November of 2009, there was an exchange of communications between Mr. Martin, Mr. Morris of the ILMB, and Mr. Atkinson.

[117] On November 23, 2009, Mr. Martin sent the following email to Mr. Morris, which states, in part:

> … As far as the Homalko band goes I have had various conversations with the Chief Richard Harry and their consultant Gord Atkinson. I have even had a meeting with them. The response to any of our questions has been that at this time they are not willing to comment on anything as they currently have a land use study active in the Bute area. We have explained that our project encompasses a very small area of which they are studying, but they insist that regardless of the size it is important for them to complete the study to make an accurate decision. When asked how long the study will take their answer is realistically next summer. I talked with Gord Atkinson and Richard Harry last week and explained the fact that ILMB needs to see some progress or they had no choice but to close the file or contact the Homalko themselves. Gord Atkinson appreciated the call and said he would discuss it further with Richard. He said he would send me an email regarding our conversation and get back to me. …

[118] On November 24, 2009, Mr. Morris responded in an email that says, in part;

> Luke, this is good information that I can use for our decision, thanks. I will wait to hear from you again, hopefully by Monday. Then we will send

> Homalko a letter asking what their specific concerns are. We will give them only 20 days or so to respond. …

[119] Thereafter, Mr. Martin followed up again with Mr. Atkinson. On November 25, 2009, he sent Mr. Atkinson an email that says, in part;

> … In this application, we are simply trying to put a safe access to our land. In the process we are trying to be respectful of the Homalko as technically they are our neighbours. We would have no problem with an on site visit with yourself and Richard to make sure there are no cultural sites or issues and we could pay for your time. It is really as simple as this. We are talking about an area as big as a large lot and can be easily viewed. So if you can let me know of the intent of the Homalko if any in particular then it would be appreciated. This would be helpful in talking with my other partners. If you wouldn't mind confirming you have received this as well to make sure I have the right address [that] would be great thanks.

[120] Later on November 25, 2009, Mr. Atkinson responded, and said, in part:

> 1. The interest Homalko has in the foreshore fronting and adjacent their Reserve is that they have lived their [sic] for thousands of years and have and want to protect the middens and/or other archeological or cultural sites that are quite probably evident in that area.
>
> 2. Homalko is quite willing to share a 10 year lease with you so that you can have access to your property, but is not prepared at this time to have the lease in Bear Creek Contracting Ltd. name only as then Homalko could lose the right to use and/or study the area and face the probability that the lease could be sold or transferred to a third party.
>
> 3. We indicated to you that our land use study is in progress and we would be better able to make an informed decision after the results of this study are known. The only reason we suggested a joint application is to fit your time schedule. We are quite willing to await the results of our land use study by making an informed decision at that time.
>
>   Could you please advise if you wish to proceed with a joint application or would prefer to wait until we have completed our Traditional Use and Archeologic [sic] studies.

[121] Messrs. Martin and Treswell testified that on November 26, 2009, immediately following the email exchange described above, Chief Harry wrote to Mr. Ullah with respect to the water licence applications, and said:

> To further our conversation of November 25, 2009, it has been determined that Bear River Contracting will withdraw the above-mentioned Water Licence on Bear River. We appreciate your cooperation and look forward to working with you in the future.

[122] Messrs. Martin and Treswell testified that they did not advise Chief Harry that they were withdrawing their water licence applications. Rather, they testified that they always intended to continue with the application process.

[123] Following those exchanges, Mr. Morris sent a letter dated December 4, 2009 to Robert Harry seeking further information with respect to the impacts that the FN was concerned about in relation to the construction of the dock facility and the water pipeline. In addition, as BRC had offered to conduct a preliminary field reconnaissance archeology study at its expense, Mr. Morris sought Mr. Harry's input and position in this regard.

[124] Messrs. Martin and Treswell indicated that no response was ever received to those communications, other than a response that the FN did not wish to comment until their cultural study was completed.

[125] Messrs. Martin and Treswell testified that they are fully aware that their business purpose in diverting and withdrawing water from Bear River cannot be fulfilled unless appropriate zoning changes are obtained from the Stratcona Regional District. They testified that the Commercial Water Licence application was made in advance of the zoning change application, as they were advised by the Strathcona Regional District that it would not consider any change to the zoning unless it was clear that BRC had a licence to withdraw the water.

[126] With respect to the water licensing process in this case, Messrs. Martin and Treswell indicated that they have attempted to comply with all of the requirements imposed on them by licencing officials and land tenure officials with respect to the applications, and that they have made their best effort to consult with, and negotiate with, the FN.

1. Whether the Manager fulfilled the Crown's duty to consult with, and if necessary, accommodate, the FN before he issued the Commercial Water Licence.

Parties' submissions

Submissions of the FN

[127] The FN asserts that the Commercial Water Licence ought to be set aside on the basis that the Manager failed to properly consult with the FN, as required by law. In particular, the FN submits that the Manager failed to assess the impact of the licensing decision upon the FN's Aboriginal rights and title claims, failed to share the necessary information as required by law throughout the consultation process, failed to meaningfully accommodate the FN as required by law and failed to follow the provincial government's consultation policy.

[128] The FN submits that the Crown's obligation to consult and accommodate required the Crown to complete a preliminary assessment of both the strength of the claimed Aboriginal interests at issue, and the potential impact of the Commercial Water Licence on those rights. In this regard, the FN submits that in making this preliminary assessment, the Manager was obliged to consider the potential impact of the Commercial Water Licence on the FN's interests both in the context of past events, and in the context of potential future cumulative effects. The FN submits that a preliminary assessment that considers only some of the potential impacts of the licensing decision will not fulfill the duty to consult. In this

regard, the FN submits that the statutory mandate imposed upon the Manager by the *Water Act* does not, and cannot, limit the Manager's obligation to assess the full impact of the Commercial Water Licence upon the FN's interests.

[129] The FN also submits that the Manager was obliged to share all relevant information with the FN. The FN submits that the Manager was obliged to ensure that the FN was provided with all necessary information in a timely way, and was given sufficient time and opportunity to express their interests. The FN further submits that, in considering the reasonable opportunity to express their interests, the Manager was obliged to note that Aboriginal groups in general, and the FN in particular, find that it is a significant challenge to respond to consultation requests, and that adequate resources should be provided to the FN to permit it to respond to any request for consultation.

[130] The FN is also critical of the provincial government's *Updated Procedures for Meeting Legal Obligations in Consulting First Nations* (the "Consultation Policy"), which governed the Manager's actions with respect to the Commercial Water Licence application. The FN submits that the Consultation Policy is defective because it does not provide that the preliminary assessment be shared with the FN at the outset of consultation, or that the FN be given an opportunity to respond to the information on which the preliminary assessment is based. The FN also submits that the Consultation Policy does not address the need to consider either future cumulative impacts, or the cumulative effect of past events with respect to the Commercial Water Licence.

[131] Within the context of this legal framework, the FN identifies four specific consultation deficiencies that arise with respect to the Commercial Water Licence. The FN submits, firstly, that there was a failure to properly assess the impact of the licensing decision in its broadest sense. Secondly, the FN submits that the Manager failed to adequately share information with the FN throughout the consultation process. Thirdly, the FN submits that the Manager failed to provide meaningful accommodation to the FN, and fourthly, the FN submits that the Manager failed to maintain a proper consultation record.

[132] With respect to the alleged improper assessment of the impact of the decision to issue the Commercial Water Licence, the FN submits that the Manager erred in restricting the analysis of the effect of the proposed water diversion to the immediately associated works. Rather, the FN submits that the Manager ought to have considered all other cumulative impacts including, particularly, that the construction of a dock and barge facility would increase foreshore activity and restrict access to Indian Reserve No. 8.

[133] The FN submits that the issuance of the Commercial Water Licence, other than in the context of a treaty negotiation, effectively deals the water resource "out the back door," thereby undermining the treaty process (now in stage 4) and the ongoing effort toward reconciliation between the FN and the Crown.

[134] With respect to the obligation to share information, the FN submits that the Manager failed in his duty in three material respects:

1. the Manager did not share with the FN its preliminary assessment of the strength of the FN's claims at the outset of consultation;

2. the Manager failed to fulfill the Crown's ongoing obligation to share information regarding important developments with respect to the Commercial Water Licence application, as it occurred. In particular, the FN is critical of Ms. Eedy failing to provide the FN with a copy of her August 18, 2010 letter to Mr. Martin, which set out the various requirements for the continued review of the Commercial Water Licence application (e.g., requiring assessment by a QEP), and Ms. Eedy failing to share Mr. Martin's October 30, 2010 response to that letter; and

3. the Manager failed to share the technical report that contained the important rationale and conclusions leading to the recommendation that the Commercial Water Licence be issued.

