



**SUPREME COURT OF CANADA**

**CITATION:** Quebec (Attorney General) v. Moses, 2010 SCC 17,  
[2010] 1 S.C.R. 557

**DATE:** 20100514  
**DOCKET:** 32693

**BETWEEN:**

**Attorney General of Quebec**  
Appellant  
and  
**Grand Chief Dr. Ted Moses, Grand Council of the Crees  
(Eeyou Istchee), Cree Regional Authority, Attorney General  
of Canada, Honourable David Anderson, in his capacity as  
Minister of Environment, Canadian Environmental  
Assessment Agency and Lac Doré Mining Inc.**  
Respondents  
- and -  
**Attorney General for Saskatchewan and  
Assembly of First Nations**  
Interveners

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and  
Cromwell JJ.

**REASONS FOR JUDGMENT:** Binnie J. (McLachlin C.J. and Fish, Rothstein and Cromwell  
(paras. 1 to 56) JJ. concurring)

**DISSENTING REASONS:** LeBel and Deschamps JJ. (Abella and Charron JJ.  
(paras. 57 to 143) concurring)

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Quebec (Attorney General) v. Moses, 2010 SCC 17, [2010] 1 S.C.R. 557

**Attorney General of Quebec**

*Appellant*

v.

**Grand Chief Dr. Ted Moses, Grand Council of the Crees  
(Eeyou Istchee), Cree Regional Authority, Attorney General  
of Canada, Honourable David Anderson, in his capacity as  
Minister of Environment, Canadian Environmental  
Assessment Agency and Lac Doré Mining Inc.**

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**Attorney General for Saskatchewan and  
Assembly of First Nations**

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**Indexed as: Quebec (Attorney General) v. Moses**

**2010 SCC 17**

File No.: 32693.

2009: June 9; 2010: May 14.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,  
Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Environmental law — Environmental assessment — Mining project — Project situated in James Bay area of Quebec covered by treaty between Aboriginal peoples and provincial and federal governments — Treaty setting out comprehensive procedures for environmental impact assessments and providing that “a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada” — Project falling within provincial jurisdiction but having significant impact on fish habitat — Fisheries within federal jurisdiction — Whether only provincial environmental assessment applicable — Whether treaty excluding assessment of project under federal environmental assessment legislation — James Bay and Northern Québec Agreement, ss. 22.6.7, 22.7.1, 22.7.5 — Canadian Environmental Assessment Act, S.C. 1992, c. 37.*

*Aboriginal law — Treaty — Environmental assessment — Mining project — Project situated in James Bay area of Quebec covered by treaty between Aboriginal peoples and provincial and federal governments — Treaty setting out comprehensive procedures for environmental impact assessments and providing that “a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada” — Project falling within provincial jurisdiction but having significant impact on fish habitat — Fisheries within federal jurisdiction — Whether only provincial environmental assessment applicable — Whether treaty excluding assessment of project under federal environmental assessment legislation — James Bay and Northern Québec Agreement, ss. 22.6.7, 22.7.1, 22.7.5 — Canadian Environmental Assessment Act, S.C. 1992, c. 37.*

*Aboriginal law — Treaty — Modern treaty — Interpretation.*

*Constitutional law — Aboriginal peoples — Treaty — Whether James Bay and Northern Québec Agreement qualifies as a treaty under s. 35 of Constitution Act, 1982.*

The Cree and Inuit communities signed the *James Bay and Northern Québec Agreement* with the governments of Quebec and Canada in 1975. The Agreement established a governance scheme and created a framework that would govern many aspects of life in the territory, including the Aboriginal economic and social development and the preservation of the natural environment. Under s. 22, the Agreement set out detailed and comprehensive procedures for environmental impact assessments. Whether a provincial or federal assessment will be conducted under the Agreement depends on the constitutional jurisdiction within which the project itself falls. In particular, s. 22.6.7 provides that “a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada”. If the exception applies, two assessments will be required, but these assessments may be combined with the “mutual agreement” of the parties. Section 2.5 of the Agreement also provides that the Agreement is paramount over all other laws of general application that are inconsistent with it.

A company intends to open and operate a mine in the James Bay area of Quebec in the Agreement “Category III” lands, an area where the Agreement recognizes Quebec’s right to regulate natural resource development subject to the environmental protection provisions of s. 22. In accordance with the Agreement’s procedures, the proponent of the project submitted to the administrator responsible for “matters respecting provincial jurisdiction” information concerning its proposed

development. The provincial Administrator transmitted this information to the Evaluating Committee, which made a recommendation about the extent of impact assessment and review and whether or not a preliminary and/or a final impact statement should be done. Subsequently, the provincial Administrator alone decided the scope of the assessment and gave appropriate directions to the proponent. On receipt of the provincial Administrator's instructions, the proponent supplied information about the potential environmental and social impacts, which acknowledged a significant impact on fish habitat. This was transmitted by the provincial Administrator to the provincial Review Committee and was then to be transmitted to the Cree Regional Authority for their representations.

Meanwhile, federal officials who were not involved in the review process under the Agreement, concluded that the project's impact on fisheries — a matter within exclusive federal jurisdiction under s. 91(12) of the *Constitution Act, 1867* — engaged s. 35(2) of the *Fisheries Act* and required a comprehensive study pursuant to the regulations made under the *Canadian Environmental Assessment Act* ("CEAA"). The federal officials informed the Cree that the study would be conducted by a review panel under the CEAA and not through the federal assessment procedure provided for in s. 22 of the Agreement. While the provincial review process of the project was still pending, the Cree commenced an action for declaratory relief in the Quebec Superior Court, which declared that only the provincial environmental assessment was applicable to the project pursuant to the Agreement. The Court of Appeal set aside that decision. The court concluded that the CEAA, in conjunction with the federal *Fisheries Act*, validly triggered a federal environmental assessment under the CEAA but that there were practical and operational inconsistencies between the CEAA review procedure and the one set out in the Agreement. Since the Agreement was paramount,

the court held that the *CEAA* review procedure was inapplicable, but substituted the federal review procedure in the Agreement for the one in the *CEAA*. The court also concluded that the project is subject as well to the provincial review procedure under s. 22 of the Agreement.

*Held* (LeBel, Deschamps, Abella and Charron JJ. dissenting): The appeal should be dismissed but the order of the Court of Appeal varied to provide that if the mine project is approved pursuant to the Agreement, the proponent may not proceed with the work without an authorization under s. 35(2) of the *Fisheries Act*, and that the issuance of any such authorization is to comply with the *CEAA* in accordance with its procedures, as well as the Crown's duty to consult with the Cree in relation to matters that may adversely affect their rights under the Agreement.

*Per* McLachlin C.J. and Binnie, Fish, Rothstein and Cromwell JJ.: The Agreement is a treaty covered by s. 35(1) of the *Constitution Act, 1982*. The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties and close attention should be paid to its terms. This case therefore should be decided on the basis of the terms the parties actually negotiated and agreed to as set out in the text of the Agreement rather than on general observations and ideas which are unsupported by the text.

A mining project within the territory covered by the Agreement that results in the harmful alteration, disruption or destruction of fish habitat is not exempted from any independent scrutiny by the federal Fisheries Minister by virtue of the Agreement. While there is no doubt that this project, considered in isolation, falls within provincial jurisdiction, a mining project anywhere in Canada that puts at risk fish habitat cannot

proceed without a permit from the federal Fisheries Minister, which he or she cannot issue except after compliance with the *CEAA*.

On the view advanced by the appellant Attorney General of Quebec, the provincially appointed Administrator under the Treaty could base a final decision upon an abbreviated fisheries study that is simply unacceptable to the federal Fisheries Minister. Alternatively, the Quebec Cabinet could for its own reasons override the fisheries concerns altogether and approve the mining project over the objection of the Administrator it has appointed, or lighten the conditions designed to mitigate the adverse effects of the project on the fisheries. In any such circumstances, on his view, the federal Fisheries Minister would be powerless to withhold the permit. Such a view is not consistent with the terms of the Agreement entered into by the parties.

The reference in s. 22.6.7 of the Agreement to only one impact assessment and review procedure merely regulates the internal review processes of the Agreement leading up to the decision of the Administrator or (on application by the mine proponent) the provincial Cabinet. The recommendations forwarded to the relevant Administrator will come from either the provincial committee or the federal panel but (in the absence of governmental agreement) not both, unless the project itself falls within both jurisdictions. The relevant Administrator will then (at least in the first instance) make an approval decision. While there is to be only one “impact review” of the mine project under the Agreement, the agreement of the parties to avoid duplication internal to the Agreement does not eliminate the post-approval permit requirement contemplated by the Agreement itself if imposed externally by a law of general application, such as the *CEAA* or the *Fisheries Act*. Under s. 22.2.3 of the Agreement, all federal laws of general application respecting environmental

protections apply insofar as they are not inconsistent with the Agreement. The *CEAA* is a federal law of general application respecting the environment and there is no inconsistency between the *CEAA* and the Agreement. Section 22.7.1 provides that once the proposed development is approved under the Agreement, the proponent “shall before proceeding with the work obtain . . . the necessary authorization or permits from responsible Government Departments and Services”. If the argument of the Attorney General of Quebec were correct, s. 22.7.1 would be worded to place the obligation on the responsible Government Department and Services to issue automatically the necessary authorization or permit, not to put the obligation on the proponent to obtain the necessary authorization or permit. Since nothing in the Agreement relieves the proponent from compliance with the ordinary procedures governing the issuance of the necessary authorization or permits referred to, it follows that once the project is approved by the provincial Administrator (or the provincial Cabinet overruling the Administrator’s disapproval), the proponent would have to make an application for the s. 35(2) fisheries permit to the federal Minister of Fisheries. As a matter of federal law, a *CEAA* assessment is obligatory prior to the grant of a s. 35(2) permit. The federal laws, the provincial laws and the Agreement fit comfortably together, and each should be allowed to operate within its assigned field of jurisdiction. A refusal by the federal Fisheries Minister to issue the necessary fisheries permit pursuant to s. 35(2) of the *Fisheries Act* without compliance with the *CEAA* would neither be in breach of the Agreement nor be unconstitutional even if the project had been approved in accordance with the Agreement.

The Court of Appeal erred in substituting the Agreement procedure for the *CEAA* procedure. Although the Agreement guarantees the Cree particular rights to participate in the assessment process, s. 22.7.5 expressly permits a federal impact



assessment review procedure where required by federal law or regulation. Since the Agreement specifically provides for processes outside those established by the Agreement, it cannot be inconsistent with the Agreement to require the proponent to follow them. In this case, the *CEAA* procedure governs and it must be applied by the federal government in a way that fully respects the Crown's duty to consult the Cree on matters affecting their rights pursuant to the Agreement in accordance with the principles established in this Court's jurisprudence. In many cases, the Agreement procedures would provide sufficient information for federal fisheries purposes, and the *CEAA* allows the responsible federal authority to collaborate with another jurisdiction in order to promote uniformity and harmonization in the assessment of environmental effects at all levels of government. The participatory rights of the Cree on matters that may adversely affect their rights pursuant to the Agreement are not at risk. The issue is whether, in relation to a mine which is expected to pollute fish habitat, the fisheries interest is ultimately the responsibility of the federal Fisheries Minister or provincial treaty bodies and (if its assistance is invoked by the mine proponent) the Quebec Cabinet. Common sense as well as legal requirements suggest that the *CEAA* assessment will be structured to accommodate the special context of a project proposal in the territory covered by the Agreement, including the participation of the Cree.

The federal Minister is not bound to issue a s. 35(2) fisheries permit following the approval of a mining project by the provincial Administrator or the Quebec Cabinet. The requirement for the provincial bodies to have regard to the native fisheries in reaching a conclusion on the merits of the project for the purposes of the Agreement does not constitute the provincial Administrator or Quebec Cabinet delegates of the federal Minister or relieve the federal Minister of the responsibility to comply with federal rules and responsibilities in relation to fish habitat.

*Per* LeBel, Deschamps, Abella and Charron JJ. (dissenting): The Agreement, which is both an Aboriginal rights agreement and an intergovernmental agreement, establishes a comprehensive and elaborate regime for the administration of the James Bay territory. It settles and determines not only the rights and obligations as between the provincial and federal Crowns, on the one hand, and the Aboriginal peoples living in the territory, on the other, but also the obligations, in relation to the territory, of the federal and provincial governments as between themselves. This Agreement, which was clearly intended to have the force of law, has supra-legislative status. It came into force and bound the parties only after both provincial and federal legislation approving and giving it effect was in force, and includes a clause which clearly indicates that, in the event of a conflict, the Agreement is to be paramount over other federal and provincial laws of general application. Both provincial and federal authorizing legislation confirm the Agreement's paramountcy. The Agreement has also constitutional status as it qualifies as a modern treaty for the purposes of s. 35(3) of the *Constitution Act, 1982*. It creates mutually binding obligations and establishes a comprehensive legal framework, setting out the parties' respective responsibilities where services and rights to land are concerned and organizing their relationships for the future. Furthermore, it is clear from the legislative record that the parties intended to resolve all outstanding issues between them and settle their respective rights and obligations. When interpreting a modern treaty, a court should strive for an interpretation that is reasonable, yet consistent with the parties' intentions and the overall context, including the legal context, of the negotiations. Any interpretation should presume good faith on the part of all parties and be consistent with the honour of the Crown. Any ambiguity that arises should be resolved with these factors in mind.

As is clear from an overview of the environmental assessment scheme contemplated by s. 22 of the Agreement, the nature of that project, not its impact, determines which assessment should be conducted and, as a general rule, a development project will be subject to only one environmental assessment process. In this case, the project is subject only to the provincial environmental assessment set out in the Agreement. The nature of the project — the development of a mine — falls under the exclusive jurisdiction of the province over either local works and undertakings, property and civil rights in the province, or non-renewable natural resources in the province, and the project’s impact on fish habitat — a matter of federal jurisdiction — does not bring it within the exception in s. 22.6.7 so as to override the general rule of only one assessment. Nothing in the language of s. 22 supports the conclusion that a project’s impact can trigger a second environmental review process where the project itself falls within the jurisdiction of one government and it has effects which fall within that of the other government. If a project’s impact could trigger a separate environmental review process, the consequence would be to turn the exception into the rule. Such a conclusion would directly contradict the clear intention of the parties who were extremely careful to distinguish between projects within federal jurisdiction and those within provincial jurisdiction. Furthermore, s. 22 explicitly addresses the role and participatory rights of the Cree in the environmental assessment process. They have both a substantive and a procedural role at each and every stage of that process. The federal process under the *CEAA*, which does not provide for either substantive or procedural participation by the Cree, is inconsistent with the provisions of the Agreement and cannot apply.

