Canadian Environmental Assessment Agency, 160 Elgin Street, 22nd Floor, Place Bell Canada, Ottawa, ON, K1A 0H3, 613-948-2674
Energy Resources Conservation Board, 9915 Franklin Avenue, Provincial Building, 2nd Floor, Fort McMurray, AB, T9H 2K4, 780-743-7473

October 26, 2012

TO: ALL INTERESTED PARTIES

Re: Jackpine Mine Expansion Project (the "Project")
CEAR Reference Number 10-05-59540
ERCB Application No. 1554388
Notices of Questions of Constitutional Law

The Joint Review Panel ("Panel") received notices of questions of constitutional law ("NQCL") from the following interested parties: Athabasca Chipewyan First Nation ("ACFN"); Fort McMurray #468 First Nation ("FMFN"); and Métis Nation of Alberta Region 1 ("MNA"). The Panel provided participants in this proceeding and the addressees of the NQCLs with a process to provide written submissions with regard to matters that may bear on the Panel's jurisdiction over or consideration of the questions presented in the NQCLs. The Panel also gave the NQCL filers an opportunity to provide submissions in reply to those filed by other participants. The Minister of Justice and the Attorney General of Alberta ("Alberta"), the Attorney General of Canada ("Canada"), Shell Canada Limited ("Shell") and the FMFN filed written submissions; however, the FMFN subsequently advised that it would not be pursuing its NQCL or leading any evidence in support of its NQCL. ACFN and MNA provided reply submissions.

The questions are set out below in this letter.

After considering the written submissions, the Panel decided to hold a hearing session to receive oral argument on the matters addressed in the written submissions. As contemplated in the Notice of Hearing issued on August 17, 2012, the hearing respecting NQCLs was held in Fort McMurray on October 23, 2012. Details of the matters to be considered in the hearing were set out in a letter from the Panel's counsel dated October 19, 2012 (filed in the registry as document #1210). All of the parties who filed written submissions concerning the NQCLs participated in the oral hearing, except for FMFN. When the hearing session concluded, the Panel stated that it would provide decisions regarding the further consideration by the Panel of the two remaining NQCLs. This letter contains the Panel's decisions. To ensure its decisions are issued prior to the commencement of the main hearing on October 29, 2012, the Panel has not set out in this letter the detailed positions of the parties but has instead referred to some aspects of the parties' positions within the Panel's reasons. Although the Panel has not included a summary of each party's position, the Panel assures participants that it has considered all of the written and oral submissions provided in this part of the proceeding. The attachment to this letter decision lists the submissions that the Panel considered.

The Panel has made the following decisions in relation to the NQCLs filed by the ACFN and MNA.

1. The Panel does not have an express grant of statutory authority to consider the adequacy of Crown consultation in relation to the Project. Although the Panel is empowered by statute to

consider questions of constitutional law relating to the matters before it in this proceeding or arising from its statutory mandate, the questions presented in the NQCLs do not arise from either. As a result, the Panel does not have jurisdiction over the questions of constitutional law raised in ACFN's and MNA's NQCLs.

2. Even if the Panel had jurisdiction over the questions of constitutional law raised in the NQCLs, it would be premature for the Panel to make a finding on the adequacy of Crown consultation and make a decision in reliance on that finding (if the Panel concluded consultation was inadequate). The Crown conduct that gives rise to the duty to consult will continue after this proceeding is completed and after the Panel has issued its report. The Panel's report will inform the Crown's subsequent decisions about constitutional consultation and opportunities will exist for the Crown and Aboriginal groups to continue the consultation process. When that process is completed, and if the Crown's decision is that constitutional consultation is adequate, the Aboriginal groups will be entitled to challenge the Crown's decision if they are not satisfied with the results of that process.

3. Notwithstanding that the Panel has decided that it cannot consider the questions of constitutional law because it does not have jurisdiction to do so, it will consider all the evidence and argument relating to the potential effects of the Project on Aboriginal groups and individuals in accordance with the terms of the *Amended Agreement To Establish a Joint Review Panel for the Jackpine Mine Expansion Project* ("the Agreement").