[135] With respect to the failure to accommodate, the FN submits that the Manager failed in any meaningful way to accommodate the FN's interests. In this regard, the FN submits that the conditions placed on the Commercial Water Licence do not constitute meaningful accommodation, as they are too limited in scope – i.e., they do not deal with the dock and barge facility, and do not compensate for the impact to the resources in the FN's traditional territory.

[136] Finally, the FN submits that the Manager failed to ensure that a proper consultation record was maintained. In particular, the FN is critical of the Manager for failing to retain and disclose notes of his conversations with Ms. Eedy and Mr. Ullah. The FN submits that this consultation record was particularly important in the context of this case, because of the Manager's decision not to refer the licence application to the Treaty negotiation table.

Submissions of the Manager

[137] The Manager concedes that he had a duty, on behalf of the Crown, to consult with the FN regarding any possible impact of the Commercial Water Licence on the FN's rights and title, and to make efforts to accommodate the FN in mitigating the effects of any such impacts. The Manager submits that, in the context of the facts of this particular licencing decision, the Crown's duty to consult with, and accommodate, the FN was met.

[138] The Manager agrees that the first stage in the process of consultation was to make a preliminary assessment of the strength of the FN's claims. The Manager submits that the phrase "strength of claims" relates to "strength of the case supporting the existence of the right or title, and to the seriousness of the potential adverse effect upon the right or title." (*Haida Nation v. British Columbia*, 2004 SCC 73, para. 39).

[139] With this test in mind, the Manager asserts that he asked the FN to express how its rights or title might be affected by the Commercial Water Licence. The Manager asserts that, in the absence of any response to this request, he was obliged to embark upon his own assessment of the FN's asserted rights and title, based upon available information. The Manager submits that Ms. Eedy completed the preliminary assessment, and provided the key findings to the FN for its consideration (in the letter of August 27, 2010), but that no response from the FN was forthcoming.

[140] In the end, Ms. Eedy concluded in the technical report that the FN's assertion of rights in the area was strong, and it assertion of title in the area was significant. With respect to the seriousness of potential impact of the Commercial Water Licence on the FN's asserted rights and title, the Manager submits that, based on the available evidence to Ms. Eedy and the Manager, and given that the FN made no response to any of her requests for further information, it was correct to conclude that the Commercial Water Licence's potential adverse impact on the FN's rights and title was extremely low. However, the Manager submitted that this is premised upon the assumption that only the effects directly flowing from the Commercial Water Licence were relevant to the assessment of potential adverse impacts, and that the Manager was statutorily prohibited from engaging in a broader assessment or consultations with regard to matters outside of his jurisdiction, such as the construction of the dock and barge facility.

[141] The Manager relies upon the findings of Ms. Eedy, which were not challenged by the FN, that the extremely small amount of water authorized to be withdrawn pursuant to the Commercial Water Licence (up to a maximum of 0.15 cubic metres per second or 1% of the instantaneous pre-diversion stream flow at the point of diversion, whichever is less), together with the conditions in the Commercial Water Licence requiring intake screening, minimal disturbance of vegetation and land from installation of the intake pipe, and that the intake pipe and other works be constructed on BRC's privately owned land, properly grounded the conclusion that there would be virtually no impact of any sort on the FN's rights and title.

[142] With respect to the level of consultation required, the Manager submits that, as the seriousness of the potential impacts was low (or none), the level of consultation required was towards the low or middle end of the spectrum. The Manager submits that the consultation process with the FN in this case was in the middle part of the spectrum, and fulfilled the Crown's duty to consult.

[143] The Manager submits that his duty to consult was frustrated because of the FN's failure to comply with its reciprocal obligation to respond in good faith to the Manager's consultation efforts.

[144] The Manager submits that Ms. Eedy made a number of good faith efforts to provide the FN with the Ministry's preliminary assessment of the strength of the claim and seriousness of impact, and that the Ministry sought the FN's input prior to making any decision. The Manager submits that the FN's failure to respond with details of their interests and how they might be affected, constitutes a failure to meet its reciprocal duty in the consultation process.

[145] Consequently, the Manager further submits that the Ministry provided a proper level of information to the FN, and that any failure to provide information lies at the door of the FN, who failed to ask for any information. The Manager submits that the FN is now estopped from asserting that it did not receive sufficient information.

[146] In this regard, the Manager notes that BRC's representatives, Messrs. Martin and Treswell, met with and exchanged communication with the FN with regard to the water bottling project. The Manager notes that at a September 3, 2009 meeting, Mr. Martin advised the FN with respect to the particulars of the water

bottling project, but the only response from the FN was that it was not prepared to comment on the water licence application pending completion of a land use study to be completed at some later time.

[147] The Manager submits that the FN does not exercise a veto over water licencing decisions. Rather, the Manager submits that the FN is obliged to engage in good faith discussions with respect to its rights and title, and that the FN's failure to do so is fatal to its complaint that its interests have not been accommodated.

[148] With respect to accommodation, the Manager submits that, in light of the FN's failure to engage in the consultation process, he attached conditions to the Commercial Water Licence that are intended to address any potential environmental or fisheries impacts, as they might affect any corresponding Aboriginal rights. In particular, the Manager asserts that the following conditions in the Commercial Water Licence fully accommodate the FN's Aboriginal rights, in terms of how they may potentially be affected by the Commercial Water Licence:

1. Diversion of water may be restricted or prohibited at any time by an Engineer's order, in order to prevent any unacceptable impact to fish, aquatic life and/or other licences.
2. The water intake pipe must be screened to prevent the entry of fish and other aquatic life.
3. The licenced works must occur in previously disturbed areas to minimize disturbance of vegetation.
4. The diversion rate from Bear River is not to exceed 0.15 cubic metres per second or 1% of the pre-diversion stream flow, whichever is less.
5. The licenced works must be inspected after installation by an independent and appropriately qualified QEP, who must prepare a report describing whether or not the licenced works are in working order and any environmental concerns, and such report is to be submitted within six months of completing the installation of the works.

Submissions of BRC

[149] BRC submits that it is caught in a process for which it is not responsible, but which it attempted to accommodate as best it could.

[150] BRC submits that, as owner of the BRC Property, it was entitled to take reasonable steps to make use of the Property and the resources contained thereon. In this regard, BRC submits that it was entitled to settle on a plan to withdraw a small amount of water from the Bear River for purposes of water bottling, to be used in a microbrewery which its principles intend to operate.

[151] BRC submits that it undertook every obligation imposed upon it in the water licence application process. It submits that it filled out the appropriate forms, submitted the necessary data, and undertook every level of consultation required by the Manager to successfully complete its licence application.

[152] With regard to FN consultation, BRC submits that it made its best efforts to initiate contact with, and inform, the FN of its plans to construct a dock and barge

loading facility, and to withdraw water from the Bear River for the purposes of water bottling. BRC emphasizes that it made an offer to the FN to fund an archeological study on the BRC Property, but that no response was received to that offer. By way of comparison, BRC submits that the very minimal impact of the Commercial Water Licence upon the environment, and upon any potential rights or title of the FN, versus the substantial financial investment made by BRC in the BRC Property, falls in BRC's favour. In this regard, BRC notes that, even if the effect of the barging and dock facility were to be taken into account, there is no impact on the FN's ability to access Indian Reserve No. 8.

[153] BRC submits that the FN's true objection to the Commercial Water Licence application is not any potential impact on rights and title; rather, the FN's objection is to the "commercialization of water" from which it will not be directly benefiting. In this regard, BRC emphasizes that it holds title to the BRC Property, through which the Bear River flows. BRC also submits that it has always remained willing and able to continue to consult with the FN, and to accommodate the FN's needs or interests, if such needs or interests are made known to them.

The Panel's findings

Introduction

[154] The Crown is obliged to consult with First Nations with respect to any activity to be authorized by the Crown with regard to land or resources claimed by a First Nation, even where the Aboriginal right to such land or resources has not yet been proven. This duty is based upon the honour of the Crown, and was described by the Supreme Court of Canada in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku*], at para. 24 as follows:

> … As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act*, *1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[155] In this case, the FN submits that the honour of the Crown was engaged in its duty to consult and accommodate prior to the issuance of the Commercial Water Licence which, the FN submits, has the potential to impact its rights and title, both with respect to Indian Reserve No. 8, and with respect to its *sui generis* claim to rights and title in the surrounding Bute Inlet area, all of which is the subject of

treaty negotiations with the Federal/Provincial governments, now at stage 4 of that process.