An additional federal assessment of the project is not required by s. 22.7.5 of the Agreement, which provides that nothing in s. 22 “shall be construed as imposing

an impact assessment review procedure by the Federal Government unless required by Federal law or regulation”. That sentence does not impose any obligations on the federal government other than those ordinarily required by general federal law or regulation. In view of the parties’ express intention that the Agreement constitute a comprehensive governance scheme for the entire territory, that it provides for only one environmental assessment as the general rule and that it be paramount over all other laws of general application which are inconsistent with it, and of the fact that no other government assessment process existed at the time and that no parallel process was provided for in the Agreement itself, s. 22.7.5 cannot be interpreted as triggering a separate federal environmental assessment of the project under the *CEAA*. To agree that the *CEAA* should prevail over the specific provisions of the Agreement would be to subvert the constitutional structure the parties to the Agreement intended to establish. Furthermore, s. 22.7.5 is a transitional provision. It was included in the Agreement in order to address the application of the law during the period between the signing of the Agreement and its coming into force, and govern environmental matters until the coming into force of the authorizing legislation.

The *CEAA* was enacted after the Agreement had been signed and implemented by statute. It is clear from the Agreement and its authorizing legislation that neither party can unilaterally modify its terms. In light of the constitutional normative hierarchy, the *CEAA* cannot prevail to impose a parallel process in addition to the ones provided for in the Agreement. Any other interpretation would mean that the federal government can unilaterally alter what was intended to be a comprehensive, multilateral scheme. The federal government is therefore prohibited from effectively and unilaterally modifying the procedure established by the Agreement, or derogating from the rights provided for in the Agreement, by purporting to attach conditions based

on external legislation of general application. The practical effect of this interpretation is that, if the Fisheries Minister determines that a permit must be issued under the *Fisheries Act*, the Minister must issue one on the basis of the environmental processes established by the Agreement and cannot insist that an additional environmental process be undertaken pursuant to the *CEAA*. The environmental review process under the Agreement is paramount.

### Cases Cited

By Binnie J.

**Referred to:** *R. v. Badger*, [1996] 1 S.C.R. 771; *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.

By LeBel and Deschamps JJ. (dissenting)

*Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Cree School Board v. Canada (Attorney General)*, [2002] 1 C.N.L.R. 112; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995]

3 S.C.R. 453; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Howard*, [1994] 2 S.C.R. 299; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

### **Statutes and Regulations Cited**

*Act approving the Agreement concerning James Bay and Northern Québec*, R.S.Q., c. C-67, ss. 2(1), (6)(a), 6.

*Canadian Environmental Assessment Act*, S.C. 1992, c. 37, ss. 5, 12(5)(c), 14, 16, 16.1, 40 to 45.

*Comprehensive Study List Regulations*, SOR/94-638, s. 3, Sch., s. 16(a).

*Constitution Act, 1867*, ss. 91 “preamble”, (12), (27), 92(5), (10), (13), (16), 92A.

*Constitution Act, 1982*, s. 35.

*Fisheries Act*, R.S.C. 1985, c. F-14, ss. 31, 34(1), 35(1), (2).

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 13.

*James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, Preamble, ss. 3(1), (3), 8.

*Law List Regulations*, SOR/94-636, Sch. I, item 6(e).

## Treaty

*James Bay and Northern Québec Agreement*, ss. 2.5, 2.7, 2.9.7, 2.15, 16.0.2, 22, 23.

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APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Rochon and Hilton JJ.A.), 2008 QCCA 741, [2008] R.J.Q. 944, [2009] 1 C.N.L.R. 169, 35 C.E.L.R. (3d) 161, SOQUIJ AZ-50487232, [2008] J.Q. No. 3142 (QL), 2008 CarswellQue 8289, setting aside a decision of B  nard J., 2006 QCCS 1832, [2006] R.J.Q. 1113, [2007] 1 C.N.L.R. 256, SOQUIJ AZ-50365314, [2006] J.Q. No. 3112 (QL), 2006 CarswellQue 3042. Appeal dismissed, LeBel, Deschamps, Abella and Charron JJ. dissenting.

*Francis Demers, Samuel Chayer and Hugues Melan  on*, for the appellant.

*Robert Mainville, Henry S. Brown, Q.C., and Jean-S  bastien Cl  ment*, for the respondents Grand Chief Dr. Ted Moses, the Grand Council of the Crees (Eeyou Istchee) and the Cree Regional Authority.

*Ren   LeBlanc, Bernard Letarte and Virginie Cantave*, for the respondents the Attorney General of Canada, the Honourable David Anderson, in his capacity as Minister of Environment, and the Canadian Environmental Assessment Agency.

*Yvan Biron*, for the respondent Lac Dor   Mining Inc.

Written submissions only by *P. Mitch McAdam* and *Chris Hambleton*, for the intervener the Attorney General for Saskatchewan.

*Bryan P. Schwartz and Jack R. London, Q.C.*, for the intervener the Assembly of First Nations.



The judgment of McLachlin C.J. and Binnie, Fish, Rothstein and Cromwell JJ. was delivered by

BINNIE J. —

I. Introduction

[1] The question raised by this appeal is whether a mining project within the territory covered by the *James Bay and Northern Québec Agreement* (“James Bay Treaty” or “Treaty”) that “results in the harmful alteration, disruption or destruction of fish habitat” (*Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1)) is nevertheless exempted by virtue of the Treaty from any independent scrutiny by the federal Fisheries Minister before issuing the federal fisheries permit. All parties to this appeal agree the mine will require the permit before commencing operations. If the permit is not obtained, or if the permit conditions are not complied with, the mine operator would face civil and criminal consequences.

[2] The Attorney General of Quebec contends that the federal Minister will have no choice but to issue the permit once the mine is approved by a provincially appointed Treaty Administrator or the Quebec Cabinet. He contends that despite the anticipated impact of the mine’s tailing ponds and other pollutants on fish and fish habitat, and despite fisheries being a matter within exclusive federal jurisdiction under s. 91(12) of the *Constitution Act, 1867*, the James Bay Treaty should be interpreted to exclude what would elsewhere be a compulsory assessment of the project’s impact under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”), and/or under federal fisheries policy.

[3] My colleagues LeBel and Deschamps JJ. agree with that position. They rely, in particular, on a term of the Treaty that provides that “a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada” (s. 22.6.7). They then interpret the Treaty to exclude fisheries’ “impacts” from the determination of whether the mine is to be considered “exclusively” federal or provincial. In the result, on this view, the provincially appointed Administrator under the Treaty could base a final decision upon an abbreviated fisheries study that is simply unacceptable to the federal Fisheries Minister. Alternatively, the Quebec Cabinet could for its own reasons override the fisheries concerns altogether and approve the mining project over the objection of the Administrator it has appointed, or lighten the conditions designed to mitigate the adverse effects of the project on the fisheries. In any such circumstances, on this view, the federal Fisheries Minister would be powerless to withhold the permit. I do not agree that the terms of the Treaty support such an anomalous result.

[4] My colleagues go further and accuse the federal government of “unilaterally reneg[ing] on its own solemn [treaty] promises” (para. 58). This is a very serious allegation and, I believe, highlights the importance of paying attention to the actual terms of the treaty to determine what the parties (including the federal government) agreed to, and whether the federal government has (as alleged) gone back on its word and, as my colleagues see it, violated “the honour of the Crown” (para. 58). With respect, I find no support whatsoever for this harsh condemnation in the body of the Treaty, or in the circumstances that gave rise to this dispute.

[5] My colleagues express concern about the “First Nations’ participatory rights” (para. 58), but the Cree First Nation — certainly a profoundly important party to the Treaty — considers that it is the Quebec government position, endorsed by my colleagues, that is not only “legally incorrect” but “makes no practical sense”. In a factum filed jointly on behalf of Grand Chief Dr. Ted Moses, Grand Council of the Crees (Eeyou Istchee) and Cree Regional Authority (the “Cree respondents”), they write:

In essence, the Attorney-General of Québec argues that federal authorities responsible for the implementation and enforcement of the *Fisheries Act*, R.S.C. 1985, c. F-14, are required to rely solely on a provincial review (in which they do not participate) to base their decisions under the *Fisheries Act* in regard to the Vanadium project. In addition to being legally incorrect, this approach makes no practical sense. [para. 6]

The Cree objection was essentially endorsed by the Quebec Court of Appeal. While, as will be seen, I do not entirely accept the procedural element of the Cree argument, I agree with their conclusion that on a proper construction of s. 22.7.5 of the Treaty, “a federal assessment in this case is indeed ‘required by Federal law or regulation’” (Cree Factum, at para. 80). Furthermore, as I interpret the Treaty, the participatory rights of the Cree are fully protected (contrary to what is said by my colleagues, at para. 58), as will be discussed.

[6] What all of this means, I believe, is that it is necessary to approach this case on the basis of the terms the parties actually negotiated and agreed to as set out in the text of their agreement rather than on general observations and ideas which, in my respectful view, are unsupported by the text. Applying this approach, I would dismiss the appeal, albeit for reasons that differ somewhat from those of the Quebec Court of Appeal (2008 QCCA 741, [2009] 1 C.N.L.R. 169).

A. Overview

[7] In *R. v. Badger*, [1996] 1 S.C.R. 771, Cory J. pointed out that Aboriginal “[t]reaties are analogous to contracts, albeit of a very solemn and special, public nature” (para. 76). At issue in that case was an 1899 treaty. The contract analogy is even more apt in relation to a modern comprehensive treaty whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not understand (paras. 52-53). The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties. As my colleagues note, “all parties to the Agreement were represented by counsel, and the result of the negotiations was set out in detail in a 450-page legal document” (para. 118). The importance and complexity of the actual text is one of the features that distinguishes the historic treaties made with Aboriginal people from the modern comprehensive agreement or treaty, of which the James Bay Treaty was the pioneer. We should therefore pay close attention to its terms.

[8] I do not agree with the attribution by the Attorney General of Quebec of “trump” status to the reference in s. 22.6.7 to only “one (1) impact assessment and review procedure”. This provision merely regulates the *internal* treaty review processes. It does not refer to requirements *external* to the Treaty. Indeed, s. 22.7.1 specifically preserves the external requirement imposed on the vanadium mine promoter, triggered by final approval of the project under the Treaty, to obtain “the necessary authorization or permits from responsible Government Departments and Services”, as follows:

22.7.1 If the proposed development is approved in accordance with the provisions of this Section, the proponent shall before proceeding with the work obtain where applicable the necessary authorization or permits from responsible Government Departments and Services. The Cree Regional Authority shall be informed of the decision of the Administrator. [Emphasis added.]

If the argument of the Attorney General of Quebec were correct, s. 22.7.1 would be worded to place the obligation on the responsible Government Department and Services to *issue* automatically the necessary authorization or permit, not to put the obligation on the proponent to *obtain* the necessary authorization or permit.

[9] What, then, is the role and function of s. 22.6.7 relied upon by the Attorney General of Quebec whose approach in this respect is adopted by my colleagues? It provides:

22.6.7 The Federal Government, the Provincial Government and the Cree Regional Authority may by mutual agreement combine the two (2) impact review bodies provided for in this Section and in particular paragraphs 22.6.1 and 22.6.4 provided that such combination shall be without prejudice to the rights and guarantees in favour of the Crees established by and in accordance with this Section.

Notwithstanding the above, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada or unless such project is located in part in the Territory and in part elsewhere where an impact review process is required.

My colleagues lay stress on the second paragraph (“shall not be submitted to more than one (1) impact assessment and review procedure”), but clearly the second paragraph must be read with the first paragraph. The two paragraphs read together are an elaboration of the internal treaty processes *leading up to* the decision of the Administrator. The rule against duplication simply provides that only one impact

assessment is to be conducted *within* the pre-approval treaty process for the benefit of the Administrator. The recommendations forwarded to the relevant Administrator will come from *either* the provincial Committee *or* the federal Panel but (in the absence of governmental agreement) not both, unless the project itself falls within both jurisdictions.

[10] I agree with my colleagues that there is to be only one “impact review” of the mine project *under* the James Bay Treaty. The recommendations of that review process, as stated, will provide input to the provincial Administrator. The provincial Administrator (or the Quebec Cabinet) will then make an approval decision. However, the agreement of the parties to avoid duplication *internal* to the Treaty does not eliminate the *post*-approval permit requirement contemplated by the Treaty if imposed *externally* by a law of general application, such as the *CEAA* or the *Fisheries Act*, whose operation is preserved by the Treaty itself in s. 22.7.1.

[11] To this group of provisions the parties added a further stipulation which contemplated the possibility of an external “impact assessment review procedure by the Federal Government” as follows:

22.7.5 Nothing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation. However, this shall not operate to preclude Federal requirement for an additional Federal impact review process as a condition of Federal funding of any development project. [Emphasis added.]

The parties to the Treaty plainly agreed that the Treaty provisions dealing with the environment do not themselves require an independent impact assessment review by the federal government (i.e. the federal government itself as distinguished from the

Treaty review bodies on which the federal government may or may not be represented). However, this provision is expressly made subject to such an external requirement being imposed by “Federal law or regulation” (i.e. not the Treaty). Far from excluding a separate federal obligation external to the Treaty, the Treaty thus contemplates the obligation of compliance with federal law whether in existence at the time of the negotiations (e.g. s. 31 of the *Fisheries Act* as it then was) or impact assessments subsequently imposed by federal law (e.g. the *CEAA*). This is the position of the Cree respondents and I agree with it.

[12] My colleagues LeBel and Deschamps JJ. take a different view. They state that s. 22.7.5 must be understood as merely a “transitional” provision pending enactment of implementing legislation (para. 133). I can find no support for this idea in the text of the Treaty or its context. It is true that s. 22.7.5 is found at the end of Section 22 in a group of sections headed (appropriately enough) “Final Provisions”. The same group includes the provision for a Cabinet override of an Administrator’s decision not to authorize a proposed development (s. 22.7.2), a provision which is clearly permanent, not “transitional”. Where transitional arrangements are contemplated (as in s. 22.7.7), the text refers in explicit language to “interim measures”. There is no such qualification in s. 22.7.5. If we are to proceed, as I do, on the basis that these provisions were drafted by skilled individuals to reflect the precise agreement reached by the Cree with the federal and provincial governments, we have no mandate to rewrite them. The Court ought to do the parties the courtesy of respecting the rights and obligations in the terms they agreed to.

