Federal Court  Cour fédérale

Date: 20171019

Docket: T-1427-15

Citation: 2017 FC 932

Ottawa, Ontario, October 19, 2017

PRESENT: The Honourable Madam Justice Mactavish

REPRESENTATIVE PROCEEDING

BETWEEN:

WILLIAM ENGE, ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE NORTH SLAVE MÉTIS ALLIANCE

Applicant

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, GOVERNMENT OF THE NORTHWEST TERRITORIES, FORT SMITH MÉTIS COUNCIL, HAY RIVER MÉTIS GOVERNMENT COUNCIL, FORT RESOLUTION MÉTIS COUNCIL AND NORTHWEST TERRITORY MÉTIS NATION

Respondents

JUDGMENT AND REASONS

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I. Introduction

[1] William Enge is a Métis person and a member of the Métis community of the Great Slave Lake area in the Northwest Territories. He is also the President of the North Slave Métis Alliance (NSMA).

[2] Mr. Enge brings this application for judicial review on his own behalf and as the representative of the members of the NSMA. Mr. Enge says that he and the members of the NSMA have Aboriginal harvesting rights that have been judicially recognized and affirmed under subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[3] By this application, Mr. Enge challenges the adequacy of the consultation by the Minister of Indian Affairs and Northern Development with the members of the NSMA with respect to the "Northwest Territory Métis Nation Land and Resources Agreement-in-Principle" (NWTMN AiP) that was approved on July 31, 2015.

[4] Mr. Enge asserts that the members of the NSMA are a Métis people whose Aboriginal harvesting rights in the area north of Great Slave Lake in the Northwest Territories will be

adversely affected by a Final Agreement negotiated pursuant to the NWTMN AiP. He further asserts that Canada intends to extinguish the Aboriginal rights held by NSMA members to harvest in the area north of Great Slave Lake, notwithstanding the fact that the NSMA and its members have been largely excluded from the negotiations leading up to the conclusion of the NWTMN AiP.

[5] According to Mr. Enge, Canada's decision to exclude the NSMA from consultations was based on several errors of law and was, moreover, unreasonable. The result of these errors is that the parties were unable to have meaningful and fair discussions about how Canada should accommodate the Aboriginal rights held by NSMA members prior to it signing the NWTMN AiP.

[6] As a consequence, Mr. Enge asserts that negotiations towards a final Northwest Territory Métis Nation land and resources agreement (Final Agreement) should be stayed until such time as meaningful consultation with the NSMA can occur. This consultation should consider accommodation measures to address the NSMA's concerns with respect to the extinguishment of their Aboriginal harvesting rights as Métis north of Great Slave Lake.

[7] The respondent Minister of Indian Affairs and Northern Development (Canada) submits that this case is not fundamentally about the adequacy of Crown consultation, but is rather a challenge to the authority of the Northwest Territory Métis Nation (NWTMN) as the proper representative of the Métis people whose Aboriginal ancestors were indigenous to the south Slave region of the Northwest Territories. Canada further submits that the duty to consult does not arise in this case, as the members of the NSMA are part of the group with whom Canada has

been negotiating. In the alternative, Canada submits that if the Crown's duty to consult does arise here, the duty has been adequately discharged.

[8] Canada further disputes Mr. Enge's standing to bring this application as a representative of the NSMA. According to Canada, Mr. Enge did not obtain the authority of the members of the NSMA to bring this application, nor did he take effective steps to determine the prevailing views of the membership in relation to the NWTMN AiP. Consequently, Canada submits that Mr. Enge has not satisfied the requirements of Rule 114 (the provision of the *Federal Courts Rules* governing representative actions).

[9] The Government of the Northwest Territories (GNWT), the Fort Smith Métis Council, the Hay River Métis Government Council, the Fort Resolution Métis Council and the NWTMN have also been named as respondents to this application.

[10] The GNWT accepts that the NSMA was entitled to be consulted with respect to the NWTMN AiP. It submits, however, that, in coordination with Canada, it consulted with the NSMA regarding the potential adverse impact of the NWTMN AiP on the Aboriginal rights that are allegedly held by the members of the NSMA. The GNWT also states that deeper consultation and, if appropriate, accommodation will take place as the parties move closer to a final agreement. Given that consultation with the NSMA with respect to the final agreement is ongoing, the GNWT submits that this application is premature.

[11] The NWTMN is a registered society under the *Societies Act*, R.S.N.W.T. 1988, c. S-11 of the Northwest Territories. It is a representative body whose mandate is to serve and protect the interests of the Indigenous Métis of the south Slave region who are members of the three

respondent councils: the Fort Smith Métis Council, the Hay River Métis Government Council, and the Fort Resolution Métis Council. The NWTMN and the three respondent councils will be referred to collectively in these reasons as the NWTMN.

[12] The NWTMN notes that it is not a party to the consultations between Canada, the GNWT and the NSMA, and that it does not owe a duty of consultation to the NSMA. The NWTMN further contends that it has no control over how Canada or the GNWT approached the consultation process with the NSMA.

[13] The NWTMN submits, however, that while Mr. Enge's application for judicial review is framed in terms of the adequacy of consultation, it is, in reality, a challenge to the legal basis or authority of the NWTMN to enter into the Agreement in Principle on behalf of the Métis of the Northwest Territories. The NWTMN also denies that Mr. Enge has the requisite standing to bring this application as a representative proceeding because they say that he has failed to satisfy the requirements of Rule 114 of the *Federal Courts Rules*, SOR/98-106. Consequently, the NWTMN submits that this application should be dismissed on this basis alone.

[14] For the reasons that follow, I have concluded that Mr. Enge has the necessary standing to bring this application on behalf of the members of the NSMA, and that his application for judicial review is not premature. I have further concluded that the NSMA was entitled to be consulted with respect to the potential adverse impact of the NWTMN AiP on the Aboriginal rights held by its members. I am also satisfied that Canada erred by failing to share its preliminary assessment of the strength of the NSMA members' claim with the NSMA.

[15] Canada also misapprehended the severity of the potential impact that a final land and resources agreement negotiated in accordance with the terms of the NWTMN AiP would have on the Aboriginal rights of the NSMA's members. Having misunderstood the extent of the potential impact that such an agreement would have on the Aboriginal harvesting rights of the members of the NSMA, Canada entered into its consultation with the NSMA based on a fundamental misconception of the nature and scope of its duty to consult. Moreover, without fully understanding the seriousness of the potential impact that a land and resources agreement would have on the section 35 rights of the members of the NSMA, Canada could not properly assess what, if any, accommodation measures would be appropriate.

[16] Consequently, Mr. Enge's application for judicial review will be granted.

II. The Métis Parties

[17] Mr. Enge has been the President of NSMA since 2004. The NSMA is a registered society under the provisions of the *Societies Act*. It represents those members of the contemporary ethnic Métis community of the Northwest Territories who assert their Aboriginal rights as Métis north of Great Slave Lake. The over-arching objective of the NSMA is to protect the Aboriginal rights of its members in the area north of Great Slave Lake.

[18] The NSMA claims to have 283 members out of a community of approximately 500 people. I understand the parties to agree that many of these individuals have ancestral ties to the area south of Great Slave Lake. Membership in the NSMA is limited to "Indigenous Métis". Since 2011, individuals registered as "Indians" under the provisions of the *Indian Act*, R.S.C. 1985, c. I-5 have been expressly prohibited from membership in the NSMA by the organization's By-laws.

[19] The NSMA's Bylaws define an "Indigenous Métis" as being "a person who is descendant of the Métis People of the Northwest Territories including the North Slave area and is recognized by the Community of Indigenous Métis of the North Slave area as a descendant of the Métis People who resided in, or used and occupied the Northwest Territories including the North Slave area prior to the federal Crown taking effective control of their traditional lands including the North Slave area".

[20] The parties agree that there is only one Métis community in the Northwest Territories whose traditional territory encompassed the entirety of the Northwest Territories and the northern portion of the provinces that abut the Northwest Territories. However, as was noted earlier, the NSMA is not the only organization purporting to represent the interests of the Métis community. The NWTMN also claims to have a similar purpose, although its focus is predominantly on the area south of Great Slave Lake, whereas the members of the NSMA claim to have Aboriginal rights in the area north of Great Slave Lake.

[21] According to its Constitution, the objectives of the NWTMN include promoting the unity of Métis in the south Slave region of the NWT, as well as developing and implementing Métis land claims, the inherent right of self-government and constitutional development. The mandate of the NWTMN is also to serve and protect the interests of Indigenous Métis who are members of the Fort Smith Métis Council, the Hay River Métis Government Council and the Fort Resolution Métis Council. This mandate includes the affirmation, protection and recognition of Métis aboriginal rights throughout the traditional territory of the NWTMN.

[22] The NWTMN maintains that it represents the interests of all Indigenous Métis of the Northwest Territories regardless of their current residence. The By-laws of the NWTMN define an "Indigenous Métis" as being a person who has:

> a) resided in a designated community [i.e. Fort Smith, Fort Resolution, Hay River]; and
>
> b) used or occupied the South Slave on or before December 31, 1921; or
>
> c) is a descendant of a person described in (a) and (b);
>
> d) is a descendant of a person registered as an Indian under the *Indian Act* who:
>
> (i) resided in a designated community; and
>
> (ii) used and occupied the South Slave on or before December 31, 1921.
>
> e) is not registered as an Indian under the *Indian Act*, and
>
> f) is not enrolled as a beneficiary in another land claim agreement in Canada.

[23] While the NWTMN claims that 2,169 Indigenous Métis people across Canada are eligible for membership in the organization, it has refused to provide any actual membership numbers. The NWTMN says that it is currently undertaking a questionnaire process to identify additional Indigenous Métis who are eligible for membership in one of its three member Councils. The NWTMN is verifying the information provided by applicants, including information regarding their genealogy, such as birth certificates, death certificates, baptismal certificates and historic records.

III. The History of the Negotiations Leading Up to the NWTMN AiP

[24] In 1978, Canada accepted land claim submissions from the Indian Brotherhood of the Northwest Territories and the Métis Association of the Northwest Territories and agreed to

undertake the negotiation of a single land claim with both groups with respect to an area covering the entire Mackenzie Valley. This became known as the "Dene/Métis Land and Resource Negotiation".

[25] Because of the many familial and community connections between the Dene and the Métis of the Northwest Territories, Canada decided that the best approach was to negotiate a single land claim for all of the Aboriginal people indigenous to the Northwest Territories rather than to pursue a divisive approach, trying to distinguish between the Dene and the Métis for the purpose of the negotiations.

[26] Negotiations toward a single Dene/Métis Agreement proceeded throughout the 1980s and resulted in a Comprehensive Land Claim Agreement dated April 4, 1990 between Canada, the Dene Nation and the Métis Association of the Northwest Territories. However, neither the Dene Nation nor the Métis Association of the Northwest Territories ratified this agreement, and negotiations then ceased for a period of time.

[27] Following the failure of the Dene/Métis Comprehensive Land Claim Agreement, Canada subsequently entered into regional land claim negotiations at the request of the Métis, the Gwich'in and the Sahtu Dene. These negotiations proceeded on the basis of the Dene/Métis draft agreement and the regions that had been predetermined for land selection purposes: namely the Gwich'in, Sahtu, North Slave, South Slave and Dehcho regions of the Northwest Territories.

[28] Land claims agreements were concluded with the Gwich'in and Sahtu Dene in 1992, and with the Métis in 1993. A land claim and self-government agreement was subsequently

concluded with the Tlicho First Nation in 2005. This agreement largely covered the area known as the North Slave region.

[29] In the South Slave region, the First Nations (as represented by the Akaitcho Dene Treaty 8 Tribal Corporation) pursued Treaty Land Entitlement under Canada's Specific Claims Policy. However, Specific Claims (including Treaty Land Entitlements) are based on unfulfilled treaty obligations, and are only available to First Nations who had been signatories to treaties. As the Métis of the South Slave region did not have a treaty with Canada, they were excluded from the Specific Claims negotiation process.

[30] To address this situation, negotiations recommenced between the Métis (as represented by the South Slave Métis Tribal Council, a predecessor to the NWTMN), Canada and the GNWT. These negotiations led to the signing of the South Slave Métis Framework Agreement in 1996. According to the evidence of Christie Morgan, a senior negotiator with the federal Department of Indian Affairs and Northern Development (now Indigenous Affairs and Northern Development), Canada is negotiating an agreement with the NWTMN that is based, to a large extent, on Canada's Comprehensive Land Claims Policy. This Policy has guided the negotiation of regional land claims in the Northwest Territories.

[31] Ms. Morgan further deposes that the negotiation of a Final Agreement is intended to allow the indigenous Métis people of the South Slave region of the Northwest Territories who were eligible for enrollment under the failed Dene-Métis Agreement but were ineligible for Treaty Land Entitlement to participate in a modern land and resources agreement with Canada.

[32] Since 1996, the NWTMN, Canada and the GNWT have been actively negotiating the terms of the NWTMN AiP, which, as was noted earlier, was signed on July 31, 2015. The NWTMN AiP will form the basis for the negotiation of a Final NWTMN Land and Resources Agreement.

