Court File No.: 285/06

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N :

HIAWATHA INDIAN BAND now known as Hiawatha First Nation, and GIMAA GREG COWIE, suing on his own behalf and on behalf of the members of the Hiawatha First Nation

ALDERVILLE INDIAN BAND now known as Mississaugas of Alderville First Nation, and GIMAA JAMES ROBERT MARSDEN, suing on his own behalf and on behalf of the members of the Mississaugas of Alderville First Nation

BEAUSOLEIL INDIAN BAND now known as Beausoleil First Nation, and GIMAA RODNEY MONAGUE JR., suing on his own behalf and on behalf of the members of the Beausoleil First Nation

CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND now known as Chippewas of Georgina Island First Nation, and GIMAA BRETT MOONEY, suing on his own behalf and on behalf of the members of the Chippewas of Georgina Island First Nation

CHIPPEWAS OF RAMA INDIAN BAND now known as Mnjikaning First Nation, and GIMAANINIIKWE SHARON STINSON-HENRY, suing on her own behalf and on behalf of the members of the Mnjikaning First Nation

CURVE LAKE INDIAN BAND now known as Curse Lake First Nation, and GIMAA KEITH KNOTT, suing on his own behalf and on behalf of the members of the Curve Lake First Nation

MISSISSAUGAS OF SCUGOG ISLAND INDIAN BAND now known as Mississaugas of Scugog Island First Nation, and GIMAANIIKWE TRACY GAUTHIER, suing on her own behalf and on behalf of the members of the Mississaugas of Scugog Island First Nation

and DAVID SANFORD

Applicants

-and-

MINISTER OF THE ENVIRONMENT,
ONTARIO REALTY CORPORATION and HURON WENDAT NATION

Respondents

APPLICATION UNDER Sections 2(1), 4 and 6(1) of the
Judicial Review Procedure Act, R.S.O., 1990 C.J.1 and
Rules 14.05 and 68 of *the Rules of Civil Procedure*

FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. This is an application for judicial review to quash the decision of the respondent, Ontario Realty Corporation ("ORC"), dated January 11, 2006, to issue a Notice of Completion which indicated that the Class C Environmental Study Report ("ESR") in this matter was complete; for declarations that ORC had duties to consult with the applicant First Nations and that these duties were not fulfilled, and for an order in the nature of prohibition prohibiting ORC from transferring certain publicly owned lands prior to engaging in a process of meaningful consultation with the applicants.

2. In or about 1999, the Ministry of Municipal Affairs and Housing ("MMAH") entered into a "Land Exchange" agreement whereby ORC would exchange 1270 hectares of Crown lands in north Pickering ("the Seaton lands") for lands in Richmond Hill owned by private developers for the purpose of development into a significant City. This is the largest sale of public land in which ORC ever has, or ever will engage.

   Miele, T., qq. 103-106

3. The Seaton lands are an ecologically vibrant patchwork of forest blocks and river corridors which link the Oak Ridges Moraine ecosystem to Lake Ontario. Since before European contact until recently, the Seaton lands were important hunting, fishing and gathering grounds supporting the traditional way of life of ancestors of the applicant First Nations. These lands remain of prime significance to the cultural heritage of applicant First Nations.

4. The applicant's interest in their cultural heritage in these lands is without contradiction. The applicant First Nations claim aboriginal rights in the Seaton lands extending to burial and other sacred sites which on the uncontradicted evidence in this record are likely to be

established. It is common ground between the parties that the applicants are owed a duty of consultation. The scope of that duty, the extent of pre-right accommodation and whether the respondents have fulfilled their duty are at issue between the parties here.

5. The ORC oversaw a consultation process which failed to meet the requirements of the duty applicants say they are owed, or indeed, failed to meet any conceivable duty of meaningful consultation. The ORC purports that one of its own agents represented the interests of the applicant First Nations in the consultation process – a position that amounts to ORC alleging it was consulting with itself.

6. The ORC's consultation process admittedly failed to make contact with 3 of the applicant First Nations. Eight of the nine Chiefs who swore affidavits in support of this application say they never heard of ORC's "consultation process". ORC never exchanged the most critical, or in most cases, any information with the applicants. ORC did not listen to the applicant's concerns, give them any opportunity to contest ORC's archaeological studies or accommodate the applicant's concerns in any way.

7. The applicant's say that the Seaton lands are likely to contain ancestral remains, burial sites, sacred sites and other important artifacts, which in themselves, and the practices associated with accessing them, are central and defining features of the First Nations' identities as peoples. The applicants say that ORC's "process" runs roughshod over these concerns, which concerns are likely protected as aboriginal rights. The ORC's "process" did not afford all but one of the applicants any opportunity to express their concerns, and did not address or accommodate these concerns. Accordingly the applicants say that ORC has failed in its admitted duty to consult protected by the Constitution and the *Environmental Assessment Act*

("*EAA*"), and failed to accommodate as required by the Constitution. Accordingly the Notice of Completion cannot stand and the orders for declarations and prohibition should issue.

