ABORIGINAL RIGHTS VS.

THE PUBLIC INTEREST

These materials were prepared by Robert Freedman and Sarah Hansen, Partners of Miller Thomson LLP, Vancouver, BC for a conference held in Vancouver, BC hosted by Pacific Business & Law Institute on February 26 & 27th, 2009. Many thanks also to Karen Lowe, student at law, for her contribution to these materials.

TABLE OF CONTENTS

I. INTRODUCTION

In *Paul v. British Columbia,* 2003 SCC 55, the Supreme Court of Canada held that the British Columbia Forest Appeals Commission ("FAC") could properly consider questions related to aboriginal rights arising under section 35 of the *Constitution Act, 1982* in carrying out its legislative mandate pursuant to valid provincial forestry legislation. The judgment of the Court was written by Mr. Justice Bastarache who explained the requisite test at par. 39 as follows:

> I am of the view that the approach set out in *Martin,* in the context of determining a tribunal's power to apply the *Charter,* is also the approach to be taken in determining a tribunal's power to apply s. 35 of the *Constitution Act, 1982.* The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

In coming to the conclusion that administrative tribunals are competent to consider questions arising pursuant to section 35 of the *Constitution Act, 1982*, the Court rejected the respondent's argument that a section 35 analysis is inherently more complex compared to other constitutional questions before a tribunal and therefore should be determined by a court, rather than a tribunal. In essence, the Court concluded that there were adequate procedures and expertise within the FAC to decide questions of constitutional law, even if they raise section 35 issues.

This paper will examine whether, six years later, the Supreme Court of Canada's approach in *Paul* was correct and will revisit the question of whether administrative tribunals, especially those with empowering legislation which directs them to consider the "public interest", ought to have the authority to determine questions related to aboriginal rights under section 35 or whether they should not.

While there are other tribunals which use a "public interest" balancing test to determine whether or not industrial activity ought to be approved, two such tribunals are of particular interest to the authors: the National Energy Board ("NEB") and the Alberta Energy Resources Conservation Board, including its predecessor, the Alberta Energy and Utilities Board (collectively, the "ERCB"). Those tribunals are empowered to determine whether large-scale projects – pipelines, conventional oil and gas, and oil sands projects - ought to be approved. Since those kinds of activities have the potential to adversely affect and infringe section 35 rights, they provide a

helpful context for discussing the main issue of concern in this paper: whether or not a tribunal empowered to consider the "public interest" is competent to decide questions involving section 35 rights in carrying out its mandate.

The analysis does not repeat the arguments advanced in *Paul*. The discussion does not consider the division of power issue raised in *Paul* and the relationship between valid provincial legislation and matters under federal competence, nor does the discussion consider the complexity of the section 35 analysis undertaken by a tribunal, except to review the inflexibility of the mandate of some tribunals and the impact that inflexibility has on determining section 35 rights.

Rather, this paper will examine the application of the *Paul* decision in the context of a review of energy projects before the ERCB and the NEB and the inherent conflict facing those tribunals in considering aboriginal rights versus the public interest. In our view, the mandate of each of these tribunals to consider the public interest as an overriding concern is fundamentally at odds with the approach taken by courts in considering issues related to section 35. In our view, this conflict is so manifest that it is simply wrong at law for public interest tribunals to have the jurisdiction to adjudicate on section 35 issues.

II. ABORIGINAL RIGHTS VERSUS THE PUBLIC INTEREST

In this section, we will consider what we believe is a fundamental problem in the law, namely, the wide gulf between how ordinary courts deal with section 35 issues and the way in which those issues are being dealt with by tribunals with a public interest mandate.

A. NOT ALL TRIBUNALS ARE CREATED EQUALLY

In the *Paul* decision, the Court acknowledged that administrative tribunals are not exactly like ordinary courts, but it overlooked important distinctions in objective and purpose mandated by the constituting legislation of a number of administrative tribunals in deciding questions of aboriginal rights. The Court also failed to turn its mind to the fact that not all administrative tribunals are created alike. Some administrative tribunals operate quite like an ordinary court, which was arguably the case with the FAC, while others such as the ERCB and the NEB are charged with a specific legislative mandate: to make a determination on whether a project is in the "public interest". It is this objective that is at odds with a section 35 analysis.

In *Paul,* the Court was persuaded that the FAC could consider section 35 rights because it operated very much like a court. In the Court's view, the empowering legislation of the FAC read much like that of an ordinary court, including references to rules of natural justice, fairness, and an unbiased process. Although not argued in the case, of particular importance was that, due to its empowering legislation, the FAC did not have to weigh any section 35 issues against a larger public interest test. As a result, one can presume that adjudication of section 35 rights by the FAC would afford a fair and unbiased process to First Nations.