[13] My colleagues refer to the Treaty as a manifestation of cooperative federalism, but with respect, as they interpret it, the Treaty turns out to be a vehicle for

provincial paramountcy. My view, on the contrary, is that a refusal by the federal Fisheries Minister to issue the necessary fisheries permit to alter, disrupt or destroy fish habitat pursuant to s. 35(2) of the federal *Fisheries Act* without compliance with the *CEAA* would neither be in breach of the Treaty nor be unconstitutional (as argued by the Attorney General of Quebec — see transcript, at pp. 2-3 and 5-9, and para. 84 of the Appellant’s Factum). The federal laws, the provincial laws and the James Bay Treaty fit comfortably together, and each should be allowed to operate within its assigned field of jurisdiction.

B. *The Treaty Addressed a Long-Standing Aboriginal Grievance*

[14] The James Bay Treaty was an epic achievement in the ongoing effort to reconcile the rights and interests of Aboriginal peoples and those of non-Aboriginal peoples in Northern Quebec. Concluded in 1975 between the Grand Council of the Crees (of Quebec), the Northern Québec Inuit Association, the Governments of Canada and Quebec, and a number of Quebec Crown corporations, the Treaty was designed to fulfill obligations assumed by Quebec towards Aboriginal peoples at the time of the transfer of approximately 410,000 square miles of land and lakes from Canada’s northern territories to Quebec in 1898 and 1912.

[15] There is no doubt that when the First Ministers’ Conference on Aboriginal Constitutional Affairs agreed in 1983 to amend s. 35 of the *Constitution Act, 1982* to provide in subsection (3) that “[f]or greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired”, their deliberations included the James Bay Treaty concluded but a few years earlier. The Cree participated in the relevant sessions, as did the federal and Quebec



First Ministers. Many observers at the time considered the amendment to be superfluous. Hence the phrase “[f]or greater certainty”. The James Bay Treaty is clearly covered by s. 35(1) of the *Constitution Act, 1982*.

[16] The Treaty is not intended to operate as a land freeze. It contemplates “[t]he right to develop in the Territory” (s. 22.2.2) and preserves the “rights and interests of non-Native people, whatever they may be”, but such development is to be regulated by planning procedures that recognize “[t]he protection of the hunting, fishing and trapping rights of Native people in the Territory” and the need to minimize the “negative environmental and social impacts of development on Native people and on Native communities” (s. 22.2.4).

[17] It was of great importance to have Cree and Inuit participation in the environmental impact assessment of projects within their respective territories, although their formal participation in the development of Category III lands (as here) was to be only as members of consultative and recommending bodies. In a project involving Category III lands, these Treaty bodies include the James Bay Advisory Committee on the Environment, which is described in the Treaty as “the preferential and official forum for responsible governments in the Territory concerning their involvement in the formulation of laws and regulations relating to the environmental and social protection regime” (s. 22.3.24); and the Evaluating Committee, which recommends “the extent of impact assessment and review” of a proposed development (s. 22.5.14) as well as the Environmental and Social Impact Review *Committee* for projects “involving” provincial jurisdiction (s. 22.6.1) and the Environmental and Social Impact Review *Panel* for projects “involving” federal jurisdiction (s. 22.6.4). In none of these committees or panels do the Cree nominees have a majority (s. 22.6.2

and s. 22.6.5). In any event, these bodies do not make development decisions. Their recommendations are not binding on the relevant decision makers.

*C. The Ultimate Treaty Decision Maker on This Project Is the Quebec Cabinet*

[18] The treaty decision-making power in relation to development on the lands in question rests not with these committees or panels but with the provincial Administrator (in “matters” respecting provincial jurisdiction) and a federal Administrator (in “matters” involving federal jurisdiction) or a Cree Administrator in matters involving Category I lands (s. 22.1.1). (As stated, the proposed vanadium mine is located on Category III lands.)

[19] The Treaty contains a political override. An appeal lies from the decision of the Administrator to the Lieutenant-Governor in Council of Quebec (the Quebec Cabinet) or the federal Governor in Council (the federal Cabinet) on projects within their respective jurisdictions (s. 22.7.2). Cabinet may “authorize a development which has not been authorized [by the Administrator] or alter the terms and conditions established by the Administrator pursuant to Sub-Section 22.6” (s. 22.7.2). Cree participation is important and essential, but, at the end of the day, the Quebec Cabinet will have the final word on Category III lands if its intervention is sought by a mine promoter dissatisfied with the provincial Administrator’s decision.

II. Facts

[20] The salient background is set out in the opinion of my colleagues LeBel and Deschamps JJ. It is appropriate, however, to elaborate on some of the concerns related to the fisheries and fish habitat.

[21] The assessment procedure under the Treaty leading up to the Administrator's decision consists of three stages. At the first stage of the present application, the proponent of the mining project submitted to the Administrator responsible for "matters respecting provincial jurisdiction" some preliminary information concerning its proposed development (s. 22.5.11). (I will refer to this official throughout as the "provincial Administrator" as it is a provincial appointment.) All parties accept that for treaty purposes the vanadium mine is a provincial project, relying on *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501 (C.A.), at p. 527:

. . . once the project falls under provincial jurisdiction (as opposed to under federal jurisdiction) it is the provincial side of the procedure which is set in motion, regardless of whether the project has an environmental impact in an area under federal jurisdiction, and that the federal Administrator, the federal Review Panel and the Governor in Council then have no active role to play. [Emphasis added.]

*Eastmain Band* addressed internal treaty procedures. It said nothing about the requirement imposed on a mine operator to obtain required permits and authorizations. As mentioned, the parties to the Treaty segregated out the fisheries licence issue and left it to be determined *not* under the Treaty procedures but according to federal laws of general application.

A. *The Review Procedure*

[22] The provincial Administrator transmitted the proponent's information about its proposal for a mine to the Evaluating Committee (s. 22.5.12), which was limited to making a recommendation about the extent of impact assessment and review and whether or not a preliminary and/or a final impact statement should be done (s. 22.5.14). Once provided with the Evaluating Committee's recommendations, the provincial Administrator *alone* decided the scope of the assessment (s. 22.5.4) and gave appropriate directions to the proponent (ss. 22.5.4, 22.5.15 and 22.5.16) in that regard.

[23] While Schedule 3 to Section 22 contemplates a broad ranging assessment that would normally include fish habitat, where relevant, the Administrator is not bound by Schedule 3, which itself provides in its introduction that:

In the exercise of his functions, and duties pursuant to this Section of the Agreement, the Administrator shall give due consideration to the provisions of this Schedule but shall not be restricted or bound by or to the said provisions. [Emphasis added.]

It is to be expected that all participants in the approval process will be conscientious and carry out their work with due diligence, but the fact remains that the Treaty is structured to give the Administrator(s) and Cabinet(s) a lot of leeway in establishing the scope of the impact assessment and in reflecting (or not) its recommendations in their final decision to approve or not to approve a development project such as a vanadium mine.

[24] On receipt of the provincial Administrator's instructions, the proponent supplied information about the potential environmental and social impacts "especially those on the Cree populations potentially affected" (Section 22, Sch. 3). This material

(“the impact statement”) was transmitted by the provincial Administrator to the provincial Review Committee (s. 22.6.10). The material was also to be transmitted to the Cree Regional Authority (s. 22.6.11) for their “representations” (s. 22.6.12).

## B. Fisheries Concerns

[25] The impact study prepared in this case by the mining proponent was presented on June 26, 2003. It acknowledged a significant impact on fish habitat, including the risks associated with the tailing ponds, and the fact that many water bodies, including lakes, would be lost during the building of the complex. In its summary of the impact study, the proponent itself mentioned the following:

[TRANSLATION] As for the federal framework, it requires, first, compliance with the *Canadian Environmental Assessment Act* (CEAA) to the extent that the project has an impact on fish habitat . . . .

. . .

Some small bodies of water that are undergoing eutrophication will be lost as a result of the disposal of mining waste. A number of watercourses will be spanned by the access road and the electrical power line, while others will be cut off by or diverted around the plant and its waste disposal sites. The main collectors (Villefagnan, Boisvert) have minimum annual flows up to 40 times greater than the tributaries that will be affected by the project.

. . .

The study area includes a walleye spawning ground in the Armitage River and several brook trout spawning grounds at the outfall of Audet Lake and in Wynne Creek. The Boisvert River has a habitat suitable for the reproduction of walleye. Chibougama Lake is of great importance to the region’s residents and tourists, primarily for walleye fishing in the summer. [Emphasis added; Exhibit P-11, Appellant’s Record, vol. III, at pp. 76 and 81-82.]

(See Exhibit P-11, Appellant’s Record, vols. III to IX, for the detailed Impact Study.)

The proponent, however, did not provide very much information about the scale and nature of the precise impact of the project on fish habitat; nor did it disclose in any detail how it proposed to mitigate the environmental damage.

[26] On the basis of the impact study and other information before it, the Review Committee was given the task of recommending to the provincial Administrator whether or not the development should proceed and, if so, under what terms and conditions (s. 22.6.15).

[27] In this case, the Review Committee found the fisheries information deficient, as noted in its report dated March 2004, as follows:

[TRANSLATION] To compensate for the loss of fish habitat that would result from the mining project, the proponent recommends alterations to a waterfall located 300 metres upstream of Villefagnan Creek in order to provide access to the walleye spawning grounds.

However, the information in the impact assessment statement does not make it possible to quantify the loss of fish habitat production capacity associated with the project, although it is agreed that the project will result in a net loss of breeding, nursery and rearing areas, overwintering habitat, etc., for several species of fish in various types of environments.

The proponent must therefore present its fish habitat compensation exercise by specifying the various types, functions and surface areas involved together with the multispecies potential of the environments affected by the project. [Exhibit P-13-1, at p. 15, Appellant's Record, vol. IX, at p. 60]

[28] The Review Committee notably expressed concern with respect to fish habitat, water quality loss, loss of numerous lakes, use of explosives, pollution through discharge of effluent into water, extraction and use of fresh water, pollution of waters frequented by fish through tailing ponds, remedial works including construction of a

fish ladder or waterfall, loss of fish production, and degradation of fish habitat generally (Exhibit P-13-1, at pp. 14-16, Appellant's Record, vol. IX, at pp. 59-61).

C. *Federal Commentary on the Fisheries Concerns*

[29] Although there are no federal appointees on the provincial Review Committee, the Canadian Environmental Assessment Agency did contact the provincial Administrator by letter dated October 28, 2003 to try to coordinate the Treaty process and the *CEAA* review (Exhibit P-25, Appellant's Record, vol. IX, at pp. 153-54). The *CEAA* expressly contemplates dealing with bodies designated by land claims agreements (see ss. 12(5)(c) and 40(1)(d)). It therefore seems that the federal government was willing to harmonize both assessment processes as it is authorized (but not required) to do under ss. 40 to 45 of the *CEAA*. Such harmonization would be an exercise in cooperative federalism. For present purposes, it is sufficient to note that no joint body was established, by the federal Minister or delegation made to the Treaty body, as must be done in writing under s. 43(2) of the *CEAA*.

[30] Fisheries and Oceans Canada commented in its October 2003 statement on the proponent's submission:

[TRANSLATION] As a result, the content of the impact assessment statement (IAS) submitted by McKenzie Bay Resources Ltd. (MBRL) does not meet the requirements of DFO [the Department of Fisheries and Oceans] and is insufficient for the FHMB [Fish Habitat Management Branch] to conduct a complete analysis of the project's potential impact on fish and fish habitat for the purposes of the Fisheries Act (FA). Much information remains to be clarified or provided. [Exhibit P-24, Appellant's Record, vol. IX, at p. 121]

On page 176 of Volume 2 of the IAS, the promoter proposes alterations to a waterfall 300 m upstream from its mouth in order to provide access to potential spawning grounds for walleye in the downstream portion of Villefagnan Creek. This measure is proposed to compensate for the losses of fish habitat that would result from the mining project.

At this time, the information in the IAS is insufficient for us to quantify the loss of fish habitat production capacity. It is therefore currently impossible to determine whether the proposed compensation project would make a result of no net loss possible.

. . . the mining project will likely result in the loss of breeding, feeding, nursery and rearing areas, overwintering habitat, etc., for several species of fish in various types of environments (lenitic, lotic, grass bed, etc.). However, only walleye spawning grounds were considered for the purposes of compensation. [Emphasis added; Exhibit P-24, Appellant's Record, vol. IX, at p. 129.]

[31] Environment Canada commented in November 2003:

[TRANSLATION] First of all, it is our opinion that there are significant gaps in the project description and in the description of the receiving environment. The information in the report does not provide a sufficient scientific basis for assessing the project's environmental impact, particularly where the aspects under our jurisdiction are concerned. [Exhibit P-24, Appellant's Record, vol. IX, at p. 135]

[32] Natural Resources Canada also commented in November 2003:

[TRANSLATION] Natural Resources Canada is of the opinion that there are significant gaps in the impact assessment statement and that we need more information to assess the project's environmental impact, especially where the aspects under our jurisdiction are concerned. [Exhibit P-24, Appellant's Record, vol. IX, at p. 141]

[33] Thus, all parties involved in the present matter acknowledged the harmful impact of the mining project on fish and fish habitat, and both the Review Committee and the governmental authorities at the federal as well as the provincial level identified a serious lack of pertinent information.



[34] The Treaty provides that the Review Committee report is to be forwarded to the Administrator who makes the decision whether or not to approve the project and on what conditions. In the present case, the litigation was commenced before the provincial process had proceeded to completion.

### III. Relevant Statutory Enactments

[35] See Appendix.

### IV. Analysis

[36] There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*. The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.

[37] Parliament, of course, has bound the federal government to comply with the Treaty provisions in all respects: *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 8. The Attorney General of Quebec argues that the Treaty review process leading up to a decision by the Administrator is exhaustive of environmental assessment requirements (unless overturned by order of the Cabinet) but, in my view, the effect of the Treaty provisions is as follows. Under s. 22.2.3 of

the Treaty, all federal laws of general application respecting environmental protections apply insofar as they are not inconsistent with the Treaty (a similar regime applies to education (s. 16.0.2)). The *CEAA* is a federal law of general application respecting the environment. The question, then, is whether there is any inconsistency between the *CEAA* and the Treaty. I believe not. As stated, s. 22.7.1 of the Treaty provides that once the proposed development is approved by the Administrator following consultation and receipt of “recommendations”, the mine promoter is required *notwithstanding such approval* to obtain “the necessary authorization or permits from responsible Government Departments and Services”. Nothing in the Treaty relieves the proponent from compliance with the ordinary procedures governing the issuance of the necessary authorization or permits. If the makers of the Treaty had intended the Administrator’s approval (or Cabinet’s substituted approval) to be the end of the regulatory requirements, they would have said so, but they did not. They said the contrary.