The reasons for the Panel's decisions are set out below.

<u>The Questions of Constitutional Law</u>
The ACFN's NQCL posed the following questions:

> 1. Has the Crown in right of Alberta discharged the duty to consult and accommodate ACFN with respect to the potential adverse effects of the Project on ACFN's Treaty Rights, as mandated by the Treaty and s. 35 of the *Constitution Act, 1982*?
>
> 2. Has the Crown in right of Canada discharged the duty to consult and accommodate ACFN with respect to the potential adverse effects of the Project on ACFN's Treaty rights, as mandated by the Treaty and s. 35 of the *Constitution Act, 1982*?

The ACFN requested the following relief:

> 1. That the Joint Review Panel, sitting as the Energy Resources Conservation Board, deny the project for approval because the Crown in right of Alberta and/or the Crown in right of Canada has failed to adequately discharge the duty to consult and accommodate the ACFN;
>
> 2. A finding that the Project is not in the public interest and cannot be authorized unless and until the Crown has fully discharged its duties to consult

and accommodate ACFN with respect to potential adverse effects on its Treaty Rights (as described below);

3. In the alternative, a deferral of the decision on the Project for approval until each of the Crown in right of Alberta and the Crown in right of Canada adequately consult the ACFN regarding the potential impacts of the Project on the ACFN's Treaty rights and accommodates the same; and

4. That the Joint Review Panel, pursuant to the *Canadian Environmental Assessment Act, 2012*, recommend to the Minister that the Project will cause significant adverse impacts on ACFN's Treaty Rights and culture that are not mitigated and cannot be justified unless and until the Crowns and each of them has fully discharged their duties to consult and accommodate ACFN with respect to potential adverse effects on its Treaty Rights (as described below).

From paragraph 7b) of its written submission dated October 1, 2012, the Panel interprets the MNA's question as follows:

1. Has the Government of Alberta upheld its duty to consult with the Métis people whose rights will be impacted by this project? The MNA asserts that these rights exist and are and have been asserted by the MNA Region 1 throughout this process. These submissions herein provide the Notice of Question of Constitutional Law and associated information required in accordance with Schedule 2 of the *Administrative Procedures and Jurisdiction Act, Designation of Constitutional Decision Makers Regulation,* A.R. 69/2006 including the aboriginal right to be determined.

MNA requested the following relief in paragraphs 99 and 100 of its submission:

99. A finding that:

a) The evidence shows that there is a credible assertion that the Aboriginal Rights of the Métis in the area will be impacted by this Application;

b) The Government of Alberta has not engaged in any consultation with any Métis people with respect to this Application; and

c) Shell has not fulfilled the Terms of Reference of the Government of Alberta or the Joint Review Panel and therefore cannot be said to have relieved the Crown of their obligation to consult and/or accommodate the impacts to the Aboriginal rights asserted.

100. Denial of the application on the basis that the impact on the Aboriginal Rights of the Métis people in the area has not been addressed in the Application.

The Panel considers that the findings requested in paragraph 99 of the MNA submission are actually the facts the MNA proposed to show in evidence in order to support the request for relief that appears in paragraph 100.

Each NQCL asks the Panel to find that the Crown has a duty to consult with the Aboriginal people identified, and to find that the Crown has not met that duty. The duty to consult and accommodate is a legal duty with unique aspects that distinguish it from other Aboriginal rights. The duty arises from the Honour of the Crown and always rests with the Crown, although the Crown may delegate procedural aspects of consultation. Crown consultation is part of a process of fair dealing and reconciliation that flows from the historical relationship between the Crown and Aboriginal people[1].

The duty is owed to Aboriginal communities as a whole and not to individual Aboriginal persons[2]. It arises when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right, title or interest and contemplates Crown conduct that might adversely affect it. When assessing potential impacts to aboriginal claims or rights, the impacts must be causally linked to the proposed Crown conduct or decision. Although that assessment may include a consideration of cumulative effects based on the existing state of affairs, addressing past wrongs is not one of the purposes of Crown consultation[3].