The concern is with tribunals considering section 35 rights and related issues arises where those tribunals are required to consider the larger "public interest" in making decisions. In our view, adjudication of section 35 issues is fundamentally at odds with a public interest-based tribunal. This becomes clear when one contrasts the FAC's mandate with the mandates of the ERCB and the NEB. The FAC's mandate is to hear appeals from various forestry related statues. Nothing in its mandate requires the FAC to weight the public interest against individual interests.

In contrast, the ERCB's mandate is created by the *Energy Resources Conservation Act,* R.S.A. 2000, and c. E-10 (the "*ERCA*"). Section 3 of the *ERCA* requires that, in its deliberations, the ERCB consider the public interest as follows:

> Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment (emphasis added).

As such, in addition to considering constitutional questions, the ERCB is required by law to consider the overall public interest in coming to a determination on whether a particular project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

The NEB's mandate also includes a consideration of the public interest. The NEB is created by the *National Energy Board Act,* R.S., C. N-6, s. 1. (the "NEB Act"). Section 12 of the NEB Act sets the jurisdiction for the NEB as follows:

> 12. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter
>
> (*a*) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, license or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, license, permit, order or direction; or
>
> (*b*) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, license, permit, order or direction is prohibited, sanctioned or required to be done (emphasis added).

Thus, under section 12(1)(b) at least insofar as an order or direction, leave, sanction or approval is required to authorize a particular project, the NEB's overriding mandate is to satisfy itself that any such order or direction, leave, sanction or approval is in the public interest.

In the case of issuing a certificate of public convenience and necessity in relation to a pipeline project, the Board must also consider section 52 of the NEB Act, which incorporates additional public interest factors into the NEB's decision-making mandate:

> 52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:
>
> (*a*) the availability of oil, gas or any other commodity to the pipeline;
>
> (*b*) the existence of markets, actual or potential;
>
> (*c*) the economic feasibility of the pipeline;
>
> (*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and
>
> (*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application (emphasis added).

The enabling legislation for each of the ERCB and the NEB establishes these Boards as public interest tribunals meaning that, by their mandates, they must consider the "public interest". Although there is no specific definition of "public interest" which guides either tribunal, the concept is fleshed out, albeit in a vague fashion, in the decisions of these tribunals. While the decision of each tribunal Panel is not binding on another Panel, as a matter of practice, the Panels look to previous decisions in considering the particular issues before them. Since these tribunals are required to "act constitutionally," they ought to take into account court decisions as well.

B. WHAT DOES THE "PUBLIC INTEREST" MEAN?

What factors are considered when the ERCB or the NEB consider the public interest? With respect to the ERCB, section 3 of the *ERCA* mandates that the ERCB:

> ... in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment (emphasis added).

The ERCA does not include any further definition of what is meant by "public interest", the effect of which is to provide the ERCB with wide discretion to fill in the gaps in its enabling legislation. As a result, the ERCB, through various decisions, has attempted to define what is meant by the public interest, having regard to the social, economic, and environmental effects of the project, as discussed below.

ERCB Decision 2003-101 reviewed an application for a well license, special gas well spacing, compulsory pooling, and flaring permit. The Board denied the application and stated at p. 3 of its decision that:

> Consideration of the public interest is in essence a question of finding the appropriate balance between the benefits of the proposed project and the potential risks of the project to the public and the environment. Where the potential for risk outweighs the possibility of gain, the Board will find that the specific proposed project is contrary to the public interest.
>
> As all projects may have some element of risk, a great deal of the Board's attention must be focused upon the level of risk and the ability and willingness of the applicant to mitigate or eliminate such risks. An applicant's ability to take the appropriate measures to deal with risks is therefore critical to the Board's final determination as to whether the project can be found to be in the public interest.

For this application, the Board was not satisfied that the proposed project was in the public interest given that the well was needed to obtain exploratory information. The Board weighed this need against other factors, including a perceived inability on the part of the Company to address the environmental impacts of the proposed well.

ERCB Decision 2002-107 considered what is meant by public interest in a review of an application for wells, pipelines and facilities licenses by Manhattan Resources Ltd. At p. 4, the Board discussed what is meant by "in the public interest":

> The determination the public interest is ultimately a subjective one bounded only by the general and specific objects of the legislation in question and the powers of the Board to carry out those purposes. Such a determination must also arise from the evidence presented and the careful, fair, and objective discernment of that evidence by the Board. The facts, circumstances, and issues of each individual application necessarily mean that no single objective test of what constitutes "in the public interest" can be formulated.
>
> Generally, the public interest standard is met by an activity that benefits the segment of the public to which the legislation is aimed, while at the same time minimizing, to an acceptable degree, the potential adverse impacts of that activity on more discrete parts of the community. The existence of regulatory standards is an important element in deciding whether potential adverse impacts are acceptable and whether a proponent has satisfactorily accounted for these impacts, but the Board retains the discretion where circumstances require to find that a project fails to meet the public interest notwithstanding its compliance with these standards.