PART II - FACTS

A. PARTIES

8. The applicant, David Sanford, is an individual of First Nations heritage who has from time to time acted as an advocate for First Nations consultation issues. Mr. Sanford commenced this proceeding and subsequently brought it to the attention of the applicant First Nations which have carried it forward.

9. The applicants, Hiawatha First Nation ("Hiawatha"), Alderville First Nation ("Alderville"), Beausoleil First Nation ("Beausoleil"), Georgina Island First Nation ("Georgina"), Mnjikaning First Nation ("Mnjikaning"), Curve Lake First Nation ("Curve Lake"), and Scugog Island First Nation ("Scugog"), are Indian Bands under the *Indian Act* and their members are Aboriginal people within the meaning of Section 35 of the *Constitution Act, 1982*. The applicant First Nations are all of the Anishnaabeg ancestral heritage, also often referred to as Ojibwe.

10. Pursuant to Section 5(3) of the *EAA*, no person shall proceed with an undertaking unless the Minister of the Environment ("MOE") gives her approval.

11. ORC has statutory objects and powers under Part V of the *Capital Investment Plan Act, 1993*. ORC manages Crown land holdings in Ontario. ORC is responsible for conducting the Class Environmental Assessment ("Class EA") process with respect to the disposition of the Seaton lands.

12. The Mississaugas of New Credit First Nation ("New Credit") have provided affidavit evidence in support of this application but are not a party to the proceeding. Like the applicant First Nations, New Credit is an Indian Band of Anishnaabeg ancestral heritage.

13. The Mohawks of the Bay of Quinte (Tyendinaga) ("Tynedinaga") have provided affidavit evidence in support of this application but are not a party to the proceeding. Tyendinaga is an Indian Band of the Haudenosaunee ancestral heritage, often referred to as Iroquois.

14. The Huron Wendat Nation (the "Hurons") are an Indian Band from Lorette, Quebec, which took part in the subject consultation process and obtained an order to be added as a respondent to this proceeding.

B. THE CLASS EA PROCESS

(1) Class C Process Versus Full Individual Assessment

15. On April 27, 2004, ORC announced that it would conduct an environmental assessment of the Seaton Lands pursuant to the *EAA*. ORC decided that the review would follow the process for Class C projects under the Class EA process.

16. Class assessments relieve ORC from having to draft specific Terms of Reference to guide analysis of the undertaking. Class assessments differ from full individual assessments, which require the proponent to draft specific Terms of Reference in consultation with interested parties.

17. Full individual assessments are reserved for undertakings which are unique or large in scale. Class assessments are reserved for undertakings where the potential adverse effects are well understood or well-defined.

(2) Consultation Required

18. The ORC is required to produce an Environmental Study Report (ESR) for Class C EA processes. In this matter, ORC retained Marshall Macklin Monaghan to prepare the ESR. Before the ESR can be completed it is necessary to consult with First Nations that have an identifiable interest.

Agensky, T. I, qq. 103, 321, 338-342

19. ORC acknowledges that consultation with First Nations communities must begin as soon as it identifies the nature of the proposed undertaking in the first stages of the Class EA process. ORC acknowledges that its obligation at that point is to provide First Nation communities with as much information as is then available.

Agensky, T. II, qq. 44-46, 48, 359
Dieterman, T., qq. 68-69

20. In late December, 2005, Marshall Macklim Monaghan forwarded to ORC what was deemed to be the completed ESR in this matter. ORC approved the ESR and directed that the Notice of Completion be issued on January 11, 2006. This commenced the 30-day review period within which interested parties could make a 'bump-up' request of the MOE to have the Class EA process elevated to a full individual EA.

Willis, T., qq. 45-49

(3) 'Bump-Up' to Full Individual Assessment

21. Bump-ups are warranted in situations where the EA process is not being properly followed, consultation is not properly proceeding or there are complaints about the archeological work.

Agensky, T. II, qq. 503-505

22. ORC acknowledges that at the start of this EA process, the archeological issues were neither well understood nor well-defined.

Agensky, T. II, qq. 513-14, 526, 557, 565-568

23. The president of the ORC opined that this EA process should have proceeded as a full individual assessment.

Miele, T., qq. 119
Agensky, T. II, qq. 411-412

24. No bump-up requests were made in the course of this EA process on the basis of cultural heritage or archeological issues. The applicants contend that their exclusion from the consultation process precluded them from making a bump-up request.

Agensky, T. II, qq. 503-505

C. ABORIGINAL RIGHTS

(1) Seaton Lands Are Within Traditional Territories

25. The Seaton lands come within the territory subject to the Williams Treaties. The applicant First Nations represent all of the signatories to the Williams Treaties

26. The Williams Treaties recite that the Crown is interested in obtaining surrender of "the Indian title of the said tribe to fishing, hunting and trapping rights over the said lands". Nowhere do the Williams Treaties surrender graves, sacred sites or the Indian interests to access graves and sacred sites for ceremonial purposes.