IV. The Discussions with the NSMA

[33] In addition to their negotiations with the NWTMN, Canada and the GNWT determined that it was also appropriate to consult with what Ms. Morgan described as "neighbouring Aboriginal groups" whose rights could potentially be affected by a final land and resources agreement. The purpose of this consultation would be to determine "if and how those concerns might be addressed in the AiP or in a Final Agreement".

[34] In order to identify the relevant groups for the purpose of consultation, Canada first identified those Aboriginal groups whose asserted or established Aboriginal or Treaty rights might fall within the NWTMN AiP's proposed Agreement Area. The Agreement Area covers a large area in the east of the Northwest Territories, largely to the south and east of Great Slave Lake. A copy of the map in the NWTMN AiP that identifies the Agreement Area is attached as an appendix to these reasons. Canada and the GNWT were aware that the NSMA asserted Aboriginal harvesting rights in the area north of Great Slave Lake. Consequently, the NSMA was identified as an appropriate Aboriginal group for Canada and the GNWT to consult with.

[35] While Mr. Enge asserts that Canada and the GNWT failed to consult with the NSMA prior to entering into the NWTMN AiP, there were in fact discussions between the parties. Although there is a dispute as to the adequacy of the consultation that took place, the parties did exchange correspondence with respect to the terms of the NWTMN AiP. The NSMA was,

moreover, provided with funding to assist them in advancing the claims of its members to Aboriginal harvesting rights in the area north of Great Slave Lake, and with an opportunity to provide the two governments with documentary evidence supporting these claims.

[36] Amongst other things, the NSMA provided the two governments with five reports (at least one of which had been commissioned by Canada itself) that described the history, ethnogenesis, traditional knowledge and land use patterns of the members of the NSMA. There were also two face-to-face meetings at which Mr. Enge and other representatives of the NSMA were able to discuss the terms of the NWTMN AiP and possible accommodation measures with representatives of Canada and the GNWT.

[37] While Canada had previously refused to consult with the NSMA, the two levels of government jointly wrote to the NSMA on October 10, 2012, advising that it would be consulted with respect to the NWTMN AiP, and asking for the name of a main contact person for the consultation process. The NSMA subsequently identified Mr. Enge as the contact person for the consultation process.

[38] The October 10, 2012 letter further asked the NSMA "to identify potential adverse impacts that the proposed NWTMN AiP may have on your Aboriginal group's potential or established Aboriginal or Treaty rights". In response, the NSMA provided a substantial amount of information to Canada and the GNWT, including documentation regarding the NSMA's section 35 harvesting rights and its concerns with the terms of the NWTMN AiP.

[39] On February 12, 2013, Canada wrote to Mr. Enge stating that it had reviewed the information submitted by the NSMA in support of its asserted section 35 rights and title and that

it had "determined the NSMA has not provided sufficient evidence to establish the existence of an ancestrally-based, present-day Métis community in the North Slave area with links to a historic Métis community in that area". As a consequence, Canada stated that "the NSMA have not established a credible claim to s. 35 Métis rights which would support recognition of the NSMA as a distinct s. 35 Métis rights-holding community".

[40] Despite having taken the position that the NSMA had not established that its members had a credible claim to section 35 Métis rights, Canada and the GNWT jointly wrote to NSMA on June 11, 2013 in an attempt to begin consultations with respect to the NWTMN AiP. They provided the NSMA with a copy of the draft NWTMN AiP, and set a deadline of July 26, 2013 for the NSMA to complete its review of the document. The two governments also offered funding to the NSMA to a maximum amount of $11,500 to support the consultation process.

[41] The June 11, 2013 letter to the NSMA noted that Canada and the GNWT were aware that the NSMA was asserting Aboriginal rights to harvest in the area north of Great Slave Lake. They went on to note that "[t]he draft NWTMN AiP contemplates providing non-exclusive harvesting rights … to Métis Members … throughout the proposed Agreement Area", which, it will be recalled, is an area to the south and east of Great Slave Lake. The letter further stated that "[t]here may exist *a small area of overlap* between the northwest corner of the proposed Agreement Area and the area over which the NSMA asserts an Aboriginal right to harvest" [my emphasis].

[42] Referring to the non-derogation clause in the draft NWTMN AiP, the June 11, 2013 letter went on to state that "[i]n the course of negotiations, Canada and the GNWT have been mindful to negotiate an agreement that would not affect the asserted Aboriginal or Treaty rights of groups

that are not party to the NWTMN final agreement". That said, Canada and the GNWT asked the NSMA to identify any concerns that it may have in the event that any part of the draft NWTMN AiP would adversely affect the asserted Aboriginal right of the NSMA's members to harvest in areas that overlapped with the Agreement Area.

[43] By letter dated June 25, 2013, Mr. Enge provided Canada and the GNWT with a copy of the decision of the Northwest Territories Supreme Court in *Enge v. Mandeville*, 2013 NWTSC 33, [2013] N.W.T.J. No. 38 [*Mandeville*], asking whether that decision affected Canada's assessment of the strength of the NSMA's section 35 claim.

A. *The Mandeville Decision*

[44] *Mandeville* was another proceeding commenced by Mr. Enge, this one in the Northwest Territories Supreme Court. There, Mr. Enge sought judicial review of a decision by the Territorial Minister of the Environment and Natural Resources to deny a portion of the annual quota for the harvest of Bathurst caribou to members of the NSMA.

[45] Based on evidence similar to that before this Court, the Court in *Mandeville* found that there was some evidence that established, on a *prima facie basis*, that there is a contemporary rights-bearing Métis community in the Great Slave Lake area of which Mr. Enge and the other members of the NSMA are members: at para. 207. In addition, the Court found that Mr. Enge had presented *prima facie* evidence that he is a Métis person through his long-term self-identification as a Métis, his ancestral connection to an historic Métis figure, and community acceptance by other Métis people: at para. 213.

[46] The Court also found that Mr. Enge had established a good *prima facie* claim that he and the members of the NSMA had the right to hunt caribou, based upon their asserted rights as Métis people who have traditionally hunted in the Great Slave Lake area: *Mandeville* at para. 230. In addition, the Court found that the Minister's decision to deny Mr. Enge and the other members of the NSMA the opportunity to participate in the limited Aboriginal caribou harvest had a not insignificant adverse effect on their Aboriginal rights: at para. 236.

[47] In addition, the Court found that the GNWT's consultation process with respect to the caribou harvest at issue in *Mandeville* was not reasonable: at para. 271. As a consequence, the Court concluded that the GNWT had erred in failing to conduct a preliminary assessment of the strength of the claims of Mr. Enge and the members of the NSMA, and the potential adverse effects of denying them a portion of the limited Aboriginal harvest of the Bathurst caribou herd. According to the Court, the GNWT had further erred in fulfilling its duty to consult by failing to conduct a reasonable consultation process: at para. 282.

[48] After reviewing the decision in *Mandeville*, Canada advised Mr. Enge that it had revised its preliminary assessment of the strength of the NSMA's claim to rights under section 35. In a letter to Mr. Enge dated August 16, 2013, Canada acknowledged that the NSMA "has a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands, and are entitled to an appropriate measure of consultation when that asserted right may potentially be adversely impacted by the Crown's action".

[49] However, Canada's letter further stated that its revised assessment "is not a determination by Canada that the North Slave Métis Alliance has any section 35 rights. The law relating to the

duty to consult makes it clear that an assessment of the strength of the claim for the purposes of consultation is not a rights-determination process".

B. *The NSMA's Submissions*

[50] In a letter dated August 15, 2013, Mr. Enge provided the NSMA's initial submissions with respect to the NWTMN AiP, identifying the portions of the agreement that raised concerns on the part of the NSMA. Mr. Enge also indicated that the NSMA was concerned that the definition of "Métis" in the NWTMN AiP was very broad. The NWTMN AiP defines the term "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan [collectively the "Dene"] ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such person". Mr. Enge also questioned whether it was Canada's intention "that if a person fails to meet all three criteria, that that person would not be considered Métis for the purposes of the Final Agreement".

[51] Mr. Enge's August 15, 2013 letter specifically raised the issue of how harvesting rights were being dealt with in the draft NWTMN AiP. He asked whether it was Canada's intention "to extinguish the common law Aboriginal rights to harvest wildlife, fish, plants and trees throughout the NWT held by Métis eligible to be enrolled under the Final Agreement and confer new rights by the Final Agreement to harvest wildlife, fish, plants and trees exercisable only in the Agreement Area … to Métis eligible to be enrolled under the Final Agreement?" Or, in the alternative, Mr. Enge asked whether it was Canada's intention "that the certainty provided under subsection 2.3.1 will only apply to the common law Aboriginal rights of the current members of the NWTMN and its affiliate Métis Councils?"

[52] The concerns of NSMA members were discussed during two face-to-face meetings between NSMA, Canada, and the GNWT. Present at those meetings were Mr. Enge and the NSMA's legal counsel, and representatives of Canada and the GNWT. The first such meeting occurred on August 29, 2013, and the second on October 24, 2013. The purpose of these meetings was to for Canada and the GNWT to discuss the draft NWTMN AiP with the NSMA.

[53] At the August 29 meeting, the NSMA representatives requested additional funding to allow them to participate fully in the consultation process. Canada refused this request, but agreed to consider further requests for additional funding as the parties moved toward a Final Agreement.

[54] The principle concern expressed by the representatives of the NSMA at this first meeting was that neither Canada nor the GNWT be permitted to unilaterally extinguish the Aboriginal harvesting rights of the members of the NSMA that had received judicial recognition in the *Mandeville* case. To this end, the NSMA proposed a modification to the provisions dealing with who was to be bound by a Final Agreement.

[55] The draft NWTMN AiP provided that the agreement would provide certainty with respect to the use and ownership of lands in the Northwest Territories by individuals who were "eligible to be enrolled under the Final Agreement". According to the "Eligibility" provision in Chapter 3.1.1 of the NWTMN AiP, "[a]n individual will be 'eligible to enrolled' under the Final Agreement if he or she is a Canadian citizen who a) is Métis; or b) was adopted as a Child, under Laws or under NWTMN custom, by a Métis or is a descendant of such person". The term "Métis" is defined in Chapter 1 of the NWTMN AiP as meaning "an Aboriginal person of Cree,

Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such people".

[56] Chapter 2.4.1 of the NWTMN AiP states that "[t]he Final Agreement will provide that the NWTMN represents and warrants to Government that, with respect to the matters dealt with in the Final Agreement, it has the authority to enter into the Final Agreement on behalf of all individuals who are *eligible to be enrolled* under the Final Agreement in accordance with the Eligibility and Enrolment chapter." [my emphasis].

[57] The NSMA does not accept that the NWTMN has the mandate or authority to enter into a Final Agreement on behalf of all of the individuals who are "eligible to be enrolled" under the agreement. According to the NSMA, this warranty would be a misrepresentation of the facts, as the NSMA is not a member society of the NWTMN and was not a party to the NWTMN AiP negotiations between Canada, the GNWT, and the NWTMN. The NSMA thus asked that the NWTMN AiP be amended so that the words "eligible to be enrolled" in the "Certainty" provision (Chapter 2.3.1) be replaced with the words "who are members of" so that the amended provision would read "[t]he Final Agreement will provide certainty with respect to the use and ownership of lands and resources within the Northwest Territories and the Wood Buffalo National Park by Métis *who are members of* the NWTMN and the Métis Councils" [my emphasis].

[58] Also relevant is the "non-derogation" clause (Chapter 2.5.1) in the NWTMN AiP, which provides that "No provision in the Final Agreement will be construed to … affect …any Aboriginal Rights of any Aboriginal people other than individuals *eligible to be enrolled* under the Final Agreement" [my emphasis].

[59] In asking that the words “eligible to be enrolled” be deleted from the “Certainty” provision and the “non-derogation” clause in the NWTMN AiP, the NSMA’s concern was that if the language was not altered, these provisions would operate to extinguish at least some NSMA members’ rights as Métis north of Great Slave Lake based solely on the fact that the Dene ancestry of these members would make them “eligible to be enrolled” under the Final Agreement. This extinguishment would, moreover, occur without the NSMA members’ elected representatives having participated in the negotiations.

[60] Canada’s position was that if an individual held Aboriginal rights in the area north of Great Slave Lake as a member of another Aboriginal people (independent of his or her other ancestral ties to the south Slave region of the Northwest Territories), the ability of these individuals to exercise their Aboriginal rights should not be affected by a Final Agreement by virtue of the agreement’s “non-derogation” clause. If, however, the individual’s ancestral ties were just to the south Slave area, and they met the eligibility criteria of the Final Agreement, then that individual would be bound by the decision of the collective to ratify the agreement. This would be the case whether or not the individual had chosen to align him- or herself with another organization such as the NSMA.

