Federal Court of Appeal | Cour d'appel fédérale

Date: 20150817

Docket: A-354-14

Citation: 2015 FCA 179

CORAM: **NADON J.A.**
DAWSON J.A.
BOIVIN J.A.

BETWEEN:

HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS ORGANIZATION - CLYDE RIVER, AND JERRY NATANINE

Applicants

and

TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS), PETROLEUM GEO-SERVICES INC. (PGS), MULTI KLIENT INVEST AS (MKI), and THE ATTORNEY GENERAL OF CANADA

Respondents

and

NATIONAL ENERGY BOARD

Intervener

Heard at Toronto, Ontario, on April 20, 2015.

Judgment delivered at Ottawa, Ontario, on August 17, 2015.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
BOIVIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150817

Docket: A-354-14

Citation: 2015 FCA 179

CORAM: **NADON J.A.**
DAWSON J.A.
BOIVIN J.A.

BETWEEN:

HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS ORGANIZATION - CLYDE RIVER, AND JERRY NATANINE

Applicants

and

TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS), PETROLEUM GEO-SERVICES INC. (PGS), MULTI KLIENT INVEST AS (MKI), and THE ATTORNEY GENERAL OF CANADA

Respondents

and

NATIONAL ENERGY BOARD

Intervener

REASONS FOR JUDGMENT

DAWSON J.A.

[1] Clyde River (in Inuktitut: Kanngiqtugaapik - ᑲᖏᖅᑐᒑᐱᒃ) is an Inuit hamlet located on the northeast coast of Baffin Island on Patricia Bay. Patricia Bay lies off the Clyde Inlet, an arm

of Baffin Bay in the Qikiqtaaluk Region of Nunavut. The vast majority of the residents of Clyde River are Inuit.

[2] For generations the people of Clyde River have relied upon the harvest of marine mammals in Baffin Bay and the adjoining Davis Strait for their food security and their economic, cultural and spiritual well-being. Marine mammals of particular importance to the community are the bowhead whale, the narwhal, the ringed, bearded and harp seals, and the polar bear.

[3] The Davis Strait/Baffin Bay populations of bowhead whales have been identified as "threatened" under the *Species at Risk Act*, S.C. 2002, c. 29 (SARA) and by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Both SARA and COSEWIC identify the narwhal of the Eastern Arctic as being of "Special Concern".

[4] In May, 2011, TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geo-Services Inc. (PGS) and Multi Klient Invest as (MKI) (together the proponents) applied to the National Energy Board (Board) for a Geophysical Operations Authorization (GOA) to undertake a two-dimensional offshore seismic survey program in Baffin Bay and the Davis Strait (Project). The Project was to be conducted in the open water season for up to five years. The application was made pursuant to paragraph 5(1)(*b*) of the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (COGOA or the Act).

[5] On June 26, 2014, the Board issued a GOA to the proponents on specified terms and conditions. Attached to the letter notifying the proponents of the issuance of the GOA were the

authorization itself, the terms and conditions that applied to the authorization and an environmental assessment report prepared by a member of the Board on its behalf.

[6] In the environmental assessment, the Board concluded that "with the implementation of [the project operator's] commitments, environmental protection procedures and mitigation measures, and compliance with the Board's regulatory requirements and conditions included in this [Environmental Assessment] Report, the Project is not likely to result in significant adverse environmental effects."

[7] This is an application for judicial review of the decision of the Board to grant the GOA (Decision).

I. The Issues

[8] The issues raised on this application are:

1. Do the applicants have standing to bring this application?
2. Was the Crown's duty to consult with the Inuit in regard to the Project adequately fulfilled?
3. Did the Board err in issuing the GOA? Specifically:
    a. Were the Board's reasons adequate?
    b. Did the Board reasonably conclude that the Project is not likely to result in significant adverse environmental effects?

c. Did the Board fail to consider Aboriginal and Treaty rights?

4. Was the Crown obliged to seek the advice of the Nunavut Wildlife Management Board?

[9] For the reasons that follow, I have concluded that:

1. The applicants have standing to bring this application.
2. The Crown adequately fulfilled its duty to consult with the Inuit in regard to the Project.
3. The Board did not err in issuing the GOA.
4. The Crown was not obliged to seek the advice of the Nunavut Wildlife Management Board.

It follows that I would dismiss this application with costs in favour of the Attorney General of Canada. I would not award costs to the proponents.

II. Do the applicants have standing to bring this application?

[10] The Attorney General raises, as a preliminary issue, whether the applicants have standing to challenge the Decision. In his submission, the applicants are not directly affected by the Decision. Nor should the applicants be granted public interest standing.

[11] The Attorney General is partially supported in this view by the proponents. TGS accepts that the applicants have standing to make administrative law arguments. It argues, however, that

the applicants do not have standing to pursue claims based on Aboriginal or treaty rights. PGS and MKI adopt and endorse this submission.

[12] I begin consideration of this issue by describing the applicants. The Hamlet is a municipal corporation which exercises power pursuant to the *Hamlets Act*, R.S.N.W.T. (Nu) 1988, c. H-1. This Act provides, in section .01, that the purpose of municipal governments include providing good government and developing safe and viable municipalities.

[13] The Nammautaq Hunters & Trappers Organization – Clyde River (HTO – Clyde River) is a Hunters and Trappers Organization (HTO) as defined in the Nunavut Land Claims Agreement. As such, it is mandated to oversee wildlife harvesting by Inuit (Article 5.7.1) and to manage wildlife harvesting among its members (Article 5.7.3(d)). Where a right of action arises to an Inuk, the HTO of which that Inuk is a member may sue to enforce the right on the Inuk's behalf.

[14] Jerry Natanine is a resident of Clyde River and is currently its Mayor.

[15] In my view, as TGS submits, the applicants are directly affected by the Decision and so have standing to challenge the Decision based upon administrative law principles. I reach this conclusion on the following basis.