The Board went on to discuss the legislative purposes of the relevant statutes including the *Oil and Gas Conservation Act*, R.S.A. 200, c. O-6, and the *Pipeline Act*, R.S.A. 2000, c. P-15 such as the economical, orderly and efficient development of energy resources in the province and pollution control and environmental conservation in the energy sector. It stated that these purposes were also considerations in the public interest inquiry.

ERCB Decision 2001-9 considered what is meant by the public interest in its review of an application by Shell Canada Ltd. for a well license. In its conclusion, the Board stated that:

> ... most Albertans believe that, in general, the economic benefits of oil and gas development have, at least to date, outweighed the potentially negative effects associated with energy projects, provided that they are reasonable and properly managed.

However, the risks associated with this particular drilling, including the inadequately addressed risk of groundwater contamination, were not clearly outweighed by any economic benefit. The Board concluded that Shell had not adequately addressed public safety issues in its emergency response plan, and as such the project was not in the public interest.

Finally, the ERCB Decision 2005-060 considered the public interest in reviewing Compton Petroleum's application to drill six sour gas wells in south-east Calgary. The Board outlined what is meant by the concept of "public interest" at p. 12 of the decision. It stated that the consideration does not simply involve a "greatest good for the greatest number" inquiry. Also, it clarified that the interests of all Albertans must be considered alongside the interests of the applicants and interveners:

> Concepts as fluid as social, economic, and environmental impacts are not easily resolved through the application of fixed principles. The Board must identify the elements of each applied-for energy development that would provide benefit not exclusively to the applicant and those directly connected to the development, but to Albertans in general. The Board must also weigh those benefits against the risk factors that are present, given the nature of the development, the location proposed, and other factors associated with the specific situation.

The Board noted at p. 16 that the right of Albertans to obtain royalties was a relevant economic consideration in the overall assessment of the public interest, but this factor was not determinative. In the end, the Board was not satisfied that the applicant had adequately addressed the risks associated with the project. At p. 25, it stated that "where the risk is determined to be too high, cannot be safely mitigated, or outweighs the benefits, the Board will generally find that a proposed energy development project is contrary to the public interest".

The Board did not entirely reject the proposal, but instead required that the applicant submit a revised emergency response plan for further determination stating that the plan that had been submitted was incomplete. When the proponent applied for a second extension of time to submit that plan, the extension was denied by a Board (News Release 2005-38) and, having not filed the plan within the time allowed by the first extension, on January 4, 2006 (News Release 2006-01), the Board advised Compton that its application had been closed due to the failure to file the plan by the deadline.

In summary then, while the ERCB continues to consider what factors will inform what is in the public interest, the following factors have been applied to date:

- The interests of the intervener, applicant, as well as all Albertans are relevant to the inquiry.
- The Board will consider the legislative objectives of any applicable legislation.
- Social, economic and environmental benefits will be weighed against social, economic, and environmental risks. If the risks outweigh the benefits, it is unlikely the Board will find that the project is in the public interest (although the approach of the Board to assessing social, economic, and environmental risks is, in our view, an unduly narrow one).
- The Board will consider the applicant's ability to mitigate risks. For example, if the project has significant environmental impacts, the Board will examine measures taken to reduce the risks of these environmental impacts such as an emergency response plan (mitigation has also been approached in a narrow way and does not properly take into account social, environmental, cultural, health and economic impacts on section 35 rights).
- The Board has been reluctant to apply a cumulative impacts analysis to look at the regional impacts of development on the rights and interests at stake.

With respect to the NEB, Decision OH-1-2007 represents the NEB's analysis of the meaning of public interest. In reviewing TransCanada's Keystone Pipeline GP Ltd. application under section 52 of the NEB Act, the NEB stated at p. 58 that, in respect of the public interest:

> In making its decision, the Board must weigh the various benefits of the project against its various burdens and come to a conclusion about whether there is an overall benefit, detriment or lack of effect on the public interest.
>
> The Board has weighed the evidence projecting benefits of the Project against the evidence projecting detriments and finds that the advantages of approving the Project outweigh its potential burdens. The Board therefore concludes that approval of the Project is in the public interest and that the applied for facilities will be required for the present and future public convenience and necessity.

In brief, NEB decisions consistently apply a benefit-burden analysis in determining the public interest. Decision OH-4-2007 further explains what is meant by the "public interest" in considering aboriginal interests, at page 10:

> The Board weighs the overall public good a project may create against its potential negative aspects, including any negative impacts on Aboriginal interests, and makes its decisions in accordance with the public interest. As part of the decision-making process, it takes into consideration the potential environmental and social impacts and the potential for mitigation of those impacts. Mitigation measures proposed by an applicant or interested parties may be as varied as, for example, requiring the implementation of a heritage resources contingency plan, re-routing a pipeline or adjusting the proposed construction schedule (emphasis added).