A. *Application of the Canadian Environmental Assessment Act*

[38] What must the proponent of the mine do in order to obtain the s. 35(2) fisheries permit as required (“shall” obtain) by s. 22.7.1 of the Treaty? Once the project is approved by the provincial Administrator (or the provincial Cabinet overruling the Administrator’s disapproval), the proponent would have to make an application for the s. 35(2) fisheries permit to the federal Minister of Fisheries. As a matter of law, a *CEAA* assessment is obligatory prior to the grant of a s. 35(2) permit.

[39] Section 5(1)(d) of the *CEAA* provides that an environmental assessment must be made “before a federal authority” acting “under a provision prescribed [by

regulation] pursuant to paragraph 59(f) [of the *CEAA*], issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part”. The Governor General in Council has enacted the *Law List Regulations*, SOR/94-636, which set out the government functions that require an environmental assessment pursuant to s. 5(1)(d). Item 6(e) of Sch. I on the list is “*Fisheries Act* . . . subsection 35(2)”.

[40] The vanadium mine at issue here — a metal mine with an ore production capacity of greater than 3,000 tons per day — is covered by s. 3 of the federal *Comprehensive Study List Regulations*, SOR/94-638, and s. 16(a) of the Schedule. As such, the assessment under the *CEAA* must comply with the “comprehensive study” provisions, meaning that it requires public consultation and participation, among other procedures set out in the *CEAA* itself : *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

B. *There Is No Conflict Between the Treaty and the CEAA*

[41] The Treaty specifically provides for processes outside those established by the Treaty and it cannot, therefore, be inconsistent with the Treaty to require the mine promoter to follow them.

[42] The Quebec Court of Appeal found that the *CEAA procedures* conflict to some extent with the Treaty procedures. For example, the *CEAA* does not specifically contemplate Cree participation, although it does provide that “[c]ommunity knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment” (*CEAA*, s. 16.1). The argument is that the Treaty

guarantees the Cree particular rights to participate in the assessment process (ss. 22.5.6, 22.6.2 and 22.6.5) and that the *CEAA* process denies them that constitutionally protected right. The *CEAA* process (it is contended) is to that extent inconsistent with the Treaty.

[43] However, s. 22.7.5 not only singles out the federal government for special attention in matters of impact assessment, but specifically preserves the application of its federal “impact assessment review procedure”. I reproduce s. 22.7.5 for convenience:

22.7.5 Nothing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation. However, this shall not operate to preclude Federal requirement for an additional Federal impact review process as a condition of Federal funding of any development project. [Emphasis added.]

I noted earlier that the Cree respondents themselves emphasized in their factum the words “unless required by Federal law or regulation” as preserving the application of the *CEAA* to the proposed vanadium mine.

[44] Section 22.7.5 cannot, in its terms, refer to the Environmental and Social Impact Review Panel established under s. 22.6.4 to review “development projects in the Territory involving Federal jurisdiction” because the words “Federal Government” are not apt to describe a Treaty body to which the federal government may nominate some of the members. Moreover, the reference in s. 22.7.5 expressly permits a federal impact assessment review *procedure* where required by federal law or regulation. In this respect, the Quebec Court of Appeal erred, in my view, in substituting the Treaty

procedure for the *CEAA* procedure. The application of a federal government *procedure* is expressly preserved by the Treaty.

[45] Accordingly, unlike the Quebec Court of Appeal, I do not believe the correct outcome here is to substitute the Section 22 Treaty procedure in place of the statutory procedure required by the *CEAA*. The *CEAA* procedure governs but, of course, it must be applied by the federal government in a way that fully respects the Crown's duty to consult the Cree on matters affecting their James Bay Treaty rights in accordance with the principles established in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. I need say nothing further on this aspect of the case because nothing in the evidence or argument suggests a federal reluctance to consult fully with the Cree in the *CEAA* process.

[46] Nor can it be said that the federal Fisheries Minister would not, in the ordinary course, pay close attention to the work done by the Treaty bodies. Undoubtedly, in many cases, the Treaty work would provide sufficient information for federal fisheries purposes. Indeed, as Canada points out in its factum, at para. 49, the *CEAA* allows the responsible federal authority to collaborate with another [TRANSLATION] "jurisdiction"/"instance" and, at para. 50, that one of the objects of the *CEAA* is to promote uniformity and harmonization in the assessment of environmental effects at all levels of government.

[47] In short, I believe the concern expressed by my colleagues (at para. 58) that “[t]he results would be duplication, delays and additional costs for taxpayers and interested parties, and a breach of the First Nations’ participatory rights” is not well founded. The “First Nations’ participatory rights” on matters that may adversely affect their Treaty rights are not at risk. The issue is whether in relation to a vanadium mine, which is expected to pollute fish habitat, the fisheries interest is ultimately the responsibility of the federal Fisheries Minister or (if invoked) the Quebec Cabinet.

[48] Common sense as well as legal requirements suggest that the *CEAA* assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including the participation of the Cree. Reference has already been made to the possibility of a joint or substituted panel under ss. 40 to 45 of the *CEAA*. Nevertheless, the legal question before us is whether, absent such an arrangement, the federal Minister is *bound* to issue a s. 35(2) fisheries permit following the approval of a mining project by the Administrator (or the Quebec Cabinet) and, in my view, he is not so bound.

C. *The Autonomy of the Federal Minister of Fisheries*

[49] Section 35(1) of the *Fisheries Act* provides that “[n]o person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.” As stated, s. 35(2) allows the Minister to set conditions upon which a person can engage in conduct otherwise prohibited by s. 35(1). Specifically, it provides that “[n]o person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in

Council under this Act.” In other words, s. 35(2) allows the Minister to issue a permit to a person, like the proponent of the vanadium mine, to engage in conduct harmful to fish habitat that would otherwise contravene s. 35(1) and expose the mine operator to serious consequences.

[50] Although the requirement for authorization under s. 35(2) of the *Fisheries Act* was disputed by the Attorney General of Quebec in the courts below (see Quebec Court of Appeal decision, at para. 114), he now concedes that a federal fisheries permit is required. (See transcript, at pp. 8-9 and 11-12.) I agree that the federal permit is required once the Treaty approvals are given. Having conceded the necessity of a federal fisheries permit, however, the Attorney General of Quebec is unable to point to anything in the Treaty that would relieve a mining promoter of compliance with the federal law applicable to the issuance of such a permit, including in particular the *CEAA*.

[51] The Treaty does not purport to dictate to the federal Minister how to go about making his decision under s. 35(2) of the *Fisheries Act*. In particular, it does not fetter the exercise of his or her evaluation of the fisheries issues to the outcome of the provincial Treaty Administrator’s (or Quebec Cabinet’s) assessment of the mine and its impact on fish habitat.

[52] The autonomy of the federal Fisheries Minister is preserved even though Section 22 of the Treaty requires the provincial bodies to “consider” fisheries concerns. The provincial bodies do not bear constitutional responsibility for the fisheries. The Treaty requirement for them to have regard to the native fisheries in reaching a conclusion on the merits of the vanadium mine for treaty purposes does not

constitute the provincial Administrator (or, if called on, the Quebec Cabinet) delegates of the federal Minister or relieve the federal Minister of the responsibility to comply with federal rules and responsibilities in relation to fish habitat.

## V. Conclusion

[53] In my view, the vanadium mine cannot lawfully proceed without a fisheries permit. The proponent is unable to obtain, and the federal Minister is unable to issue, a s. 35(2) fisheries permit without compliance with the *CEAA*. The contention of the Quebec Attorney General that the Treaty requires the federal Minister to issue the s. 35(2) fisheries permit as a result of the province-led review panel regardless of the federal Minister's independent assessment of potential damage to fish habitat should be rejected.

[54] It is only after final approval by the Treaty bodies that it can be said that “the proposed development is approved in accordance with the provisions of this Section”, which is the condition precedent to the proponent's obligations under s. 22.7.1 to “obtai[n] where applicable the necessary authorization or permits from responsible Government Departments and Services”. There is thus no conflict. The need for a *post*-Treaty approval fisheries permit is made mandatory by the Treaty itself (“shall” obtain). In the case of fisheries, it is federal law, not the Treaty, that governs when such a permit may be granted as well as its terms and conditions.

[55] I agree with the observation expressed by my colleagues LeBel and Deschamps JJ. that “[i]t would hardly be reasonable to believe that the parties intended that one of them might sign the Agreement one day and withdraw its signature the next



day, week or year in respect of a key part of their contract” (para. 58). This sentiment is true so far as it goes, but in my view, with respect, it has no application to the dispute at issue in this appeal. I would dismiss the appeal but vary the order of the Quebec Court of Appeal to provide that if the vanadium mine project is approved pursuant to the Treaty, the proponent may not proceed with the work without authorization under s. 35(2) of the *Fisheries Act*, and that the issuance of any such authorization is to comply with the *CEAA* in accordance with its procedures, as well as the Crown’s duty to consult with the First Nations in relation to matters that may adversely affect their Treaty rights.

[56] The Attorney General of Quebec is to pay the Cree respondents and the Attorney General of Canada respectively their costs in this Court. The costs of prior proceedings are to remain as disposed of by the courts below.

The reasons of LeBel, Deschamps, Abella and Charron JJ. were delivered by

LEBEL AND DESCHAMPS JJ. (dissenting) —

## I. Introduction

[57] For the first time since the groundbreaking *James Bay and Northern Québec Agreement* (“Agreement”) was signed in 1975, this Court must interpret its provisions. At issue are conflicting views about which, or how many, of three possible environmental assessment processes should apply to a mining project in the James Bay area of Quebec that is covered by this agreement between certain First Nations, the

governments of Quebec and Canada and several Crown corporations. The parties disagree about whether the project should be reviewed once, twice or three times, or possibly through a combination of competing processes. We find that there is but one answer from both a legal and a practical standpoint: on the facts of this case, only the provincial process provided for in the Agreement applies. The Quebec Superior Court so concluded, while the Court of Appeal disagreed.

[58] Our colleague Binnie J. rejects this interpretation. He finds support in the argument of the Cree that to interpret the Agreement as limiting the assessment to the provincial process would be legally incorrect. However, far from accepting the only interpretation the Cree consider legally correct, one that would entitle them to participate in the assessment process (see para. 29 of the factum of the Cree respondents), he proposes yet another interpretation, which rests on s. 22.7.5 of the Agreement. According to this interpretation, a federal environmental assessment based on a statute that was not in force at the time of the Agreement is mandatory because of a proviso that the negotiated process applies alone only if no other process is “required by Federal law or regulation”. With respect, this provision is merely transitional. In any event, we cannot accept these words as proof that the parties intended to allow the federal government to unilaterally alter the terms of the Agreement. In so interpreting them, Justice Binnie would add yet another level of assessment without any evidence of a benefit for the public or of an improvement on any aspect of the processes provided for in the Agreement, especially the provincial process. The results would be duplication, delays and additional costs for taxpayers and interested parties, and a breach of the First Nations’ participatory rights. The parties to the Agreement adopted a pioneering approach in respect of environmental law. The *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”), did not

exist at the time. The parties surely did not intend that one of them would be able to unilaterally change the terms of the Agreement with respect to a matter that was one of their main concerns and had been the subject of difficult and intensive negotiations. The Agreement contemplated the application of existing laws of general application. It would hardly be reasonable to believe that the parties intended that one of them might sign the Agreement one day and withdraw its signature the next day, week or year in respect of a key part of their contract. The long history of negotiations and of amendments to the Agreement does not allow of such an interpretation. Our colleague would now condone a decision by the federal government to unilaterally renege on its own solemn promises. This is hardly what one would expect this Court to endorse in such stark contradiction to the honour of the Crown.

[59] In the reasons that follow, we will explore the background and judicial history of this case. We will discuss important issues concerning the nature and interpretation of the Agreement and of modern treaties between the Crown and the First Nations of Canada more generally, and these issues will inform our final disposition of this appeal.

## II. Background

### A. *James Bay Agreement*

[60] In 1971, the Quebec government announced plans to build an extensive hydro-electric generation complex on the La Grande River in the James Bay area. The project involved flooding vast expanses of land used by the Cree for hunting and fishing in order to build reservoirs that would feed hydro-electric turbines. The Cree

responded by initiating litigation. In November 1973, the Quebec Superior Court granted an interlocutory injunction that stopped all work on the project on the basis that it had been undertaken without any consultation about its environmental and social impact on Aboriginal inhabitants. The Court of Appeal reversed that decision, and leave to appeal to this Court was refused ([1975] 1 S.C.R. 48). While the litigation was under way, the Cree and Inuit communities entered into negotiations with the governments of Quebec and Canada that resulted in the signing of the Agreement in November 1975.

[61] The Agreement territory, which comprises more than 1,082,000 square kilometres extending inland from the shores of James Bay, constitutes the northernmost reaches of present-day Quebec (the “Territory”). Its only permanent inhabitants in 1975 were 7,000 Cree and 5,000 Inuit, who had occupied the land “since time immemorial” (É. Gourdeau, “Genesis of the James Bay and Northern Québec Agreement”, in A.-G. Gagnon and G. Rocher, eds., *Reflections on the James Bay and Northern Québec Agreement* (2002), at p. 17). The Agreement was intended to settle all Aboriginal claims to the land, establish a comprehensive and forward-looking governance regime, and provide a framework for the exercise and performance of the respective rights and obligations of the two First Nations and the two governments in the course of their ongoing relationship. In many respects, the Agreement grants the First Nations parties a form of self-government.

[62] For this purpose, the Agreement established a far-reaching governance scheme under which important powers are conferred on the Cree and Inuit. It created a framework that would govern many aspects of life in the Territory, including Aboriginal hunting and fishing, resource and hydro-electric development, the

administration of justice, school administration, Aboriginal economic and social development, health and social services, local governance and — the aspect that is in issue in this case — preservation of the natural environment.

[63] The environmental protection regime will be examined in greater detail below, but it will be helpful here to mention a few of its most noteworthy features. Sections 22 and 23 of the Agreement set out detailed and comprehensive procedures for environmental impact assessments that, when drafted, were ahead of their time. Indeed, they predated analogous environmental legislation that has since been enacted by all the provinces and by the federal government. In a sense, the Agreement foreshadowed the increased knowledge of and heightened concern for environmental issues that have since developed throughout Canada. Another significant feature of the Agreement is the explicit affirmation in s. 22.2.2 of its goal of striking a balance between two overarching objectives: economic development and the protection of traditional Aboriginal uses of the land. The resulting environmental impact assessment procedure, which involves the First Nations and the governments of Quebec and Canada, rests on two key principles: guaranteeing Aboriginal participation and consultation at all stages of the assessment process, and avoiding duplication by providing for a single environmental assessment process based on the nature of the project involved and on whether it falls within provincial or federal constitutional jurisdiction.