[16] The Board acknowledged in its environmental assessment that a number of potential adverse environmental effects could flow from the Project. These included a decrease in local

ambient air and water quality, potential disturbance of traditional and commercial resource use if the seismic survey changed the migration route of marine mammals or fish, and adverse changes to the "ecosystem process" and marine presence due to spills or accidents. As the realization of any of these potential adverse impacts would affect the applicants' natural environment and the livelihood of the members of the HTO, they are directly affected by the decision within the meaning of subsections 18.1(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[17] The Board's findings referred to in the above paragraph make the authorities relied upon by the Attorney General distinguishable. For example, in *Williams v. Canada (Minister of Fisheries and Oceans),* 2003 FCT 30, 227 F.T.R. 96, a First Nation was found not to have standing to challenge the issuance of a marine mammal predator control licence. The First Nation was found not to be directly affected by the granting of the licence because it adduced no evidence that the licence had any detrimental impact on its members' ability to hunt seals.

[18] I next consider whether the applicants should be granted standing to pursue claims based upon Aboriginal or treaty rights.

[19] In *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, at paragraph 37, the Supreme Court enumerated three factors to be considered in the exercise of discretion to grant public interest standing:

i) whether there is a serious justiciable issue raised;

ii) whether the applicant or plaintiff has a real stake or genuine interest in the issue; and

iii) whether, in all of the circumstances, the proposed proceeding is a reasonable and effective way to bring the issue before the courts.

[20] According to the Attorney General, these factors do not militate in favour of granting standing to the Hamlet or its Mayor. The Attorney General also submits that HTO – Clyde River may have public interest standing because its members have harvesting rights within the Nunavut Settlement Area pursuant to the Nunavut Land Claims Agreement – a land claim agreement contemplated by section 35 of the *Constitution Act, 1982*. In this event, the Attorney General submits that the HTO – Clyde River must be styled as representing its members.

[21] The proponents object that the HTO – Clyde River failed to file evidence it was authorized by the collective rights holding body under the Nunavut Land Claims Agreement to pursue these claims.

[22] In *Downtown Eastside Sex Workers*, the Supreme Court instructed that when considering whether to grant standing, Courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to balance ensuring access to the courts with preserving judicial resources (reasons of the Supreme Court at paragraph 23). The requirements for standing are to be addressed in a liberal and generous manner (reasons of the Supreme Court at paragraph 2).

[23] Subsequently, this approach was applied to allow the Manitoba Métis Federation to advance "a collective claim of the Métis people" (*Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paragraphs 43-44).

[24] In my view, there is no doubt that the application raises serious justiciable issues about whether the Board's decision was reasonable and whether the Crown's obligation to consult was met. As well, I have no doubt that the application for judicial review of the Decision is a real and effective way to bring these issues before the Court. Applying *Manitoba Métis Federation*, I also have no doubt that the HTO – Clyde River has a real stake and genuine interest in these issues. I am satisfied that in these circumstances it should be given public interest standing.

[25] Having concluded that all of the applicants are directly affected by the Decision, and that the HTO – Clyde River should be given public interest standing, it is not necessary to consider whether the Hamlet and its Mayor should be given public interest standing. It is sufficient that the HTO – Clyde River has standing to assert issues relating to Aboriginal or treaty rights.

[26] This said, it is relevant to consider the position of the respondents on the substantive issues raised in this application: they all assert that the Crown's duty to consult was satisfied through the Board's process. As will be explained in greater detail below, in its environmental assessment, the Board found that the Project operator had made sufficient efforts to consult with potentially affected Aboriginal groups and to address their concerns. The Board also found that Aboriginal groups had an adequate opportunity to participate in the Board's environmental

assessment process by attending public meetings held by the Board and by filing letters of comment with the Board.

[27] On the first point, the Board appended as Appendix 2 to its environmental assessment a summary list of MKI's consultation activities. Included on the list were two meetings with the community of Clyde River, a meeting with the Mayor and Council of Clyde River, a meeting with the HTO – Clyde River and what appears to be a joint meeting with the Council of the Hamlet and the HTO – Clyde River. Also listed were consultations with other communities and HTOs. Comments were also sent by the residents of Pond Inlet. On the second point, letters of comment were sent to the Board by Clyde River; a joint letter was sent from the Municipality of Clyde River (signed by its Mayor) and the HTO – Clyde River.

[28] In this circumstance, it appears that the respondents rely upon the participation of the applicants and other similarly situated entities in the consultative process to argue it was a robust process, while at the same time the Attorney General (and to a lesser extent the proponents) argue the applicants ought not to be permitted to challenge the Decision. Had I found it necessary to decide whether the Hamlet and its Mayor had public interest standing, this would have been, in my view, a relevant consideration.

[29] Having dealt with the issue of standing, I turn to the issue of the requirement of adequate consultation.

III. Was the Crown's duty to consult with the Inuit in regard to the Project adequately fulfilled?

[30] The applicants assert that:

i) the duty to consult was triggered by the Board's receipt of the proponents' GOA application;

ii) given that the Inuit possessed treaty rights to harvest marine mammals in Baffin Bay and the Davis Strait, and given the impact of the Project on those rights, the duty to consult lies at the high end of the consultative spectrum;

iii) when the duty lies at the high end of the consultative spectrum, there must be meaningful attempts to engage the Inuit in the decision-making process; this may include a requirement that the Inuit's rights and interests be accommodated; and

iv) the Crown has done "virtually nothing" to discharge its duty.

[31] In response, the Attorney General submits:

i) Canada owed a duty to consult the Inuit residing in Clyde River and other communities in respect of potential adverse impacts to any rights established or asserted under section 35 of the *Constitution Act, 1982* that might result from the authorization of the Project;

ii) the scope of consultation owed was at the mid-range of the consultative spectrum;

iii) in fulfilling its duty to consult, Canada relied on the consultative efforts of the proponents and their agents, and on the administrative process of the Board. The

consultation process, including the Board's environmental assessment, were specifically designed to hear and consider all of the applicants' concerns; and

iv) the GOA, when read with the terms and conditions imposed on the Project and the environmental assessment report, amounts to a reasonable degree of accommodation of the applicants' concerns regarding potential impacts to their section 35 harvesting rights.