[61] Mr. Enge’s counsel stated that its proposed changes to the wording of the NWTMN AiP would address two fundamental interests on the part of the NSMA. First, they would ensure that the Aboriginal rights of the NSMA members, including their right to harvest in the area north of Great Slave Lake, could only be extinguished where those NSMA members had applied for, and been accepted for enrollment under the Final Agreement. This would mean that there could be no

extinguishment by operation of law, as there would have to be a clear choice made by individuals who elected to sign on to the agreement.

[62] Mr. Enge further noted that this accommodation measure would also allow for the South Slave Métis people to proceed with their Final Agreement.

[63] Canada and the GNWT rejected the NSMA's proposed modification to the language of the NWTMN AiP at the October 24, 2013 meeting on the basis that it was inconsistent with Canada's approach to negotiations of agreements of this nature, which was that agreements were intended to deal with the rights of *all* of those who are eligible for enrollment under the agreement in question.

[64] The NSMA then proposed that it be included as a party to post-NWTMN AiP negotiations towards a Final Agreement, so as to ensure that NSMA members had meaningful participation in negotiations that were intended to extinguish their Aboriginal hunting rights in the North Slave region. This proposal was also rejected by Canada and the GNWT.

C. *The End of the Discussions*

[65] Following a further exchange of correspondence, Canada and the GNWT advised the NSMA by letter dated April 7, 2014 that there would be no further consultation with respect to the NWTMN AiP. This letter stated that Canada and the GNWT were negotiating with the NWTMN "by virtue of its members' Aboriginal ancestry, and not on the basis of the NWTMN representing a rights-bearing *Powley* community" [referring to the criteria for determining who qualifies as a Métis established by the Supreme Court in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R 207.

[66] Canada and the GNWT took the position that "*if* the NSMA is a rights-bearing collective as contemplated by the Supreme Court of Canada in *Powley*, then the NSMA would be an Aboriginal group distinct from the NWTMN" and the rights of its members would thus be protected by virtue of the non-derogation clause contained in the Agreement. Canada and the GNWT further suggested that the NSMA discuss the situation with the NWTMN to see if the two organizations could come to some form of understanding.

[67] During the process leading up to the signing of the NWTMN AiP, Mr. Enge was in communication with the President of the NWTMN with respect to the Agreement in Principle. A meeting between representatives of the two organizations took place on December 5, 2014. However, the two sides were unable to reach an agreement on the issues that divided them.

[68] By letter dated August 18, 2015, Canada and the GNWT officially notified NSMA that the NWTMN AiP had been concluded on July 31, 2015. This followed the ratification of the Agreement at a meeting of the NWTMN at which 43 unidentified members of the organization were present.

V. The Decision under Review

[69] The decision at issue in this proceeding is Canada's decision to enter into the NWTMN AiP with the NWTMN and the GNWT.

[70] The NWTMN AiP confirms the right of "Métis members" to harvest all species of wildlife year-round in the "Agreement Area", which, as was mentioned earlier, is defined as that portion of the Northwest Territories that is to the south and east of Great Slave Lake. If the terms of the NWTMN AiP are ultimately incorporated into a Final Agreement between Canada, the

NWTMN and the GNWT, Mr. Enge states that the effect of this Agreement would be to extinguish the judicially-recognized section 35 right of the members of the NSMA to hunt caribou in the area to the north of Great Slave Lake. Indeed, Canada has confirmed that its intent is that a final land and resources agreement with the Métis of the Northwest Territories would extinguish the section 35 harvesting rights outside of the Agreement Area for Métis whose ancestors lived in the South Slave area.

[71] As noted earlier, the NWTMN AiP defines the term "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such people".

[72] The applicants say that Canada and the GNWT are negotiating an agreement with the NWTMN that is blind to the constitutional distinction between "Métis" and "Indian" peoples. Eligibility under the NWTMN AiP is based on the Dene ancestry of the members of the NWTMN and their ancestral ties to the area south of Great Slave Lake. Mr. Enge notes that Aboriginal ancestry is just one of the *indicia* of being a Métis, and that as it is used in section 35 of the *Constitution Act, 1982*, the term "Métis" "does not encompass all individuals with mixed Indian and European heritage". It instead refers to "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears": both quotes from *Powley*, above at para. 10.

[73] Ms. Morgan, who, it will be recalled, was Canada's senior negotiator in the negotiations with respect to the Northwest Territories land and resources agreement, acknowledged that the definition of "Métis" in the NWTMN AiP does not incorporate the elements of the *Powley* test.

[74] In contrast, Mr. Enge asserts that the members of the NSMA are ethnically "Métis", as contemplated by subsection 35(2) of the *Constitution Act, 1982*, as they satisfy the criteria established by the Supreme Court in the *Powley* case. They are, moreover, a distinct section 35 rights-bearing Métis collective whose traditional harvesting activities were carried out north of Great Slave Lake - an area that is largely outside the area that was being dealt with in the NWTMN negotiations.

[75] In accordance with the non-derogation clause in the NWTMN AiP, no provision in any Final Agreement between Canada, the NWTMN and the GNWT will be construed to affect any Aboriginal or treaty rights of any Aboriginal People other than individuals who are "eligible to be enrolled under the Final Agreement".

[76] Mr. Enge acknowledges that those members of the NSMA who share ancestral ties to the Dene of the South Slave region would be "eligible to be enrolled" under the Final Agreement, and that that the non-derogation clause would only protect the rights of Aboriginal groups who are distinct from those with ancestral ties to the Dene of the south Slave region. Mr. Enge submits, however, that it should be open to such individuals to choose to assert *Powley*-type Métis rights through the NSMA, rather than participate in the NWTMN negotiation process by virtue of their Dene ancestry.

[77] Before addressing the merits of Mr. Enge's application for judicial review, however, there is a preliminary matter that must be addressed. That is, as was mentioned earlier, Canada and the NWTMN assert that Mr. Enge has failed to satisfy the requirements of Rule 114 of the *Federal Courts Rules*, as he has not been properly authorized to act on behalf of the members of the NSMA, and he has failed to demonstrate that he can fairly and adequately represent their

interests. As the issue of Mr. Enge's standing to bring this application could potentially be determinative of this application, it will be addressed first.

VI. Does Mr. Enge have Standing to Bring this Application on Behalf of the Members of the NSMA?

[78] Mr. Enge brings this application for judicial review on his own behalf and on behalf of the members of the NSMA. He acknowledges that as such, the application is governed by the provisions of Rule 114(1) of the *Federal Courts Rules*, which provides that:

114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that	114 (1) Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27 ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :
(a) the issues asserted by or against the representative and the represented persons	a) les points de droit et de fait soulevés, selon le cas :
(i) are common issues of law and fact and there are no issues affecting only some of those persons, or	(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,
(ii) relate to a collective interest shared by those persons;	(ii) visent l'intérêt collectif de ces personnes;
(b) the representative is authorized to act on behalf of the represented persons;	b) le représentant est autorisé à agir au nom des personnes représentées;
(c) the representative can fairly and adequately represent the interests of the represented persons; and	c) il peut représenter leurs intérêts de façon équitable et adéquate;

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding	d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

[79] Canada and the NWTMN submit that Mr. Enge has not satisfied the requirements of Rule 114(1)(b) and Rule 114(1)(c). That is, they argue that he has not been duly authorized to act on behalf of the members of the NSMA, and he has not demonstrated that he can fairly and adequately represent their interests. The GNWT does not dispute Mr. Enge's standing to bring this application on behalf of the members of the NSMA, perhaps because they conceded as much in *Mandeville*.

[80] While accepting that Mr. Enge is a member of a rights-bearing group, Canada and the NWTMN submit that this does not give him standing to bring this application.

[81] Citing the Supreme Court of Canada's decisions in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 30, [2013] S.C.R. 227, and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 35, [2010] 3 S.C.R. 103, these respondents observe that Aboriginal rights are collective rights, and the Crown does not owe a duty to consult individual members of an Aboriginal group. Consequently, Canada and the NWTMN submit that if Mr. Enge has not been duly authorized to bring this application for judicial review on behalf of the members of the NSMA, it follows that the application should be summarily dismissed.

A. *Was Mr. Enge Authorized to Act on Behalf of the Members of the NSMA?*

[82] Rule 184(1) of the *Federal Courts Rules* provides that allegations of fact asserted in a pleading that have not been admitted by the opposing party or parties will be deemed to have been denied. Rule 184(2)(a) further provides that is it not necessary for a party to prove his or

her right to bring a claim in a representative capacity, unless that right has been denied by an adverse party. That is the case here.

[83] In support of its contention that Mr. Enge has not been duly authorized to act on behalf of the members of the NSMA in this case, Canada notes that no specific authority was given to Mr. Enge by the members of the NSMA prior to the filing of his application for judicial review on August 26, 2015. No resolution of the Board of Directors of the NSMA was ever passed authorizing this application, and because minutes of Board meetings are not kept, it is not clear whether the bringing of this application was ever discussed or approved by the Board of the NSMA.

[84] According to Canada, the only authorization given for Mr. Enge to bring this application for judicial review is the *ex post facto* resolution passed at an Annual General Meeting of the NSMA that was held on April 9, 2016. This resolution ratified the filing of this application some seven months earlier. While acknowledging that such after-the-fact approval might by sufficient to comply with the requirements of Rule 114(1)(b) in some cases, Canada contends that it is not sufficient in this case because of the inadequacies of the notice that was given to members of the NSMA with respect to the Annual General Meeting of the organization.

[85] One advertisement informing the public of the upcoming Annual General Meeting of the members of the NSMA was placed in "*The Yellowknifer*", a local Yellowknife newspaper. Canada acknowledges that this notice complied with the requirements of Article 8.2 of the NSMA's By-laws, which require that notice of an Annual General Meeting be given by way of "public advertisement" not less than 30 days prior to the date of the meeting. However, Canada

says that there is good reason to believe that many of the members of the NSMA were unaware of the meeting.

[86] In support of this contention, Canada points out that many of the NSMA's members do not live in Yellowknife and would thus not have seen the advertisement. Moreover, the NSMA holds Annual General Meetings only sporadically, with the last such meeting having taken place in 2013. Consequently, the members of the NSMA would have had no reason to expect an Annual General Meeting to take place in April of 2016. Canada further notes that there were any number of ways that the NSMA could have given notice of its upcoming Annual General Meeting to its members, including, for example, by posting a notice on the NSMA's website, sending notice to members of the NSMA by regular mail or email, or including a notice in a NSMA newsletter. For whatever reason, it chose not to avail itself of any of these methods of communication.

[87] When he was asked in cross-examination why none of these other methods were used to provide NSMA members with notice of the upcoming Annual General Meeting, Mr. Enge stated that a single notice in the newspaper "was good enough for the Registrar of Societies so it is good enough for the NSMA". Mr. Enge further suggested that the onus was on members of the NSMA who lived outside of Yellowknife to keep themselves informed as to what was going on with the organization.

[88] Canada notes that Mr. Enge's claim to having had a "clear mandate" to pursue this application stemmed not from the collectively expressed views of the members of the NSMA who had been informed of the contents of the NWTMN AiP, but rather from the objects of the organization, as set out in the NSMA's Constitution, and from the provision in NSMA

membership application forms designating the NSMA as the representative of the members' interests. Canada says that such a mandate is "too general" to support the proposition that the members of the NSMA had specifically authorized Mr. Enge to commence legal proceedings on their behalf, the results of which would be binding on them.

[89] The NWTMN notes that the position taken by the NSMA with respect to the NWTMN AiP was formulated by Mr. Enge, his brother, his cousin and his legal counsel, and that the members of the NSMA were not consulted regarding their views of the NWTMN AiP prior to the commencement of this application for judicial review. Mr. Enge made virtually no effort, moreover, to inform the members of the NSMA of the issues that he had raised during the consultation process with respect to the NWTMN AiP, and he made only minimal effort to seek the views of the NSMA's membership and their authority to commence this proceeding.

[90] The NWTMN also argues that Mr. Enge seemed to accept that a specific mandate to commence this application for judicial review was required. That is, when he was asked why he had sought a resolution authorizing him to bring this application for judicial review after he had already done so, Mr. Enge explained that "[t]he North Slave Métis Alliance Board of Directors felt it was necessary to secure a general mandate and confirmation from its members that this judicial review was in the best interests of the North Slave Métis Alliance people".

[91] The NWTMN notes that the NSMA's 2016 Annual General Meeting was attended by only 22 unnamed members of the NSMA, out of a total membership of 283. The NWTMN submits that the low turnout was explained by the inadequacy of the notice given with respect to the meeting, the result of which is that this retroactive authorization does not provide sufficient authority for Mr. Enge to bring this application as a representative proceeding. This is especially

so, the NWTMN says, in light of the fact that the advertisement in "*The Yellowknifer*" did not specify that the membership would be asked to vote on a resolution authorizing Mr. Enge's actions in bringing this application on behalf of the NSMA's members. While no copy of the advertisement appears in the record, Mr. Enge stated in his cross-examination that the advertisement simply indicated that "the following business will be conducted: financial statements, resolutions, something like that".