The scope of the duty to consult is based on a preliminary assessment of the strength of the claim or right asserted and the extent of the alleged infringement. Where the perceived breach is less serious or relatively minor, the content of the duty will be at the lower end of the scale, for example, mere notice may be sufficient. If a strong *prima facie* case for the claim is established and the potential infringement is of higher significance, deep consultation that is aimed at finding a satisfactory solution may be required; however, the duty to consult does not confer a veto power on Aboriginal groups[4].

Adequacy of the NQCLs

No concerns were raised in relation to the form, content, filing or service of ACFN's NQCL.

In relation to MNA's NQCL, Alberta raised a number of concerns, including that:

- strict compliance with the notice requirements of the *Administrative Procedures and Jurisdiction Act* ("*APJA*") is required;
- the MNA NQCL does not contain a clear statement of a question of constitutional law; and
- contrary to the requirements of the *Designation of Constitutional Decision Makers Regulation* ("Regulation"), the NQCL does not provide the substance of the evidence of all of the MNA's proposed witnesses. Alberta stated that this defeats the purpose of the

[1] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69.
[2] *Newfoundland and Labrador v. Labrador Métis Nation,* 2007 NCLA 75; leave to appeal to SCC refused Docket 32468 (May 29, 2008), 2008 CanLII 32711 (SCC).
[3] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247; leave to appeal to SCC refused Docket 34403 (February 23, 2012), 2012 CanLII 8361 (SCC).
[4] *Haida Nation, ibid.*

notice requirement, which is to allow the Attorney General of Alberta to know the case it has to meet and the testimony that will be heard from witnesses. Alberta also stated that it is impossible for Alberta to prepare its submissions in response to the NQCL without having the substance of the MNA's witnesses' testimony.

During oral submissions, Alberta advised that it was not insisting on a strict technical approach to the NQCL and was therefore not asking that the MNA's NQCL be struck. Rather, it requested that the Panel not permit any witnesses for whom the MNA had not provided a will-say statement to testify.

The MNA's position was that, given the volume of materials it provided and the information provided regarding its witnesses, its NQCL complied in substance with the provisions of the *APJA*. It also stated that the responders to its NQCL suffered no prejudice as a result of the form or content of its NQCL. During oral submissions, MNA's counsel provided Alberta with one additional will-say statement and advised that 5 of the 11 MNA witnesses for whom a will-say statement was not submitted would not be testifying. The MNA further took the position that, given that certain MNA witnesses are Elders, there was no requirement to provide a written submission as to the content of their evidence.

The Panel is satisfied that the provisions of the *APJA* apply to its ability to consider the questions of constitutional law. In particular, section 12 of the *APJA* and Schedule 2 of the Regulation require the filer of a NQCL to provide to the Minister of Justice and Attorney General of Alberta and the Attorney General of Canada certain information including:

- the grounds to be argued and reasonable particulars of the proposed argument, including a concise statement of the constitutional principles to be argued, references to any statutory provision or rule on which reliance will be placed and any cases or authorities to be relied upon;
- the law in question, the right or freedom alleged to be infringed or denied, or the aboriginal or treaty right to be determined, as the case may be;
- the material and documents that will be filed with the decision-maker; and
- a list of witnesses intended to be called to give evidence before the decision-maker and the substance of their proposed testimony. (underlining added by the Panel)

The provisions of the *APJA* and the Regulation are mandatory. The Panel has no discretion to cure defects in NQCLs provided to Alberta, Canada or any other parties to the proceeding entitled to the notice. The legislation is clear that a notice meeting all of the foregoing criteria must be given to the Panel, Shell, Alberta and Canada.

The Panel accepts that the purpose of the notice requirement is to ensure that the Panel, the proponent, and the governments of Alberta and Canada can be informed of the substance of the constitutional questions being raised so that they can respond to them appropriately. A failure to provide the required information is more than a technical deficiency that may have the potential to create prejudice to Shell, Alberta and Canada and any other parties responding to the NQCL. It is a contravention of the *APJA* that deprives the Panel of any jurisdiction it might otherwise have to consider the constitutional question posed in the NQCL.