[156] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], at para. 35, the Supreme Court of Canada stated as follows with respect to when the duty to consult arises:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty 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 …

[157] The Supreme Court of Canada has also opined with respect to the content of the duty to consult, and has established a spectrum which reflects that the honour of the Crown to consult First Nations may differ in different situations. In *Haida*, at paragraphs 43 through 45, the Court said:

> 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 discuss any issues raised in response to the notice. …
>
> 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.
>
> 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.
>
> [underlining added]

[158] It is clear that the duty to consult and to accommodate First Nations interests contemplates both a procedural and a substantive element. The duty is procedural in the sense that it does not mandate any particular outcome and a First Nation is not entitled to any particular substantive remedy or award. It is substantive in the sense that the duty to consult is premised upon a correct assessment of the strength of the First Nation's claims in the case before the decision-maker, and the potential for infringement of asserted Aboriginal rights.

[159] Before turning to the consultation issues engaged in this particular case, it is important to note that the Board commonly conducts appeals as a new hearing of the matter. In doing so, it may consider evidence that was not before the person who made the appealed decision, and may consider afresh any evidence that was before the person who made the appealed decision. The Board also has broad remedial powers. In this regard, sections 92(7) and (8) of the *Water Act* state as follows:

92(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the comptroller, regional water manager or engineer, with directions,

(b) confirm, reverse or vary the order being appealed, or

(c) make any order that the person whose order is appealed could have made and that the board considers appropriate in the circumstances.

[160] In the context of this appeal, the issues before the Panel require it to consider the adequacy of the consultation provided by the Manager. However, it is not the Board's role to engage in a process of consultation with the FN, if the Panel concludes that the process of consultation and accommodation conducted by the Manager was insufficient. The Panel may only evaluate the efforts of the Manager, and his staff, to consult with and accommodate the FN. If the Panel finds those efforts to be inadequate, the Panel may reverse or vary the Commercial Water Licence, or send it back to the Manager with directions, such as to engage in a further process of consultation and accommodation prior to rendering a new decision with respect to granting the Commercial Water Licence.

[161] The Supreme Court of Canada had the following to say in the case of *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43 [*Rio Tinto*], at paragraphs 55 to 57, in respect of a decision of the B.C. Utilities Commission approving an energy purchase agreement:

> The duty of a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their

> constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers that legislature has conferred on it.
>
> ...
>
> … the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their aboriginal interest relevant to the decision at hand.
>
> [underlining added]

[162] Later, at paragraph 61, the Court states:

> A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests to promote the reconciliation of interests called for in *Haida Nation*.

[163] From a review of the relevant provisions of the *Water Act*, cited above, and the *Environmental Management Act*, which establishes the Board, it is clear that the legislature did not intend for the Board itself to engage in a consultation process. The Board is an appellate tribunal, and its role in this case is to review the decision of the Manager, in light of the evidence.

[164] In this case, the Panel has considered new evidence that was not before the Manager. In particular, it has considered evidence regarding the *Land Act* approval sought by BRC for the docking facility. Much of that evidence was provided by the FN, and is contained in correspondence with BRC and staff in ILMB regarding the application for a *Land Act* approval associated with the proposed water bottling operation. In this sense, the appeal was conducted as a hybrid process wherein the Panel will determine, based on the evidence before it, whether the Manager adequately fulfilled his duty to consult with the FN.

[165] With this general framework in mind, the Panel now turns to the specific consultation issues engaged in this case.

The Manager's Duty to Consult

[166] The Manager concedes that, on behalf of the Crown, he was bound by a duty to consult with, and if necessary accommodate, the FN before granting the Commercial Water Licence. However, the parties dispute whether the Manager fulfilled that duty.

[167] Resolution of this question requires the Panel to make an assessment with respect to the strength of the FN's claim to Aboriginal rights and title, and to assess the seriousness of the potential infringement upon such rights and title resulting from the Manager granting the Commercial Water Licence.

Strength of the FN's claims to Aboriginal rights and title in the area affected by BRC's water bottling proposal

[168] The FN's rights to Aboriginal title, insofar as they relate to Indian Reserve No. 8, are unassailable. Indian Reserve No. 8 is reserve land, and the FN could have no higher claim to these lands. Incidental to its rights and title with respect to Indian Reserve No. 8, the FN has a strong, if not unassailable, right to access those lands. As Indian Reserve No. 8 is entirely surrounded by the BRC Property, this right of access can only be exercised via the foreshore of Bear Bay.

[169] Apart from the FN's Aboriginal rights and title in relation to Indian Reserve No. 8, Chief Harry testified that the FN's position, in its treaty negotiations with the Crown, is that the water resources in its traditional territories are vested in the FN. This position was not raised by the FN in any of its limited responses to Ms. Eedy's attempts to engage in consultation, but this evidence was not contradicted by the Manager, and the Panel must, therefore, presume that the Crown, and thus the Manager, had constructive notice of this asserted claim (see *Haida*, above).

[170] The FN submitted that the Manager had erred in his understanding of the Aboriginal rights and title at issue in this matter. In particular, the FN submitted that the Manager had "erroneously fettered his discretion to properly consider the impacts of the water licences upon those rights and title" in failing to consider the FN's "aboriginal rights and title comprehensively, beyond fishing, hunting and archeological remains".

[171] Although the FN made this broad submission, it only led evidence before the Panel with respect to the title and access rights in respect of Indian Reserve No. 8, and the assertion by Chief Harry that the FN claims ownership of the fresh water within the Bear River.

[172] Also of relevance to the analysis regarding the strength of FN's claim to Aboriginal rights and title, is the fact that the water diversion works are entirely situated upon lands privately owned by BRC. The FN does not assert any claim to ownership of the BRC Property and, therefore, the installation of works upon the BRC Property cannot be a matter relevant to the FN's claims to rights and title.

[173] The FN submits that the mere removal of water from the Bear River, pursuant to the Commercial Water Licence, deals the water resource "out the back door," thereby undermining the treaty process. There was, however, no evidence with respect to either the basis or strength of the FN's claim to an Aboriginal right to ownership of fresh water, nor to the status of the treaty negotiations and, in particular, whether within the treaty negotiation context, the assertion of an Aboriginal right to the vesting of fresh water is considered weak or strong.

[174] As stated by the Supreme Court in *Haida* at paragraph 36:

> … However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements ….

[underlining added]

[175] As noted above, the FN bears the burden of "outlining its claims with clarity", a burden it did not meet in respect of its claim to ownership of the water resource. In *Haida*, at paras. 69 to 71, the Court discussed the "voluminous" evidence before the chambers judge regarding the Haida's continuous habitation of Haida Gwaii since at least 1774, and their culture's use of red cedar in both coastal and inland portions of the cutblock area since at least 1846. In contrast, in the present appeal, the FN presented virtually no evidence of their historic use of the water resources, or any traditional practices involving the water resources that would amount to a right akin to ownership of the water in the Bear River.

[176] The Panel concludes, therefore, that the FN's claim to Aboriginal rights and title is strong in respect of its rights of ownership, use, occupation and access to Indian Reserve No. 8. In respect of the FN's claim to ownership of the fresh water resources of the Bear River, the strength of the claim is weak, based on the evidence, or lack thereof, before the Panel.

Seriousness of the potential impact of the Commercial Water Licence on the FN's asserted Aboriginal rights and title

[177] The Panel finds that the issue of the seriousness of the potential impact of the granting of the Commercial Water Licence upon the FN's asserted Aboriginal rights and title is the primary point of contention between the parties, and is the issue which occupied the majority of the evidence and submissions.

[178] Regarding the FN's asserted right of ownership of the Bear River's water resources, the Panel finds that there is no evidence that water withdrawal in accordance with the Commercial Water Licence will cause any harm to the asserted water ownership right. As stated by the Supreme Court of Canada in *Rio Tinto*, at paragraph 41:

> The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as settlement negotiations proceed: Newman at, at p. 30, citing *Haida Nation*, at paras. 27, 33.
>
> [underlining added]

[179] And later, at paragraphs 45 and 46, the Court states:

> The third element of a duty to consult is the possibility that 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.
>
> 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, 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, … there must be 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 affect on a First Nation's future negotiating position does not suffice.
>
> [underlining added]

[180] In the present appeal, there is no evidence that the withdrawal of water in accordance with the Commercial Water Licence will cause any harm that could impact the FN's asserted water ownership rights.

[181] The potential impact of the Commercial Water Licence upon the FN's Aboriginal title to Indian Reserve No. 8, and the associated access rights of the FN, depends on whether the Manager was permitted or, as asserted by the FN, obliged to consider, the overall impact of the water bottling project upon those rights; or alternatively, whether the Manager was obliged, as asserted by the Manager, to only consider the diversion of water and construction of the associated works upon those rights.