#### B. *Vanadium Mine Project*

[64] At issue in this appeal is the future of a vanadium mining project (“Project”) located at Lac Doré, near Chibougamau, within the James Bay Territory.

Lac Doré Mining Inc. (“proponent”) intended to open and exploit the mine. The Project is to be situated in the Agreement Territory on “Category III” lands, with respect to which the Agreement recognizes Quebec’s right to regulate natural resource development subject to the environmental protection provisions of Section 22.

Vanadium is an element used in the production of steel alloys. The mine contains reserves of 10 million tons, has an anticipated life of 40 years, corresponds to 12 percent of worldwide vanadium consumption, and is the only mine of its kind in North America.

[65] On May 27, 1999, the proponent forwarded to the Quebec Minister of Environment a Notice of Project in respect of the Project in accordance with the Agreement’s procedures. In June 2003, the proponent submitted its impact statement to the deputy minister, and the impact statement was then forwarded to the provincial Review Committee.

[66] Meanwhile, federal officials concluded that the Project’s impact on fisheries engaged s. 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14, and required a comprehensive study pursuant to s. 16(a) of the Schedule of the *Comprehensive Study List Regulations*, SOR/94-638, made under the *CEAA*. In April 2004, federal officials informed the Cree that the study would be conducted by a review panel under the *CEAA* and not through the federal assessment procedure provided for in Section 22 of the Agreement.

[67] In response, the Cree commenced an action for declaratory relief in the Quebec Superior Court. The commencement of this litigation effectively interrupted

the environmental assessment process originally undertaken pursuant to the Agreement.

### III. Judicial History

#### A. *Superior Court, 2006 QCCS 1832, [2007] 1 C.N.L.R. 256*

[68] In the Superior Court, the Cree sought a declaration (i) that the *CEAA* was inapplicable in the Agreement Territory because it was inconsistent with the Agreement, and (ii) that the federal and provincial environmental assessments under the Agreement should be conducted instead in light of the nature and impact of the Project. The Attorney General of Quebec (“AGQ”) agreed with the Cree that the *CEAA* was inapplicable but argued that because the nature of the Project related to a matter within provincial jurisdiction, only the provincial assessment under the Agreement was applicable. The Attorney General of Canada took a third position: (i) because of the licence requirement in the *Fisheries Act*, the Project’s potential impact on fisheries validly triggered the federal environmental assessment legislation, and (ii) because the nature of the Project related to a matter within provincial jurisdiction, the provincial environmental assessment procedure in the Agreement was also applicable. In the Superior Court, the parties proceeded on the basis of an agreed statement of facts that read as follows:

- (1) that the Cree rights under the Agreement “exist by way of land claims agreements” in the sense of s. 35(3) of the *Constitution Act, 1982*;

- (2) that the lands impacted by the vanadium mine are used by the Cree for traditional activities;
- (3) that mining projects are “Future Developments Automatically Subject to Assessment” as provided by Sch. I of Section 22 of the Agreement;
- (4) that the provincial nature of the project made it subject to provincial jurisdiction and a provincial environmental assessment, though litigation was required to determine whether its impact on federal jurisdiction might also make it subject to a federal assessment.

[69] The parties’ divergent positions gave rise to several issues: (i) whether the environmental assessment procedures under the Agreement are consistent with the procedures required by the *CEAA*; (ii) the effect of any inconsistency between the Agreement and the *CEAA*; and (iii) whether the requirement to proceed with a provincial or federal environmental assessment under the Agreement was triggered solely by the nature of the Project, or by both its nature and its impact.

[70] On the first issue, B nard J. undertook a detailed comparison of the environmental assessment provisions of Section 22 of the Agreement and those of the *CEAA*. She observed that Section 22 establishes a set of principles that inform the conduct of the assessment. A salient feature of this regime is that it ensures consultation with the Cree — about the specific impact of the use of the lands on their lifestyle and traditional activities — in all environmental assessments conducted on Category III lands. By contrast, the *CEAA*’s procedure contains no equivalent guiding principles or consultation rights for the Cree and grants no rights to Aboriginal



membership in review panels. B  nard J. referred to nine different examples of inconsistency between the *CEAA* and the Agreement (paras. 111-34), focusing most notably on the issue of Cree participation. She held that the overall effect of proceeding with an environmental assessment under the *CEAA* would be to dilute the role of the Cree in the conduct of the assessment, contrary to the protections guaranteed by the Agreement (para. 134).

[71] After identifying the inconsistencies between the Agreement and the *CEAA*, B  nard J. turned to the second issue. She observed that the Agreement is a tripartite pact between the governments of Canada and Quebec and the Cree, is binding upon the two levels of government and imposes an obligation on them to uphold Cree rights, including the right to a [TRANSLATION] “detailed and exhaustive” environmental review process (paras. 136 and 138). She added that the Agreement cannot be amended without the consent of all parties (para. 138). Both the Agreement and the implementing legislation provide that in the event of any inconsistencies between the Agreement and provincial or federal law, the Agreement is paramount, which meant that owing to the inconsistencies between the Agreement and the *CEAA*, the *CEAA* was inapplicable to the Project (paras. 147 and 177).

[72] This led to the third issue: whether the Project was covered by the Agreement’s provincial or federal assessment procedure. To resolve this issue, it was necessary to decide whether the nature of the Project alone, or both its nature and its impact, should be considered in determining which procedure or procedures would apply. B  nard J. acknowledged the *dictum* of the Federal Court of Appeal in *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501 (*per* D  cary J.A.), that only the nature of the project is relevant in determining which procedure to employ,

but she stopped short of explicitly endorsing it. Instead, she reached the same result by interpreting the words of the Agreement, resting her conclusion on the following propositions: First, the Agreement clearly distinguishes between federal and provincial projects. Second, the intent of the Agreement is to provide, as a general rule, for a single environmental assessment, subject to only two narrow exceptions, neither of which was relevant on the facts of the instant case. As a result, B  nard J. concluded that the position of the Cree that both the nature and the impact of a project can trigger an assessment would lead to a dual assessment in most cases, thereby turning the exception into the rule. B  nard J. concluded that only the provincial process was applicable in the case at bar.

B. *Quebec Court of Appeal (Pelletier, Rochon, and Hilton JJ.A.), 2008 QCCA 741, [2009] 1 C.N.L.R. 169*

[73] The Cree appealed the Superior Court’s judgment. The Quebec Court of Appeal ruled, in a *per curiam* decision, on three issues: (i) whether there was a valid *CEAA* trigger justifying a federal environmental assessment procedure; (ii) whether there was any inconsistency between the *CEAA*’s assessment procedure and the procedures set out in the Agreement; and (iii) whether, under the Agreement’s assessment procedures, two assessments — one provincial, the other federal — can be conducted if the federal trigger is the *CEAA* and not the Agreement.

[74] In the court’s view, the first issue did not concern the constitutional validity of the *CEAA*, as this Court had held it to be valid in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. Rather, the question was whether, in light of the decision on jurisdiction in *Oldman*, the *CEAA* was applicable in the instant case. Comparing the *Guidelines Order* (the federal

legislation at issue in *Oldman*) with the *CEAA* (more recent legislation passed after *Oldman*), the Court of Appeal concluded that the *CEAA*, in conjunction with s. 35 of the federal *Fisheries Act*, validly triggered a federal environmental assessment. As a result, before the Minister of Fisheries and Oceans could authorize a work or undertaking, a valid environmental assessment had to be conducted pursuant to s. 5(1)(d) of the *CEAA*.

[75] The AGQ had argued that the *CEAA*'s review procedure exceeded the scope of the federal jurisdiction over fisheries as delineated in *Oldman*, because s. 16(2) of the *CEAA* authorized the Minister to review the purpose of the Project, not merely its effects. Such a power extended beyond the limits of the federal jurisdiction recognized in *Oldman* (para. 108). The court rejected this argument, comparing s. 16(1)(e) of the *CEAA* to s. 4(2) of the *Guidelines Order* upheld in *Oldman* and finding that they were equivalent although the *CEAA* provision was [TRANSLATION] "[w]ritten more elaborately" (para. 111). Rejecting the AGQ's constitutional and textual arguments about the scope of the *CEAA*, the court concluded that there was a valid external trigger for a federal assessment.

[76] The second issue arose from the first: the finding of a valid external trigger for the federal process led to an analysis of whether the *CEAA*'s process was consistent with Section 22 of the Agreement. In this inquiry, the question was what principles should guide the court in interpreting a modern Aboriginal treaty. After reviewing the principles of interpretation applicable to treaties as summarized by this Court in *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall (1999)*"), and the decisions of the courts of appeal in *Cree School Board v. Canada (Attorney General)*, [2002] 1 C.N.L.R. 112 (Que. C.A.), and *Eastmain Band*, the Court of Appeal outlined a set of

guiding principles for the interpretation of modern treaties. First and foremost, the Agreement must be interpreted broadly and liberally, in a manner consistent with the government's fiduciary obligations to the Cree. Nevertheless, the interpretation must reflect a reasonable analysis of the parties' intentions and interests, taking into account both the historical context and the legal context of the Agreement. Finally, where two or more interpretations are reasonably possible, the interpretation most consistent with the interests of the Aboriginal signatories must prevail.

[77] The Court of Appeal then proposed a method for applying these principles to conduct a comparative analysis of the *CEAA* and the Agreement. To begin, an inconsistency will be found only if there is an irreconcilable conflict that prevents the Aboriginal signatories from exercising their rights under the Agreement. An inconsistency may emerge, first, from a comparative analysis of the provisions of the Agreement and those of the *CEAA*. However, beyond this comparative exercise, there may also be a second level of inconsistency resulting from the principles underlying the Agreement itself. This analysis is based solely on the words of the Agreement.

[78] In the first inquiry, the court found that while the [TRANSLATION] "principles, purposes, and objectives of the two texts are consistent" (para. 148), "[t]he irreconcilable conflict appears when the review procedures at issue are examined to reveal a practical and operational inconsistency" (para. 149). Briefly stated, the consultative and participatory rights guaranteed to the Cree in the Agreement are not available under the *CEAA* (paras. 154-60). As a result, the *CEAA* procedure must be excluded on the Agreement Territory.

[79] The second inquiry turned on a key principle found by the court to arise from the Agreement: the prohibition against a dual federal/provincial assessment of the same project (s. 22.6.7). Reading the Agreement as a whole, and noting in particular the [TRANSLATION] “considerable care [the parties took] to distinguish the projects under federal jurisdiction from those under provincial jurisdiction”, the court rejected the argument of the Cree that the level of government designated to conduct an environmental assessment should be determined by both the nature and the impact of the project (para. 171). Instead, it endorsed the Superior Court’s reasoning and refused to make the conduct of dual federal and provincial assessments the rule rather than the exception. The determination of the level of government that would conduct the assessment depended on the nature of the project (paras. 176 and 178). A reading of the Agreement itself did not justify triggering the federal assessment process in the case at bar.

[80] Having found a valid external trigger for the *CEAA* in the *Fisheries Act* but no valid trigger for the federal assessment process in the Agreement, the court went on to consider whether the external trigger could justify a federal environmental assessment in the Agreement Territory. Applying s. 22.2.3, the court concluded that valid external provincial or federal environmental legislation could, to the extent that it was not incompatible with the Agreement, trigger an external environmental assessment under the procedure provided for in the Agreement (para. 193). The combined effect of these conclusions was that the *CEAA* assessment was valid owing to the external trigger, but that because the Agreement was paramount, the *CEAA* assessment process was inapplicable. To the extent of the inconsistency, the Agreement’s federal assessment process prevailed.

#### IV. Analysis

[81] The issue remains the same as in the courts below. Which environmental review process applies to the Project: the provincial or the federal process under the Agreement, both those processes, or the federal process under the *CEAA*? To resolve this issue, we must first discuss the nature, interpretation and effect of the Agreement and situate it in its proper legal and constitutional context.

##### A. *The James Bay Agreement*

###### (1) Nature

[82] The Agreement is both an intergovernmental agreement and an Aboriginal rights agreement. It is binding upon, and creates rights and obligations for, the federal and provincial governments and the First Nations. It may be viewed as a model for the many modern land treaties that have been signed since the 1982 constitutional amendments, which included the protection of what are now referred to as “modern” treaty rights under s. 35(3) of the *Constitution Act, 1982*. However, the Agreement does not just settle and determine the rights and obligations as between the provincial and federal Crowns, on the one hand, and the Aboriginal peoples living in the Territory, on the other. It also settles and determines the obligations, in relation to the Territory, of the federal and provincial governments as between themselves. Both these points warrant further discussion.

[83] The full significance and effect of the Agreement as it relates to the government and Aboriginal signatories will be discussed below. It will suffice for now

to note that all the parties saw the Agreement as a means of settling the rights of the Cree and Inuit with respect to the Territory (speech to the National Assembly by John Ciaccia, representative of then Premier Robert Bourassa, reproduced in the *James Bay and Northern Québec Agreement and Complementary Agreements* (1998)). The Aboriginal parties were to be given the power of “self-administration” — what would today be referred to as “self-government” — over all Category I lands within the Territory. The Agreement also protected the right of the Aboriginal signatories to hunt, fish and trap throughout the Territory. At the time, the Agreement was groundbreaking in that one of its objectives was to establish and develop procedures and mechanisms to enable Aboriginal communities to participate in the management and development of the Territory’s lands and resources.

[84] However, in addition to being an Aboriginal rights document under which the Cree are given powers of self-government over large segments of the Territory, the Agreement is an intergovernmental agreement between the federal government and the province of Quebec. It is therefore yet another example of what this Court has repeatedly called “co-operative federalism” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162; see also *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 10).

[85] Governance through intergovernmental agreements has become increasingly commonplace in Canada and is resorted to frequently by the federal government and the provinces, and also by the provinces between themselves. As

Professor Poirier has noted, modern states continue to rely on these types of agreements as a means of coordinating and managing government services:

[TRANSLATION] The functioning of federal systems is supported by a wide range of co-operation and information- and resource-sharing mechanisms. Defining what is to be done by various levels of government appears to be essential to the effective management of public business. .

..

...

Intergovernmental agreements between components of a federal state are one of the most formal and most widely used mechanisms of federal governance.