What is sorely lacking, however, is any meaningful analysis of how (or if) section 35 rights can be considered in the context of a public interest test. To the extent that section 35 rights have been raised at the NEB, Decision OH-4-2007 demonstrates that section 35 issues and impacts will merely form part of the overall public interest analysis. To the extent that section 35 consultation issues were raised in front of the ERCB, that tribunal focused on whether the Crown or proponent complied with Alberta's departmental consultation guidelines and ERCB Directive 056 (Energy Development Application and Schedules) and not on whether the Crown breached its constitutional duties of consultation.

C. SECTION 35 ANALYSIS IS AT ODDS WITH THE PUBLIC INTEREST TEST

In the growing case law on section 35 rights, certain key themes have emerged which are relevant to the issues raised in this paper:

(a) Aboriginal rights are constitutionally protected by section 35;

(b) Aboriginal rights have constitutional priority over certain other kinds of rights and interests;

(c) One of the purposes of section 35 is to reconcile aboriginal rights and Crown sovereignty;

(d) A finding that section 35 rights have been adversely affected and/or infringed will normally require some kind of accommodation – in *R. v.*

Kapp, the Supreme Court of Canada referred to both consultation and accommodation as constitutional obligations;

(e) The Crown must justify any infringement of a section 35 right; and

(f) The failure of the Crown to discharge its constitutional duty to consult may be a basis upon which to delay or even cancel a decision.

A unique jurisprudence concerning section 35 rights has been developed by the courts, beginning with the decision of the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where issues related to the interaction between Crown decision making and section 35 rights have been fleshed out. Some 19 years after *Sparrow*, these issues continue to be adjudicated. In our view, the courts continue to struggle with difficult questions surrounding the existence of the rights protected by section 35, the Crown's constitutional consultation and accommodation obligations, and many other questions. In our view, unlike the case with certain *Charter* rights, there is not yet a settled body of law which can simply be applied by tribunals when section 35 questions arise.

The *Sparrow* case expressly rejected a "public interest" justification for infringement of section 35 rights. At par. 1113 of the decision, the Court commented that: "We find the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

While one may argue that subsequent decisions of the Court have adopted a public interest consideration in the application of the justificatory test arising from *Sparrow*, it must be remembered that the justificatory test does not arise until a court first considers the existence of the right and whether it has been infringed. As part of the justificatory test, the onus is on the Crown to show, among other things, that it is operating under a valid legislative objective, that it has consulted, and other related matters. It is not until the second branch of the justificatory test that the Crown might be able to use some public interest considerations in seeking to justify a particular action – such as jobs, regional fairness, and related economic measures. Even then, if proper priority is not afforded the right, the governmental action is not likely to meet the justification test. Nowhere in the jurisprudence is the existence and infringement of the right

simply weighed against a number of public interest factors, such that a demonstration of the existence of a right and its infringement will be downplayed or disregarded.

In respect of the consultation law that has arisen in the past ten or more years, the courts have made it clear, most recently in the *Mikisew* decision, [2005] 3 S.C.R. 388, that a decision to approve a project may be quashed if a First Nation can show that the procedure followed by the Crown was flawed, irrespective of the substantive impact of the project on section 35 rights. In other words, both procedural and substantive factors are taken into account in determining whether or not the Crown has properly discharged its constitutional duty to consult – a breach of either can lead to the quashing of a decision.

In summary, outside of a public interest tribunal context, adjudication of section 35 issues can lead to delay in decisions or the quashing of decisions. The adjudication of those rights does not depend on a weighing of the public interest. In fact, one of the many reasons why the Supreme Court of Canada developed the consultation framework in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, was in consideration of the fact that in injunction cases, the rights and interests of First Nations are often downplayed. In particular, the Court held:

> 12. It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In RJR — MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.
>
> 13. It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.
>
> 14. Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its

> very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 31, and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after Delgamuukw: The Role of the Injunction" (June 2000) (emphasis added).

Despite this jurisprudence, the mandates of both the NEB and the ERCB are to consider the public interest as an overriding concern. No procedural process exists whereby either Board would first consider section 35 rights separate and apart from its public interest analysis. This was expressly rejected, in fact, by the NEB in a recent decision, described below. The end result is that while the ERCB and NEB have the express jurisdiction to consider section 35 rights questions, they simply cannot do so while at the same time considering the public interest. In our view, consideration of section 35 rights as one of many factors in decision making through a public interest test is fundamentally at odds with section 35 jurisprudence.