[32] The Attorney General's submissions are supported by the proponents who also argue that the Board's process could and did fulfil the duty to consult.

[33] Prior to addressing these submissions, I will review the applicable standard of review to be applied to the Decision and then review the relevant legal principles.

A. *Standard of review*

[34] Questions as to the existence of the duty to consult and the extent or content of the duty are legal questions, reviewable on the standard of correctness. The consultation process and the adequacy of consultation is a question of mixed fact and law, reviewable on the standard of reasonableness (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraph 61-62; and, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paragraph 64).

[35] The adequacy of the Board's reasons are to be addressed within the framework of the reasonableness analysis, (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraphs 14 to 22.

[36] Similarly, the merits of the Board's decision to issue the GOA is reviewable on the standard of reasonableness because the Board's decision was fact based, informed by legislation closely connected to its function.

B. *Relevant legal principles*

[37] The duty to consult is grounded in the honour of the Crown. The duty arises when the Crown has actual or constructive knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation* at paragraph 35).

[38] The Attorney General acknowledges a duty to consult "the Applicants regarding the [Board's] approval of the GOA" (Attorney General's memorandum of fact and law at paragraph 57). In making this acknowledgement, the Attorney General does not identify the conduct or contemplated Crown conduct that triggered the duty to consult.

[39] In my view, this concession appears, at the least, to reflect the fact that the Board could not authorize the Project until the responsible Minister had either approved a benefits plan in respect of the Project, or waived the requirement of approval (subsection 5.2(2) of the Act).

[40] In light of this statutory requirement for ministerial approval, I am satisfied that the Attorney General correctly acknowledged that the duty to consult was triggered.

[41] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation* at paragraph 39; *Rio Tinto* at paragraph 36).

[42] When consultation duties lie at the low end of the consultation spectrum, the claim to title is weak, the Aboriginal interest is limited or the potential infringement is minor. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information, and discuss any issues raised in response to the notice (*Haida Nation* at paragraph 43). Where the duty of consultation lies at the high end of the spectrum, 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 this type of case, while the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons which show that Aboriginal concerns were considered and how those concerns impacted on the decision (*Haida Nation* at paragraph 44).

[43] It is now settled law that Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal. Tribunals that consider resource issues that impinge on Aboriginal interests may be given: the duty to consult; the duty to determine whether adequate consultation

has taken place; both duties; or, no duty at all. In order to determine the mandate of any particular tribunal, it is relevant to consider the powers conferred on the Tribunal by its constituent legislation, whether the tribunal is empowered to consider questions of law and what remedial powers the tribunal possesses (*Rio Tinto* at paragraphs 55 to 65).

[44] Thus, for example in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, the Supreme Court accepted that an environmental assessment process was sufficient to satisfy the procedural requirements of the duty to consult. At paragraph 40 of the Court's reasons, the Chief Justice wrote that the province was not required to develop special consultation measures to address the First Nation's concerns "outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples". Subsequently, in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paragraph 39, this aspect of *Taku River* was characterized to be a holding that participation in a forum created for other purposes may satisfy the duty to consult "if in substance an appropriate level of consultation is provided".

[45] In *Taku River*, the Supreme Court also recognized that project approval is "simply one step in the process by which the development moves forward" (reasons at paragraph 45). Thus, outstanding First Nation concerns could be more effectively considered at later stages of the development process. It was expected that throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to fulfil its duty to consult, and if required, accommodate.

[46] When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's duty. Rather, it is a means by which the Crown can be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated (*Haida Nation* at paragraph 53).

[47] The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation equate to a duty to agree; what is required is a commitment to a meaningful process of consultation. Put another way, perfect satisfaction is not required. The question to be answered is whether the regulatory scheme, when viewed as a whole, accommodates the Aboriginal right in question (*Haida Nation* at paragraphs 42, 48 and 62).

[48] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation* at paragraph 47).

[49] Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through meaningful process of consultation" (*Haida Nation* at paragraph 42). At the same time, Aboriginal claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making

decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation* at paragraph 42).

[50] I now turn to consider the mandate conferred on the Board.

C. *Is the Board mandated to engage in consultation?*

[51] The Board is established under the *National Energy Board Act*, R.S.C. 1985, c. N-7. Subsection 12(2) of that Act confers jurisdiction on the Board to determine all matters before it, "whether of law or of fact".

[52] The COGOA governs petroleum exploration activities in waters under federal jurisdiction. This Act prohibits any work or activity related to the exploration of oil or gas in Federal waters unless the work or activity is authorized under paragraph 5(1)(*b*) of the Act (subsection 4(*b*)). Paragraph 5(1)(*b*) confers jurisdiction on the Board to authorize such work or activity. The Board is given full jurisdiction to hear and otherwise determine all matters under the Act "whether of law or of fact" (subsection 5.31(3)).

[53] Under paragraph 5(1)(*d*) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA, 1992) a federal authority, such as the Board, could not issue an authorization under federal legislation to enable a project to proceed unless the federal authority first ensured that an environmental assessment of the project was conducted. While the CEAA, 1992 is no longer in force, it was in force when the proponents sought their project authorization. Upon repeal of the CEAA, 1992 the Board continued the environmental assessment process, noting that it continued

to have a mandate under the COGOA to consider the environmental effects of the Project. No one takes issue with that position.

[54] Having embarked upon the required environmental assessment, subsection 37(1) of the CEAA, 1992 required the Board, as the responsible authority to, either permit the project to proceed or to decline to exercise its authority to permit the project to be carried out. In exercising this authority the Board was required to assess the Project's "environmental effects" and to consider mitigation measures it considered appropriate.