[92] Mr. Enge argues that independent of any resolution specifically authorizing the commencement of this application for judicial review, he had the requisite authority to commence this application by virtue of his office as President of the NSMA. He further submits that he can personally assert section 35 Aboriginal rights through this application on his own behalf and on behalf of others, as he is himself a member of the Métis of the north Slave area who has section 35 Aboriginal harvesting rights. Finally, Mr. Enge contends that there is no evidence before the Court of any other organization (including the NWTMN) that is authorized to represent Métis asserting harvesting rights in the area to the north of Great Slave Lake.

B. *The History and Purpose of Rule 114*

[93] In determining whether Mr. Enge has the necessary standing to bring this application on behalf of the members of the NSMA, it is helpful to start by reviewing the history and purpose of Rule 114.

[94] The *Federal Courts Rules* historically had a rule permitting representative proceedings which only applied to actions, and not to applications. The rule was, however, repealed in 2002 when the *Rules* were amended to allow for class actions. The view at the time was that proceedings that had previously been brought as representative actions would now be brought as

class actions: Chief Justice Allan Lutfy and Emily McCarthy, "*Rule-Making in a Mixed Jurisdiction: the Federal Court (Canada)*" (2010) 49 S.C.L.R. (2d) 313 at para. 33.

[95] Rule 114 was re-introduced into the *Federal Courts Rules* a few years later, however, at the request of members of the Aboriginal litigation bar who submitted that representative proceedings were more suitable than class actions for the group litigation of claims relating to Aboriginal and Treaty rights. Not only do representative actions not have the costly and complex certification requirements of class actions, there is, moreover, an important distinction between the two types of proceeding. Members of a class have the ability to opt out of a class action, something that is not appropriate when collective Aboriginal rights are being asserted. In contrast, in representative proceedings, all of the members of a group will be bound by the outcome of the proceeding: *Gill v. Canada*, 2005 FC 192 at para. 13, 271 F.T.R. 139; Lutfy and McCarthy, above at para. 38.

[96] The re-enacted Rule 114 established a number of requirements that a representative party must meet in order to protect the individual members of Aboriginal groups: *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada*, 2012 FC 517 at para. 84, 409 F.T.R. 82. One such requirement is that a representative applicant be duly authorized to act on behalf of the represented persons.

[97] As the Supreme Court observed in *Behn*, "[t]he duty to consult exists to protect the collective rights of Aboriginal peoples": above at para. 30. Because of the collective nature of Aboriginal rights, the duty to consult is not owed to individuals, but rather to the Aboriginal group that holds the section 35 rights: *Beckman*, above at para. 35. Consequently, the fact that Mr. Enge may himself enjoy section 35 harvesting rights does not give him a personal right to be

consulted with respect to the NWTMN AiP, nor is it enough to allow him to represent the other members of the NSMA in this application.

[98] This is because self-appointed individuals will not be permitted to assert collective Aboriginal rights on behalf of an Aboriginal community: *Ross River Dena Council v. Canada (Attorney General)*, 2009 YKSC 38 at para. 26, [2009] Y.J. No. 55 citing *Queackar-Komoyue Nation v. British Columbia (Atty. Gen.)*, 2006 BCSC 1517 at para. 35, [2007] 1 C.N.L.R. 286. An Aboriginal group can, however, authorize an individual or organization to represent it for the purpose of asserting its section 35 rights.

[99] The question, then, is whether Mr. Enge has been properly authorized to assert collective Aboriginal rights on behalf of the members of the NSMA.

C. *The Sufficiency of the Authority Given to Mr. Enge*

[100] Mr. Enge contends that independent of any resolution specifically authorizing the commencement of this application for judicial review, he had the authority to commence this application by virtue of his office as the duly-elected President of the NSMA, an office that he has held since 2004. As will be explained below, I agree with this submission.

[101] According to its Constitution, the NSMA is an organization whose purpose is "to advance the interests of its members by whatever means as are appropriate", and to promote and support the recognition and advancement of the Aboriginal rights of the Métis community of the North Slave area of the Northwest Territories.

[102] The objects of the NSMA include "undertak[ing] any activities related directly or indirectly that are of interest or concern to the Alliance", and "advanc[ing] and support[ing] the

constitutional, legal, political, social and economic rights of the Indigenous Métis of the North Slave area of the Northwest Territories". The objects of the NSMA also include "negotiat[ing], ratify[ing] and implement[ing] agreements to advance and support the inherent right of self-government and self-determination of the community of Indigenous Métis of the North Slave area in the Northwest Territories for the benefit of the Alliance and its members between the federal Crown as represented by the Government of Canada and the territorial Crown as represented by the Government of the Northwest Territories".

[103] Thus the assertion of Aboriginal harvesting rights in the area north of Great Slave Lake is part of the very *raison d'être* of the NSMA, and Mr. Enge's actions in bringing this application for judicial review are entirely consistent with the objects of the organization.

[104] Furthermore, the NSMA's membership application includes a provision whereby applicants confirm that they have voluntarily chosen the NSMA as their sole representative for the purpose of pursuing any Aboriginal rights that they may have in the North Slave Region of the Northwest Territories. This further supports Mr. Enge's authority to bring this proceeding on behalf of the members of the NSMA.

[105] As a registered society, the NSMA has all the rights and powers of a corporation: *Societies Act*, subsection 4(2). Corporations, in turn, have all the rights, powers and privileges of natural persons: *Business Corporations Act*, S.N.W.T. 1996, c.19, subsection 15(1). The *Business Corporations Act* further provides that "it is not necessary for a bylaw to be passed in order to confer any particular power on the corporation or its directors": subsection 16(1).

[106] The By-laws of the NSMA do, however, provide that the Board of Directors of the NSMA is the governing body of the organization and is responsible for upholding its Constitution. The President of the NSMA has overall responsibility for the governance of the day-to-day business and activities of the organization.

[107] Mr. Enge evidently developed the position taken by the NSMA with respect to the NWTMN AiP in conjunction with two members of the organization's Board of Directors. Mr. Enge has further stated that the rest of the Board members were kept apprised of the position that he and the other two Board members were taking in their discussions with Canada and the GNWT. This is consistent with the role of Mr. Enge as President and of the Board of Directors as the governing body of the NSMA.

[108] As the Manitoba Court of Appeal noted in *Chartrand v. De la Ronde* (1996), 113 Man.R. (2d) 12 at para 50, [1996] M.J. No. 433, (citing *Shaw & Sons (Salford) Ltd. v. Shaw*, [1935] 2 K.B. 113 (C.A.) at p. 134), "[a] company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting". Canada and the NWTMN have not identified any provision in either the NSMA's Constitution or its By-laws that require that the members of the NSMA approve any litigation brought on their behalf. I am thus not persuaded that it was necessary for Mr. Enge to obtain the specific approval of the membership of the NSMA before commencing this application for judicial review.

[109] Moreover, the Court went on in *Shaw* to note that "[t]he only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the

directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove".

[110] Mr. Enge was first elected President of the NSMA in 2004. According to Article 5 of the NSMA's By-laws, elections are to be held every four years. Consequently, it appears that Mr. Enge would likely have been re-elected President of the NSMA in 2016 – after this application was commenced, and after he had successfully asserted Aboriginal harvesting rights in the area north of Great Slave Lake on behalf of the members of the NSMA in the *Mandeville* case.

[111] Mr. Enge's re-election to the Presidency of the NSMA in 2016 suggests that the members of the organization were satisfied with his actions in bringing both of these cases.

[112] Indeed, it appears that the main impetus for the commencement of this application was to ensure that Canada and/or the GNWT could not extinguish the Aboriginal harvesting rights of the members of the NSMA in the area north of Great Slave Lake that received judicial recognition in *Mandeville*.

[113] Moreover, without losing sight of the fact that the onus is on Mr. Enge to demonstrate that he has the requisite authority to bring this application for judicial review on behalf of the members of the NSMA, I note that neither Canada nor the NWTMN has identified a single member of the NSMA who does not support Mr. Enge's actions in bringing this application on his or her behalf.

[114] Finally, even if the specific authorization of the members of the NSMA was required for Mr. Enge to commence this application, such authority was obtained (albeit it on an after-the-fact

basis) through the resolution passed at the Annual General Meeting of the organization held on April 9, 2016 ratifying the filing of this application.

[115] This resolution provides that:

> The members affirm that the President of the North Slave Métis Alliance, acting with the approval of the NSMA Board of Directors, has the authority to pursue all necessary legal and political actions to preserve NSMA members' Aboriginal rights as Métis of the Great Slave Lake area of the Northwest Territories from the effect of the Final Agreement as signified by NWTMN AiP including, but not limited to, the prosecution of the Application for Judicial Review, Federal Court File No. T-1427-15.

[116] While better notice of the Annual General Meeting of the NSMA could perhaps have been provided, the fact is that the notice that was given complied with the provisions of both the *Societies* Act of the Northwest Territories and the By-laws of the NSMA.

[117] For all of these reasons, I am satisfied that Mr. Enge has sufficient authority to bring this application on behalf of the members of the NSMA so as to satisfy the requirements of Rule 114(1)(b) of the *Federal Courts Rules*.

[118] The next question is whether Mr. Enge can fairly and adequately represent the interests of the members of the NSMA.

D. *Has Mr. Enge Demonstrated that He Can Fairly and Adequately Represent the Interests of the Members of the NSMA?*

[119] The respondents Canada and the NWTMN also claim that Mr. Enge has failed to demonstrate that he can fairly and adequately represent the interests of the members of the NSMA as he has failed to take reasonable steps to inform himself of their views. As a result, they

say that he is unaware of the opinions of most of the members of the NSMA with respect to the NWTMN AiP.

[120] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41, [2001] 2 S.C.R. 534, the Supreme Court of Canada addressed the type of considerations that a court should take into account in assessing whether an individual litigant has the capacity to adequately represent a group. Amongst other things, the Supreme Court stated that regard may be given to "the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally)". The Court went on to state that "[t]he proposed representative need not be 'typical' of the class, nor the 'best' possible representative". The Court should, however, be satisfied that the proposed representative "will vigorously and capably prosecute the interests of the class", citing W. K. Branch, *Class Actions in Canada* (1998), at paras. 4.210-4.490; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 729-32.

[121] While the Court's comments were made in the context of class actions, they are also relevant in the case of representative proceedings.

[122] Inasmuch as Canada and the NWTMN's argument relates to the extent of Mr. Enge's consultation with the members of the NSMA before bringing this application for judicial review, I have already concluded that he had the necessary authority to bring this application for judicial review on behalf of the members of the NSMA, and that his action in doing so and the position taken in the application accords with the NSMA's Constitution. He has, moreover, demonstrated through his leadership role in the *Mandeville* case that he has the necessary knowledge of the

facts and issues involved in this application, coupled with the ability to successfully assert section 35 Aboriginal harvesting rights on behalf of the members of the NSMA. Mr. Enge is, moreover, represented by experienced counsel who successfully prosecuted the *Mandeville* case on behalf of Mr. Enge and the members of the NSMA.

[123] Consequently I am satisfied that Mr. Enge has satisfied the requirements of Rule 114(1)(c), and that he can fairly and adequately represent the interests of the members of the NSMA in this application.

[124] This then takes us to the merits of the application for judicial review.

VII. The Issues

[125] Mr. Enge asserts that Canada has failed in its duty to properly consult with the members of the NSMA prior to entering into the NWTMN AiP with the NWTMN. Consequently he asks, amongst other things, that negotiation of any Final Agreement be stayed until such time as meaningful consultation and accommodation has occurred between Canada and the NSMA with respect to the concerns that it has raised.

[126] In particular, Mr. Enge asserts that Canada has erred in law by:

(1) Failing to conduct a preliminary assessment of the strength of the NSMA members' claim;

(2) Failing to correctly identify the parameters of the scope and content of its duty to consult;

(3) Failing to reassess the strength of the NSMA members' claims during the consultation process; and by

(4) Relying on the non-derogation clause in the NWTMN AiP as a mitigation measure.

[127] Mr. Enge further asserts that the consultation process that was carried out by Canada was unreasonable because it:

(1) Took a rigid and inflexible position by relying on its regional claims negotiation policy and ignoring legal principles;

(2) Took an "ends justify the means" approach to consultation; and

(3) Refused to conduct deep consultation and to consider appropriate accommodation measures given the extreme nature of the potential adverse effects contemplated by the NWTMN AiP.

[128] Before addressing Mr. Enge's issues, however, I will first address the GNWT's argument that this application for judicial review should be dismissed on the basis that it is premature. I will also address Canada's argument that no duty to consult with the NSMA was triggered in this case, as the members of the NSMA are part of the Métis community of the Northwest Territories – the group with whom Canada has been negotiating, as represented by the NWTMN.

[129] In order to put the issues raised by this application into context, however, it is helpful to start by reviewing the law relating to the source and function of the duty to consult.

VIII. The Source and Function of the Duty to Consult

[130] As the Supreme Court of Canada observed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the management of the relationship between Canada's Aboriginal and non-Aboriginal peoples "takes place in the shadow of a long history of grievances and misunderstanding". The Court noted that the "multitude of smaller grievances created by the indifference of some government officials to Aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies": both quotes from para. 1.