(J. Poirier, “Les ententes intergouvernementales et la gouvernance fédérale: aux confins du droit et du non-droit”, in J.-F. Gaudreault-DesBiens and F. Gélinas, eds., *The States and Moods of Federalism: Governance, Identity and Methodology* (2005), 441, at pp. 442-43)

The scope of these agreements can be quite broad, covering the vast majority of areas of public policy, including the protection of minority language rights, the financing of government programs such as health care, and matters that engage a federation’s international obligations (see Poirier, at p. 443). Often essentially administrative in nature, such agreements set out who does what, and who pays for it, within the Canadian federal structure. They can — directly or indirectly — affect the constitutional division of legislative powers (see Poirier, at pp. 446 and 448; see also S. A. Kennett, “Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment” (1993), 31 *Alta. L. Rev.* 644).

[86] Intergovernmental agreements can range from rather simple declaratory statements to complex regulatory mechanisms (see *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292). However, not all



will be found to have the force and effect of positive law. In this sense, “a spectrum exists between ‘political’ agreements and those having a ‘legal’ content” (Kennett, at p. 655). According to the commentators, in the absence of some form of statutory approval, an intergovernmental agreement will be binding only on its signatories, and therefore will not create rights and obligations for third parties (N. Bankes, “Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia” (1991), 29 *Alta. L. Rev.* 792; Kennett, at p. 658). Nor would it appear that statutory authorization alone will suffice. Rather, a provision indicating that an agreement takes effect as if it were a statute will provide the strongest indication that the agreement ought to be given the force of law (Bankes, at p. 828). For example, Professor Bankes suggests that, in English, language such as “as if enacted in this Act” will be required.

[87] The legal status of the Agreement must be considered with this in mind. There is no question that the Agreement establishes a comprehensive and elaborate regime for the administration of the James Bay Territory. Of clear significance is the provision that the Agreement would come into force only upon the coming into force of both provincial and federal legislation approving and giving effect to it and declaring it valid:

- 2.7 During the Transitional Period of two (2) years referred to herein, Canada and Québec shall to the extent of their respective obligations, take the measures necessary to put into force, with effect from the date of execution of the Agreement, the Transitional Measures referred to in the Agreement.

Except for such Transitional Measures, the Agreement shall come into force and shall bind the Parties on the date when both the federal and provincial laws respectively approving, giving effect to and declaring valid the Agreement are in force.

Upon the coming into force of the said federal and provincial legislation the Transitional Measures shall be replaced by all the

other provisions of this Agreement. All acts done by the Parties in virtue of the said Transitional Measures shall then be deemed to have been ratified by all the Parties hereto. [Emphasis added.]

It is important to stress that the Agreement itself was not binding on the parties until this authorizing legislation was in force.

[88] In accordance with ss. 2.5 and 2.7 of the Agreement, Parliament enacted the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32. In addition to a preamble in which the government's purpose in entering into the Agreement is stated, the Act contains, in s. 3(1), the following statutory authorization: "The Agreement is hereby approved, given effect and declared valid." Likewise, the Quebec legislature enacted the *Act approving the Agreement concerning James Bay and Northern Québec*, R.S.Q., c. C-67. In approving the Agreement, the National Assembly used language virtually identical to that of the federal legislation: "The Agreement is hereby approved, given effect to and declared valid" (s. 2(1)). In further support of the intention to give the Agreement the force of positive law, the provincial legislation includes the delegation of a regulation-making power to the Quebec government so that it may "create the agencies provided for in the Agreement necessary for the implementation thereof" (s. 2(6)(a)).

[89] The Agreement also provides clear direction to the respective legislative bodies on the content of the legislation contemplated in s. 2.7:

- 2.5 Canada and Québec shall recommend to the Parliament of Canada and to the National Assembly of Québec respectively, forthwith upon the execution of the Agreement, suitable legislation to approve, to give effect to and to declare valid the Agreement and to protect, safeguard and maintain the rights and obligations contained in the Agreement. Canada and Québec undertake that the

legislation which will be so recommended will not impair the substance of the rights, undertakings and obligations provided for in the Agreement. [Emphasis added.]

The Agreement is clearly intended to have the force of law.

[90] The Agreement also clearly indicates that, in the event of a conflict, it is to be paramount over other federal and provincial laws of general application:

2.5 . . .

Both the federal and provincial legislation approving and giving effect to and declaring valid the Agreement, if adopted, shall provide that, where there is an inconsistency or conflict between such legislation and the provisions of any other federal or provincial law, as the case may be, applicable to the Territory, the former legislation shall prevail to the extent of such inconsistency or conflict. Canada and Québec acknowledge that the rights and benefits of the Indians and Inuit of the Territory shall be as set forth in the Agreement and agree to recommend that the federal and provincial legislation approving, giving effect and declaring valid the Agreement will provide for the repeal of Sub-Sections c), d) and e) of Section 2 of the federal Québec Boundaries Extension Act, 1912, and of the same Sub-Sections of Section 2 of the Schedule to the provincial Québec boundaries extension act, 1912. [Emphasis added.]

[91] Both pieces of authorizing legislation confirm the Agreement's paramountcy over all other general laws. Section 8 of the federal Act reads as follows:

**8.** Where there is any inconsistency or conflict between this Act and the provisions of any other law applying to the Territory, this Act prevails to the extent of the inconsistency or conflict.

In the same vein, s. 6 of the provincial legislation reads as follows:

6. In case of conflict or inconsistency, this Act shall prevail over any other Act applicable to the territory described in the Agreement to the extent necessary to resolve the conflict or inconsistency.

[92] These provisions have never been repealed, and they continue to bind both governments. The Agreement settles the parties' mutual rights and obligations, and is clearly binding on the parties in the same way as any ordinary private law contract would be. However, the Agreement has the added feature of statutory implementation through legislation enacted by both federal and provincial legislative bodies, includes a paramountcy clause, and clearly allows that there was an intention to elevate the Agreement to supra-legislative status. Having demonstrated that the Agreement is binding law and that it is paramount over conflicting laws of general application, we will now discuss its constitutional status.

[93] While the Agreement itself has been the subject of much litigation, the courts that have considered it have thus far refrained from expressly addressing its constitutional status. In *Eastmain Band*, Décaré J.A. expressed no opinion on this issue:

The appellant, Hydro-Québec and the Attorney General of Canada, assuming for the purposes of this case that the Agreement is a "treaty", strictly speaking, on which point I shall express no opinion, argue that while the first element of this rule — liberal construction — applies in the case of a modern treaty, the second element — doubtful expressions should be construed in favour of the Indians — does not apply. The point which they dispute, to borrow the expression used by counsel for Hydro-Québec, is that the Aboriginals have a constitutional right to have any ambiguity resolved in their favour. [Emphasis added; p. 514.]

Rousseau-Houle J.A., writing for the majority in *Cree School Board*, also refrained from considering the issue:

[TRANSLATION] Like Baudouin J.A., I believe that it is inappropriate to rule on whether the Agreement should benefit from constitutional protection under section 35 of the *Constitution Act, 1982*, given the record as constituted by the parties and the three actions brought before the Superior Court (*Coon-Come v. Procureur général du Québec*, No. 500-02-017984-960; *Coon-Come v. Hydro-Québec*, No. 500-05-004330-906; and *Lord v. Procureur général du Québec*, No. 500-05-043203-981) that bear directly on the characterization and validity of the Agreement.

...

Although it is not necessary to examine whether the rights granted in the Agreement should benefit from constitutional protection, the Agreement is nonetheless a solemn accord reached with the Crees and the Inuit, which was ratified and implemented through legislative channels. [Emphasis added; paras. 91 and 96.]

[94] Nor was the constitutional status of the Agreement a live issue in the courts below. In the Superior Court, the parties admitted that the Agreement was a treaty for the purposes of s. 35(3):

[TRANSLATION]

## **2. Admissions by the parties**

This Agreement is a claims agreement within the meaning of subsection 35(3) of the *Constitution Act, 1982*, and the Crees' rights are treaty rights recognized and affirmed by section 35 of the *Constitution Act*. [para. 22]

Because of this admission, the constitutionality of the Agreement was not in issue on appeal (paras. 14 and 126). It therefore falls to this Court to determine whether the Agreement qualifies as a modern treaty for the purposes of s. 35(3). In light of the parties' arguments, we must address this issue squarely.

[95] The Agreement, which was signed in 1975, of course predates s. 35 of the *Constitution Act, 1982*, as does the federal and provincial legislation approving it. Quite understandably, in this context, the Agreement is silent with respect to the constitutional status of the rights it recognizes. The Agreement must therefore be analysed from the perspective of a constitutional framework that did not exist at the time it was negotiated and executed.

[96] Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing treaty rights of Aboriginal peoples:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Because the Agreement is a modern agreement, s. 35(3) is also relevant:

35. . . .

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

[97] In *R. v. Sioui*, [1990] 1 S.C.R. 1025, Lamer J. (as he then was) set out the constituent elements of a treaty for the purposes of s. 35. Relying on this Court’s earlier decision in *Simon v. The Queen*, [1985] 2 S.C.R. 387, he concluded that “it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity” (p. 1044; see also S. Grammond, “Les effets juridiques de la *Convention de la Baie James* au regard du droit interne canadien et québécois” (1991-1992), 37 *McGill L.J.* 761, at p. 779).

[98] The most significant feature, for the purposes of our analysis, is the creation of mutually binding obligations. The Agreement is far more comprehensive in scope than either the treaties of peace and friendship or the numbered treaties considered by this Court in a number of cases in which the analytical framework for interpreting the historical treaties between certain First Nations, Canada and Great Britain was developed (see e.g. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *Marshall (1999)*; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Simon*). As Professor Grammond suggests, modern treaties tend to address far more than just the ceding of territory:

[TRANSLATION] Modern treaties therefore cover a much wider range of subjects than the territorial treaties of the 19th century. In modern treaties, the Crown and Aboriginal peoples have tried to specifically define their rights and obligations in many areas, such as land use, hunting and fishing, sharing of royalties for the use of natural resources, environmental assessment, economic development, preferential hiring, awarding of contracts, adaptation of public services, etc. The most recent agreements also include provisions on self-government, dispute arbitration and co-ordination with the claims of neighbouring Aboriginal peoples.

(S. Grammond, *Aménager la coexistence: Les peuples autochtones et le droit canadien* (2003), at p. 255)

The Agreement fits this description well. It establishes a comprehensive legal framework, setting out the parties' respective responsibilities where services and rights to land are concerned and organizing their relationships for the future.

[99] It is also important to note that the Agreement was the first one entered into by the federal government and an Aboriginal group following this Court's decision in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. That

decision is credited with reorienting the federal government's policy on Aboriginal land claims and, more specifically, with producing a "shift toward negotiation as the preferred policy for resolving land claims in northern Quebec, Yukon, Northwest Territories, and British Columbia" (D. Sanders, "'We Intend to Live Here Forever': A Primer on the *Nisga'a Treaty*" (1999-2000), 33 *U.B.C. L. Rev.* 103, at p. 108; *Cree School Board*, at para. 81). In 1973, under the then Minister of Indian Affairs, Jean Chrétien, the federal Department of Indian Affairs created the Office of Native Claims to deal with both specific and comprehensive land claims. The Agreement was the first one entered into under this new policy.

[100] Furthermore, it is clear from the legislative record that the parties intended to resolve all outstanding issues between them and settle their respective rights and obligations. As we mentioned above, effect was given to the Agreement by enacting legislation at both the federal and the provincial levels. A review of both those statutes further supports this reading of the parties' intentions.

[101] The wording of a statute's preamble often provides insight into the statute's purpose or goal that can be helpful to a court interpreting it. According to s. 13 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, "[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object." As Professor Sullivan notes, "[t]he most direct and authoritative evidence of legislative purpose is found in formal purpose statements appearing in the body of legislation" (*Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 270). Legislative preambles in particular may "contain direct descriptions of purpose or descriptions of the circumstances giving rise to the enactment — the mischief the legislature intended to cure, the social problems it wished to address" (Sullivan, at p.



271). Although a legislative preamble will never be determinative of the issue of legislative intent since the statute must always be interpreted holistically, it can nevertheless assist in the interpretation of the legislature's intention (P.-A. Côté with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 72-75).

[102] The preamble to the federal legislation further highlights the intention to create mutually binding obligations between the parties:

WHEREAS the Government of Canada and the Government of Quebec have entered into an Agreement with the Crees and the Inuit inhabiting the Territory within the purview of the 1898 acts respecting the Northwestern, Northern and Northeastern Boundaries of the Province of Quebec and the 1912 Quebec Boundaries extension acts, and with the Inuit of Port Burwell;

AND WHEREAS the Government of Canada and the Government of Quebec have assumed certain obligations under the Agreement in favour of the said Crees and Inuit;

AND WHEREAS the Agreement provides, *inter alia*, for the grant to or the setting aside for Crees and Inuit of certain lands in the Territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the Territory of regional and local governments to ensure the full and active participation of the Crees and Inuit in the administration of the Territory, measures to safeguard and protect their culture and to ensure their involvement in the promotion and development of their culture, the establishment of laws, regulations and procedures to manage and protect the environment in the Territory, remedial and other measures respecting hydro-electric development in the Territory, the creation and continuance of institutions and programs to promote the economic and social development of the Crees and Inuit and to encourage their full participation in society, an income support program for Cree and Inuit hunters, fishermen and trappers and the payment to the Crees and Inuit of certain monetary compensation;

AND WHEREAS the Agreement further provides in consideration of the rights and benefits set forth therein for the surrender by the said Crees, the Inuit of Quebec and the Inuit of Port Burwell of all their native claims, rights, titles and interests, whatever they may be, in and to the land in the Territory and in Quebec;

AND WHEREAS Parliament and the Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit;

AND WHEREAS it is expedient that Parliament approve, give effect to and declare valid the Agreement;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows . . . .

[103] Important concessions were made by the Cree and Inuit parties in entering into the Agreement. Before the negotiations started, the parties had been involved in protracted litigation. The Aboriginal signatories therefore, in addition to agreeing that the document was to be exhaustive with regard to their rights, agreed that all court actions were to be discontinued during the transitional period:

2.9.7 The Parties agree to further suspend during the Transitional Period the legal proceedings relating to the James Bay project or to the claims, rights, titles and interests in land of the James Bay Crees and the Inuit of Québec, including the effects of any judgment, rendered or to be rendered, resulting therefrom, and not to institute any further proceedings relating to such matters, during the Transitional Period, including all matters contemplated by the proceedings in the case of *Kanatewat et al.* vs. the *James Bay Development Corporation et al.* pending before the Supreme Court of Canada and related proceedings pending before the Superior Court of Québec. The Parties further agree not to institute legal proceedings relating to Transitional Measures referred to herein during the Transitional Period. [Emphasis added.]