The Panel finds that for those MNA witnesses for whom a will-say statement or other statement of his or her intended testimony was not provided with the NQCL, the notice requirement of the *APJA* not met. This is the case even if those witnesses are MNA Elders: the *APJA* notice requirement makes no distinction between expert witnesses and laypersons or persons having traditional, cultural or other special knowledge. As a result, the Panel would not permit those witnesses to give evidence in relation to the question of constitutional law posed in the MNA's NQCL.

In all other respects, the Panel is satisfied that the MNA's NQCL provides the information required by the legislation such that the notice requirement in the *APJA* is met and there is no apparent prejudice to Alberta, Canada or Shell. Notwithstanding that finding, the Panel would like to provide additional comments that may assist the MNA and other parties participating in proceedings in which constitutional questions of law arise. Subsection 12(4) of the *APJA* states "the notice under subsection (1) must be in the form and contain information provided for in the regulations". Schedule 2 of the Regulation provides a template form of notice. It is in the nature of a "fill in the blanks" form that would be understandable and useful to any person, with or without legal training. The form also provides directions on what information is to be included in the Details of Argument. The Panel strongly encourages anyone intending to file a NQCL to slavishly follow the template notice that is provided in the Regulation. Doing so practically eliminates any possibility that a filer's notice may be found to be deficient by a designated decision-maker.

Application of the APJA to the NQCLs

The Panel addressed this matter in its letter of October 19, 2012, concerning the participation of the Non-status Fort McMurray/Fort McKay First Nation and the Clearwater River Paul Cree Band #175, but it bears repeating in this decision. Under the terms of the Agreement, the Panel is directed to conduct its review in a manner that discharges the responsibilities of the Energy Resources Conservation Board ("ERCB" or "Board") and the requirements set out in the *Canadian Environmental Assessment Act, 2012* ("*CEAA, 2012*") and the Terms of Reference appended to the Agreement. The ERCB is a "designated decision maker" as defined in subsection 10(c) of the *APJA*. As a result, Part 2 of the *APJA* applies to the Panel when it discharges its responsibilities as a division of the ERCB.

Can the Panel Consider Questions of Constitutional Law?

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[5], (*Carrier Sekani*) cited by all the participants in this proceeding, the Supreme Court of Canada summarized the law relating to an administrative tribunal's power to consider constitutional issues. The Court stated:

> [68] ..., tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the constitution.
>
> [69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007

[5] 2010 SCC 43.

> [Energy Purchase Agreement (EPA)] is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.
>
> (underlining added by the Panel)

Similar to the British Columbia Utilities Commission ("BCUC") in *Carrier Sekani*, the ERCB is authorized by the legislation establishing its powers, duties and functions to decide questions of law. That is implied from several provisions of the *Energy Resources Conservation Act* ("*ERCA*"), in particular section 26, which requires the ERCB to decide what legal rights arise that may entitle an individual to a hearing before the Board, and section 41 which provides for a right of appeal from a Board decision on a question of jurisdiction or on a question of law. The Panel therefore concludes that is empowered, as the ERCB, to decide constitutional issues that are properly before it unless there is a clear demonstration that the legislature intended to exclude such jurisdiction from the ERCB's powers.

Pursuant to the Regulation, the ERCB is authorized to decide all questions of constitutional law. As a result, Part 2 of the *APJA* does not displace any of the ERCB's constitutional authority that is indicated under a *Paul* or *Conway* analysis (assuming the section 12 *APJA* notice requirement is met). But the *APJA* does not enlarge that authority either. The Panel therefore finds that it has jurisdiction to decide the questions of constitutional law raised in the NQCLs if the questions relate to matters that are properly before the Panel or are related to the Panel's statutory mandate.

The Duties Relating to Crown Consultation

In *Carrier Sekani*, the Supreme Court of Canada stated that government could delegate the duties associated with section 35 consultation to an administrative tribunal.