[131] It was in this context that the Supreme Court stated that "the fundamental objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions": *Mikisew*, above at para. 1; *Clyde River (Hamlet) v. Petroleum Geo Services Inc.*, 2017 SCC 40 at para. 19, [2017] S.C.J. No. 40. The duty to consult is grounded in the honour of the Crown, and seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown: *Clyde River*, above at para. 19, citing *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 34, [2010] 2 S.C.R. 650.

[132] In order to act honourably, the Crown cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 27, [2004] 3 S.C.R. 511. Instead, the Crown must respect these potential, but as yet unproven, interests and must consult with the affected Aboriginal group or groups before any

decision is made that may affect the Aboriginal or treaty rights of the group in question. As the Supreme Court noted in *Clyde River*, "'consultation' in its least technical definition is talking together for mutual understanding": above at para. 49, citing T. Isaac and A. Knox, "*The Crown's Duty to Consult Aboriginal People*" (2003), 41 Alta. L. Rev. 49, at p. 61.

[133] The duty to consult has both a legal and a constitutional character: *Rio Tinto*, above at para. 34; *R. v. Kapp*, 2008 SCC 41 at para. 6, [2008] 2 S.C.R. 483. The constitutional dimension of the duty to consult is grounded in the honour of the Crown: *Kapp*, above at para. 6. It is enshrined in section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights: *Clyde River* at para. 19, citing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 24, [2004] 3 S.C.R. 550.

[134] It is, moreover, "a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process": *Rio Tinto*, above at para. 32, citing *Haida Nation* at para. 20

[135] The Supreme Court has explained that the duty to consult "derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right": *Rio Tinto*, above at para. 33. The duty to consult requires that the Crown take contested or established Aboriginal rights into account before making a decision that may have an adverse impact on them: *Rio Tinto*, above at para. 35.

[136] The duty to consult is primarily a procedural right: *Mikisew*, above at para. 57. It is not based on the common law duty of fairness, however. Rather, it is a duty based on "a process of

fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution": *Haida Nation*, above at para. 32.

[137] While primarily procedural in nature, the duty to consult also has a substantive dimension. The duty "is not fulfilled simply by providing a process within which to exchange and discuss information": *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at para. 178, [2008] 4 C.N.L.R. 315. Consultation must instead be meaningful, and be conducted in good faith "with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue": *Clyde River*, above at para. 23; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168, [1997] S.C.J. No. 108; see also Arthur Pape, "The Duty to Consult and Accommodate: A Judicial Innovation Intended to Promote Reconciliation" in *Aboriginal Law since Delgamuukw*, ed. Maria Morellato (Aurora, ON: Cartwright Group Ltd., 2009) at 317. In addition to being meaningful, consultation must also allow for accommodation where necessary. The representations of the Aboriginal group must be "seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action": *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 at para. 160, [1999] 4 C.N.L.R. 1.

[138] Canada is required to consult with its Aboriginal peoples where it "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": *Haida Nation*, above at para. 35. The knowledge threshold that must be met to trigger the duty to consult and accommodate is not high: see *Rio Tinto*, above at para. 40. Indeed, knowledge of a credible but unproven claim is sufficient to trigger the duty: *Haida Nation*, above at para. 37.

[139] Although it is essential that the Aboriginal people establish the existence of a potential claim, proof that the claim will succeed is not required: see *Rio Tinto*, above at para. 40.

[140] While the threshold for triggering a duty to consult is relatively low, once it is triggered, the degree of consultation that will be required in a specific case will depend on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right: *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 38 (*CTFN*), [2017] S.C.J. No. 41, citing *Haida Nation*, at paras. 39 and 43-45. Each case must be considered on its individual merits, and "flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light": *Clyde River*, above at para. 20, citing *Haida Nation*, at paras. 39 and 43-45.

[141] A weak claim may only require the giving of notice, whereas a stronger claim may attract more onerous obligations on the part of the Crown: *Haida Nation*, above at para. 37. The content of the duty to consult in the circumstances of this case will be discussed in greater detail later in these reasons.

[142] The duty to consult does not provide Aboriginal groups with a veto: *CTFN*, above at para. 59. As long as the consultation is meaningful, there is no obligation on the Crown to reach an agreement with the Aboriginal groups in issue. Rather, accommodation requires that "Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process": *Taku River*, above at para. 92.

[143] Where, however, "there is a strong Aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of Aboriginal interests pending their final resolution": *Wii'litswx*, above at para. 178. See also *Haida Nation*, above at paras. 41-42, 45-50. Consultation must be meaningful, and cannot simply be an opportunity for the Aboriginal group in issue to "blow off steam": *Mikisew*, above at para. 54.

[144] The Crown has discretion as to how it structures the consultation process and how the duty to consult is met: *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 203, [2016] 4 F.C.R. 418, leave to appeal refused, [2016] S.C.C.A. No. 386, SCC 37201, *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2013 ABCA 443 at para. 39, 566 A.R. 259 (Alta. C.A.).

[145] Perfect satisfaction of the duty to consult is not required. As long as the Crown "makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty": *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, at para. 54, [2008] F.C.J. No. 946.

[146] In all cases, the fundamental question is what is necessary to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake: *Haida Nation*, above at para. 45. The honour of the Crown also mandates that it balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims: *Haida Nation*, above at para. 45. Consequently, any decision affecting Aboriginal or

treaty rights that is made without proper consultation will not be in compliance with the duty to consult, and should be quashed on judicial review: *Clyde River*, above at para. 24.

[147] With this understanding of the source and function of the duty to consult and accommodate, I turn next to consider the GNWT's prematurity argument.

IX. The GNWT's Prematurity Argument

[148] The GNWT notes that the focus of Mr. Enge and NSMA in this application is on the actions of Canada, and that only Canada's actions are identified in the grounds for review in the applicants' Notice of Application. The GNWT further submits that Canada was "in the driver's seat" in the discussions with the NSMA, and that it merely followed Canada's lead in this regard.

[149] The GNWT concedes that it had a duty to consult with, and, if appropriate, accommodate the NSMA with respect to its members' asserted Aboriginal harvesting rights in the area to the north of Great Slave Lake. It further concedes that this duty was triggered by the negotiation of the draft NWTMN AiP, and that the GNWT will, moreover, continue to have a duty to consult with the NSMA through to the conclusion of any Final Agreement. The GNWT submits, however, that because there will be further consultation with the NSMA prior to the conclusion of a Final Agreement, this application for judicial review is therefore premature. I do not agree.

[150] The duty to consult is not limited to decisions that have an immediate impact on lands and resources: *Clyde River*, above at para. 25. As I observed in *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204, 405 F.T.R. 182, "the duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights, even if that impact on the

disputed lands or resources may not be immediate": at para. 164, citing *Rio Tinto*, above at para. 44.

[151] Consultation must, moreover, be timely: *Halfway River*, above at para. 160. As I said in *Sambaa K'e*, "[i]f it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions". This is because "[o]nce important preliminary decisions have been made there may well be 'a clear momentum' to move forward with a particular course of action": at para. 165, citing *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at para. 75, 34 B.C.L.R. (4th) 280. Such momentum, may, moreover, develop even if the preliminary decisions are not legally binding on the parties: both quotes from *Sambaa K'e*, above at para. 165.

[152] The duty to consult has been found to have been engaged by a Crown decision to enter into an agreement in principle with respect to lands and resources: *Sambaa K'e*, above at paras. 164-168; *Huron-Wendat Nation of Wendake v. Canada*, 2014 FC 1154, at para. 102-105. [2015] 3 C.N.L.R. 53.

[153] Indeed, the case law shows that the non-binding nature of preliminary decisions does not necessarily mean that there can be no duty to consult. For example, in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106, negotiations leading to a non-binding Cooperation Plan nonetheless triggered a duty to consult that fell at the high end of the consultation spectrum.

[154] While there is still much to be resolved with respect to the terms of a final land and resources agreement, as the GNWT itself acknowledged, the NWTMN AiP provides "a general framework" for those discussions.

[155] As a consequence, this application for judicial review is not premature. It is open to Mr. Enge and the NSMA to challenge the adequacy of the consultation that has taken place with it to this point with respect to the NWTMN AiP.

[156] The next question, then, is whether the duty to consult with the NSMA has been triggered in this case.

X. Has the Duty to Consult with the Members of the NSMA been Triggered in this Case?

[157] While the GNWT concedes that it had a duty to consult with the NSMA that was triggered by its decision to negotiate the NWTMN AiP, Canada does not agree that it owed a duty to consult with the NSMA, or that any such duty was triggered in this case. Canada says that this is because the members of the NSMA are part of the group with whom it has been negotiating, namely the NWTMN.

[158] According to Canada, the Métis rights that will potentially be affected by a Final Agreement are the rights held by Métis people who are eligible for enrollment in accordance with the terms of the NWTMN AiP. It will be recalled that the NWTMN AiP defines "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such person". This is essentially the Métis community that Canada says that is has been negotiating with for many years, as represented by the NWTMN.

[159] While it had been negotiating with the NWTMN for a long time, Canada says that it started consulting with the NSMA in 2012 based on its understanding that the NSMA represented a distinct Aboriginal group that was asserting section 35 Aboriginal rights in the North Slave area. However, in the course of its consultations with the NSMA, Canada says that it learned that many members of the NSMA were in fact eligible for enrollment under the terms of the NWTMN AiP, and would thus be eligible to participate in the Final Agreement contemplated by the NWTMN AiP.

[160] Canada further notes that a binding final agreement will not be imposed on the Métis of the Northwest Territories. A final agreement will only come into existence if it is ratified by a majority of the people who are eligible for membership under its terms.

[161] According to Canada, this case is thus not fundamentally about the adequacy of Crown consultation; it is, rather, a challenge to the NWTMN as the proper representative of the Métis people whose Aboriginal ancestors were indigenous to the South Slave region of the Northwest Territories.

[162] Canada accepts that it had an obligation to consult with the Métis community of the Northwest Territories prior to entering into the NWTMN AiP. Canada further accepts that the Métis of the Great Slave Lake area have a good *prima facie* claim to a right to harvest caribou in their traditional asserted territory, which includes the area north of Great Slave Lake. What Canada disputes is whether it had any duty to consult with the members of the NSMA, independent of its obligation to consult with the Métis community of the Northwest Territories as represented by the NWTMN.

[163] The question for determination is thus whether Canada owed a duty to consult with the members of the Métis community of the Northwest Territories who are represented by the NSMA, in addition to the duty that it owed to consult with the members of the NWTMN. Before addressing this question, however, I will first examine the appropriate standard of review to be applied to Canada's choice of negotiating partner.

A. *The Standard of Review*

[164] The Supreme Court of Canada discussed the standards of review to be applied to Crown decisions relating to the duty to consult in *Haida Nation*, above at paras. 61-63. The Supreme Court held that on questions of law, the decision-maker must generally be correct, whereas a reviewing Court may owe a degree of deference to the decision-maker on questions of fact or mixed fact and law: above at para. 61.

[165] *Haida Nation* was decided before the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. However, in *Ahousaht*, above at para. 34, the Federal Court of Appeal confirmed that *Dunsmuir* did not change the standards of review to be applied in reviewing decisions relating to the duty to consult.

[166] The question of whether a duty on the part of the Crown to consult with a particular Aboriginal group has been triggered is a question of law, inasmuch as it defines a legal duty. As such, it is reviewable on the standard of correctness. That said, it also involves an assessment of the facts such as the composition of the Métis community in the Northwest Territories, and the nature of the two organizations that purport to represent that community. Consequently, a degree of deference is owed to Canada's assessment of the facts underlying its choice of negotiating partner in this case: *Haida Nation*, above at para. 61.

B. *The Duty to Consult in the Métis Context*

[167] To a large extent, the disagreement between the parties with respect to whether a duty to consult is owed to the NSMA stems from the fact that the Aboriginal people whose rights are at stake in this proceeding are Métis, rather than "Indians", as that term is used in the *Indian Act*.

[168] The governance structures and legal status of groups of "Indians" are largely governed by the provisions of the federal *Indian Act*. Because of this, it will usually be clear which entity represents which Aboriginal group, and which entity must thus be consulted with respect to Crown actions that may have an impact on the Aboriginal rights held by members of the group in question. There is no comparable legislation at the federal or territorial level that creates legal identities and governance structures for identifiable Métis collectives, although some provinces have legislated in this area. As a result, it may be unclear who the Crown must consult prior to taking action that may affect the Métis' Aboriginal rights.

[169] As was noted earlier in these reasons, Canada has been engaged in negotiations with the Métis community of the Northwest Territories since the 1980s. After the failure of the Dene/Métis Land and Resource Negotiation, Canada entered into regional land claim negotiations in each of the five regions of the Northwest Territories, including the North and South Slave regions. It appears that it was initially understood that the Métis of the North Slave region would be pursuing their interests separately from the Métis of the South Slave Region, in conjunction with the Dogrib Treaty 11 Tribal Council.