[104] The Agreement also extinguished all outstanding and future Aboriginal claims, which is confirmed by s. 3(3) of the *James Bay and Northern Quebec Native Claims Settlement Act*:

### 3. . . .

(3) All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished, but nothing in this Act prejudices the rights

of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from the *Indian Act*, where applicable, and from other legislation applicable to them from time to time.

In short, the Aboriginal signatories agreed to abandon all current and future claims against the Crown and also agreed that their rights were to be determined exclusively and comprehensively by reference to the Agreement.

[105] The amendment procedure provided for in the Agreement attests to its solemnity. Although the Agreement can be amended, the prior consent of all the parties is required:

- 2.15 The Agreement may be, from time to time, amended or modified in the manner provided in the Agreement, or in the absence of such provision, with the consent of all the Parties. Whenever for the purposes of, or pursuant to, the Agreement, unless otherwise expressly specified, consent is required in order to amend or modify any of the terms and conditions of the Agreement, such consent may be given on behalf of the Native people by the interested Native parties.

The Agreement has in fact been amended several times. In this sense, it is similar to a binding contract entered into by parties who are all ably represented by counsel. This is a strong indication of the solemnity of the Agreement. So, too, is the requirement of statutory authorization, from two separate levels of government, before the Agreement will have binding effect on the parties themselves.

[106] We therefore conclude that the Agreement has constitutional status under s. 35(3) of the *Constitution Act, 1982*. It satisfies the criteria established by this Court

for the recognition of a treaty under s. 35(3) and should therefore be recognized to be one.

(2) Principles of Interpretation

[107] Since we have determined that the Agreement is a treaty for the purposes of s. 35(3) of the *Constitution Act, 1982*, it follows that special principles of interpretation will apply to it. This Court has stated many times that Aboriginal treaties are to be interpreted broadly, flexibly and generously (*R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 76-78; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *Sioui*, at p. 1043; *Simon*, at p. 404, see also Sullivan, at p. 513). In *Marshall* (1999), McLachlin J. (as she then was), dissenting but not on this point, provided what is now the most frequently cited summary of the relevant interpretive principles, as they have been developed by this Court (at para. 78):

This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger, supra*, at para. 41.
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger, supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra*; *Horseman, supra*; *Nowegijick, supra*.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger, supra*, at para. 76; *Sioui, supra*, at p. 1069; *Horseman, supra*, at p. 908.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown, supra*, at para. 32; *Simon, supra*, at p. 402.

[108] The rationale behind this interpretive approach is that the negotiation of historical treaties was marked by "significant differences" in the signatories' languages, concepts, cultures and world views. This meant that the Crown and the Aboriginal signatories had fundamentally different understandings of the exact nature of their agreements (L. I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997), 46 *U.N.B.L.J.* 11, at p. 20). Because of these contextual factors, Aboriginal treaties are to be interpreted in light of the contexts in which they were signed, and that interpretation must be both liberal

and dynamic so as to avoid the freezing of rights, while any ambiguity is to be resolved in favour of the Aboriginal signatories.

[109] Applying these principles, without adaptation, to the interpretation of modern agreements, as opposed to historical ones, is not uncontroversial. Appellate courts have held that, because the circumstances that support a generous interpretation of historical treaties do not always exist in the context of modern agreements, courts should not automatically take such an approach without first considering whether it is necessary. Indeed, both the courts below reviewed the distinct circumstances of the negotiation of modern treaties in their analyses, and the appellant urges this Court to take the same approach as them. The Cree respondents and the intervener Assembly of First Nations strongly object to this, however.

[110] The trial judge applied the principles set out in *Cree School Board* to the instant case. Section 22 was given a large and liberal interpretation, consistent with the government's fiduciary obligation towards the Cree. The parties' intentions and interests were analysed reasonably, taking into account the historical and judicial context. It was considered important to remember that the Agreement had been the result of lengthy negotiations in which all the parties had been represented by lawyers and that this situation was very different from the circumstances of the negotiation of historical treaties (para. 135). Although the Court of Appeal noted that neither it nor the Federal Court of Appeal had in interpreting the Agreement taken the constitutional status of the Agreement expressly into account, it nevertheless chose to adopt the reasons in *Cree School Board*, with one minor caveat:

[TRANSLATION] These various elements lead the Court to conclude that a treaty that on the one hand confers constitutionally protected rights

and on the other enjoys paramountcy over any inconsistent Canadian and Quebec laws must, according to the principles stated by Rousseau-Houle, J.A. in *Cree School Board*, be interpreted in conjunction with an additional element drawn from the submission of counsel for the Aboriginal parties: where two or more interpretations of the text may reasonably be argued, the interpretation that is most consistent with the interests of the Aboriginal signatories must prevail. Emphasis is placed on the reasonableness of the interpretation. [Emphasis added; para. 135.]

[111] The courts below found support for their interpretive approach in the reasons of Rousseau-Houle J.A. in *Cree School Board*, and Décary J.A. in *Eastmain Band*. In the latter case, Décary J.A. noted that, “while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed” (p. 518).

[112] In *Cree School Board*, Rousseau-Houle J.A. also refused to systematically resolve every ambiguity in favour of the Aboriginal signatories, noting in particular that they had been ably represented by lawyers:

[TRANSLATION] These considerations lead me to conclude that paragraphs 16.0.22 and 16.0.23 of the Agreement must be interpreted broadly, liberally and in compliance with the governments’ fiduciary obligation toward the Crees. This fiduciary relation must, however, reflect a reasonable analysis of the signatories’ intention and interest, and take into account the historical and juridical context that produced the Agreement. Given that the Crees were counselled by attorneys and that the Agreement can be characterized as “modern”, ambiguity cannot systematically be interpreted in the Crees’ favour. [para. 98]

[113] Although this Court has yet to pronounce on this particular issue, it did note in *R. v. Howard*, [1994] 2 S.C.R. 299, that the 1923 treaty at issue in that case did “not raise the same concerns as treaties signed in the more distant past or in more

remote territories where one can legitimately question the understanding of the Indian parties” (p. 306). On this point, Gonthier J., writing for the Court, relied on *Sioui*, at p. 1036, and *Eastmain Band*, at pp. 515-16.

[114] The intervener Assembly of First Nations and the Cree respondents strongly urge us to reject the interpretive approach adopted in the courts below. The Cree respondents argue that the same rules of interpretation apply to all Aboriginal treaties, whether historical or modern (Respondent’s Factum, at p. 16). Similarly, the Assembly of First Nations challenges the decision in *Eastmain Band* as the starting point for a rigid, categorical split in interpretive approaches (Intervener’s Factum, at p. 3). Both the Cree respondents and the intervener rely on the following passage from *Marshall (1999)* in support of their submissions:

This raises the issue of whether it is useful to slot treaties into different categories, each with its own rules of interpretation. The principle that each treaty must be considered in its unique historical and cultural context suggests that this practice should be avoided. [para. 80]

However, the approach to the interpretation of modern treaties adopted in *Eastmain Band* and *Cree School Board* does not necessarily lead to the consequences suggested in these submissions. First, when she urged against slotting treaties into different interpretive categories, McLachlin J. was addressing the hypothetical differences, for interpretation purposes, between “peace” treaties and “cession” treaties. In other words, the issue related to the content of the treaty, not the time period when it was signed. A more accurate formulation of the issue raised in the case at\* bar, however, is whether the rationale for the approach taken in interpreting historical treaties — and

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\* See Erratum [2010] 2 S.C.R. iv



specifically the requirement that every ambiguity be resolved in favour of the Aboriginal signatories — ought to apply automatically or systematically to the interpretation of modern agreements. In other words, the issue relates to the context in which an agreement was negotiated and signed, not to the date of its signature.

[115] In *Eastmain Band and Cree School Board*, the courts did not suggest that the generous and flexible approach to interpretation be rejected outright when the treaty being interpreted happens to be a modern one. Rather, they simply recognized that the *circumstances* at the root of the principle that ambiguities in historical treaties must be resolved in favour of the Aboriginal signatories — unequal bargaining skill and vulnerability of the Aboriginal parties in particular — do not necessarily exist in the context of a modern agreement (see e.g. *Rotman*, at p. 23; *Sullivan*, at p. 525). The likelihood of ambiguity, though clearly not eliminated, is nevertheless significantly reduced. Indeed, the parties' mutual promises are likely to be set out more clearly and more exhaustively. The court must look first to the parties' common intention in light of the context of their specific agreement, and its analysis must be reasonable.

[116] Furthermore, this Court has stated that the honour of the Crown infuses both the making of treaties and, ultimately, the interpretation of treaties by the courts (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 19; *Mikisew Cree First Nation*, at para. 51). The honour of the Crown requires it, in the treaty-making process, to try to reconcile Aboriginal rights and interests with those of the public more generally, because the Crown must be mindful of Aboriginal interests but must also consider the public interest. Modern agreements thus reflect a mixture of rights, obligations, payments and concessions that

have already been carefully balanced (Sullivan, at p. 525). In negotiations, therefore, the Crown must, and does, actively consider the Aboriginal party's interests.

[117] There are important policy reasons in favour of this understanding of the context of modern treaties. This Court has observed, in a case concerning the duty to consult, that “[a]t all stages, good faith on both sides is required” (*Haida Nation*, at para. 42). The principle underlying this requirement also extends to the treaty negotiation process. Good faith on the part of all parties should be fostered and encouraged. This goal would be undermined by an interpretive approach under which all ambiguities are automatically resolved in favour of the Aboriginal parties, as such an approach might encourage the parties to use vague language in the hope that later litigation would produce a result more favourable than what could be obtained through negotiation (see *Eastmain Band*, Décary J.A., at p. 518).

[118] When interpreting a modern treaty, a court should strive for an interpretation that is reasonable, yet consistent with the parties' intentions and the overall context, including the legal context, of the negotiations. Any interpretation should presume good faith on the part of all parties and be consistent with the honour of the Crown. Any ambiguity that arises should be resolved with these factors in mind. In the specific case of the Agreement, we have the benefit of a legislative preamble which clearly states its purpose and effect. And as Décary J.A. noted in *Eastmain Band*, all parties to the Agreement were represented by counsel, and the result of the negotiations was set out in detail in a 450-page legal document. The negotiations were part of a policy initiative whose objective was to settle land claims through negotiation rather than litigation. There was plenty of “give and take”.

[119] The Agreement is a modern treaty, and how it is interpreted and applied will be critical to our decision on the issues raised in this appeal. Because this interpretive exercise will necessarily be influenced by the jurisdiction under which the Project falls, it will be helpful to discuss the constitutional powers relevant to this case.

B. *Constitutional Powers Relevant to This Case*

[120] An inquiry into which level of government has environmental jurisdiction over the Project must begin with the oft-repeated observation that the environment is not a matter over which one level of government has exclusive jurisdiction. As La Forest J. said in *Oldman* (at p. 63):

I agree that the *Constitution Act, 1867* has not assigned the matter of “environment” *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.

[121] Legislation on environmental matters must therefore be related to at least one constitutional head of power. The inquiry into whether federal jurisdiction can be validly invoked turns on whether the activity or, as in this case, the Project can be viewed as having a federal aspect. Thus, federal jurisdiction will be validly exercised, and federal environmental legislation will apply to the extent that the legislation is “truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction”: *Oldman*, at p. 72. Federal legislation concerning the environment has been upheld on the bases, for example, of the national concern branch of the s. 91 peace, order, and good government power (*R. v. Crown Zellerbach Canada*

*Ltd.*, [1988] 1 S.C.R. 401) and of the s. 91(27) criminal law power (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213).

[122] In the case at bar, the Attorney General of Canada relies on the federal fisheries power (s. 91(12)) and the *dicta* in *Oldman* as a basis for federal jurisdiction over the Project and, by extension, for the applicability of the licensing provisions of the *Fisheries Act* and, in turn, the environmental assessment provision of the *CEAA* that they trigger.

[123] The AGQ, in arguing in favour of provincial jurisdiction over the Project and a provincial environmental assessment under the Agreement, relies on several heads of power under the *Constitution Act, 1867*: public lands (s. 92(5)), local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), matters of a merely local or private nature (s. 92(16)), and non-renewable natural resources in the province (s. 92A).

[124] The nature of the Project — the development of a vanadium mine — falls under the province’s jurisdiction over either local works and undertakings, property and civil rights in the province, or non-renewable natural resources in the province. However, the Project’s impact on fish habitat engages federal jurisdiction. The question, then, is whether the nature of the Project or its impact is what determines which assessment should be conducted.

[125] In our view, the answer to this question turns on the interpretation of the Agreement. The status of the Agreement as both a constitutional document that protects rights and a supra-legislative intergovernmental agreement must remain at the

forefront of this Court's analysis. Consideration must also be given to the circumstances in which the Agreement was signed to ensure that the analysis is consistent with the intent and goals of all the parties.

C. *Interpretation and Application of the Agreement*

(1) Review of the Agreement's Environmental Assessment Process and Context

[126] Before we turn to the substantive provisions of the Agreement that are directly in issue in this appeal, it will be helpful to begin with a brief overview of the environmental assessment scheme contemplated in the Agreement. The relevant part of the Agreement is a central aspect of the intergovernmental nature of the James Bay Agreement. Well before the CEEA was adopted, the federal and provincial governments agreed with the First Nations parties to establish what all the parties intended at the time to be a comprehensive scheme for the assessment of land development projects. Section 22 establishes the environmental and social protection regime applicable in the Territory (s. 22.2.1), which is designed to minimize the negative environmental and social impact of development on the Territory's Aboriginal inhabitants and wildlife while at the same time recognizing Quebec's right to develop the Territory. Section 22.2.4 sets out a number of guiding principles to which each government must give due consideration in exercising its authority under Section 22. Those principles focus overwhelmingly on protecting Aboriginal hunting, fishing and trapping rights, minimizing the environmental and social impact on Aboriginal inhabitants, and promoting the involvement of the Cree in the decision-making process. The overarching purpose of Section 22 is to ensure the participation of and consultation with Aboriginal peoples at all stages of the environmental

assessment process while promoting an efficient process: a single environmental assessment is the rule, duplication the exception.

[127] Section 22 also sets out in detail the procedure to be followed in the environmental impact process itself. The Agreement lists projects that are automatically subject to an assessment (s. 22.5.1) and projects that are not subject to one (s. 22.5.2). Section 22.3.1 creates an Advisory Committee that is responsible for reviewing and overseeing the administration and management of the environmental and social protection regime; its members include representatives from all three levels of government.