> [56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.
>
> [57] Alternatively, 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.
>
> [58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also

> relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.
>
> (underlining added by the Panel)

No party stated that the Panel had an express grant of statutory power to consider the adequacy of Crown consultation; in fact, Alberta stated that the Legislature of Alberta had not granted the Panel jurisdiction to consider and assess Alberta's consultations as part of the Project application process. The Panel agrees that any statutory authority it has to consider the question has not been expressly granted to it, and therefore must arise within the "contours of [the Panel's] jurisdiction".

Although the ACFN stated in its written submission that the Panel itself is a Crown entity, counsel for ACFN stated in his oral submissions that the Panel remained an independent, quasi-judicial body similar to the BCUC in *Carrier Sekani*. Counsel for MNA stated that the Panel's exercise of its authority is government action. Notwithstanding those submissions, no party argued that the Panel was the Crown and was therefore required to consult with Aboriginal groups.

The Panel agrees with Canada and Alberta that a Canadian Environmental Assessment Agency review panel does not exercise a decision-making function. It performs an environmental assessment and provides a report to the federal Minister of the Environment that must be taken into account for the purposes of the federal government's decisions with respect to the environmental assessment as well as in respect of federal approvals and permits that are needed for a project to proceed. A review panel is neither the Crown nor an agent of the Crown to which the duty to consult is delegated.

Counsel for Alberta stated that Alberta addresses its consultation obligations through Policy and Guidelines that are administered by Alberta government departments (with procedural aspects delegated to project proponents). The Panel also notes that the decision of the Court of Appeal of Alberta in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*[6], makes it clear that the ERCB is not the Crown and does not have the duty to consult.

> [24] It is now conceded to us that neither the energy company nor the Board has or had any duty in law to consult with those holding aboriginal or treaty rights. That concession is plainly correct today, though it may have been unclear for a time. At one point in oral argument, there was a stray reference to the Board as an "emanation" of the Crown, a characterization not argued elsewhere, and in our view inaccurate. In the 1930s the Privy Council condemned that term as vague and apt to mislead.

The Panel states, in case there is any uncertainty over the question, that the ERCB is not the Crown and does not have the Crown's duty to consult, whether as an agent of the Crown or pursuant to some other delegation. As a result, the Panel's jurisdiction over the question of the adequacy of Crown consultation cannot arise from this aspect of the duty to consult.

[6] 2005 ABCA 68.

The Duty to Consider Consultation

In *Carrier Sekani*, the Supreme Court restated the test from *Haida Nation* that sets out the circumstances in which the duty to consult arises.

> [79] A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may adversely affect the Aboriginal claim or right.

The applicant in *Carrier Sekani*, B.C. Hydro, was an agent of the Crown and therefore obliged to uphold the honour of the Crown, including discharging the duty to consult (if the duty arose). Having regard for this, the British Columbia Court of Appeal urged the BCUC "to grasp the nettle and decide the consultation dispute".[7] On appeal, the Supreme Court of Canada agreed that the BCUC had the power to consider whether adequate consultation with Aboriginal groups had taken place but it overturned the Court of Appeal's decision on the basis that the issue of consultation did not arise from B.C. Hydro's application. The Court concluded that the only Crown conduct arising from the decision that was before the BCUC was B.C. Hydro's intention to purchase power as reflected in the proposed Energy Purchase Agreement. As a result, the Court decided that the question of the adequacy of Crown consultation did not arise from the application filed by B.C. Hydro and was not within the BCUC's mandate.

> [84] It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.
>
> (underlining added by the Panel)

In its October 19, 2012 letter to the parties that filed or responded to the NQCLs, the Panel asked parties to identify the contemplated Crown conduct that gives rise to the duty to consult. Counsel for ACFN stated that this was an academic question since Alberta and Canada had both accepted that the duty was triggered and existed. However, he also stated that the entire amendment approval process for the Project is Crown conduct that triggered the duty as early as the date that Shell proposed Terms of Reference for its Environmental Impact Assessment. ACFN argued that the Panel's decision would be a milestone decision because the Panel would decide *if* the Project should be approved, not *how* the Project should be approved. He stated that subsequent permitting decisions would be limited to deciding what conditions to attach to various approvals that might follow. ACFN also argued, albeit in the alternative, that the Panel's approval process is Crown conduct because it is a Crown-established process for project approval. ACFN stated that the Panel's amendment approval decision is Crown conduct that triggers the duty to consult.