[182] If the Manager was only entitled or obliged to engage in consultation with the FN in respect of the narrow issue of the amount of water to be withdrawn and the construction of the associated works, then the only issue for determination regarding the seriousness of the potential impact of the Commercial Water Licence is whether the Commercial Water Licence potentially infringes upon the FN's (as previously determined, weak) claim to ownership of the water resource. Alternatively, if the Manager was obliged to consult with the FN with respect to the water bottling project in its broad sense, then the potential impact upon the FN's access to, and use of, Indian Reserve No. 8 must be considered.

Was the Manager obliged to consider the Commercial Water Licence application in the context of the entire commercial water bottling proposal (including the associated land tenure application for the dock and barge facility)?

[183] The Manager's efforts to consult with the FN were limited to the issues relating to the withdrawal of water from the Bear River and the construction of the associated water works.

[184] The water bottling project, however, encompasses a much larger suite of issues. The most obvious is the construction, maintenance and operation of a dock and barging facility which could impede the FN's ability to access Indian Reserve No. 8, as well as raise environmental issues within the marine environment, thereby possibly affecting fisheries and other resources.

[185] It is without question that the Manager made no effort (and, indeed, argues that he was restrained by the limits of his statutory jurisdiction) to consult with the FN with respect to these broader issues. If he was obliged by the law to engage in consultation with respect to these broader issues, then the FN's submission that there was inadequate consultation carries much more weight.

[186] As noted, the Manager submits that he is precluded by law from engaging in consultation with respect to issues outside of his statutory jurisdiction, as provided in the *Water Act*. By contrast, the FN submits that the Manager was obliged, by law, to engage in a broad and deep consultation relating to all possible aspects of the decision to grant a Commercial Water Licence, including potential access issues relating to the dock and barge facility. The FN relies upon *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 [*West Moberly*], as authority for this proposition.

[187] The FN submits that *West Moberly* stands for the proposition that the full environmental, social and economic impact of the water bottling operation on the FN was covered by the duty to consult, and that an assessment considering only some of the potential impacts of the decision fails to fulfill that duty. The FN further submits that *West Moberly* is authority for the proposition that a restricted statutory mandate cannot limit the Manager's assessment of the project's impacts upon the FN's interests.

[188] The Manager submits that, while he was required to consider the context in which the claim of rights and title is made, the obligation was discharged in the circumstances of this case. The Manager further submits that there must be a causal relationship between the government's decision and the risk of an adverse impact from the issuance of the Commercial Water Licence. In other words, the Manager submits that he was only obliged to consider the full impacts by potential claims for rights and title flowing from the removal of water from the Bear River, pursuant to the Commercial Water Licence. The Manager submits that he adequately considered the potential impact on the environment of the withdrawal of water from the Bear River, as authorized by the Commercial Water Licence, by his review and consideration of the referral response from Plutonic Hydro Inc., which had previously negotiated the necessary approvals, including FN approval, to the large scale diversion of water from the Bear River for a run-of-river power project, many kilometers upstream from BRC Property and Indian Reserve No. 8.

[189] *West Moberly* concerned two decisions made by officials within the Ministry of Energy, Mines and Petroleum Resources ("MEMPR"), which amended existing permits to allow First Coal Corporation ("First Coal") to obtain bulk samples of coal, and to carry out an advance exploration program in anticipation of future mining operations. The West Moberly First Nation ("WMFN") objected to the grant of those amended permits, as the project was located within their traditional hunting grounds. WMFN asserted that the decisions were made without proper consideration of their hunting rights, and without making adequate provision for the protection and restoration of the Burnt Pine Caribou herd. The Court of Appeal upheld the determination of the trial court that the consultation had been inadequate, but the Court did not quash the amended permits. Rather, the Court suspended the effect of the licences for a 90-day period to permit the Crown to put in place a plan for the protection and augmentation of the Burnt Pine Caribou herd. With respect to the rights and title asserted by the WMFN, it is important to note that the WMFN was a party to a treaty (Treaty 8), which provided that the WMFN had the right to pursue, amongst other things, hunting activities within their traditional areas. This fact is important because the Court was not engaged with an asserted claim of right or title, but rather an existing treaty right.

[190] One of the issues dealt with by the Court of Appeal was whether the MEMPR was obliged to assess the full scope of the mining project with respect to the WMFN's rights and title, or whether it was limited by its statutory jurisdiction to consideration of the exploration permits only.

[191] In rejecting the government's position, the Chief Justice, speaking for the majority stated as follows at paragraphs 106 and 107:

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

[192] Later, the Court addressed First Coal's submission that the scope of the duty to consult should be limited to the impact of the exploration permits, and not the potential impacts of a full mining operation. In that regard, the Chief Justice stated as follows at paragraphs 121 to 125:

> First Coal's second contention on the scope of the duty to consult is that it must be limited to the impact of the amended exploration permits, and must exclude consideration of whatever effects a full mining operation might have.
>
> It is correct that the consultation in this case must be directed at the Bulk Sampling and Advanced Exploration Permits and their impact. However, the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.
>
> On my reading of the chamber judge's reasons, it does not appear that he gave much, if any, weight to the potential impact for a full mining operation as a relevant factor in the Crown's duty to consult. However, the whole thrust of the petitioner's position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, if it were shown to be justified by the

> exploration programs. That was the whole object of the Bulk Sampling and Advanced Exploration Programs.
>
> …
>
> I am therefore respectfully of the view that to the extent the chambers judge considered future impacts, beyond the immediate consequences of the exploration permits, as coming within the scope of the duty to consult, he committed no error. And, to the extent that MEMPR failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation.
>
> [underlining added]

[193] The Panel finds that *West Moberly* raises two issues which must be considered in order to determine, on the facts of this case, whether the Manager was obliged to consult with the FN narrowly (i.e., regarding the potential impact of the water withdrawal and construction of associated water works) or more broadly (i.e., regarding the potential impact of the entire water bottling project, including the dock and barge facility). The two issues are, firstly, the statutory jurisdiction of the Manager in considering a licence application under the *Water Act*; and, secondly, if the Manager had the statutory jurisdiction to consult more broadly, was he "permitted" to do so, or was he "obliged" to do so? If he was only "permitted" to do so, what are the factors that might engage his discretion in this regard?

Statutory jurisdiction of the Manager

[194] The Manager derives his jurisdiction from the provisions of the *Water Act*. That Act provides that "the property and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government."

[195] More specifically, the Manager derives his authority to issue the Commercial Water Licence from the provisions of the *Water Act*. Section 12 of the *Water Act* provides that the Manager may issue licences to utilize water for specific purposes enumerated in section 1 of the Act.

[196] Under section 12(1), when a person applies for a licence, the Manager has a number of powers, including the discretion to refuse the application, amend the application, grant all or part of the application, or "require additional plans or other information." Section 12(1) states that those powers may be exercised "whether objections to [the application] are filed or not …."

[197] Thus, the Manager has discretion to decide whether to issue a licence to an applicant, and in exercising that discretion, he had the authority to compel the delivery of, and to consider, "other information" relevant to the granting of the licence.

[198] The Panel concludes, therefore, as did the Court in *West Moberly*, that there was no statutory restriction imposed on the Manager limiting him from engaging in consultation with respect to the potential impacts of the bottling project as a whole, on the FN's asserted rights and title, in the context of deciding whether to grant the Commercial Water Licence.

Was the Manager required to consider the overall impact of the water bottling project upon the FN's asserted Aboriginal rights and title?

[199] The Panel concludes that the Manager was obliged by the honour of the Crown, which grounds the Crown's duty to consult with Aboriginal people, to at least consider the possibility of the impact of the water bottling project upon the FN's Aboriginal rights and title. The FN was, and is, entitled to be consulted with respect to the impact of the water bottling project, as a whole, upon its asserted Aboriginal rights and title.

[200] The question that arises, however, is whether it was the Manager who was obliged to engage in consultation with respect to the water bottling project, viewed broadly, or whether there were, or are, other consultation processes that would have engaged with the FN prior to the issuance of all of the permits necessary to permit BRC to make use of the Commercial Water Licence. It will be recalled that, in order for BRC to proceed with its plans, it needed not only the Commercial Water Licence, but also approval of its land tenure application from the ILMB with respect to the dock and barge facility, and it needed a change of land use zoning from the Strathcona Regional District.

[201] The ILMB was, at the relevant time, also a branch of the Crown. It was charged with assessing applications for Crown land tenure pursuant to the provisions of the *Land Act*. In the context of *Land Act* applications for tenure, there are obligations imposed upon the Crown to consult with First Nations.

[202] There was limited evidence led before the Panel with respect to the consultation processes engaged in by the ILMB with the FN in relation to the application for tenure for the dock and barge facility. It is clear from the limited evidence that the FN was notified of, and objected to, the grant of land tenure for the dock and barge facility, but there is no evidence of the subsequent consultation efforts, if any, undertaken by the ILMB.