The ERCB and NEB's mandates of considering the public interest is at odds with the adjudication of aboriginal rights. There appears to be no ability of either tribunal to decide not to approve a project on the basis of lack of consultation or on the basis of an infringement of a section 35 right. Even if a breach of a section 35 right is found, these tribunals must still weigh their decision against the greater public interest. These tribunals have largely confined their consideration of accommodating section 35 rights to attaching conditions to an approval. Whereas a court can quash a decision for such breaches, these tribunals appear to be unwilling or unable to do so in most instances.

D. SHOULD TRIBUNALS BE REQUIRED TO ADJUDICATE SECTION 35 ISSUES BEFORE DECIDING WHETHER A PROJECT IS IN THE "PUBLIC INTEREST"?

In our view, a project can be in the broader "public interest" but still constitute an unjustifiable infringement of a section 35 right or a breach of the Crown's duty to consult. This is especially the case where individual projects are viewed in isolation without regard to the cumulative impacts of those projects in a given area or watershed, for example. As noted earlier, in a section 35 analysis, the question of justification does not come into play until after the aboriginal right and corresponding infringement has been demonstrated by the claimant. However, since the

ERCB and the NEB must consider the public interest, not individual interests, elements of the justification analysis may colour the initial analysis of whether or not the aboriginal right exists and has been infringed in the first instance.

If a tribunal with a public interest mandate is required to consider factors such as how many jobs will be created, how much money the proponent spent on acquiring a lease and undertaking exploratory work and other such factors, it is difficult to see how a tribunal can refuse to approve a project, irrespective of the impacts on section 35 rights. Moreover, we are concerned that when a section 35 defence is raised before the ERCB and the NEB, issues of justification may creep into the initial stage of the inquiry under the guise of public interest considerations. In *R. v. Sampson* 1995 CanLII 3254 (BCCA), the Court expressly cautioned against considering the justificatory factors in *Sparrow* as part of infringement analysis, stating at par. 40:

> 40 As earlier stated, ***Sparrow*** dealt with recognition of aboriginal rights under s. 35(1) of the Act. It set out a procedure to be followed which involved consideration of a test which involved two separate stages. If the person claiming an aboriginal right establishes on a *prima facie* basis an infringement of an aboriginal right then, and only then, the enquiry shifts to consideration of the second stage, that of justification of the infringement. There is no indication that the factors involved in consideration of the second stage should be taken into account in the first stage. An interchange of the order of enquiry is not warranted on the authority of ***Sparrow***. The onus of establishing compliance with the two stages of the test is different. On the first stage, the onus rests upon the claimant to establish a *prima facie* infringement of an aboriginal right; on the second stage, the onus, which is heavier, rests upon the Crown.
>
> ...
>
> 42 The fact that s. 35(1) of the Act does not fall within the ambit of s. 1 of the ***Charter of Rights*** - as acknowledged in ***Sparrow*** at 1108 - suggests that caution should be exercised in determining what factors are relevant to the issues involved in the first stage of the test - infringement. Consideration of factors which go to the issue of justification would minimize the importance of aboriginal rights established by s. 35(1) (emphasis added).
>
> 43 The purpose of the three questions posed in the first stage of the test (is the limitation unreasonable; does the regulation impose undue hardship; and does the regulation deny to the holders of the right their preferred means of exercising that right) is, in our view, to ensure that only meritorious claims are considered. The onus on the applicant is not heavy. The establishment of an infringement on a *prima facie* basis is sufficient. To include consideration of such factors as priority and consultation - factors which are relevant to the second stage of the test - would adversely affect the onus of proof resting upon the applicant. It would

> diminish the safeguard for aboriginal rights established by s. 35(1) as interpreted by the Supreme Court in ***Sparrow***.

This makes good sense. If public interest considerations or Crown attempts to justify their actions creep into the infringement analysis, it is not difficult to see how a court or tribunal might be persuaded that there is no infringement, based on some "greater good."

The NEB's Decision in OH-4-2007 is a good example of the conflict that arises where a section 35 defence is raised before a public interest tribunal. The question emerging in this and two other companion decisions of the NEB concerned whether or not the NEB ought to consider the discharge of the Crown's duty to consult prior to considering whether or not a project is in the public interest. As noted earlier, the *Mikisew* case and subsequent decisions have held that a project can be delayed or even quashed where there is a finding that the Crown has breached this important constitutional duty.

In Decision OH-4-2007, the NEB reviewed Enbridge Pipelines Inc.'s section 52 Application dated 30 May 2007 for approval under Part IV of the NEB Act for the Alberta Clipper Expansion Project. On November 6, 2007, the Standing Buffalo First Nation filed a Notice of Motion requesting the following decisions of the Board:

> a) a decision that the Board has no jurisdiction to consider the Alberta Clipper Expansion Project Application on its merits without first determining whether Standing Buffalo has a credible claim within the meaning of the Supreme Court's decision in *Haida Nation v. British Columbia (Minister of Forests)*; and
>
> b) a decision that the duty of fairness requires that the Crown be required to attend and respond to Standing Buffalo's claim, and in the absence of any such response from the Crown, Standing Buffalo's claim should be accepted as uncontradicted and the Board should then determine that it is without jurisdiction to determine the substantive merits of Enbridge's application (page 5).