[7] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, at para. 56.

ACFN's counsel emphasized that this did not mean the Panel was acting as a Crown agent but that it remained an independent, quasi-judicial body similar to the Commission in *Carrier Sekani*. In response to the submissions of Canada, Alberta and Shell, the ACFN reiterated that the duty to consult in relation to the Project was triggered long ago and that it did not make sense for the Panel to consider consultation obligations on only a forward-looking basis. He urged the Panel to consider what had happened in the past and to decide the question of consultation adequacy.

The MNA stated that it adopted the submissions of the ACFN on the question of the Panel's jurisdiction over the NQCLs. The MNA also stated that any exercise of statutory authority is a government action. Its counsel argued that a decision of the Surface Rights Board had established that the ERCB is an expropriating body, and that expropriation is unquestionably a government action.

Alberta confirmed that it has a duty to consult relative to the Project. Alberta disagreed, however, that the Panel had the jurisdiction to consider the adequacy of Crown consultation. Alberta stated that Crown decisions have already been made in relation to the Project and that those could potentially be challenged for inadequate consultation. Alberta argued that there is no contemplated Crown conduct before the Panel and that neither the Panel (as the ERCB) nor the proponent is the Crown. Alberta stated that in order for the Panel to be able to consider Crown consultation, it would have to have jurisdiction over the parties, the subject matter, and the remedies being sought. In Alberta's view, none of those requirements are met in this case.

Alberta stated that in addition to the Panel's approval of the Project application filed with the ERCB, the Project requires approvals from Alberta under the *Environmental Protection and Enhancement Act*, *Water Act*, and *Public Lands Act* before it can proceed, and that the Panel has no decision-making authority regarding those Alberta approvals. Alberta submitted that the processes for acquiring the Alberta approvals provided additional opportunities for Aboriginal consultation after the Panel issues its report. Alberta further stated that although this proceeding is about Shell's application, the Crown's efforts to consult and respond to the concerns of First Nations are much broader than the application and encompass other processes and avenues to mitigate impacts. Alberta argued that the Panel's hearing is one of the tools that allows the Crown to better understand the Project, and in fact is part of Alberta's consultation process. Alberta submitted that a decision by the Panel on the adequacy of Crown consultation would therefore be premature and unnecessary.

Canada stated that in addition to numerous provincial approvals for the Project (which Canada listed on page 8 of its written submission dated October 15, 2012), federal approvals are required under the *Fisheries Act*, as amended, and the *Navigable Waters Protection Act*, as amended. Canada described the sequencing of events that might lead to approval of the Project by Canada and Alberta, and stated that the Panel is part of a planning process that informs all federal and provincial Crown decisions relating to the Project. Canada also stated that Crown decisions about the adequacy of Aboriginal consultation and accommodation *should* be informed by the Panel's findings about project impacts on actual or asserted Aboriginal or Treaty rights. This requires that any Crown decision about sufficiency of consultation and accommodation be made after the Panel's report is issued and before federal decision-making occurs under *CEAA, 2012* or other

federal statutes. Canada submitted that the Panel's proceeding did not represent an appropriate time for consultation adequacy to be assessed, given the capacity and intention of the Crown to address the concerns raised by Aboriginal groups in the future.

Similar to Alberta and Canada, Shell described the various federal and Alberta government approvals that would need to be considered and dispositioned after the Panel had issued its decisions and recommendations. Shell stated that it was premature for the Panel to consider the adequacy of Crown consultation because many of the decisions needed to allow the Project to proceed would not be made until well after the Panel's report was issued.