[55] Pursuant to subsection 2(1) of the CEAA, 1992 "environmental effect" was defined to include the effect of any change that a project may cause in the environment, including any change upon "the current use of lands and resources for traditional purposes by aboriginal persons". More specifically, paragraphs 2(1)(*a*) and (*b*) of the CEAA, 1992 provided that:

"environmental effect" means, in respect of a project, (*a*) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*, (*b*) any effect of any change referred to in paragraph (*a*) on (i) health and socio-economic conditions, (ii) physical and cultural heritage, (iii) the current use of lands and	« effets environnementaux » Que ce soit au Canada ou à l'étranger, les changements que la réalisation d'un projet risque de causer à l'environnement — notamment à une espèce sauvage inscrite, à son habitat essentiel ou à la résidence des individus de cette espèce, au sens du paragraphe 2(1) de la Loi sur les espèces en péril — les répercussions de ces changements soit en matière sanitaire et socioéconomique, soit sur l'usage courant de terres et de ressources à des fins traditionnelles par les autochtones, soit sur une construction, un emplacement ou une chose d'importance en matière historique, archéologique, paléontologique ou architecturale, ainsi que les changements susceptibles

resources for traditional purposes by aboriginal persons, or	d'être apportés au projet du fait de l'environnement.
(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or	[Je souligne.]

[emphasis added]

[56] Finally, subsection 18(3) of the CEAA, 1992 provides for public participation in the Board's process when the Board determines such participation is appropriate.

[57] Having described the legislative scheme, it is relevant to focus on the definition of "environmental effect" and the extent it required every environmental assessment conducted pursuant to this legislation to consider any changes to the environment likely to result in changes to the modern-day use that Aboriginal people make of the land, its flora and fauna for traditional purposes including residence, hunting, trapping, gathering, fishing and ceremonies. More particularly, the question to be asked is whether this provision signalled Parliament's intent to confer a mandate on the Board to carry out a consultative process within the contemplation of *Rio Tinto*?

[58] Turning to the legislative history, the definition of "environmental effect" in section 2 of the CEAA, 1992 was amended to include reference to land use by Aboriginal persons as a related amendment to the enactment of the *Species at Risk Act*. This particular amendment came into force on June 5, 2003.

[59] Prior to this amendment, it was the position of the Board that before rendering decisions in cases where the effect of the decision might be to interfere with an Aboriginal or treaty right, the Board was responsible to determine whether there had been adequate Crown consultation. This was expressed in a letter the Board issued on March 4, 2002, to companies subject to its jurisdiction and others, including "representatives of Aboriginal peoples".

[60] The Board's position was based upon its understanding of three decisions of the Supreme Court: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; and, *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

[61] On August 3, 2005, the Board again wrote to its stakeholders following issuance of the Supreme Court's decisions in *Haida Nation* and *Taku River*, stating that the Memorandum on Guidance and Consultation with Aboriginal Peoples issued on March 4, 2002, might no longer reflect recent developments in the law. The memorandum was therefore withdrawn. The Board stated its commitment "to ensuring that appropriate consultation is carried out in respect of projects where there is a potential impact on the rights or interests of Aboriginal peoples." This position was consistent with the mandate conferred on the Board when the definition of "environmental effects" was amended.

[62] As PGS and MKI submit, at the time the Decision was made the Board had disseminated two public documents that bear on the issue of consultation. The first is entitled "Consideration of Aboriginal Concerns in National Energy Board Decisions" (tab 29 Book of Authorities GPS and MKI). In this document the Board explains that:

- The Board takes steps to ensure that it has sufficient evidence before it makes a decision, including evidence on the impact a proposed project may have on Aboriginal people.
- In order to ensure that it has sufficient evidence about the possible impact of a project on Aboriginal people, the Board requires proponents to contact potentially affected Aboriginal communities well before an application is filed with the Board.
- A proponent is required to include the following information in its application:
    - Identification of all Aboriginal communities that may be affected by the project and how they were identified.
    - When and how Aboriginal communities were contacted by the proponent and who the contact person was in each community.
    - Evidence the proponent has provided potentially affected Aboriginal people with a project overview that clearly explains the nature of the project, its routing, proposed construction and possible environmental and socio-economic impacts. The proponent is also to provide affected Aboriginal peoples with information regarding measures proposed to minimize such impacts.
    - Documentation and summaries of meetings with potentially affected Aboriginal people. While details of confidential discussions need not be revealed, the evidence provided should include enough information to enable the Board to understand the general issues discussed with Aboriginal people.
    - Information about the concerns raised by Aboriginal people, and whether those concerns remain outstanding or have been addressed by the proponent.
    - An analysis of the potential impacts of the project on the exercise of traditional practices such as hunting, fishing, trapping and gathering.

- After reviewing evidence submitted by a proponent the Board may make a number of information requests of a proponent or require the proponent to file further evidence to complete the evidentiary record on Aboriginal issues.
- The Board recognizes that in some cases Aboriginal groups may be able to participate more meaningfully in an oral hearing with support from third parties, including legal and technical specialists. Funding may be available to interested persons.

[63] The second public document is entitled "Information for Aboriginal People" (tab 30 Book of authorities GPS and MKI). In this document the Board explains that:

- The Board requires all proponents to consult with potentially impacted Aboriginal groups early in the project planning and design phases, when it is easiest for a proponent to respond to concerns raised by Aboriginal groups.
- While Aboriginal groups are encouraged to raise their concerns about a project with the proponent, Aboriginal groups may bring any outstanding concerns or views about the project directly to the attention of the Board through the hearing process. These concerns could include concerns about how the project might impact Aboriginal communities, the use of traditional territory, and any potential or established Treaty or Aboriginal rights. The Board will take all relevant concerns into account when determining whether a project can go ahead and what conditions to place on its approval.
- The Board understands that Crown consultation is an issue of interest to Aboriginal groups. In recent hearings, the Crown has stated that it will rely on the Board process to the extent possible to meet any duty the Crown may have to consult with Aboriginal groups.

[64] I summarize the preceding information as follows:

i) The Board has a full mandate to decide questions of law.

ii) From June 5, 2003, at least until the repeal of the CEAA, 1992, when considering an environmental assessment, the Board was required to assess any change to the environment caused by a project that could result in changes to current land use by Aboriginal persons.

iii) The Board is a decision-maker whose decisions must be made in accordance with subsection 35(1) of the *Constitution Act, 1982*.

iv) The Board's process is designed to ensure that it has sufficient evidence about the possible impact of a project upon Aboriginal people, the extent affected Aboriginal groups have been consulted and the extent their concerns have been addressed, or are still outstanding.

v) The Board is given a broad discretion when conducting an environmental assessment: it may permit a project to proceed, with or without mitigation measures, or it may decline to allow the project to proceed.

vi) The Board may allow public participation in its process.

vii) The Board may provide funding to affected Aboriginal groups to enable them to participate more fully in the Board's process.