[170] In 1996, Canada negotiated a framework agreement called the "South Slave Métis Framework Agreement" with the GNWT, the Métis of Fort Smith Métis Nation Local #50, the Hay River and Area Métis Nation Local #51, and the Fort Resolution Métis Nation Local #53, as

represented by the South Slave Métis Tribal Council (SSMTC). The SSMTC was an umbrella organization representing the Métis of the South Slave region of the Northwest Territories, and was the predecessor to the NWTMN. According to Canada, this Framework Agreement continues to govern its negotiations with the Métis community of the Northwest Territories.

[171] At the same time, the NSMA was asking that it be recognized as the party to be consulted with respect to Métis claims relating to the area north of Great Slave Lake. This request appears to have been rejected on the basis that at least some of the members of the NSMA were eligible for membership in the NWTMN.

[172] Although it appears to have had limited information regarding the NWTMN (perhaps because it never asked the NWTMN for information regarding the Aboriginal group that it purported to represent), Canada says that after the failure of the Dene/Métis negotiations, it was an "easy decision" to continue negotiating the terms of a land and resources agreement with the NWTMN as the representative of the Métis people of the Northwest Territories.

[173] Canada has, moreover, taken the position that any concern with respect to the make-up of the NWTMN can be addressed through the ratification process. That is, Canada says that the successful ratification of a Final Agreement would signify that the NWTMN had been granted the necessary authority to enter into the agreement. The applicants call this an "ends justify the means" approach.

[174] While the successful ratification of a Final Agreement would signify that the majority of the members of the NWTMN approve of the agreement, it would not address the question of

who had to be consulted with respect to the terms of that agreement. Nor would it address any shortcomings in the consultation process leading up to the ratification vote.

C. *Comparing the NSMA and the NWTMN*

[175] The NSMA and the NWTMN were both established in the mid-1990s and both are registered societies under the *Societies Act* of the Northwest Territories. Although they have different criteria for membership, both organizations purport to represent the Métis people of the Northwest Territories who have section 35 rights to harvest in the area surrounding Great Slave Lake.

[176] While both the NWTMN and the NSMA assert section 35 harvesting rights in and around Great Slave Lake, the NSMA clearly represents a different constituency within the Métis community than does the NWTMN. The focus of the NWTMN appears to be on preserving the rights of its members in the area south of Great Slave Lake, whereas the focus of the NSMA is to preserve the rights of its members in the area to the north of Great Slave Lake.

[177] Although both organizations accept that there is a single Métis community in the Northwest Territories whose traditional territory encompasses the whole of the Territories, the two organizations have different objectives, different priorities and different criteria for membership.

[178] One of the objects of the NWTMN is promoting the unity of the Métis in the region to the south of Great Slave Lake in the Northwest Territories. Other goals include protecting, promoting and enhancing the Aboriginal rights of the Métis of the South Slave Region. According to the affidavit of Gary Bailey, the President of the NWTMN, the mandate of the

NWTMN is, in general terms, “to serve and protect the interests of Indigenous Métis who are members of the Fort Smith Métis Council, the Hay River Métis Council, and the Fort Resolution Métis Council”. Mr. Bailey further asserts that this mandate includes “the affirmation, protection and recognition of Métis aboriginal rights throughout the traditional territory of the NWTMN”, which, it says, includes the entirety of the Northwest Territories.

[179] In contrast, the aims of the NSMA include promoting the unity of the Métis in the North Slave Region of the Northwest Territories, and promoting and supporting the recognition of the Aboriginal rights and title and treaty rights of the community of indigenous Métis of the North Slave Region.

[180] The two organizations also appear to have different priorities, and to represent different constituencies within the Métis community of the Northwest Territories. While the focus of the NSMA is on protecting the Aboriginal harvesting rights of the community of indigenous Métis in the north Slave area of the Northwest Territories, Canada acknowledges that the NWTMN AiP contemplates the *extinguishment* of Aboriginal harvesting rights in the area to the north of Great Slave Lake.

[181] The NWTMN does not agree that the NWTMN AiP contemplates the extinguishment of Aboriginal wildlife harvesting rights in the area north of Great Slave Lake, stating that the extinguishment of its members’ Aboriginal rights outside of the agreement area is a matter that is “not under negotiation”. However, although the terms of the Final Agreement remain to be negotiated, the extinguishment of Aboriginal harvesting rights in the area north of Great Slave Lake does seem to be exactly what is contemplated by the NWTMN AiP. Indeed, Canada made clear that this was its intention throughout the consultation process.

[182] Indeed, during the October 24, 2013 meeting, Canada advised Mr. Enge and the NSMA of its intent that a final land and resources agreement with the Métis would extinguish the Aboriginal harvesting rights north of Great Slave Lake of those individuals eligible to be enrolled under the Final Agreement. Canada further conceded at the hearing of this application that Mr. Enge was "probably correct" in his understanding of the impact of the eligibility provisions in the NWTMN AiP on the rights of the members of the NSMA in the area north of Great Slave Lake.

[183] The NWTMN and the NSMA also appear to have different views as to who should be considered to be Métis for the purposes of a Final Agreement with the Crown. Both the By-laws of the NWTMN and the NWTMN AiP define "Métis" solely by reference to Aboriginal ancestry. However, as was noted by Mr. Enge and the NSMA, while all Métis have Aboriginal ancestry, not everyone with Aboriginal ancestry qualifies as "Métis", as that term has been understood by the Supreme Court of Canada in cases such as *Powley* and *Daniels v. Canada* (*Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99. Indeed, in *Powley*, the Supreme Court specifically rejected the idea that the term "Métis" includes everyone with mixed Indian and European heritage.

[184] Section 35 of the *Constitution Act, 1982* affirms Métis rights, but is silent as to the definition of what it means to be "Métis". The Supreme Court attempted to provide guidance on this point in *Powley*, setting out *indicia* of Métis identity for the purpose of claiming Métis rights under section 35. In addition to ancestral connection, these include self-identification and community acceptance: at paras. 31-33. In *Daniels*, the Supreme Court affirmed that that the criteria in *Powley* were developed specifically for purposes of applying section 35 of the

Constitution Act, 1982, which, it said, "is about protecting historic community-held rights": at para 49, citing *Powley,* above, at para 13.

[185] The Supreme Court further emphasized the case-by-case nature of the *Powley* analysis, noting that although determining who will be considered to be a member of a Métis community "might not be as simple as verifying membership in, for example, an Indian band". That does not, however, "detract from the status of Métis people as full-fledged rights-bearers". The Supreme Court further observed that "[a]s Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified". In the interim, the Court stated that "courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis": all quotes from para. 29.

[186] Although Canada says that the NSMA has essentially the same membership criteria as NWTMN, the eligibility criteria for membership in the NWTMN focus largely on Aboriginal ancestry, whereas the eligibility criteria for membership in the NSMA includes other *Powley*-type considerations such as community recognition.

[187] The NSMA currently has 283 members, whose names have been provided to the two governments in the course of the consultation process. While the Bylaws of the NSMA prohibit the membership of those individuals with status under the *Indian Act,* Canada has noted that 33 of the individuals on the NSMA's membership list have the same name as individuals registered as "Indians" under the *Indian Act*. It has not, however, established that they are in fact the same individuals.

[188] The NWTMN claims that there are 2,169 Métis people in Canada who are *eligibl*e for membership in the organization, and it says that it is currently undertaking a questionnaire process to identify additional Indigenous Métis who are eligible for membership in one of its the three member Councils. The NWTMN has, however, refused to provide any actual membership numbers nor has it provided the names of its members. We thus have no way of knowing how the size of the membership of the NWTMN compares to that of the NSMA.

D. *Conclusion as to Whether a Duty on the Part of Canada to Consult with the NSMA was Triggered in this Case*

[189] While the entitlement of an Aboriginal organization to be consulted is not strictly a numbers game, I am prepared to draw an adverse inference from the fact that the NWTMN has refused to disclose its current membership numbers. I find that this information would likely have not assisted the NWTMN in demonstrating that it was the only organization that was entitled to be consulted with respect to a land and resources agreement between the Métis of the Northwest Territories and the federal and territorial Crown.

[190] There is no suggestion that the two government respondents ever asked the NWTMN to establish the strength of its members' claims to Aboriginal rights. Nor have the respondents established that the NWTMN has any greater right to represent the interests of the Métis people of the Northwest Territories than does the NSMA. The respondents have also not established that the NWTMN has any greater right than the NSMA to be consulted with respect to the terms of a land and resources agreement between the Métis of the Northwest Territories and the federal and territorial Crown.

[191] The Supreme Court has, moreover, affirmed that Métis communities have a significant role to play in the identification of membership requirements and the development of organizational and governance structures: *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 81, [2011] 2 S.C.R. 670, citing *Powley*, above at para. 29. It is thus not for Canada to decide which organization is better suited to represent the interests of the Métis community of the Northwest Territories, nor is it for Canada to decide which organization has the more appealing agenda.

[192] Furthermore, the law is clear that "[t]he Crown cannot run roughshod over one group's potential and claimed Aboriginal rights in favour of reaching a treaty with another": *Haida Nation*, above at para. 27.

[193] It is not appropriate to try to set out a set of guiding principles that should be taken into account in determining whether a specific organization purporting to represent a Métis collective is entitled to be consulted in a particular case. This is a fact-driven question that must instead be addressed on a case-by-case basis.

[194] In this case, it appears that Canada and the GNWT were negotiating with the NWTMN for historical reasons, based on its members' Aboriginal ancestry, and not because the members of the NWTMN necessarily represented a section 35 rights-bearing *Powley* Métis community.

[195] As the Supreme Court observed in *Haida Nation*, above at paragraph 37, knowledge of a credible but unproven claim is sufficient to trigger a duty to consult and accommodate. Canada was clearly aware that the members of the NSMA asserted a section 35 Aboriginal right to hunt caribou in the area north of Great Slave Lake. Not only was it provided with copious evidence

supporting that claim, as of June, 2013, it was also aware that the Supreme Court of the Northwest Territories had found in *Mandeville* that Mr. Enge had established a good *prima facie* claim that he and the members of the NSMA had a right to hunt caribou, based upon their asserted rights as Métis people who had traditionally hunted in the area north of Great Slave Lake.

[196] Once it determined that some members of the NSMA were eligible for membership in the NWTMN and were eligible to be enrolled under the NWTMN AiP, Canada appears to have concluded that it had no obligation to consult with the NSMA. It never considered the differences in the objects, priorities and criteria for membership between the two organizations. Nor did it consider the credibility of the organizations as representatives of the Métis community of the Northwest Territories, or whether the organizations represented different constituencies within that community. Canada's conclusion that no duty to consult was owed to the NSMA therefore lacks the justification, transparency and intelligibility required of a reasonable decision. It is thus both unreasonable and incorrect.

[197] Indeed, I am satisfied that, in this case, the NSMA is a credible organization that has existed for many years, advocating for the rights of the Métis of the north Slave region. The NSMA further represents a sizeable and identifiable constituency within the Métis community of the Northwest Territories, one with concerns and priorities that differ from those of the NWTMN. As such, it was, and is, entitled to be consulted with respect to any actions of the Crown that may have an adverse impact on the Aboriginal rights of its members.

[198] As was noted earlier, the duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might

be adversely affected by Crown conduct. The knowledge threshold that must be met to trigger the duty to consult and accommodate is not high: see *Mikisew*, above at para. 55. Knowledge of a credible but unproven claim is sufficient to trigger that duty: *Haida Nation*, above at para. 37.

[199] Canada was aware that the members of the NSMA were asserting section 35 Aboriginal rights to harvest in the area north of Great Slave Lake, and that, as of June, 2013, the Supreme Court of the Northwest Territories had found that Mr. Enge had established a good *prima facie* claim that he and the members of the NSMA had the Aboriginal right to hunt caribou in the area north of Great Slave Lake, based upon their asserted section 35 rights as Métis people who have traditionally hunted in that area: *Mandeville* at paras. 230 and 233.

[200] The negotiation of the NWTMN AiP was, moreover, an action on the part of the Crown that could have an adverse impact on the Aboriginal rights of the members of the NSMA. While the NWTMN does not agree, Canada itself acknowledges its intention to extinguish the Aboriginal harvesting rights of the Métis community of the Northwest Territories in the area north of Great Slave Lake in exchange for a codified set of rights in the Agreement Area. This is clearly contemplated conduct that may adversely affect an Aboriginal claim or right: *Haida Nation*, above at para. 35.

[201] In these circumstances, I am satisfied that a duty on the part of Canada to consult with the NSMA was triggered in this case.

[202] This then takes us to a consideration of what actually happened in this case, how Canada approached the discussions with Mr. Enge and the NSMA, and whether those discussions were sufficient to fulfill Canada’s duty to consult with the NSMA with respect to the terms of a

proposed land and resources agreement between Canada and the Métis of the Northwest Territories.