[203] Further, Ms. Eedy testified that it was not Ministry policy at the time to share information with other branches of the Crown (that policy has now changed), and therefore, she was not concerned with the level of consultation, if any, undertaken by the ILMB with regard to the land tenure.

[204] It is also clear from the technical report that Ms. Eedy contemplated the water licence applications solely in the context of the specific and particular impacts of the water licences only. She was not concerned with, and did not contemplate that her mandate permitted her to make recommendations to the Manager on the broader potential impacts of a water bottling proposal, insofar as it affected the FN's rights. For example, the docking facility, which could have a significant impact upon the FN's rights, was not something that Ms. Eedy was concerned with for the purposes of consultation, although her research included inquiring as to whether BRC had obtained permission to use Crown land. In the technical report, Ms. Eedy notes that "the applicant states that they have land tenures over the foreshore area for barge access."

[205] The Panel also notes that the Manager's evidence included two printouts dated March 5, 2010, from the provincial government's "Tantalis Gator" electronic

Crown land registry system, which indicate that BRC held two licences of occupation over Crown land: one for a water line, and one for "light industrial" purposes. However, the printouts indicate that those licences of occupation expired on March 5, 2012. Their current status is unknown to the Panel.

[206] The difficulty with the Manager's position in this regard is that no branch of the Crown appears to have accepted the obligation to consult with the FN with respect to the overall impact of the water bottling project. If the ILMB engaged in this broad consultation with the FN, there was no evidence led in this appeal with respect to that consultation.

[207] The Panel concludes that the Manager, on behalf of the Crown, was obliged to consult with the FN with regard to the potential impacts of the Commercial Water Licence on the Aboriginal rights and title of the FN and, in so doing, he was obliged to consider the broad impact of the water bottling project on the FN's rights and title.

In light of the forgoing, what is the nature and scope of the duty to consult with the FN, and did the Manager fulfill that duty?

[208] With respect to the FN's claim to ownership of the Bear River's water resources, the Panel has determined that the FN's claim is weak, and there is no evidence that the withdrawal of water in accordance with the Commercial Water Licence will cause any harm to the FN's Aboriginal rights and title. Consequently, the Panel finds that the level of consultation required with respect to this issue was on the low end of the spectrum. Accordingly, with respect to this issue, the Manager was obliged to provide the salient information regarding the Commercial Water Licence to the FN, to seek its input prior to issuing the licence, and to give a reasonable time to respond.

[209] In this regard, the evidence is clear that the Manager fulfilled that duty. In particular, the Manager provided the FN with all of the necessary information regarding the amount of water to be withdrawn, and the purpose for which it was to be withdrawn. In the absence of any substantive response from the FN with respect to its asserted right to ownership of the water resource, he nevertheless provided that the Commercial Water Licence was to terminate on December 31, 2014, and that BRC was obliged to make beneficial use of the water by that date.

[210] By inserting those conditions into the Commercial Water Licence, the Manager adequately preserved the FN's right to continue to assert ownership of the water. Furthermore, the water resource is renewable and, unlike mining or even forestry, the FN will not be permanently deprived of the benefit of the water resource if it is later able to prove an Aboriginal right to ownership of the water.

[211] The FN submits that, with regard to its failure to provide any substantive response to the consultation requests and information provided by Ms. Eedy, its lack of financial resources, as testified to by Chief Harry, is a relevant consideration.

[212] The FN submits that, even if it was not able to respond to the consultation request within a reasonable period of time, the licencing decision should have been

delayed until such time as the FN was in a position to respond, or until the Manager or BRC provided it with adequate financial resources to respond. In support of those submissions, the FN makes reference to the decision of Mr. Justice Vickers in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 [*Tsilhqot'in Nation*].

[213] The *Tsilhqot'in Nation* case concerned the provincial Crown's duty to consult with the *Tsilhqot'in Nation* with respect to the issuance of annual allowable cut determinations for cutting and removal of timber on lands claimed by the Tsilhqot'in Nation. In discussing the history between the Tsilhqot'in Nation and the Provincial Crown with respect to its objections to the annual allowable cut determinations, the Court said this at paragraph 1138:

> Tsilhqot'in people also appeared from time to time to have a fixed agenda, namely the promotion of an acknowledgment of their rights and title. It must be born in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.

[214] There was an extensive history of communication between the Tsilhqot'in Nation and the provincial Crown, and the quote referred to above was made in the context of the finding by the Court at paragraph 1141 that, on the particular facts of that case, the rights and title claimed were at the high end of the scale, requiring deep consultation and accommodation. Those facts distinguish the *Tsilhqot'in Nation* decision from the facts in the present appeal.

[215] The Panel accepts that the Manager was not entitled to impose unrealistic or tight deadlines upon the FN, and that the FN was entitled to receive adequate notice of the application for the Commercial Water Licence, and receive adequate opportunity to respond as it saw fit.

[216] The difficulty with the FN's submission in this regard is that it never advised the Manager that it needed more time, or resources, to respond to the consultation request respecting the Commercial Water Licence. In the absence of such a basic communication from the FN, and in consideration of BRC's legitimate interest in receiving a timely response to its application, the Manager was not obliged to delay the licencing decision any further. In the consultation process, there was a reciprocal obligation on the FN to express its interests and concerns, other than in generalities, and if it required additional time or money to adequately respond to the referral, it was obliged to make that clear within a reasonable period of time.

[217] In summary, with regard to the FN's claim to ownership of the Bear River's water resources, the Panel concludes that the Manager provided an adequate level of consultation, and he has properly accommodated the FN's interests pending resolution of its outstanding claims.

[218] With respect to the issue of the dock and barge facility, different considerations apply.

[219] The document evidence includes several responses from the FN in respect of the consultation efforts of the Manager, and to the ILMB, regarding the dock and barge facility. This evidence shows that the majority of the FN's responses were to the ILMB, and not to the Manager. The evidence also discloses that the Manager did not receive, from either the FN or the ILMB, copies of the responses directed to the ILMB. The relevant documents, as summarized by the Panel, are as follows:

1. two identical letters dated April 27, 2009, from the FN to Ms. Cowgill at the ILMB, and Luke Martin of BRC, advising that "your proposed activities may significantly impact our land and resources with the resulting infringement on our aboriginal rights and title";
2. two identical letters dated June 10, 2009, from the FN to Mr. Ullah (the Ministry) and to Mr. Martin (BRC) in identical terms to the letters of April 27, 2009;
3. two identical letters dated February 2, 2010, from the FN to Luke Martin (BRC), and to Phillip Morris (ILMB), advising that the FN was prepared to support tenure for a "small dock facility" but was not prepared to support tenure for the docking of a barge for the transport of drinking water;
5. two identical letters dated May 3, 2010, from the FN to Carol Johnston (ILMB), and to Luke Martin (BRC), advising that the FN objected to the construction of the dock facility for industrial or commercial use and that such use may significantly impact its lands and resources with a resulting infringement on Aboriginal rights and title; and
6. a letter dated June 3, 2010, from the FN to Ms. Cowgill (ILMB), advising that the FN opposed the granting of the land tenure for the dock and barge facility, because of the possible effect of substantial water removal and resulting environmental and fisheries concerns, and advising Ms. Cowgill that the FN was in the process of updating its traditional use study, and would be able to provide additional archeological information once the study was completed.

[220] This record of communication indicates that the FN was far more responsive to the ILMB with regard to the land tenure application, than it was to the Manager in respect of the Commercial Water Licence application.

[221] The Panel has concluded that the Manager, on behalf of the Crown, was obliged to consider, and consult with the FN, with respect to the impact of the water bottling proposal on the FN's Aboriginal rights and title. This meant that the Manager was, at the least, obliged to seek to obtain relevant information from the ILMB, to ensure the disclosure of that information to the FN, and to seek information about the FN's position with respect to the water bottling proposal as a whole.

[222] The Manager, on behalf of the Crown, failed to fulfill his duty to consult in this regard, no doubt because of the policy, at the time, that information should not be shared between various branches of the Crown. It is clear that a policy of this sort cannot supersede the constitutionally mandated duty upon the Crown to

consult with First Nations with respect to the possible impact of a licencing decision upon their Aboriginal rights and title. Moreover, had the Manager coordinated with ILMB staff, as directed in the provincial government's updated consultation procedures (set out in the government policy document dated May 7, 2010), which calls for "coordinated consultation" involving a "project-based approach" where projects require approvals from multiple ministries or agencies, the Crown's duty to consult may have been met in this case.

[223] For example, had the ILMB shared its consultation file with the Manager, he would have been made aware that the FN was legitimately concerned about its right to use, occupy and access its Indian Reserve No. 8, if the water bottling project were to proceed. The FN was entitled to be consulted about questions such as: How frequently would barges be moored at the proposed barge facility? How large were those barges to be and when and for how long would they be moored adjacent to Indian Reserve No. 8? These are relevant questions that engage some analysis of both the land tenure issues and water licencing issues.