[65] When these facts are read together, and when they are applied to the principles articulated in *Rio Tinto* and *Taku River*, I conclude that the Board has a mandate to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult with Aboriginal peoples. Of course, when the Crown relies on the Board's process, in every case

it will be necessary for the Crown to assess if additional consultation activities or accommodation is required in order to satisfy the honour of the Crown.

[66] In reaching this conclusion, I am mindful that the Supreme Court cautioned in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at paragraph 64 that consultation cannot be "an afterthought to a general public consultation". However, subsequently the Supreme Court distinguished general public consultation of the sort that occurred in *Mikisew* with consultation as a First Nation.

[67] Thus, in *Beckman*, at paragraph 79, the Court observed that in that case the First Nation was consulted as a First Nation through the Yukon government's Land Application Review Committee. This was adequate consultation.

[68] This is consistent with the holding in *Haida Nation* that affirmed the ability of governments to establish regulatory schemes to fulfil "procedural steps" of the duty to consult (*Haida Nation* at paragraph 51). It is also consistent with the Supreme Court's decision in *Taku River* which upheld the Crown's reliance on an environmental assessment process to fulfil the duty to consult (*Taku River* at paragraph 40). The Supreme Court has, therefore, affirmed that the duty to consult may be integrated into robust environmental assessment and regulatory review processes.

[69] In closing on this issue, strong practical reasons support this conclusion. As Kirk N. Lambrecht, Q.C. notes in *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at page 110:

> […] robust environmental assessment and regulatory review of projects comprise a reasonable process for gathering and assessing information on the significance of project impacts on Aboriginal peoples. Integration will foster potential for reconciliation in regard to a project to be served efficiently by project proponents, tribunals, the Crown, the courts, and Aboriginal peoples. Integration early in the planning stages of projects can foster effective and efficient dialogue and inform project decision making. This is a good beginning to relationship building early in the planning stages of project development.

[70] In the present case the Crown engaged in no additional or independent consultation. Therefore, the next issue to be considered is whether in the present case the Crown's duty to consult was properly and adequately discharged through the Board's process.

D. What was the scope of the required consultation?

[71] As described above, the Crown concedes that the duty to consult was triggered, and submits that the scope of consultation required was at the mid-range of the duty to consult spectrum. The applicants argue that the duty to consult lies at the high end of the spectrum.

[72] The depth or richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the potentially adverse effect upon the claimed right.

[73] In the present case, the Aboriginal right is acknowledged by the Crown: under the Nunavut Land Claims Agreement the Inuit possess a treaty right to continue hunting, fishing and

harvesting in the Nunavut settlement area. As to the potential effect of the Project upon this right, migratory marine mammals harvested by the Inuit move through the Project area. Potential adverse environmental effects found by the Board include:

i) Sensory and physical disturbance to marine mammals causing: temporary reduction in hearing sensitivity; permanent hearing impairment; masked communication; and, changes in behaviour and distribution including avoidance of the seismic ship and alteration of migration routes.

ii) Potential disturbance to traditional and commercial resource use if the survey changes the migration routes of marine mammals or fish.

iii) Adverse changes to marine life presence due to spills or accidents releasing hydrocarbons into the marine environment.

[74] In my view, the potential impacts of the project are such that deep consultation was required. The inquiry now moves to whether the nature and scope of the process before the Board was sufficiently deep and thus whether it was proportionate to the preliminary assessment of the strength of the case supporting the existence of the right and to the seriousness of the potentially adverse effect on that right (*Haida Nation* at paragraphs 39, 43 to 45; *Taku River* at paragraphs 29 to 32; *Rio Tinto* at paragraph 36).

E. Did the consultative process fulfil the duty to consult?

[75] The two principal arguments the applicants make in respect of the adequacy of the consultation are:

i) The Crown rejected the request made that it conduct a Strategic Environmental Assessment (SEA).

ii) The public participation afforded by the Board was not a substitute for formal consultation and the proponents' efforts were "woefully inadequate" (applicant's memorandum of fact and law at paragraph 113).

[76] I disagree.

[77] Dealing first with the request that the Crown complete a SEA before issuing any licences authorizing seismic testing, the applicants submit that there is an absence of baseline data on the ecology of the Project area. In their view, this makes it impossible to make informed and responsible policy decisions about extraction activities in the region.

[78] In my view, adequate consultation did not mandate the completion of a SEA for the following reasons.

[79] First, adequate consultation does not require agreement. Instead, accommodation requires that Aboriginal concerns be "balanced reasonably with the potential impact of the particular decision on those concerns with competing societal concerns. Compromise is inherent to the reconciliation process" (Taku River at paragraph 2).

[80] Second, the assertions that there is an adequate baseline data on the ecology of the Project area and that the absence of such data makes it impossible to make informed decisions are unsupported by the evidence.

[81] Third, in section 3.2 of its environmental assessment, the Board noted the absence of a SEA. It went on to note that the Board was required to assess applications before it on a case-by-case basis. "The Board's determination of the Project's potential for significant environmental impacts under COGOA is independent of possible or pending strategic or regional assessments and planning or management processes, although such information would be considered if it were available and appropriate." The applicants have not shown this to be an unreasonable conclusion.

[82] Finally, as will be discussed below in greater detail, the GOA was issued on terms and conditions that require annual, ongoing monitoring and reporting to Aboriginal communities. These forward-looking conditions ameliorate any scientific uncertainty by allowing future input as scientific knowledge may be acquired and as any impacts of the Project are observed.

[83] I now turn to the nature of the consultation afforded to the applicants and affected Aboriginal groups.