One of the arguments advanced by the Standing Buffalo First Nation directly raised its section 35 rights and, in particular, whether the decision to consider a project without first determining the section 35 issues was properly within the Board's jurisdiction. At pp. 6-7 and 8-9 of the Decision, the NEB set out the argument being advanced by the Standing Buffalo First Nation:

> ... if the Crown does not appear in the proceeding then it is necessary to consider the potential adverse effect of the Project. In its view, the fact that the Project would be built on Dakota lands is a potential adverse effect as contemplated in *Haida* because it interferes with constitutionally protected governance rights. The

> proposed pipeline would directly affect Standing Buffalo's right to control its traditional territory as a result of its assertion of Aboriginal title to "the land through which the pipeline runs or will run."

And further that:

> In conclusion, Standing Buffalo stated that a tribunal cannot make a decision on the substance of a matter before the tribunal first establishes that it has jurisdiction to do so. It indicated that the only way that the Board can establish its jurisdiction is by engaging the Haida test and concluding that there was no duty to consult or that there was a duty which was satisfied. Standing Buffalo's view was that there is a duty to consult and it has not been satisfied.

The NEB rejected the argument advanced by the Standing Buffalo First Nation at p. 10:

> The Board weighs and analyzes the nature of the Aboriginal concerns and the impacts a proposed project might have on those interests as part of its overall assessment of whether or not the Project is in the public interest. The Board is of the view that the process it followed in the evaluation of the Project ensures that the decisions of the Board in respect of the Project will be made in accordance with all legal imperatives (emphasis added).

The Board went on to state that it does not have the jurisdiction to *settle* aboriginal land claims, but described how it does consider aboriginal interests in the weighing of the public interest. At p. 10 the Board states that:

> The Board weighs the overall public good a project may create against its potential negative aspects, including any negative impacts on Aboriginal interests, and makes its decisions in accordance with the public interest. As part of the decision-making process, it takes into consideration the potential environmental and social impacts and the potential for mitigation of those impacts. Mitigation measures proposed by an applicant or interested parties may be as varied as, for example, requiring the implementation of a heritage resources contingency plan, re-routing a pipeline or adjusting the proposed construction schedule (emphasis added).

Decision OH-4-2007 makes it clear that the Board considers negative impacts on Aboriginal interests, which could be otherwise characterized as "infringements" or "adverse impacts", as one factor among many factors when determining whether a project is in the public interest. In our view, such an approach downplays, if not ignores, the constitutional protection afforded section 35 rights and it ignores the jurisprudence set out earlier. Aboriginal rights are given no

unique consideration and are given the same weight that would be afforded to other potential environmental and social impacts that might arise if an approval is granted.

It is difficult to see how a public interest-based approach to determining section 35 rights can satisfy the important purposes behind granting those rights constitutional protection in the first place. How is the important objective of reconciliation to be achieved if projects can simply be approved because of the money they will bring in or the jobs they will create? How in such a framework will the aboriginal perspective of their rights and the need for the land, environment, and ecosystem to remain in a certain state be properly taken into account? In our view, the rights and interests of First Nations are ignored or downplayed in these public interest-based tribunals.

E. THE *PAUL* CASE IS DISTINGUISHABLE

In our view, the decision of the Supreme Court of Canada in *Paul* is distinguishable from a consideration of public interest tribunals such as the ERCB and the NEB. The principles in *Paul* are confined to its particular facts and the public interest mandate of the ERCB and the NEB distinguishes those tribunals from the application of *Paul.* In *Paul,* the Court was not asked to consider whether a public interest test is fundamentally at odds with the adjudication of section 35 issues.

III. STANDING AS A BAR TO ADVANCEMENT

In our view, in addition to the "public interest" issue raised above, another concern is that the ERCB hearing process does not allow for a thorough determination of section 35 issues. In order for a party to be a participant in the hearing process, including an opportunity to trigger a hearing and to make submissions regarding the impacts of a project, a party must establish that it has standing under subsection 26(2) of the *ERCA.* The party must show that the application before the board may "directly and adversely affect" the rights of the person. The Alberta Court of Appeal in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board) and Penn West Petroleum Limited*, 2005 ABCA 68 describes the test in this way at par. 10:

> [10] The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows

> that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

Essentially, the test is a two prong test which must be met for a party to have standing under section 26(2):

1. The party must have legal rights that are affected by the application; and

2. The party must demonstrate that those rights may be directly and adversely affected by the application.

The onus is on the party applying for standing to assert a claim to the ERCB that satisfies these two elements. If the ERCB concludes that the party does not meet the test for standing, the ERCB will write a letter to the party setting out that decision. If a party is denied standing, it cannot advance its rights and participate in a hearing to the fullest extent it would have been able to if it were granted standing.