[224] Although the Manager had no authority to decide whether to issue the land tenure applications, his decision respecting, for example, the quantity of water to be authorized by the Commercial Water Licence may have been different if he had considered the FN's position regarding the access and use of its lands.

[225] The Panel concludes that the Manager did not fulfill his duty to consult with, or if necessary accommodate, the FN in respect of the Commercial Water Licence insofar as the water bottling project could impact the FN's right of access and use of its Indian Reserve No. 8.

2. Whether the Manager failed to comply with section 11 of the *Water Act* by failing to hold a hearing with the FN before issuing the Commercial Water Licence.

Parties' submissions

[226] The FN submits that, as a riparian owner whose rights "would be prejudiced" by the granting of the Commercial Water Licence, its June 10, 2009 letter from Chief Harry to Mr. Ullah, objecting to the issuance of the Commercial Water Licence, constituted an "objection" under section 11 of the *Water Act*. The FN further submits that, having received this objection, the Manager was bound to turn his mind to whether or not the objection warranted a hearing before him, and to notify the FN of his decision in this regard.

[227] The FN submits that the Manager's failure to comply with section 11 of the *Water Act* constitutes a loss of the Manager's jurisdiction to issue the Commercial Water Licence. The FN submits that the Commercial Water Licence ought to be set aside on this ground, irrespective of the Manager's constitutional duty to consult with the FN.

[228] The Manager testified that it did not occur to him to consider whether there ought to be a hearing pursuant to section 11 of the *Water Act.* He testified that, as the FN had not responded to Ms. Eedy's letter of August 27, 2010, he considered

that the FN did not intend to engage further in the process of consultation. The Manager believed that the process of consultation had been adequately fulfilled.

[229] The Manager submits that Ms. Eedy's statement in her letter of August 27, 2010, wherein she says, "If we do not hear from you within 45 days the intention is to proceed with review leading to a final decision," gave adequate notice to the FN that the Manager intended to proceed with its licensing decision without a further hearing. The Manager submits that this notice was implicit, if not explicit, notification that no hearing would be held pursuant to section 11(2) of the *Water Act*.

[230] The Manager further submits that, even it is determined that the Manager did not comply with section 11(2) of the *Water Act* by considering whether to hold a hearing, any prejudice that the FN suffered as a consequence thereof is remedied by the appeal hearing before the Board.

[231] The Manager also submits that compliance with section 11(2) of the *Water Act* is directory, not mandatory, and that if the Manager failed to comply with section 11(2) of the *Water Act*, the Panel should treat this as an irregularity not affecting the validity of the decision. The Manager relies upon *Coney v. Choyce* [1975] 1 W.L.R. 422 (Ch.D.) [*Coney*], wherein the Court held as follows:

> When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions …. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act.' Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience', breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, of if the court is for any reason disinclined to interfere with the act or decision that is impugned.
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> [underlining added]

Panel's findings

[232] The Panel concludes that section 11(2) of the *Water Act* is directory, not mandatory. Section 11(2) states:

> (2) The comptroller or the regional water manager has authority to decide whether or not the objection warrants a hearing, and he or she must notify the objector of his or her decision.
>
> [underlining added]

[233] The Panel finds that, if an objection to a water licence application is received, the Manager is obliged to consider whether a hearing is warranted. However, the Manager is not obliged to hold a hearing if an objection is received. The Manager has the discretion to decide that a hearing is not warranted. As such, an objector has no statutory 'right' to a hearing before the Manager. The Manager is simply obliged to decide whether a hearing is warranted.

[234] The Panel concludes that the Manager did not comply with section 11(2) of the *Water Act*, because he failed to consider whether he should hold a hearing with respect to the FN's objection to the issuance of the Commercial Water Licence. However, the Panel also concludes that, in assessing whether the Commercial Water Licence ought to be set aside as a consequence of the Manager's failure to comply with section 11(2) of the *Water Act*, the issue of prejudice to the FN must be weighed, as indicated by the reasons in *Coney*.

[235] In light of the FN's failure to respond to the Manager with respect to the details of its asserted rights or the nature of its concerns about the Commercial Water Licence, and the Panel's finding that the FN had no statutory 'right' under section 11(2) to a hearing before the Manager, the Panel concludes that the FN had little basis to expect that its generalized objection to granting the Licence would lead to a hearing before the Manager. Further, as a consequence of this appeal to the Board, the FN has had the full opportunity to express its position, and the Panel concludes that there has been no prejudice to the FN as a consequence of the Manager's failure to consider whether to hold a hearing under section 11(2) of the *Water Act.* It is clear that, had the Manager turned his mind to this issue, in light of the FN's failure to respond substantively to Ms. Eedy's attempt to consult, the result would inevitably have been the same. The Panel declines to set aside the Commercial Water Licence on this ground.

3. Did the Manager have the legal authority to decide the Commercial Water Licence application in light of a ministerial reorganization which occurred in October 2010, and given that the Manager did not make a re-referral to the Ministry of Environment for its comments with respect to the licence?

ELC's submissions

[236] The ELC directed the Panel to section 4 of the *Ministry of Environment Act* ("*MOEA*"), which states as follows:

4 (1) The purposes and functions of the ministry are, under the direction of the minister, to administer matters relating to the environment.

(2) Without limiting subsection (1), the purposes and functions of the ministry include the following:

(a) to encourage and maintain an optimum quality environment through specific objectives for the management and protection of land, water, air and living resources of British Columbia;

(b) to undertake inventories and to plan for and assist in planning, as required, for the effective management, protection and conservation of all water, land, air, plant life and animal life;

(c) to manage, protect and conserve all water, land, air, plant life and animal life, having regard to the economic and social benefits they may confer on British Columbia;

(d) to set standards for, collect, store, retrieve, analyze and make available environmental data;

(e) to monitor environmental conditions of specific developments and to assess and report to the minister on general environmental conditions in British Columbia;

(f) to undertake, commission and coordinate environmental studies;

(g) to develop and sustain public information and education programs to enhance public appreciation of the environment;

(h) to plan for, design, construct, operate and maintain structures necessary for the administration of this Act or for another purpose or function assigned by the Lieutenant Governor in Council;

(i) to plan for, coordinate, implement and manage a program to protect the welfare of the public in the event of an environmental emergency or disaster.

[237] The ELC submits that in October 2010, the provincial government reorganized its ministries resulting in the placement of the Manager and his staff into the new MNRO, pursuant to OIC-652.

[238] The ELC notes that prior to this transfer, the Manager and his staff were employees of the Ministry of Environment, and therefore, could exercise “dual” legal authority, in that they could undertake activities authorized by both the *MOEA* and under the *Water Act*. In particular, the ELC submits that the Manager was bound to fulfill the purposes described in section 4 of the *MOEA*, as set out above.

[239] The ELC further notes that the period of time from when the Commercial Water Licence application was filed by BRC, to the date of the issuance of the Licence by the Manager, encompassed a period both before and after the ministerial reorganization.

[240] The ELC submits that the legal effect of the ministerial reorganization, occurring in the midst of the Manager's consideration of the Commercial Water Licence application, is that the Manager lost the delegated authority to carry on activities or make decisions in accordance with the Ministry of Environment's core purposes as set out in section 4 of the *MOEA*.

[241] As a consequence of this loss of authority, resulting from the transfer of the Manager and his staff to the MNRO, the ELC submits that the Manager acted without legal authority in granting the Commercial Water Licence by: (1) failing to refer the application to the Ministry of Environment, so that it could exercise its independent authority and judgment in relation to consideration of potential cumulative environmental effects associated with the Commercial Water Licence application; and, (2) unilaterally waiving the requirement that BRC retain a QEP prior to the issuance of the licence.

[242] Although the Commercial Water Licence application was referred to the Environmental Stewardship Division of the Ministry of Environment in May 2009, and that Division responded to the referral, the ELC submits that after the enactment of OIC-652, the Manager was not legally able to continue to decide the merits of the Commercial Water Licence application without formally referring the matter back to the Ministry of Environment for its input in accordance with section 4 of the *MOEA*. The ELC submits that, by continuing with the application as he did, the Manager usurped the lawful authority of the Ministry of Environment, on whose behalf the Manager was no longer lawfully authorized to act.

[243] The ELC submits that this failure to refer the Commercial Water Licence application back to the Ministry of Environment after the pronouncement of OIC-652 leads to the conclusion that the Commercial Water Licence was issued without lawful authority, and that it must be set aside and referred back to the Manager to comply with his legal obligations.