[84] At section 6.1 of its environmental assessment, which appears to have been prepared sometime prior to June 26, 2014, the Board summarized the consultation conducted by the project operator MKI. Points noted by the Board were that:

- MKI had been discussing the Project with Aboriginal groups since January 2011.
- In May 2011, the Board received a petition from the community of Clyde River opposing the project. Additionally in the following month the Arctic Fisheries Alliance and the Baffin Fisheries Coalition filed letters of comment with the Board indicating a need for further consultation between MKI and the stakeholders. In July 2011, MKI postponed the Project until the 2012 season so that it could invest more time and resources to consult with the Inuit communities and other stakeholders, and achieve a better understanding of Inuit traditional knowledge. Subsequently, MKI revised the Project commencement date several times. The Board issued its 1st Information Request in February 2012 asking MKI to respond to the letters of comment received by the Board. In response, MKI addressed the questions raised and committed to conducting an Aboriginal Traditional Knowledge Study. It also indicated that it had contracted a resource management company to assist in developing an Aboriginal consultation plan. In May 2012, MKI outlined the details of its consultation program in response to the Board's 2nd Information Request.
- Following community meetings held in June, October, November and December 2012, MKI distributed Community Engagement Reports summarizing the meetings. The summaries were sent to the affected communities and to the Board. In response to comments raised at the June and October meetings, MKI circulated a Question and Response Document, as well as a Supplementary Report on marine seismic research and mitigation measures. These two reports were translated into Inuktitut.
- General themes that arose from the June 2012 community meetings included concerns regarding the impact of the Project on traditional resources, a willingness to collaborate

to ensure negative effects were mitigated and the need for more study/public education on the effect of seismic surveys on fish and whales.

- Recommendations made by community members during the meetings included the use of Passive Acoustic Monitoring and the undertaking of an Inuit Qaujimatuqangit (IQ) study (i.e. a study of Inuit Traditional Knowledge).
- MKI participated in public meetings conducted by the Board in the communities of Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit from April 29, 2013 to May 2, 2013. Representatives from its resource management company, NEXUS Coastal, PGS and TGS provided a presentation on the Project and when possible answered questions related to it. A number of questions related to MKI's environmental impact assessment were not addressed during the public meetings and MKI committed to following this up.
- In August 2013, MKI filed with the Board responses to questions outstanding from the Board's public meetings. MKI had assessed the interaction between certain marine mammal species and the Project, and used the results of this assessment to inform its survey acquisition plan. Additional details were provided on the role of Marine Mammal Observers (MMOs) and MKI committed to the installation of Passive Acoustic Monitoring on board the seismic vessel to listen for cetaceans. MKI also advised that the final observation reports of the MMOs would be provided to the affected communities. Finally, MKI and its Community Liaison Officers would work with the Arctic Fisheries Alliance and the Baffin Fisheries Coalition to avoid interaction between the Project and harvesting activities.
- After the public comment period ended, MKI filed a reply with the Board in November 2013 discussing how it would use IQ in the Project design and how it had accessed all

publicly available IQ information about marine mammal movements. MKI had applied to the Nunavut Research Institute for a Social Sciences and Traditional Knowledge research permit in order to allow it to conduct an IQ study. MKI would work with the communities of Pond Inlet, Clyde River and Qikiqtajuak on the design of the IQ study.

- In the November 2013 reply MKI reiterated its commitment to continue consultation with the communities during the Project and after field operations ended MKI advised that it would have a Community Liaison Officer in each of Pond Inlet, Clyde River, Qikiqtajuak and Iqualuit throughout the life of the Project.

[85] In section 6.2 of its environmental assessment, the Board discussed the participation of Aboriginal groups in its regulatory process. Points noted were:

- The Board's regulatory process was designed to facilitate the participation of Aboriginal groups and to enable them to convey their views on the Project. The Board had determined that public participation in the environmental assessment process was appropriate and materials related to the environmental assessment were placed on the public registry. Important Board documents were translated into Inuktitut.
- On March 22, 2013, the Board issued a discussion paper that outlined potential environmental effects, concerns raised and mitigation measures relevant to the Project. The Board also conducted public meetings, on the dates set out above, in the communities of Pond Inlet, Clyde River, Qikiqtajuak and Iqualuit for the purpose of collecting oral comments on the Project. Transcripts from the public meetings were posted on the public registry.

- During the Board's public meetings, community members sought information regarding the effects of previous seismic programs on marine mammals, the acoustic properties of marine seismic surveys, sound modelling for the Project and potential effects of the Project on walruses, seals and polar bears. MKI was unable to answer numerous questions from community members.
- On May 13, 2013, the Board found there were deficiencies in the Project application regarding the assessment of socio-economic impacts and Inuit consultation. As a result, the Board suspended its assessment of the Project application. Additional information was filed by MKI on August 30, 2013 and the Board resumed its assessment of the application. The Board accepted written comments on the project from the public until October 31, 2013.
- Aboriginal groups actively participated during the environmental assessment process. The Board received letters of comment from many Inuit communities and organizations. During the Board's public meetings, community members asked questions of MKI and the Board, and expressed their concerns regarding the Project.
- Issues and concerns raised by Aboriginal people throughout the environmental assessment process included: the environmental impacts on marine mammals (including whale migration routes, calving and feeding), fish and invertebrates; effects on traditional and commercial harvesting; adequacy of mitigation of potential harm to marine mammals; the need for discussions with communities and the use of IQ; the use of seismic data and future exploration plans, the impacts of offshore drilling; the absence of a regional environmental assessment or wildlife management planning efforts; and, the management of waste, wastewater and ballast water.