XI. Did the Crown Properly Assess the Extent of its Duty to Consult the NSMA?

[203] As previously noted, Canada's primary position appears to be that it does not owe any duty to consult with the NSMA as the members of the NSMA are part of the group with whom it has already been negotiating. Canada argues, in the alternative, that if such a duty does arise, it was adequately discharged by the consultations that have already taken place with the NSMA. As I have concluded that Canada did indeed have a duty to consult with the NSMA, I will now consider whether the interaction between the NSMA and the two levels of government was sufficient to discharge that duty.

[204] Amongst other things, Mr. Enge and the NSMA argue that Canada erred in law by failing to conduct a preliminary assessment of the strength of the NSMA members' claims to Aboriginal harvesting rights, by failing to correctly identify the parameters of the scope and content of its duty to consult and by failing to reassess the strength of the NSMA's members' claims during the consultation process.

[205] Before examining what occurred in this case, however, it is helpful to start by reviewing the law with respect to the need for a preliminary assessment of the strength of an Aboriginal claim.

A. *The Law Relating to the Need for a Preliminary Assessment of the Strength of a Claim*

[206] Once triggered, the content of the duty to consult will vary from case to case depending upon what is required by the honour of the Crown in a given set of circumstances: *Haida Nation*,

above at para. 43. See also *Rio Tinto*, above at para. 36; *Taku River*, above at para. 32; *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137 at para. 71, [2010] A.J. No. 479; *Ahousaht*, above at para. 39.

[207] Where, for example, the claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice: *Haida Nation*, above at para. 43.

[208] In contrast, where a strong *prima facie* case has been established for the Aboriginal right or title in question, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, "deep consultation" aimed at finding a satisfactory interim solution may be required: *Haida Nation*, above at para. 44.

[209] The scope of the duty to consult is thus proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and of the seriousness of the potentially adverse effect upon the right or title claimed: *Haida Nation*, above at para. 39. That is, the degree of impact on the rights asserted will dictate the degree of consultation that is required in a specific case: *Mikisew*, above at paras. 34, 55 and 62-3. The more serious the potential impact on asserted Aboriginal or Treaty rights, the deeper the level of consultation that will be required.

[210] The failure of the Crown to conduct a preliminary assessment of the strength of an Aboriginal claim, to determine the scope of the consultation required, and to discuss its preliminary assessment with the Aboriginal group in question can itself be a breach of the duty to

consult: *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247 at para. 113, [2011] 3 C.N.L.R. 343.

B. *The Applicable Standard of Review*

[211] I understand the parties to agree that the standard of review to be applied to the Crown's assessment of the extent of its duty to consult, including its assessment of the strength of the Aboriginal claim in issue, and the potential impact on the right in question is that of correctness: *West Moberly*, above at para. 174. However, as was noted in *Haida Nation*, some deference should be shown to the Crown's assessment of the facts: at para. 61.

[212] With this understanding of the applicable legal principles, I turn now to consider the sufficiency of Canada's preliminary assessment of the strength of the NSMA members' claim.

C. *Canada's Assessment of the Extent of its Duty to Consult with the NSMA*

[213] According to the evidence of Ms. Morgan, the only preliminary assessment that was carried out by Canada with respect to the strength of the Aboriginal harvesting claims asserted by the members of the NSMA was that contained in an undated table that was provided to the NSMA in the course of this application for judicial review. The GNWT evidently prepared its own "Partial Preliminary Assessment of the Depth of the Duty to Consult", which does not assess either the strength of the claims of the NSMA's members nor the depth of consultation to which they were entitled. Ms. Morgan was, moreover, clear that Canada had minimal input into this document.

[214] Although Ms. Morgan initially claimed in her cross-examination that Canada's assessment had likely been prepared in the summer of 2012, prior to it entering into discussions

with the NSMA, she subsequently conceded that the document had to have been prepared sometime after June of 2013, as it contained references to the decision in *Mandeville*. That decision was rendered on June 20, 2013, and was provided to Canada by the NSMA shortly thereafter.

[215] Ms. Morgan also stated that this was the *only* assessment of the strength of the claims of the members of the NSMA that had been carried out by Canada. However, it appears that Canada had in fact previously assessed the strength of the NSMA's claims in early 2013.

[216] Over the years, the NSMA had provided Canada with copious amounts of information in support of the section 35 harvesting rights being asserted by its members in the area north of Great Slave Lake. In a letter to Mr. Enge dated February 12, 2013, the Acting Director of Aboriginal and Territorial Relations advised that Canada had conducted a "thorough review" of the information that had been provided to support the NSMA members' claim to section 35 Aboriginal rights, and had that it had determined that that the NSMA had "not provided sufficient evidence to establish the existence of an ancestrally-based present-day Métis community in the North Slave area with links to a historic Métis community in that area". Consequently, the letter stated that the NSMA had "not established a credible claim to s. 35 Métis rights which would support the recognition of the NSMA as a distinct s. 35 Métis rights-holding community". The letter nevertheless concluded by suggesting a meeting to discuss the issue.

[217] As noted by the applicants, the law requires that a single preliminary assessment of the strength of a claim to an Aboriginal right may not be enough, and that the situation may have to

be re-evaluated from time to time, as the level of consultation required may change as the process goes on and new information comes to light: *Haida Nation*, above at para. 45.

[218] However, despite the applicants' assertion that Canada failed to reassess the strength of the NSMA's members' claims during the consultation process, it appears that Canada's initial assessment was indeed reviewed in light of the *Mandeville* decision. This second assessment is the one identified by Ms. Morgan.

[219] The assessment in question identifies the right at issue as being the "Aboriginal right to hunt for food, according to traditional practices". The document further notes that the NSMA members' traditional harvesting and land use area was "almost identical to the land area affected by the GNWT's Bathurst caribou management zones", referencing *Mandeville* at para. 231. Ms. Morgan acknowledged in her cross-examination that Canada was in fact relying on the assessment of the nature and scope of the rights that were identified in *Mandeville*.

[220] This revised preliminary assessment further states that the NWTMN AiP "contemplates providing harvesting rights to the Métis throughout the proposed Agreement Area", and that "[t]he provision of harvesting rights to the Métis in an area that overlaps with the asserted traditional territory could be perceived as potentially affecting North Slave Métis Alliance harvesting rights".

[221] There are a number of problems with this revised assessment.

[222] First, this second assessment was never shared with Mr. Enge and the NSMA, and was only produced to them in the context of this application for judicial review. However, the jurisprudence clearly requires that the Crown provide an affected Aboriginal group with an

opportunity to comment on a preliminary assessment of the strength of a claim and the potential impact of the proposed decision on the asserted rights: *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council),* 2011 BCSC 266 at para. 131, [2011] B.C.J. No. 363, rev'd, but not on this issue, 2012 BCCA 333.

[223] As the Court observed in *Adams Lake*, "[t]his is necessarily a key step in the consultation process because the scope of the duty to consult is 'proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed'": at para. 131, citing *Haida Nation* at para. 39. As the Supreme Court further observed in *Haida Nation*, the Crown is required to complete a preliminary assessment because "one cannot meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope": *Haida Nation*, above at para. 36, citing *R. v. Marshall*, [1999] 3 S.C.R. 456 at para 112.

[224] Indeed, as the Federal Court of Appeal observed in *Gitxaala*, the preliminary assessment "defines the subjects over which dialogue must take place: a broad and strong claim to rights and title over an asserted territory means that broad subjects within that territory must be discussed and, perhaps, must be accommodated": at para. 290.

[225] Once the Crown has completed its preliminary assessment of the claim to Aboriginal rights, the Crown must undertake a process that is tailored to the "spectrum of consultation": *Haida Nation* at para 44.

[226] As noted above, the first assessment of the strength of the claims asserted by Mr. Enge and the members of the NSMA was that contained in Canada's February 12, 2013 letter to Mr.

Enge. This letter simply states that the NSMA had not established the existence of a credible claim to section 35 Métis rights which would support the recognition of the NSMA as a distinct section 35 Métis rights-holding community.

[227] Insofar as the preliminary assessment identified by Ms. Morgan is concerned, although Canada had by this point conceded that the members of the NSMA had a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands, there is nothing in the document regarding Canada's assessment of the strength of the claims of the NSMA's members to section 35 harvesting rights as Métis in the area north of Great Slave Lake.

[228] Nor is there any indication in the document identified by Ms. Morgan as Canada's preliminary assessment as to what assessment, if any, the Crown had made concerning the scope of its duty to consult with the NSMA. The law, however, requires that the Crown correctly identify the legal parameters of the content of the duty to consult in order for it to be able to properly determine what will constitute adequate consultation: *Mandeville*, above at para. 145; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 at para. 18, [2009] 1 C.N.L.R. 110; *Wii'litswx*, above at para. 15. To proceed without having done so would be an error of law: *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 at para. 91, [2015] F.C.J. No. 969; *Mandeville*, above at paras. 172-180.

[229] Indeed, as the Federal Court of Appeal observed in *Gitxaala*, affected Aboriginal peoples are "entitled to know Canada's information and views concerning the content and strength of their claims so they would know and would be able to discuss with Canada what was in play in the consultations, the subjects on which Canada might have to accommodate, and the extent to which Canada might have to accommodate": at para. 309. That did not happen here.

[230] Notwithstanding an invitation from the NSMA to do so, Canada refused to assess the strength of the claimed right of the members of the NSMA to hunt in the area north of Great Slave Lake as *Métis*.

[231] As noted earlier, the NWTMN AiP defines "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such person". The focus of the NWTMN AiP is thus on individuals of Indian ancestry, at least some of whom might not qualify as "Métis" under the criteria that were established by the Supreme Court in *Powley*. Indeed, Ms. Morgan acknowledged in her cross-examination that negotiations with the NWTMN with respect to a Northwest Territories land and resources agreement were being carried out on the basis of Dene ancestry, and not Métis identity.

[232] This approach is the result of the fact that negotiations towards a land and resources agreement with the Métis of the Northwest Territories started, not just before the decision of the Supreme Court in *Powley*, but before the enactment of the *Constitution Act, 1982* with its section 35 protection for the rights of Canada's Indigenous people. The language in the NWTMN AiP was evidently based on language contained in the pre-*Powley* South Slave Métis Framework Agreement, and the governments did not reconsider their approach to the negotiations after the release of the *Powley* decision. Indeed, Canada candidly admitted during the consultation process that it did not much care which kind of Aboriginal rights were held by those who were "eligible to be enrolled" under a final agreement, as long as Canada achieved the certainty it was seeking with respect to the use of lands and resources.

[233] The NSMA was clear in its discussions with Canada and the GNWT that its members were asserting section 35 rights *as Métis*. Canada's representatives were, however, indifferent to the distinction between the Métis and people with Cree, Slavey or Chipewyan ancestry. When representatives of the NSMA attempted to discuss the issue at the October 24, 2013 meeting, a representative of Canada stated "… you can call yourself whatever you want to call yourself, but what is being settled in the claim is 'what are your Aboriginal rights?' Not your Métis rights, not your Indian rights, your Aboriginal rights".

[234] The more fundamental problem with Canada's revised preliminary assessment is that it missed the most significant potential adverse effect contemplated by the NWTMN AiP. This was the extinguishment of the Aboriginal harvesting rights in the area north of Great Slave Lake of those NSMA members who had Dene ancestors from the South Slave region, in exchange for codified harvesting rights in the area south of the Lake being provided to those individuals.

[235] Ms. Morgan confirmed in her cross-examination that in assessing the scope of the consultation with the NSMA that was required, Canada focussed on the impact of the agreement on the small area of overlap between the proposed Agreement Area and the territory to the north of Great Slave Lake to which the Supreme Court of the Northwest Territories had found that NSMA members had a good *prima facie* claim to Aboriginal harvesting rights. Ms. Morgan further confirmed that this was the *only* potential adverse impact that Canada identified in its preliminary assessment.

[236] This is consistent with the June 11, 2013 letter to the NSMA, which noted that Canada and the GNWT were aware that the NSMA was asserting Aboriginal rights to harvest in the area north of Great Slave Lake. They went on to note, however, that "[t]he draft NWTMN AiP

contemplates providing non-exclusive harvesting rights … to Métis Members … throughout the proposed Agreement Area", which, it will be recalled is an area to the south and east of Great Slave Lake. The letter further stated that "[t]here may exist a *small area of overlap* between the northwest corner of the proposed Agreement Area and the area over which the NSMA asserts an Aboriginal right to harvest" [my emphasis].

[237] However, in his August 16, 2013 letter to Mr. Enge, the Minister of Aboriginal Affairs and Northern Development expressly acknowledged that members of the NSMA have "a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands" (which include the area to the north of Great Slave Lake, and not merely a small area bordering on the Agreement Area), and that they were entitled to "an appropriate measure of consultation when that asserted right may potentially be adversely impacted by the Crown's actions".