[244] The ELC further submits that, had the Manager referred the Commercial Water Licence to the Ministry of Environment, section 4(2)(c) of the *MOEA* would have obliged the Ministry of Environment to carry out a "cumulative effects analysis" in respect of the Commercial Water Licence application. The ELC submits that the cumulative effects analysis that should have been received from the Ministry of Environment would have directed the Manager to consider not only the narrow issues relating to the issuance of the Commercial Water Licence, but also the issue of the added, or cumulative, impact from human activity on the Bear River.

[245] In support of those submissions, the ELC referred to certain decisions of the Courts and the Ontario Environmental Review Tribunal in relation to the obligation to consider cumulative environmental impacts. For example, the ELC submits that the decision of the Federal Court of Appeal in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* [1999], F.C.J No. 1515 [*Friends of the*

West Country], is in support of its submission that a cumulative environmental impact analysis is required in the circumstances of this case.

Manager's submissions

[246] The Manager submits that there is no basis for a conclusion that the Manager exercised "dual jurisdiction" under both the *MOEA* and the *Water Act*, either before or after the Manager's transition to the MNRO.

[247] The Manager submits that section 4 of the *MOEA* outlines ministry purposes and functions, but the method by which those purposes and functions are implemented or administered remain at the ministry's discretion, subject to government appropriation of resources.

[248] The Manager submits that, although the Manager was transferred from the Ministry of Environment to the MNRO, his statutory authority under the *Water Act* to render a decision in respect of the Commercial Water Licence was not impacted in any way by the transfer. In particular, the Manager submits that despite the organizational transfer, the Manager was still perfectly entitled to consider and/or be guided by the policies of the Ministry of Environment.

[249] The Manager submits that he fulfilled his obligation to consider the environmental impacts of the Commercial Water Licence by making a referral to the Environmental Stewardship Division of the Ministry of Environment, which made comments that later formed the basis of several environmental conditions in the Commercial Water Licence, particularly those limiting the withdrawal of in-stream flows.

[250] In any case, the Manager notes that Ms. Eedy's letter of August 27, 2010, concluded that the environmental impacts from the licensing decision were expected to be minimal.

[251] The Manager submits that he never derived any statutory authority for the licencing decision from the *MOEA*. Rather, he always derived his jurisdiction from the *Water Act*. The Manager submits that he was never a decision-maker under the *MOEA*, and the sole source of his authority as a licencing decision-maker is grounded in the *Water Act.* The Manager further submits that section 12 of the *Water Act* confers broad discretion on the Manager, and as long as he exercises that discretion fairly and consistently within the objects of the *Water Act*, there is no basis to interfere with the exercise of that discretion. Finally, the Manager notes that there is no statutory obligation upon the Manager to make any referrals under the *Water Act*, and therefore, there was no legal obligation upon the Manager to make a referral to the Ministry of Environment, either before or after he was transferred from that ministry to the MNRO.

Panel's findings

[252] The Panel concludes that the ELC's submission on this point is grounded on an incorrect assumption that there was, as a matter of law, a change in the Manager's authority or discretion as a consequence of his transfer from the Ministry of Environment to the MNRO.

[253] Although the Manager moved from the Ministry of Environment to the MNRO, the ELC has not pointed to any legal prohibition or mandatory direction that impacts the Manager's exercise of discretion or his legal authority in considering and determining the Commercial Water Licence.

[254] Put differently, the ELC does not point to any difference in the water licence application process that was mandated, or resulted from, the change in the Manager's ministerial employer. How would the Manager's analysis of the Commercial Water Licence have differed if he had remained an employee of the Ministry of Environment? The Panel finds that, based on both the law and the facts, there is no difference.

[255] In the Panel's view, the issue of the Manager's ministerial employer is a 'red herring'. There is no dispute that the Commercial Water Licence application was, in fact, referred to the Environmental Stewardship Division of the Ministry of Environment, and that Division made comments that were taken into account by the Manager, as they formed the basis of several environmental conditions in the Commercial Water Licence. The fundamental question raised by the ELC is whether the Manager was obliged to consider the cumulative environmental impacts of human activity upon the Bear River prior to issuing the Commercial Water Licence. In the Panel's view, this question does not hinge on what ministry the Manager was employed in. Rather, this is a question of statutory interpretation, and the answer must be found by examining the relevant provisions of the *Water Act*.

[256] The Panel concludes that there is no foundation in the law for a determination that the Manager was obliged, in the circumstances of this Commercial Water Licence application, to consider the broad cumulative environmental impacts of human activity upon the Bear River. Rather, the Manager was authorized, and obliged, by the *Water Act* to consider the impacts, including environmental impacts, of this Commercial Water Licence application on water resources, fish and aquatic habitat in the Bear River, and on any licensees, applicants for licences, and riparian owners on the Bear River.

[257] The Manager was limited by the provisions of the *Water Act* to issue a licence only to those persons authorized by section 7 of the *Water Act* (in this case, an owner of land), to withdraw water for a purpose defined in section 1 of the *Water Act* (in this case domestic and industrial use). By policy, and in consideration of the precedence of water rights mandated by section 15 of the *Water Act*, the Manager was obliged to consider the volume of water generated by the Bear River in relation to the volume of water to be withdrawn pursuant to the Commercial Water Licence application before him, and the volume of water used by other licence holders, or the volume proposed to be used by other applicants for licences. This consideration of impacts was undertaken by the Manager in his licencing decision.

[258] Likewise, the Panel finds that the Manager turned his mind to the overall environmental impact of the Commercial Water Licence application, and he inserted conditions in the Commercial Water Licence to deal with his concerns, particularly in relation to the volume of water to be withdrawn.

[259] With regard to the *Friends of the West Country* case cited by the ELC, the Panel notes that the case dealt with the obligations of the Coast Guard to consider

cumulative environmental impacts in considering an application for a licence to build bridges over a navigable river. The fact that the river in question was a "navigable river" triggered federal jurisdiction. The decision turned on an interpretation of various provisions of the *Canadian Environmental Assessment Act*, one of which expressly required a cumulative environmental impact assessment, which is not found in the *Water Act*.

[260] No such statutory obligation exists in relation to the Commercial Water Licence application. The statutory discretion, or obligation, to consider cumulative environmental impacts does appear in the BC *Environmental Assessment Act* (see section 11(2) thereof). These statutory provisions do not apply to *Water Act* applications.

[261] Similarly, the decisions cited by the ELC involving the Ontario Environmental Review Tribunal dealt with whether that tribunal should grant leave to appeal certain decisions, which only require that there be sufficient evidence to establish that the appeal has "preliminary merit" or that there is a "serious question to be tried" (see *Dawber v. Ontario (Director, Ministry of Environment)*, 241 O.A.C. 145, at paragraph 45). Those decisions did not consider the merits of the appealed permitting decisions. Further, the Ontario Environmental Review Tribunal's leave decisions were based on the language in Ontario's *Environmental Bill of Rights*, and there is no similar legislation in British Columbia.

[262] The Panel finds that the Manager did not act unlawfully in issuing the Commercial Water Licence without re-referring the matter to the Ministry of Environment, and in any case, the Manager had no obligation to consider the cumulative environmental impacts of human activity on the Bear River, in the absence of any statutory or constitutional obligation to do so.

[263] Accordingly, the Panel finds that the ELC's application to set aside the Commercial Water Licence on this basis must be dismissed.

4. Did the Manager unlawfully rely on future investigation and reporting from a QEP as a condition of the Commercial Water Licence?

ELC's submissions

[264] The ELC notes that the Manager declined to impose a requirement upon BRC to retain a QEP prior to issuing the Commercial Water Licence. Rather, the Manager imposed a condition in the Commercial Water Licence which reads:

> The licenced works must be inspected after installation by an independent appropriately qualified environmental professional who must prepare a report describing whether or not the licenced works are in working order and any environmental concerns.

[265] The ELC submits that the Manager acted unlawfully in imposing this condition, because it was unlawful for him to rely upon future investigation and reporting from a QEP, especially given that the *Water Act* contains no definition of "qualified environmental professional". Thus, the ELC submits, there is no statutory

authority under the *Water Act* to refer any investigation and reporting functions to a QEP.

[266] The ELC submits that the licence condition referred to above constitutes an illegal delegation of investigation and reporting responsibility as defined in the *Water Act*.

[267] Alternatively, the ELC submits that, even if the Manager did not exceed his jurisdiction for the reasons described above, the meaning of the term "QEP" is too uncertain to provide a basis for a sound licencing decision. The ELC submits that the Board ought to require a higher standard of certainty and specificity.

[268] Further, the ELC submits that the Manager erred in assuming that he, acting in his capacity as an Engineer under the *Water Act*, could amend the Commercial Water Licence in response to any concerns identified by the QEP. The ELC submits that the Manager erred in law in assuming that an order of an Engineer could remedy any future problems identified by the QEP because: a) an Engineer's powers are limited under the *Water Act*; and b) an Engineer's powers do not include the authority to reduce the volume of water authorized in the licence.