[86] In section 6.3 of the environmental assessment the Board expressed its own views:

- The Board found that MKI had made sufficient efforts to consult with potentially impacted Aboriginal groups and to address the concerns that were raised.
- MKI enhanced its consultation program and provided potentially impacted Aboriginal groups with adequate information about the Project. It gave them opportunities to make their views known in a timely manner to MKI and the Board.
- The Board found that Aboriginal groups had an adequate opportunity to participate in the Board's environmental assessment process. Aboriginal groups filed letters of comment with the Board. Aboriginal groups also had the opportunity to ask questions and bring forward concerns during the Board's public meetings held in potentially affected communities.
- MKI had implemented actions and made commitments as a result of its consultation with Aboriginal groups. Examples cited by the Board included: contracting NEXUS Coastal to assist in developing an Aboriginal consultation plan; committing to employing two Inuit observers, one on the seismic vessel and the other on the support vessel; committing to the installation of Passive Acoustic Monitoring on board the seismic vessel to listen for marine mammals; committing to conducting an IQ Study and to working with Inuit communities on the design of the study; preparing a survey acquisition plan based on an interaction assessment of the Project and certain marine mammal species; committing to continuing consultation with Inuit communities throughout the duration of the Project; committing to hiring Community Liaison Officers in four of the communities to facilitate communication between it and the communities; committing to sharing a final observation report with Inuit communities; and committing to working with the Baffin

Fisheries Coalition and the Arctic Fisheries Alliance to avoid interaction between their respective operations.

- The Board was of the view that concerns regarding potential environmental effects from the Project on traditional resource use were addressed by the mitigation measures developed by MKI and set out in section 7.2 of the environment assessment.
- The Board was of the view that MKI meaningfully engaged with Aboriginal groups in respect of the Project to an extent that was commensurate with the scope of the Project. The Board expressed the expectation that MKI would continue its consultation activities with Aboriginal groups throughout the lifecycle of the Projects. Conditions outlined in section 7.4 of the environmental assessment would require MKI to incorporate available IQ into the Project design, to provide MMO reports and status updates of environmental commitments to Inuit communities and to conduct Project update meetings.

[87] The applicants do not challenge the Board's recitation of the facts. Instead, they argue that:

i) As the Board noted, at the community meetings the proponents were unable to answer questions put to them.

ii) The August 30, 2013 response to the Board's notification that it had suspended its assessment of the Project application was a 3,926 page "data dump" that was not meaningful consultation. The vast majority of the response was not translated into Inuktitut. Hard copies were sent only to four Hamlet offices. While posted on the Board's website, many residents of Clyde River do not have Internet access. For

those who do, the servers are too slow to download such large documents; the Mayor was unable to download the document when he tried.

iii) The proponents did not integrate IQ into the design of the Project.

[88] In my view these concerns may be addressed as follows.

[89] First, the proponents' inability to answer questions at the Board's community meetings was the subject of the Board's letter of May 31, 2013 to the proponents. This letter required the proponents to answer these questions. Subsequently, the Board accepted the adequacy of the proponents' responses.

[90] Second, hard copies of the proponents' August 30, 2013 response were couriered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqualuit - the locations where Board sponsored public meetings took place. There is no evidence that any other hamlet office requested a copy of the response. Similarly there is no evidence that any entity requested additional copies, or complained that the information was not available on the Internet. The documents that were translated were the responses to the unanswered questions identified by the Board in its letter of May 13, 2013, and a report published by Jasco Applied Sciences entitled "Underwater Sound Propagation from a 4118 [cubic inch] Airgun Array." These were viewed by NEXUS Coastal to be of greatest interest to the communities involved in the consultation. The Board extended the deadline for comment upon the August 30, 2013 filing and there is no evidence any further extension was sought.

[91] Third, Condition 7 of the Terms and Conditions attached to the GOA requires MKI to file a report describing how IQ has been considered and incorporated into the Project design. This report is to be filed 30 days prior to the commencement of the Project for each operational season. It was not helpful, or consistent with reciprocal, good-faith consultation, that both the Clyde River Hamlet Council and the HTO - Clyde River refused to participate in the IQ study conducted by NEXUS Coastal on the proponents' behalf (Affidavit of Christopher Milley at paragraphs 80-81).

[92] In my view, the nature and the scope of the process afforded by the Board was sufficient to uphold the honour of the Crown. The process provided timely notice of the Project to potentially affected Aboriginal groups, including the Inuit of Clyde River.

[93] The proponents were required to provide detailed information about the Project area and its design, to respond to comments provided to the Board by affected Aboriginal groups, to consult affected Aboriginal groups and to answer their questions.

[94] The Board held meetings at which community members could address concerns to the Board.

[95] The proponents changed aspects of the Project's design as a result of the consultation process. In addition to the actions and commitments described above by the Board, certain survey lines were shortened in order to stop the survey process further away from the shore

and/or the border between the ocean and sea-ice in direct response to community concerns (Milley affidavit at paragraph 39).

[96] The Board's regulatory process was designed to facilitate the participation of Aboriginal groups and to enable them to convey their views on the Project.

[97] The Board in its environmental assessment assessed the concerns raised by Aboriginal groups and the responses and undertakings of the proponents. The report demonstrates that Aboriginal concerns were considered and shows how those concerns were taken into account by the Board in its report, and in the Terms and Conditions imposed on the GOA.

[98] Those terms and conditions shape how the project will go forward and allow Aboriginal concerns to be expressed at later stages of the Project process. Thus:

- Condition 8 requires MKI to file a MMO report with the Chief Conservation Officer for each operational season, annually by February 15. All such reports are to be accessible to the public and to be provided to interested communities. The Board specifies nine categories of information to be provided in these reports "at a minimum".
- Condition 9 requires MKI to provide an environmental assessment update to the Chief Conservation Officer prior to each operational season that includes any changes in its "Species at Risk assessment and cumulative effects".
- Condition 10 requires MKI to conduct Project update meetings in interested communities following each operational season for the duration of the Project. It is to file with the Chief Conservation Officer and the communities a summary of the meetings for each

operational season. The summaries must include the meeting minutes, identify concerns raised during the meetings and explain how MKI will address these concerns.

[99] As the Supreme Court noted in *Taku River*, at paragraph 45, project approval is simply one step in the process by which the development moves forward. Throughout all stages of the process the Crown will be expected to continue to fulfil its duty to consult.

[100] For these reasons, I am satisfied that to date the Board's process afforded meaningful consultation sufficient that the Crown may rely upon it to fulfil its duty to consult. The environmental assessment and the Terms and Conditions imposed upon the GOA provide a reasonable degree of accommodation of the applicants' concerns about potential impacts caused by the Project upon their section 35 harvesting rights.