A. A TRUNCATED APPROACH TO DETERMINING SECTION 35 RIGHTS

In many cases, section 35 rights asserted by First Nations are rejected by the ERCB on the grounds that they have not provided sufficient evidence of their aboriginal and treaty rights that may be directly and adversely impacted by the project. For example, in the case of an objection filed by the Beaver Lake Cree Nation (the "BLCN") objecting to an application for a project in the Athabasca Oil Sands area, the Board held that BLCN had no standing:

> BLCN has not provided any specific examples of aboriginal or treaty rights that may be directly and adversely impacted by approval of the Application. As a result, the BLCN's objection to the project is denied.

The requirement that a party seek section 26(2) standing before it can raise objections or trigger a hearing process effectively entails a determination of aboriginal rights in a truncated fashion. Moreover, it ignores the fact that infringements or adverse impacts can come from the direct, indirect or cumulative impacts of one or more projects, or from the injurious affect of one or more projects. This is contrary to what the Supreme Court of Canada had in mind in *Paul* when it stated that an administrative tribunal has the same fact-finding functions as an ordinary court. This must also be contrasted with the test for infringement in the ordinary courts, where many cases have held that the threshold for proving infringement is a low one. In effect, tribunals like

the ERCB appear to have been given the jurisdiction to implement a higher threshold for allowing First Nations to argue their cases than what is afforded by the ordinary courts.

B. NO JURISDICTION TO HEAR *PRIMA FACIE* LAND CLAIMS ASSERTIONS

A similarly disturbing approach to section 35 rights is found in NEB Decision OH-1-2007. In that decision, the NEB applied what is essentially a truncated infringement-justification analysis disguised as "mitigation measures" stating at p. 42 that:

> The Board notes that almost all the lands required for the Project are previously disturbed, are generally privately owned and are used primarily for ranching and agricultural purposes. Project impacts are therefore expected to be minimal and the Board is satisfied that potential impacts identified by Standing Buffalo which can be considered in respect of this application will be appropriately mitigated.

Absent a full trial on this issue, or at least a process that allowed for the First Nation to fully argue these issues, it is difficult to see how the NEB's decision accords with the section 35 jurisprudence. The decision appears to have been made on a number of assumptions about the legal status of consultation and section 35 rights without analyzing, for example, whether the lands had been "taken up" under the applicable treaty (a question of fact requiring evidence), whether there is a Crown duty to consult on so-called "private" lands, and related issues. Moreover, the NEB simply assumed that any potential adverse impacts can simply be mitigated.

Following Decision OH-1-2007, the Standing Buffalo First Nation requested a review of the Decision on several grounds, including that it was denied a fair hearing, that there is an ongoing obligation to protect sacred sites that have already been disturbed, and that the Panel erred when it "implicitly concluded that it had the jurisdiction to consider the certification application on its merits without having first satisfied itself that adequate Crown consultation had taken place" and that the Panel had failed to follow both the law and procedure set out in *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73. The request was denied by Letter Decision dated February 2008. It is our understanding that the three decisions of the NEB on these issues have been appealed to the Federal Court of Appeal.

C. COURTS LACK JURISDICTION TO DETERMINE FACTUAL ISSUES RELATED TO SECTION 35 RIGHTS ON APPEAL FROM BOARD DECISIONS

A determination of a First Nation's section 35 rights by the ERCB only faces review by a higher court if the ERCB can be said to have erred on a question of law or jurisdiction. Section 41(1) of the *ERCA* states that an appeal lies from the ERCB to the Court of Appeal on a question of law. Our concern is that there are complex factual determinations that must be made in any case raising section 35 rights. There are complex factual questions concerning the existence and extent of those rights, whether the Crown has properly discharged its duty to consult, and what constitutes an "infringement" or "adverse impact" on a section 35 right.

Perhaps part of the reason why it is conceivable that the ERCB can determine questions of law is because these questions are reviewable on a standard of correctness. However, the same cannot be said about questions of fact which are not reviewable and which are, in the case of section 35 claims, especially vulnerable to error given the evidentiary complexities at play. When those rights are determined in the context of a public interest test, those factual decisions are even more prone to factual errors.

In *Whitefish Lake First Nation v. Alberta (Energy and Utilities Board),* 2004 ABCA 49, the Court considered the Whitefish Lake First Nation's (WLFN) leave to appeal the Board's decision and ultimately granted leave on the basis that the Board had applied the wrong legal test for standing. The actual appeal in this case was to be heard alongside the *Dene Tha' First Nation* discussed in more detail below, but the leave decision serves to illustrate the complexity of the Board's standing determination in a s. 35 rights case.