Manager's submissions

[269] The Manager replies that there is no statutory requirement or policy obliging the Manager to require an applicant to provide a QEP assessment prior to obtaining a water licence of this size.

[270] The Manager submits that clause (m) of the Commercial Water Licence, quoted above, provides adequate opportunity to identify any environmental issues, and to obtain information on whether there has been a beneficial use of water.

[271] Further, the Manager submits that an Engineer under the *Water Act* has sufficient statutory authority to deal with any environmental issue identified by a QEP. In particular, the Manager submits that although an Engineer cannot reduce the quantity of water authorized under a licence, there remains authority in section 18 of the *Water Act* for the comptroller or a regional water manager to do so.

[272] Finally, the Manager submits that section 12 of the *Water Act* confers broad authority on the Manager to set terms and conditions and that, absent a statutory prohibition, the requirement to provide a QEP report remains within that jurisdiction.

Panel's findings

[273] The Panel finds that the Manager cannot delegate, or sub-delegate, his authority under the *Water Act* to any subordinate person without specific statutory authorization. The Panel also finds that no such statutory authority exists in the *Water Act*.

[274] The issue, therefore, is whether the Manager has delegated, or sub-delegated, his authority to the QEP by virtue of condition (m) of the Commercial Water Licence. The answer to that question is "no". Clause (m) of the Commercial Water Licence merely imposes an investigatory and informational requirement upon

BRC. Under the terms of condition (m), the Manager retains the authority to determine if the QEP is appropriately qualified, and if his or her report adequately addresses whether there were any environmental concerns and whether the licenced works are in working order. Most importantly, the Manager retained the authority, and duty, to consider the information provided by the QEP, and to take whatever steps, as authorized by the *Water Act*, that may be appropriate. There is no delegation of any decision-making authority from the Manager to the QEP.

[275] The ELC also submits that the requirement that BRC retain a QEP is void for uncertainty, because there is no definition of a QEP within the *Water Act*. The Panel finds that this submission fails for the same reason. The QEP, although undefined, is not exercising any statutory authority or decision-making power. It is the Manager's obligation to consider the qualifications of the QEP, and the substance of his or her report. In this assessment, the Manager has the discretion to accept or reject, in whole or in part, the QEP's qualifications, or the substance of the report. As a consequence of such determination, the Manager has the authority to impose changes to the Commercial Water Licence by amendment, or otherwise, and any person aggrieved by such decision has available rights of appeal.

[276] Finally, the Panel notes that the Manager is entitled under section 85(2) of the *Water Act* to do anything that an Engineer is empowered to do under the *Water Act*, and Engineers have broad remedial powers under section 88 of the *Water Act*. Section 88 states, in part:

88(1) In addition to all other powers given under this Act, an engineer may do one or more of the following:

(a) inspect, regulate, close or lock any works;

(b) inspect and regulate the construction of any works;

(c) determine what constitutes beneficial use of water;

(d) order the alteration, installation, replacement, repair, maintenance, improvement, sealing, closure or removal of, or the addition to, any works;

(e) order the restoration or remediation of any changes in and about a stream;

(f) order the construction, installation and maintenance of any measuring or testing device;

(g) order the operation of, and provision of data from, a measuring or testing device;

...

[277] Further, under section 23(2) of the *Water Act*, a water licence may be suspended by the Manager, or cancelled by the Manager for a failure by the

licensee to comply with a condition of the licence or an order or the Comptroller, a Regional Water Manager, or an Engineer.

[278] For all of these reasons, the Panel rejects the ELC's submissions on this point.

5. If any of the grounds for appeal succeed, what is the appropriate remedy in the circumstances?

[279] The Panel has concluded that the Manager adequately consulted with the FN in regard to its asserted Aboriginal right to ownership of the water to be withdrawn from the Bear River pursuant to the Commercial Water Licence.

[280] However, the Panel has also concluded that there is no evidence that the Crown satisfied its duty of consultation in relation to the bottling project as a whole, in so far as it could impact the FN's right of access to and use of Indian Reserve No. 8. The Manager did not make inquiries to determine the nature of the consultation, if any, conducted by the ILMB in regard to the dock and barge facility. Thus, there is a gap in the information and analysis required to determine whether the Crown has met its constitutional duty to consult on the water bottling project as a whole, in so far as it could impact the FN's right of access to and use of Indian Reserve No. 8. If there are problems/defects with the Crown's consultation on the water bottling project as a whole, it is conceivable that changes may need to be made to the Commercial Water Licence.

[281] The Panel has considered whether to require the Manager, or his delegate, to consult with the FN on the dock and barge facility aspects of the water bottling project. However, this may result in a duplication of consultation, as the ILMB may have engaged in adequate consultation on the *Land Act* approvals.

[282] To ensure that the Crown's constitutional duty to consult on the water bottling project has been met, a representative from the Crown is required to determine whether the consultation process regarding the water bottling project, in so far as it could impact the FN's right of access to and use of Indian Reserve No. 8, was conducted in accordance with the law. Given that the Manager's decision was made last in time, and the *Land Act* aspects of the project may impact the Commercial Water Licence, the Panel directs the Manager to gather the appropriate information to satisfy himself, on behalf of the Crown, that the appropriate consultation has been undertaken by the Crown. The Panel finds that the Manager, on behalf of the Crown, must make appropriate enquiries and satisfy himself that there has been adequate consultation with the FN with respect to the potential interference with the FN's Aboriginal rights and title in relation to the FN's right of access to and use of Indian Reserve No. 8.

[283] Section 92(8) of the *Water Act* provides that the Board may:

> (8) (a) send the matter back to the comptroller, regional water manager or engineer, with directions,
>
> (b) confirm, reverse or vary the order being appealed, or

> (c) make any order that the person whose order is appealed could have made and that the board considers appropriate in the circumstances.

[284] In the context of the Board's powers under section 92(8)(c), the Board notes that the Manager, and thus the Board, has the authority under section 23(2) of the *Water Act*, to suspend a water licence "for any time." Section 23(2) states that "The rights of a licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager …."

[285] The Panel directs that the Commercial Water Licence be suspended, subject to the Panel's directions below, and the matter returned to the Manager with the following directions:

a) The Manager (which includes the Manager's staff and/or delegates) shall:

   (i) ascertain whether the ILMB or any other agency of the Crown has given the FN an adequate opportunity to consult with respect to the impact of the water bottling project on the FN's right of access to and use of Indian Reserve No. 8, and with respect to any other impacts arising from the construction of facilities necessary to give effect to the water bottling project, on the FN's Aboriginal rights and title; and

   (ii) if the Manager is not satisfied that adequate consultation on the water bottling project was completed by the ILMB or any other agency of the Crown, then the Commercial Water Licence shall remain suspended until such time as the Crown has engaged in an adequate process of consultation with the FN with respect to the impact of the water bottling project, as proposed by BRC, upon the FN's right of access to and use of Indian Reserve No. 8, and with respect to any other impacts upon the FN's Aboriginal rights and title that may result from the construction of facilities necessary to give effect to the water bottling project, particularly the dock and barge facility.

b) The Manager may either reinstate, amend or cancel the Commercial Water Licence upon completion of the process as directed above;

c) If the Manager reinstates the Commercial Water Licence, he shall amend the Commercial Water Licence conditions (i), (o) and (p) to extend the termination date of the Commercial Water Licence from December 14, 2014 to December 31, 2016, to account for the time that has elapsed since the appeal was commenced.

d) If the Commercial Water Licence is reinstated, either with amendments or without, the Manager may provide BRC with such reasonable further extensions of the termination date of the Commercial Water Licence as are necessary to accommodate the period of consultation directed above.

[286] Finally, the Panel finds that the Board is without jurisdiction to make a "non-binding ruling", as requested by the FN, stating that any proposed decision relating to the issuance of a water licence to a third party in the FN's traditional territory should, as a matter of course, be referred to the Treaty Table, and not be adjudicated in isolation. The Board's jurisdiction in this matter is limited to the Manager's decisions with regard to BRC's licence applications. The Board has no

jurisdiction to make rulings in relation to future licence applications by other persons. In any case, such direction would amount to a policy decision that should be made by the government, and not the Board.

DECISION

[287] In making this decision, the Panel has considered all of the relevant documents and oral evidence, whether or not specifically reiterated herein.

[288] For the reasons provided above, the Panel finds that the appeal of the Domestic Water Licence is dismissed as abandoned, and the appeal of the Commercial Water Licence is allowed, in part.

"Robert Wickett"

Robert Wickett, Panel Chair
Environmental Appeal Board

February 7, 2013