The Panel has considered the arguments provided by parties on the question of what is the Crown conduct that gives rise to the duty to consult. The Panel has concluded that there is no Crown conduct arising from the matters that are before the Panel so as to trigger the duty to consult in relation to those matters. Alberta and Canada acknowledged that there is and will continue to be an obligation on the Crown to consult and accommodate in relation to the Project. But that duty is triggered by other circumstances, including federal and Alberta government decisions on applications that are not before this Panel. The Crown in right of Alberta and the Crown in right of Canada are not before this Panel, nor is the Panel empowered to direct the Crown to perfect consultation with Aboriginal groups if the Panel were to find that consultation was inadequate. With reference to the *Conway* decision, the Panel does not have the ability to grant a remedy that would require the Crown, which has the duty to consult, to fulfill its consultation obligations to ACFN and MNA. The Panel's decision-making authority is limited to making a determination as to whether the Project is in the public interest and dispositioning the Project application accordingly. The Panel may deny the Project application or approve it with or without conditions designed to ensure the Project meets applicable regulatory requirements. Those conditions and any other requirements imposed by the Panel will govern Shell's conduct, but will not and cannot authoritatively direct the conduct of the Crown.

In addition, the Panel accepts the representations from Alberta, Canada and Shell that Crown consultation in relation to the Project is not complete. It would be premature for the Panel to make a decision on the Project application in reliance on a finding that consultation has been inadequate when the Crown has acknowledged that it has a duty to consult and stated that it will continue to address this duty after this proceeding is ended. The Panel is required or authorized under the Agreement to receive a broad range of information about the potential effects of the Project on Aboriginal groups and individuals, and to include that information in its report. Alberta and Canada have each stated that the information contained in the Panel's report will be considered and used by them to continue the consultation process to its conclusion. That is an appropriate use of the Panel's report, and is a use that is recognized in law as a legitimate part of the Crown's consultation process[8]. The appropriate time for consultation adequacy to be decided is when the Crown has concluded its consultation process. At that time, Aboriginal groups can decide if they are satisfied with the results of the consultation process or if they wish to seek a remedy to enforce the Crown's obligations to them.

ACFN also stated in oral argument that the Panel cannot make a decision that is inconsistent with the *Constitution Act, 1982*. The argument, as the Panel understands it, is that by potentially

[8] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

approving the Project application without considering whether Crown consultation in relation to the Project is adequate, the Panel may be condoning or permitting the Crown to breach its duty to the ACFN, and that result is not in the public interest. In the Panel's view, the Federal Court of Appeal considered a similar argument in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[9]. In that decision, the Court found that the National Energy Board ("NEB") did not have a duty to undertake a *Haida* analysis or decide if the Crown met the duty to consult with the Aboriginal appellants. The Court described the argument in that case as follows:

> [38] The appellants further argue that in the context of an application for a Section 52 Certificate, the NEB must "have regard to all considerations that appear to it to be relevant", as specifically stated in section 52 of the NEB Act. And, according to the appellants, whether the Crown has, and has satisfied, a *Haida* duty, are matters that are relevant to, and therefore must be addressed by, the NEB. A failure to do so, their argument continues, would result in breach by the NEB of its obligation to make its decisions in accordance with the dictates of the Constitution.

The Court decided that the NEB acted constitutionally, when it stated:

> [40] First, as noted above, the decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision-making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable Project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution.
>
> (underlining added by the Panel)

The Court added that although the NEB correctly decided it was not required to determine whether the Crown was under and had discharged a duty to consult before approving pipeline project applications, that decision did not preclude adjudication of the consultation issues by a court of competent jurisdiction. In fact, the Court noted that the *Haida* and *Paul* decisions indicated that aboriginal groups should seek their recourse in the courts in such circumstances.

In accordance with the Agreement, the Panel has provided a number of opportunities for Aboriginal groups and individuals to provide comment on and participate in this proceeding to consider the Project application and environmental assessment. The ACFN and MNA have filed

[9] 2009 FCA 308; leave to appeal to SCC refused Docket 33481 (December 2, 2010), 2010 CanLII 70764 (SCC).

substantial written submissions that indicate they will participate extensively in the oral hearings. The Panel believes that its hearing process will assist both the Crown (which owes the duty to consult) and the Aboriginal groups (who are entitled to that consultation) to move towards a resolution of their differences. It will also assist the Panel to understand the potential effects of the Project on Aboriginal people. If the Panel decides that the Project is in the public interest, that understanding will allow it to disposition the Application appropriately by imposing measures within its authority that are intended to mitigate any adverse impacts from the Project on Aboriginal groups and individuals.