[238] As was noted earlier, Canada acknowledged at the October 24, 2013 meeting with Mr. Enge and other members of the NSMA that it was its intent that a Final Agreement with the NWTMN would extinguish Métis harvesting rights in the area north of Great Slave Lake for those individuals with ancestral ties to the Dene of the south Slave region. The impact of such an agreement would thus be on the entirety of the traditional territory of the members of the NSMA, and not merely on a "small area of overlap" along the northeast corner of the proposed Agreement Area.

[239] As the Supreme Court observed in *Haida Nation*, where Aboriginal claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice. That is essentially what happened here.

[240] In contrast, where a strong *prima facie* case for the claim has been established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, "deep consultation" aimed at finding a satisfactory interim solution may be required: *Haida Nation*, above at para. 44.

[241] "Deep consultation" may require that the Aboriginal group in question be provided with an opportunity to make submissions, to participate in the decision-making process, and to receive written reasons that demonstrate that their concerns were considered, and which reveal the impact those concerns had on the decision: *Haida Nation*, above at para. 44; *Clyde River*, above at para. 47.

[242] Consultation founded upon a fundamental misconception of the Aboriginal interests at stake does not discharge the Crown's obligation to consult in good faith: *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2015 BCCA 345 at para. 66, 69, [2015] 4 C.N.L.R. 225.

[243] Canada had already acknowledged in its August 16, 2013 letter to Mr. Enge that the members of the NSMA have a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands, and that they therefore were entitled to "an appropriate measure of consultation" when their asserted right may potentially be adversely impacted by Crown action. However, Canada appears to have completely misunderstood the extent of the impact that a final land and resources agreement could have on that right.

[244] Although the NWTMN AiP states that the parties would enter into land selection negotiations to identify Métis land and Métis community land for inclusion in a Final

Agreement, the Aboriginal right at issue in this case does not involve title to the lands in question. That said, the right to hunt is nevertheless an important Aboriginal right – one that has played a central role in the history and culture of the Métis of the Northwest Territories. Moreover, an agreement that has the effect of extinguishing an important Aboriginal right in a group's traditional territory is clearly a Crown action that would have a profound impact on an asserted Aboriginal right and a traditional way of life – damage that would not be readily compensable. This would suggest that consultation towards the deeper end of the spectrum would be required in this case.

[245] However, having misunderstood the extent of the potential impact that the NWTMN AiP and a final land and resources agreement would have on the Aboriginal harvesting rights of the members of the NSMA, Canada entered into its consultation with the NSMA based on a fundamental misconception of the nature and scope of its duty to consult. Moreover, without fully understanding the seriousness of the potential impact that a land and resources agreement would have on the section 35 rights of the members of the NSMA, Canada could not properly assess what, if any, accommodation measures would be appropriate.

[246] While the applicants were able to provide oral and written submissions to the federal and territorial Crown, they were not included in the decision-making process that led up to the conclusion of the NWTMN AiP in July of 2015. Indeed, there was no attempt to consult with the NSMA until such time as Canada and the GNWT had already arrived at a draft NWTMN AiP. This was, in my view, too little, too late. It was a breach of the duty to consult that was owed to the NSMA and its members by the Crown.

[247] Given that this finding is sufficient to dispose of this application, it is not necessary to address the other issues raised by the applicants.

XII. Remedy

[248] As the Supreme Court observed in *Clyde River*, "judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms." The Court further noted that "[j]udicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process": both quotes at para. 24, emphasis in the original. That is certainly the case here.

[249] That said, we are now at the litigation stage, and I must attempt to craft a remedy that would undo, to the extent possible, what I have found to be the breach of the NSMA members' right to be properly consulted with respect to the potential infringement of their section 35 Aboriginal harvesting rights in the area north of Great Slave Lake.

[250] Although the GNWT and the NWTMN have been named as respondents in this application, the decision under review in this case is the decision of the federal Minister of Indian Affairs and Northern Development not to consult the applicants sufficiently with respect to the NWTMN AiP prior to signing the agreement. Consequently, the remedy provided by the Court should be addressed solely to Canada. This is consistent with the relief sought in the applicants' Notice of Application.

[251] I have concluded that as the representative of those members of the Métis community of the Northwest Territories who assert section 35 harvesting rights in the area north of Great Slave

Lake, the NSMA is entitled to be consulted and, if necessary, accommodated with respect to potential adverse effects of the NWTMN AiP and any Final Agreement to be negotiated with the Métis of the Northwest Territories on the Aboriginal rights of its members. I have also concluded that Canada failed to consult sufficiently deeply with the NSMA prior to entering into the NWTMN AiP on July 31, 2015. Consequently, a declaration to that effect will issue.

[252] Having further concluded that the NSMA is entitled to be consulted at the mid to deep end of the spectrum with respect to a future land and resources agreement that would potentially adversely affect the Aboriginal harvesting rights of its members, a declaration to that effect will issue.

[253] Canada must also consider whether accommodation measures are appropriate to address the concerns of the members of the NSMA who are eligible to be enrolled under the terms of a final land and resources agreement, as contemplated by the eligibility provisions of the NWTMN AiP. Measures for consideration by the parties shall include:

(i) whether the words “eligible to be” should be removed from subsections 2.3.1, 2.4.1 and 2.5.1(b) of any Final Agreement; and

(ii) whether the NSMA should be included as a party to the negotiations of the final land and resources agreement in order to ensure that its members have meaningful participation in the NWTMN land claim negotiations that are intended to extinguish their Aboriginal harvesting rights in the North Slave Region;

[254] No final land and resources agreement between the federal and territorial governments and the Métis of the Northwest Territories contemplated by the NWTMN AiP shall be concluded

until there has been meaningful consultation with the members of the NSMA at the mid to deep end of consultation spectrum and the appropriate accommodation measures have been considered with respect the concerns raised by NSMA.

[255] Finally, this process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court in *Haida Nation* and *Taku River*, above.

XIII. Costs

[256] I have been advised that there is an outstanding offer to settle in this case that may have a bearing on the question of costs. Consequently, the applicants shall have 10 days in which to provide written submissions on the issue of costs, which are not to exceed five pages in length. The respondents shall then have 10 days in which to respond with written submissions that are not to exceed five pages in length. The applicants will then have a further five days in which to reply with written submissions that shall not exceed three pages in length.

JUDGMENT IN T-1427-15

THIS COURT DECLARES, ORDERS AND ADJUDGES that:

1. The respondent Minister of Indian Affairs and Northern Development has a constitutional duty to consult with, and, if necessary, to accommodate the members of the NSMA with respect to the potential adverse effects on their Aboriginal harvesting rights of the NWTMN AiP and any final land and resources agreement to be negotiated with the Métis of the Northwest Territories;

2. The respondent Minister of Indian Affairs and Northern Development breached his duty to consult with and, if necessary, accommodate the members of the NSMA by inadequately consulting with them and by failing to meaningfully address the accommodation measures put forward by the applicants with respect to the NWTMN AiP, prior to approving the agreement in principle on July 31, 2015;

3. The members of the NSMA are entitled to be consulted at the mid to deep end of the consultation spectrum with respect to a future land and resources agreement that would potentially adversely affect their Aboriginal harvesting rights in the area north of Great Slave Lake;

4. Canada must consider whether accommodation measures are appropriate to address the concerns of the members of the NSMA who are eligible to be enrolled under the terms of a final land and resources agreement, as

contemplated by the eligibility provisions of the NWTMN AiP. Measures for consideration by the parties shall include:

(i) whether the words “eligible to be” should be removed from subsections 2.3.1, 2.4.1 and 2.5.1(b); and

(ii) whether the NSMA should be included as a party to the negotiations of the final land and resources agreement in order to ensure that its members have meaningful participation in the NWTMN land claim negotiations that are intended to extinguish their Aboriginal harvesting rights in the North Slave Region;

5. No final land and resources agreement between the federal and territorial governments and the Métis of the Northwest Territories contemplated by the NWTMN AIP shall be concluded until such time as meaningful consultation between Canada and the NSMA has occurred at the mid to deep end of the spectrum, and appropriate accommodation measures have been considered with respect the concerns raised by NSMA; and

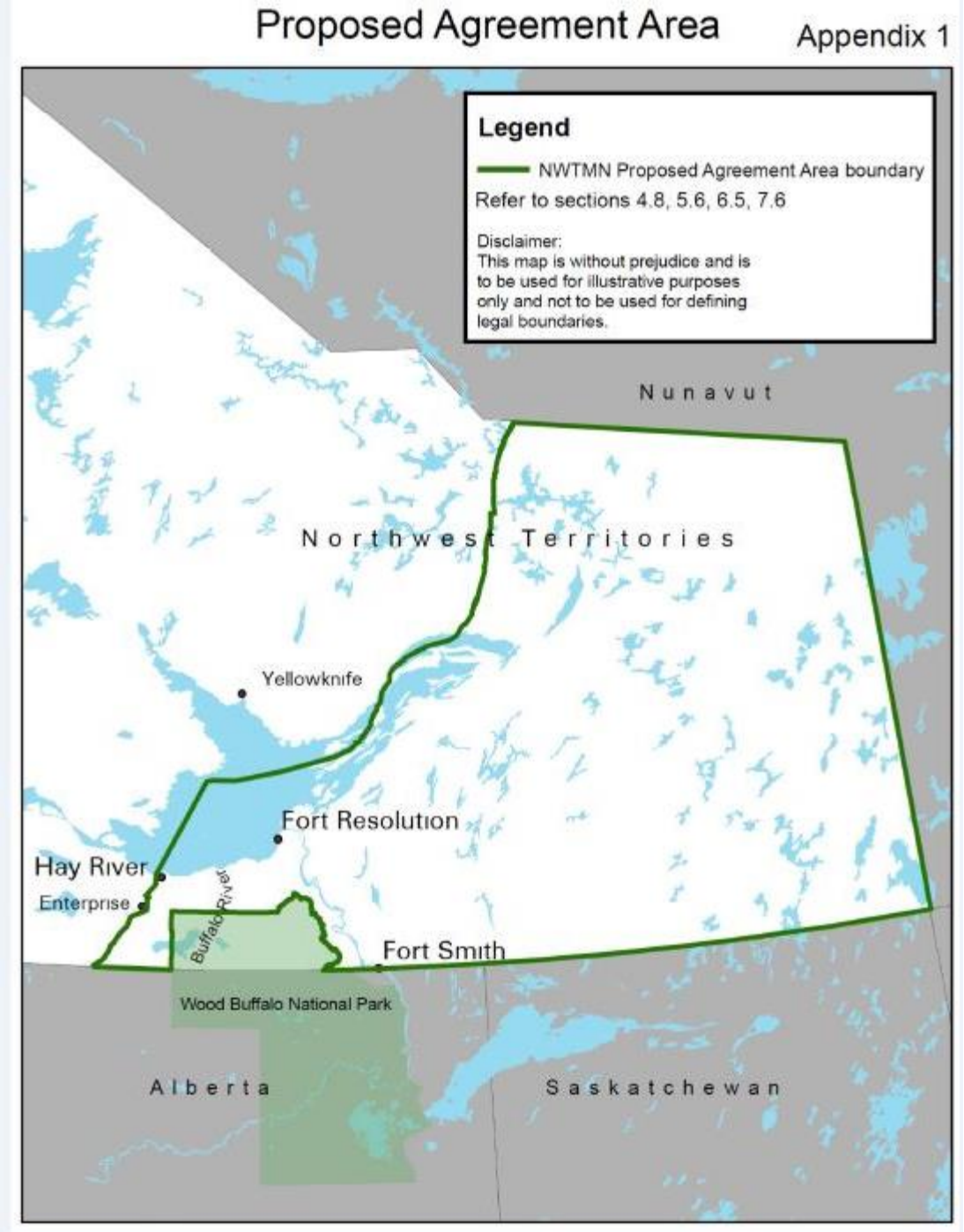
6. The Court retains jurisdiction to deal with the issue of costs. The applicants shall have 10 days in which to provide written submissions on the issue of costs, which are not to exceed five pages in length. The respondents shall then have 10 days in which to respond with written submissions that are not to exceed five pages in length. The applicants will

then have a further five days in which to reply with written submissions that shall not exceed three pages in length.

"Anne L. Mactavish"
Judge

Proposed Agreement Area

Appendix 1



FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1427-15
STYLE OF CAUSE:	WILLIAM ENGE, ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE NORTH SLAVE MÉTIS ALLIANCE v THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, GOVERNMENT OF THE NORTHWEST TERRITORIES, FORT SMITH MÉTIS COUNCIL, HAY RIVER MÉTIS GOVERNMENT COUNCIL, FORT RESOLUTION MÉTIS COUNCIL AND NORTHWEST TERRITORY MÉTIS NATION
PLACE OF HEARING:	YELLOWKNIFE, NORTHWEST TERRITORIES
DATE OF HEARING:	JUNE 6, 2017, JUNE 7, 2017, JUNE 8, 2017
JUDGMENT AND REASONS:	MACTAVISH J.
DATED:	OCTOBER 19, 2017

APPEARANCES:

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Christopher Buchanan	FOR THE RESPONDENT GOVERNMENT OF THE NORTHWEST TERRITORIES
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