[128] The proponent of a development project must submit preliminary information to the appropriate Administrator (s. 22.5.11), whose identity depends on which government has jurisdiction over the project (s. 22.1.1). This information is then transmitted to the appropriate Evaluating Committee (s. 22.5.12). The Evaluating Committee studies the project and makes recommendations to the Administrator concerning the proper scope of an environmental assessment (s. 22.5.14). The membership of the Evaluating Committee is set out in s. 22.5.6, and voting rights depend on which government has jurisdiction over the project. The Administrator then considers the Evaluating Committee's recommendations and decides whether to proceed with a review and an assessment (ss. 22.5.4 and 22.5.14). When necessary, the Administrator may give instructions or make recommendations to the proponent with respect to the environmental assessment (s. 22.5.15).

[129] The project's proponent then prepares an impact statement in accordance with Schedule 3 to Section 22 and must specifically and meaningfully address the

project's impact on the Cree populations potentially affected by it (s. 22.6.8). The impact statement is submitted to the Administrator, who transmits it to the appropriate review body (s. 22.6.10). The review body that will have jurisdiction over the project depends on which government is responsible for the project (ss. 22.6.1 and 22.6.4). Importantly, there is one review body only. It transmits the impact statement to the Cree Regional Authority (s. 22.6.11), which may then make representations to the applicable review body (s. 22.6.12). The review body has the ultimate authority to recommend whether the project should proceed and, if so, under what terms and conditions (s. 22.6.13).

[130] As is clear from this overview, although an environmental assessment focuses on the impact of the particular project, which assessment procedure applies to the project depends on the nature of the project. Which Administrator is responsible for a project depends on whether the project falls within federal or provincial jurisdiction (s. 22.1.1). In the cases of the Advisory Committee, Evaluating Committee and review bodies established by Section 22, a number of factors relating to their composition and administration also depend on whether the project falls within "exclusive" federal or provincial jurisdiction (ss. 22.3.4 and 22.5.7). Most significantly, when the project is ultimately referred to a review body pursuant to either s. 22.6.1 or s. 22.6.4, the membership of that body is limited to representatives of the Cree Regional Authority and of the government with jurisdiction over the project. In other words, if the project falls under provincial jurisdiction, the review body will have no representation from the federal government, and vice versa.

(2) Application

[131] It is in this context that we must interpret the provision of Section 22 that is central to the disposition of this appeal. At issue is whether this provision is determinative of the assessment process, as would have been the case prior to the enactment of the *CEAA*, or whether the enactment of the *CEAA* changed the nature of the constitutional ordering established by the Agreement. For ease of reference, we will reproduce s. 22.6.7 in its entirety:

22.6.7 The Federal Government, the Provincial Government and the Cree Regional Authority may by mutual agreement combine the two (2) impact review bodies provided for in this Section and in particular paragraphs 22.6.1 and 22.6.4 provided that such combination shall be without prejudice to the rights and guarantees in favour of the Crees established by and in accordance with this Section.

Notwithstanding the above, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada or unless such project is located in part in the Territory and in part elsewhere where an impact review process is required. [Emphasis added.]

Section 22.6.7 thus creates two exceptions to the general rule that a development project will be subject to only one environmental assessment process: where the project itself falls within the jurisdictions of both the federal and provincial governments, and where the project is located partly in the Territory and partly in an area outside the Territory where an environmental assessment is required. The question is whether, because the impact of the Project on fish habitat — a matter of federal jurisdiction — brings it “within the jurisdictions of both Québec and Canada”, the first exception applies to override the general rule of only one assessment.

[132] Those arguing that the answer to this question is yes also rely on s. 22.7.5, which reads as follows:



- 22.7.5 Nothing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation. However, this shall not operate to preclude Federal requirement for an additional Federal impact review process as a condition of Federal funding of any development project.

There is no suggestion that the Project has received any federal funding to which an environmental assessment could be attached as a condition. If it had received such funding, the federal government would be perfectly entitled to require an additional environmental assessment. Whether an additional federal assessment of the Project is required by s. 22.7.5 therefore depends on the interpretation of that provision's first sentence. But that sentence says nothing more than that Section 22 does not impose any obligations on the federal government other than those ordinarily required by general federal law or regulation. In view of the parties' express intention that the Agreement constitute a comprehensive governance scheme for the entire Territory, that there be no other government assessment process, that there be no parallel process in the Agreement itself, that it provide for only one environmental assessment as the general rule, and that it be paramount over all other laws of general application that are inconsistent with it, s. 22.7.5 cannot be interpreted as triggering a separate federal environmental assessment of the Project under the *CEAA*. To agree that the *CEAA* should prevail over the specific provisions of the Agreement would be to subvert the constitutional ordering established and intended by the parties to the Agreement.

[133] Section 22.7.5 must be understood for what it really is: a transitional provision. Indeed, it is significant that this provision is found in s. 22.7, which is entitled "Final Provisions", and more specifically among the transitional provisions set out in ss. 22.7.5 to 22.7.9. Section 22.7.6 explicitly sets out time requirements and

ss. 22.7.8 and 22.7.9 deal with the effects of the transitional provisions. The effect of s. 22.7.5 is that there was to be no federal assessment process until the implementing statute came into force, at which time the one provided for in the Agreement would be established. If s. 22.7.5 were read as a permanent provision, it would literally say that the federal assessment process under the Agreement will never be applicable and that only a process provided for in other federal legislation will be. As discussed, the Agreement explicitly provides that it is without force of law until legislation, both federal and provincial, is enacted to enforce it. A mechanism was needed to address the application of the law during the period between the signing of the Agreement and its coming into force. As provincial legislation concerning the environment was in force at that time, s. 22.7.7 provided that it would apply in the interim. This could not be the case at the federal level, however, because there was as yet no federal environmental legislation in force. Section 22.7.5 was therefore included in order to fill this potential legal vacuum, and it would apply to environmental matters until the coming into force of the authorizing legislation. As a result, during the transitional period, the Agreement would not require the federal government to conduct an evaluation process that was not otherwise required under existing federal law. However, the parties judged it necessary to further specify that the federal government was entitled, as a condition of federal funding for any development project, to require an environmental assessment on a purely administrative basis.

[134] The issue, then, is whether the more general exception in s. 22.6.7 applies in this case. More specifically, it must be determined whether the Project is a project “within the jurisdictions of both Québec and Canada” for the purpose of triggering a separate assessment process. From this perspective, it is clear that Section 22, when read as a whole, provides that it is the constitutional jurisdiction applicable to the

*nature* of a project that determines which environmental assessment is to be conducted. The Project falls within exclusive provincial jurisdiction and therefore does not fall within both federal and provincial jurisdiction, which means that the exception to the general rule in s. 22.6.7 does not apply. More fundamentally, nothing in the language of Section 22 supports the conclusion that a project's impact can trigger a second environmental review process where the project itself falls within the jurisdiction of one government and it has effects that fall within that of the other government.

[135] If we were to accept the argument that a project's impact could trigger a separate environmental review process, the consequence would be to turn the exception into the rule. Such a conclusion would directly contradict the clear intention of the parties. The approach taken by our colleague Binnie J. is inconsistent with the spirit of the Agreement, and perhaps even with its words. He focuses on the fact that a federal permit is issued only after the assessment process under the Agreement has been completed. However, because of the environmental assessment under the *CEAA* that necessarily accompanies the permit-issuing process, the Project would then be subject to a second environmental assessment process, contrary to the express terms of the Agreement.

[136] The signatories to the Agreement were extremely careful to distinguish between projects within federal jurisdiction and those within provincial jurisdiction. The general rule is that there is to be only one environmental assessment and that which one is to be conducted depends on the jurisdiction within which the project itself falls; and there are only two narrow exceptions to this rule. Moreover, in the limited circumstances in which two assessments are required, the Agreement clearly

states that the assessments may be combined only with the mutual consent of the parties (s. 22.6.7). If this Court were to find that jurisdiction for environmental assessment purposes depends on both the nature and the impact of a project, the distinctions the parties were so careful to draw would become meaningless. The parties drew these distinctions for a reason, and the Court ought to give effect to them.

[137] A further, related reason exists for concluding that a project's impact cannot trigger a separate environmental assessment process. The Agreement concerns Aboriginal peoples and their territory as well as the environment. The first of these matters is within the exclusive jurisdiction of the federal government, while the second falls within shared provincial and federal jurisdiction. Therefore, *any* proposed project falling within provincial jurisdiction will necessarily have an effect on a federal head of power. If two environmental assessment processes were required every time a project had an effect on either of these two matters, the exception of more than one process would become the rule. Décarý J.A. in fact recognized this in *Eastmain Band*:

[B]y definition, therefore, any development project has implications in at least one area of federal jurisdiction, that is, Indians and lands reserved for the Indians (*Constitution Act, 1867*, subsection 91(24)), and almost certainly in an area of shared jurisdiction, that is, the environment. Furthermore, it is self-evident that any development project in Quebec will have an impact on areas of provincial jurisdiction, such as natural resources (92A) [as enacted by the *Constitution Act, 1982*, R.S.C., 1985, Appendix II, No. 44, s. 50], public lands, timber and wood (92(5)), local works and undertakings (92(10)) and matters of a purely local or private nature in the province (92(16)). The parties to the Agreement did not take so much care in distinguishing between the respective roles of each government only to arrive at a solution which gives each of them equal decision-making power over every project, and automatically creates an overlap and a total impasse, the moment one government authorizes a project and the other does not. [pp. 527-28]

[138] The provisions of Section 22, and the objectives and principles that underlie the Agreement as a whole, lead to the conclusion that the Project is subject to a provincial environmental assessment only. The Agreement, which is of course both a s. 35 treaty and an intergovernmental agreement that was made binding by way of statutory implementation, involves no inappropriate delegation of jurisdiction or legislative authority. A plain reading of the Agreement against the backdrop of the circumstances and context in which it was negotiated, drafted, signed and given statutory authorization indicates that it was intended to establish a comprehensive and exhaustive scheme for the governance and management of the Territory and that it is paramount over all other federal and provincial laws of general application to the extent of any inconsistency. It cannot be altered or modified without the consent of all the signatories.

[139] It is also important to stress that Section 22 explicitly addresses the role and participatory rights of the Cree in the environmental assessment process. They have both a substantive and a procedural role at each and every stage of that process. All the section's provisions in combination ensure the continued participation of the Territory's Aboriginal inhabitants in the management, control and regulation of development in the Territory. Finally, the Agreement must now be unequivocally understood as a constitutional document that protects rights. Its status is thus not simply supra-legislative.

[140] A reading of Section 22 as a whole indicates that it is the nature of the project that triggers the applicable environmental assessment process and that the general rule is that there is to be only one assessment process. The Project falls within provincial jurisdiction, which means that there is no basis for setting up a joint review

body. The federal process under the *CEAA*, which does not provide for either substantive or procedural participation by the Cree, is inconsistent with the provisions of the Agreement and cannot apply.

[141] The *CEAA* was enacted after the Agreement had been signed and implemented by statute. It is clear from the Agreement and its authorizing legislation that neither party can unilaterally modify its terms. In light of the constitutional normative hierarchy, the *CEAA* cannot prevail to impose a parallel process in addition to the ones provided for in the Agreement. Any other interpretation would mean that the federal government can unilaterally alter what was intended to be a comprehensive, multilateral scheme. The federal government is therefore prohibited from effectively and unilaterally modifying the procedure established by the Agreement, or derogating from the rights provided for in the Agreement, by purporting to attach conditions based on external legislation of general application.

[142] The practical effect of this interpretation is that, if the Minister determines that a permit must be issued under the *Fisheries Act*, the Minister must issue one on the basis of the environmental processes established by the Agreement and cannot insist that an additional environmental process be undertaken pursuant to the *CEAA*. The environmental review process under the James Bay Agreement is paramount.

## V. Conclusion

[143] For these reasons, we would allow the appeal, restore the judgment of the Quebec Superior Court and declare that the Project is subject to the provincial environmental process set out in the Agreement. There will be no order as to costs.

## APPENDIX

*Fisheries Act*, R.S.C. 1985, c. F-14

**34.** (1) For the purposes of sections 35 to 43,

...

“fish habitat” means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;

...

**35.** (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

*Canadian Environmental Assessment Act*, S.C. 1992, c. 37

**5.** (1) [Projects requiring environmental assessment] An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

...

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

**14.** [Environmental assessment process] The environmental assessment process includes, where applicable,

(a) a screening or comprehensive study and the preparation of a screening report or a comprehensive study report;

(b) a mediation or assessment by a review panel as provided in section 29 and the preparation of a report; and

(c) the design and implementation of a follow-up program.

**16. (1)** [Factors to be considered] Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the purpose of the project;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and (d) shall be determined



- (a) by the responsible authority; or
- (b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out the project in response to a national emergency for which special temporary measures are taken under the *Emergencies Act*.

**16.1** [Community knowledge and aboriginal traditional knowledge] Community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment.

#### *Joint Review Panels*

**40.** (1) [Definition of “jurisdiction”] For the purposes of this section and sections 41 and 42, “jurisdiction” includes

...

- (d) any body established pursuant to a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and having powers, duties or functions in relation to an assessment of the environmental effects of a project;

...

**42.** [Deemed substitution] Where the Minister establishes a review panel jointly with a jurisdiction referred to in subsection 40(1), the assessment conducted by that panel shall be deemed to satisfy any requirements of this Act and the regulations respecting assessments by a review panel.

#### *Public Hearing by a Federal Authority*

**43.** (1) [Substitute for review panel] Where the referral of a project to a review panel is required or permitted by this Act and the Minister is of the opinion that a process for assessing the environmental effects of projects that is followed by a federal authority under an Act of Parliament other than this Act or by a body referred to in paragraph 40(1)(d) would be an appropriate substitute, the Minister may approve the substitution of that process for an environmental assessment by a review panel under this Act.

...

**44.** [Conditions] The Minister shall not approve a substitution pursuant to subsection 43(1) unless the Minister is satisfied that

- (a) the process to be substituted will include a consideration of the factors required to be considered under subsections 16(1) and (2);
- (b) the public will be given an opportunity to participate in the assessment;
- (c) at the end of the assessment, a report will be submitted to the Minister;
- (d) the report will be published; and
- (e) any criteria established pursuant to paragraph 58(1)(g) are met.

*Appeal dismissed with costs, LEBEL, DESCHAMPS, ABELLA and CHARRON JJ. dissenting.*

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