In its decision, the Board had denied the WLFN standing on the basis that it had not established *the potential* for direct and adverse impact in accordance with s. 26 of the *ERCA.* The Respondent argued that there had been no error of law as the Board's decision merely applied the legal test for standing to a set of facts. The Court considered the *prima facie* assertions of rights made by the WLFN, including a claim to consultation, and considered that the only way the Board could have come to the conclusion that it did was to apply a different test for standing than the one set out by the British Columbia Court of Appeal in *Halfway River First Nation v. British Columbia (Ministry of Forests),* [1999] BCCA 470, referring to par. 134 – 136. As such, the Court concluded that the determination of the proper test to be applied to a set of facts is an issue

of law, and therefore, the Board arguably made and error of law by applying the wrong test. At par. 26 the Court stated that:

> Here the Board was dealing with aboriginal and treaty rights, as well as the related right of consultation with the Crown. In the *Paul* decision, Bastarache J. held that while regulatory bodies, empowered to consider matters of law, are obliged to consider the claims of First Nations, when they do so they must be correct.
>
> The applicant, therefore, has raised a serious arguable issue relating to whether the Board properly interpreted and applied the correct test for standing and leave to appeal is granted on this point.

A further demonstration of such difficulties may be found in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* 2005 ABCA 68 decision where the First Nation appellant asserted that it would be adversely affected by proposed wells and access roads scheduled to be built on Crown land. In that case, the ERCB issued a letter stating that the First Nation had not met the section 26(2) test for standing, although the Court stated that the decision letter was somewhat ambiguous as to its grounds.

The Court noted at the outset that it could only deal with questions of law or jurisdiction, and that no appeal lies on a factual matter. It stated that the second branch of the section 26(2) test is a factual inquiry, and thus is not subject to judicial review. Mr. Justice Cote wrote at par. 13 that:

> The wording of the April 15 letter seems clear to us. When it says that no person was shown to be susceptible of direct adverse effect, it clearly makes a factual finding.

And further at paras. 14-15 it was held that:

> Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board. Whether that factual decision was correct here is not for us to say, and we lack jurisdiction to go into it.

Despite the fact that the ERCB did not afford the First Nation the opportunity to argue the potential infringement of its rights or potential adverse affects thereon in any meaningful fashion, the ERCB's factual decision as to whether or not the aboriginal right is adversely affected cannot be subject to judicial review (unless one can show that the tribunal applied the wrong legal test in

reaching its conclusion). As in any other situation, a Court of Appeal will not intervene where factual errors are asserted.

In our view, this effectively denies First Nations a remedy before a tribunal, a court, and an appeal court. Limited standing decisions in the ERCB are not informed by the purpose behind section 35, namely, to entrench aboriginal rights in the constitution, and to ensure *the recognition of the prior occupation by aboriginal peoples* and to reconcile the rights and interests of First Nations with those of the Crown, pursuant to Supreme Court of Canada jurisprudence. Such important considerations appear to play little or no role in the standing test of the ERCB.

IV. CONCLUSION

We wish to conclude this paper by raising some difficult constitutional questions and issues which, in our view, will have to be sorted out in the future by courts and tribunals concerning important issues arising in a section 35 context:

1. Do tribunals have the jurisdiction to consider Crown consultation breaches pursuant to consultation duties set out in the common law, or are they confined to considering whether the Crown (or proponent) has complied with provincial or federal consultation guidelines or departmental or regulatory directives on consultation?

2. Can tribunals reject an application on the basis of section 35 breaches or are they required to take into account the public interest, notwithstanding section 35 breaches having been found?

3. To what extent are tribunals open to ignoring or downplaying section 35 rights when they have a public interest mandate?

4. Do tribunals who are empowered to consider environmental impacts and effects, such as Joint Review Panels, have the jurisdiction to assess impacts on section 35 rights that may not be included in the Terms of Reference empowering such tribunals:

5. Can they consider rights when their empowering legislation may require them to focus on activities?

6. Can they consider potential direct, indirect and cumulative impacts (social, economic, environmental, cultural, health) on section 35 rights and First Nations communities, outside of what factors are contained in their terms of reference or empowering legislation?

7. Can tribunals consider the impacts of grants of tenure on section 35 rights as part of determining issues related to the Crown's duty to consult or are they bound by provincial or federal departmental policies saying that no such consultation is required?

8. Is there going to be a separate jurisprudence – and the potential for bifurcated decisions as between different tribunals and as between tribunals and courts – depending on the word of the enabling legislation for tribunals and whether they are bound to consider the public interest in rendering their decisions?