IV. Did the Board err in issuing the GOA?

A. *Were the Board's reasons adequate?*

[101] The applicants argue that the Board breached its duty to give reasons. In their submission, the Board gave no reasons for its decision to issue the GOA. To the extent the respondents argue that the decision should be read along with the environmental assessment, this argument is said to be unavailing because the environmental assessment dealt only with environmental concerns. The COGOA also requires the Board to consider things such as the safety of the Project and whether the proponents meet the financial responsibility requirements. As well, the Board is to

approve a project's Development Plan and ensure that the Minister has approved the required Benefits Plan. The Board's reasons are said not to deal with these issues.

[102] I see no merit in this submission. The Board's reasoning is found in the environmental assessment and the terms and conditions imposed on the GOA. These reasons deal with the real controversy: what are the potential impacts of the Project on the section 35 Aboriginal right to harvest wildlife.

[103] When the GOA is read in the light of the environmental assessment, the terms and conditions imposed upon the GOA and the entirety of the Board's record, this Court is well able to understand why the GOA was issued.

[104] As to the other items the Board was required to address, Condition 2 and the second page of the GOA letter deal with project safety. A development plan was not required under paragraph 5.1(1)(*a*) of the COGOA because the seismic survey did not involve the development of a pool or field. The applicants have acknowledged that the Minister approved the proponents' benefit plan (applicants' memorandum of fact and law at paragraph 99) and they have not alleged that the proponents do not meet the financial responsibility requirements.

[105] The Board's reasons were adequate.

B. *Did the Board reasonably conclude that the Project is not likely to result in significant adverse environmental effects?*

[106] The applicants say that once the Board acknowledged that the Project could have significant adverse environmental effects, the Board unreasonably accepted that the proposed mitigation measures would limit the adverse effects. The Board is said to have accepted "cherry-picked" scientific articles without assurances the articles were current, relevant, peer-reviewed or based on generally accepted marine biology methods.

[107] Again, I see no merit in this submission.

[108] The Board analysed the environmental effects in section 7 of the environmental assessment. After setting out the potential adverse environmental effects, the Board reviewed the proposed mitigation measures. It found those measures would minimize the possibility of marine mammals occurring in close enough proximity to the airgun discharge to suffer permanent or temporary hearing damage or behavioural change.

[109] After concluding the Project was not likely to cause significant adverse effects, the Board went on to consider any potential cumulative environmental effects. In the Board's view these would be minimal due to the mitigation measures.

[110] There was an extensive evidentiary record before the Board. The applicants have not pointed to any finding made by the Board that was not supported by any evidence. The

applicants have not established that the evidentiary record before the Board was in any way flawed.

C. *Did the Board fail to consider Aboriginal and treaty rights?*

[111] The applicants argue that because the environmental assessment contains no mention of the Inuit's constitutional and treaty rights, or the Crown's duty to consult, the Board failed to consider these rights and obligations.

[112] Again I see no merit in this submission. As explained above, the Board engaged in lengthy consideration about the extent of Aboriginal consultation and the potential impacts to traditional harvesting. The Board knew the Inuit had section 35 protected harvesting rights that had to be taken into account.

V. Was the Crown obliged to seek the advice of the Nunavut Wildlife Management Board?

[113] The applicants argue that the Crown breached the terms of the Nunavut Land Claims Agreement. Specifically, they say that Article 15.3.4 requires the Crown to consult the Nunavut Wildlife Management Board when Crown conduct "would affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area".

[114] Again, I disagree.

[115] Read in its entirety, Article 15.3.4 provides:

> Government shall seek the advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area. The NWMB shall provide relevant information to Government that would assist in wildlife management beyond the marine areas of the Nunavut Settlement Area. [Emphasis added.]

[116] From the wording of this provision the question to be answered is whether the decision to issue the GOA was a "wildlife management" decision.

[117] The Nunavut Wildlife Management Board is created in Part 2 of Article 5 of the Nunavut Land Claims Agreement. Its powers, duties and functions are enumerated in Articles 5.2.33 and 5.2.34. It is to be the main instrument of wildlife management and the regulator of access to wildlife. The scope of the Wildlife Management Board's powers demonstrate that wildlife management decisions are decisions that relate generally to things like establishing levels of total allowable harvest and the management and protection of wildlife and wildlife habitat.

[118] Wildlife management decisions do not include decisions such as the issuance of a GOA. This is reflected in Article 12 of the Nunavut Land Claims Agreement which deals with Development Impact. Under Article 12.2.2, it is the Nunavut Impact Review Board that is to screen project proposals and review the ecosystemic and socio-economic impact of proposed projects.

VI. Conclusion

[119] For the above reasons, I would dismiss the application for judicial review with costs payable by the applicants to the Attorney General of Canada. In these circumstances, I would have the proponents bear their own costs.

"Eleanor R. Dawson"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-354-14
STYLE OF CAUSE:	HAMLET OF CLYDE RIVER et al. v. TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS) et al. v. NATIONAL ENERGY BOARD
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 20, 2015
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. BOIVIN J.A.
DATED:	AUGUST 17, 2015

APPEARANCES:

Nader R. Hasan	FOR THE APPLICANTS HAMLET OF CLYDE RIVER ET AL.
Sandy Carpenter	FOR THE RESPONDENT TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS)
Nancy G. Rubin	FOR THE RESPONDENTS PETROLEUM GEO-SERVICES INC. (PGS) ET AL.
Kenneth Landa Donna Keats	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Andrew Hudson	FOR THE INTERVENER

SOLICITORS OF RECORD:

Ruby Shiller Chan Hasan Toronto, Ontario	FOR THE APPLICANTS HAMLET OF CLYDE RIVER ET AL.
Blake, Cassels & Graydon LLP Calgary, Alberta	FOR THE RESPONDENT TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS)
Stewart McKelvey Halifax, Nova Scotia	FOR THE RESPONDENTS PETROLEUM GEO-SERVICES INC. (PGS) ET AL.
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
National Energy Board Calgary, Alberta	FOR THE INTERVENER