The Panel has an additional comment in relation to the NQCL filed by the MNA. In its submissions, Alberta expressed concern that the question of constitutional law presented by the MNA was overly broad. Rather than identifying specific rights-bearing aboriginal collectives, it claimed rights in relation to Métis people generally. The Board understands that the scope and extent of Métis rights in Alberta is not as well defined as those of recognized First Nations. Although the duty to consult requires only a preliminary assessment of the strength of an Aboriginal claim or right, there must be some reference point available to do that assessment. In the decision *Lax Kw'alaams Indian Band v. Canada (Attorney General)*[10], the Supreme Court of Canada advised against allowing a regulatory proceeding to venture into a free-ranging inquiry into the historical grounds of modern Aboriginal rights.

> [11] The courts (including this Court) have long urged the negotiation of Aboriginal and treaty claims. If litigation becomes necessary, however, we have also said that such complex issues would be better sorted out in civil actions for declaratory relief rather than within the confines of regulatory proceedings. In a fisheries prosecution, for example, there are no pleadings, no pre-trial discovery, and few of the procedural advantages afforded by the civil rules of practice to facilitate a full hearing of all relevant issues.

The Panel believes that the question of constitutional law posed by the MNA, and the evidence the MNA proposed to substantiate its position on the question, presents a real prospect that this proceeding would venture into the kind of inquiry the Supreme Court of Canada cautioned regulators to avoid.

<u>The Effect of the Agreement on the Panel's Jurisdiction over the Question</u>

ACFN, and to a more limited extent MNA, argued that Articles 6.3 or 6.4 of the Agreement, or both of them together, conferred jurisdiction over the questions or indicated that the Panel had that jurisdiction. That is not the Panel's understanding or interpretation of the Agreement. Generally speaking, the Agreement provides a broad mandate for the Panel to receive information about the potential impacts of the Project on Aboriginal groups and individuals, to assess the significance of those impacts, and to include in its report the Panel's findings on those matters. Article 6.3 of the Agreement does not expand the Panel's mandate, it provides a limit on what the Panel is required to do under the Agreement by specifically stating that the Panel is *not required* to make any determinations as to the scope of the Crown's duty to consult an aboriginal group or whether the Crown has met a duty to consult or accommodate. Article 6.4 of the

[10] 2011 SCC 56.

Agreement simply confirms that the Panel is subject to Part 2 of the *APJA* and does not expand or reduce the Panel's mandate under the Agreement.

As previously stated herein, the Panel has concluded that any jurisdiction it may have over the questions of constitutional law posed in the NQCLs must be derived from statute (*Conway*). The Agreement, regardless of its terms, is incapable of conferring jurisdiction on the Panel unless that jurisdiction is rooted in a statutory grant of authority.

Yours truly,

<original signed by>

Jim Dilay
Joint Review Panel Chair

APPENDIX

Submissions Relating to the Notices of Question of Constitutional Law

CEAA Registry #	Date Filed	Party and Document Name
461	October 1, 2012	MNA NQCL and Written Submission
465	October 1, 2012	ACFN NQCL
536	October 9, 2012	Alberta letter to Panel "Preliminary Submissions"
537	October 9, 2012	ACFN letter to Panel requesting opportunity to respond to Alberta's preliminary submissions
605	October 11, 2012	Shell letter to Panel with submissions on NQCLs
772	October 12, 2012	ACFN Erratum to its NQCL
904	October 15, 2012	Shell Written Submission on NQCLs
905	October 15, 2012	Canada Written Submission on NQCLs
907	October 15, 2012	Alberta Written Submission on NQCLs
913	October 16, 2012	Alberta Correction to its Written Submission on NQCLs
1036	October 17, 2012	ACFN Written Reply Submission
1037	October 17, 2012	MNA Written Reply Submission