Text of the Williams Treaties, 1923

27. The Seaton lands form part of the traditional territory of New Credit. This community never signed the Williams Treaties. There is dispute as to whether New Credit ever surrendered any rights to the Crown given that the only treaty which New Credit ever signed, the Gunshot Treaty, failed to describe the lands being surrendered.

Chief LaForme, Aff., para. 4
ESR, pp. 2-28 to 2-29

28. Tyendinaga asserts that the Seaton lands form part of its traditional territory as evidenced by the Great Peace Treaty of 1701 which recognized Tyendinaga's hunting rights in the region. This community never surrendered any rights in the territory.

Chief Maracle, T., qq. 362, 381
Chief Maracle, Aff., paras. 5-6

29. Thus, the applicant First Nations, New Credit and Tyendinaga all have a direct cultural interest in the Seaton lands and the proposed Land Exchange. Each of these First Nations also claims, and can plausibly establish, aboriginal rights in these lands based on that cultural interest. The ORC recognizes the nature and quality of these claims.

Dieterman, T., qq. 72-90

(2) Historical Evidence

30. As part of the Class EA process, ORC retained Archeological Services Inc. ("ASI") to manage the First Nations consultation process. Through ASI, ORC commissioned two historical reports in an effort to understand the history of First Nations occupation of the Seaton lands. These reports rely on secondary sources. They do not rely on primary archival sources.

Dieterman, Aff., para. 4
Dieterman, Aff., Ex. D
Dieterman, Aff., Ex. E

31. Emails between ORC and ASI show that ORC decided not to commission histories which relied on primary archival sources. ORC deemed that archival histories would only be necessary if litigation developed.

Corr. from ORC and ASI, dated April 6, 2005

32. Both historical reports commissioned confirm the presence of the Anishnaabeg ancestors of the applicant First Nations in the vicinity of the north shore of Lake Ontario from at least the early 1700s.

Dieterman, Aff., Ex. D
Dieterman, Aff., Ex. E

33. Professor Darlene Johnston, an Anishnaabeg historian and U of T Professor of Law, provided evidence that these reports do not completely reflect the history of the Anishnaabeg in the area which includes the Seaton lands. Professor Johnston's observes that the Public History Inc. report is silent on the issue of Mississauga occupation of the north shore of Lake Ontario from 1720-1763 and that the report equates a lack of villages with a lack of occupation.

Prof. Johnston, T., q. 146

34. With respect to the Lytwyn report, Prof. Johnston notes that further available information with respect to the Mississaugas was not included. The report provides no population figures which are available through INAC records, it skips the period from 1796 to 1840 and

is missing further historical evidence of Anishnaabeg occupation of the north shore of Lake Ontario which can be obtained from missionary records. There is also no reference to early surveys or maps done by Crown Land Office, field notes from the surveyors and any correspondence or diaries which they may have left which would document Anishnaabeg occupation.

Prof. Johnston, T., q. 146

35. Professor Johnston stated that any notion that Huron alone occupied the Seaton lands prior to 1650, and not Anishnaabeg, cannot be defended on the evidence. Early records of the Jesuits in the 1600s show that the Anishnaabeg commonly wintered with the Hurons and that at some Huron villages, the Anishnaabeg language was spoken. There was a very close relationship between the Hurons and the Anishnaabeg and ample evidence of the two groups cohabiting together in villages.

Prof. Johnston, T., q. 147

36. Professor Johnston identified various maps and historical records from the 1700s which indicate Anishnaabeg presence across the north shore of Lake Ontario and in the specific vicinity of Duffins Creek, which is on the Seaton lands.

Prof. Johnston, T., q. 148

(3) Practices Integral to the Distinctive Culture of Anishnaabeg

37. The Anishnaabeg have distinctive cultural practices with regard to the burial and remembrance of their dead. These practices date from the pre-contact period, and continue to be observed by modern Anishnaabeg communities today. Anishnaabeg burial customs

were "integral to the distinctive culture" of pre-contact Anishnaabeg communities. They were of central significance to Anishnaabeg communities in that they expressed the distinctive Anishnaabeg world view and in so doing they made Annishnaabeg culture distinctive and solid.

Prof. Johnston, T., q. 146

38. The Anishnaabeg believed in an ongoing relationship between the dead and the living, ancestors and descendants, since before the time of first contact with the Europeans, which historians estimate to be some time in the early 1600s. The 17th century Anishnaabeg attached great importance to the physical remains of the dead and considered their burial grounds as sacred lands and central to the relationship between the dead and the living.

Prof Johnston, Aff., paras. 14-17

39. The earliest Europeans to encounter the Anishnaabeg noted the reverence with which the Anishnaabeg regarded the dead and the importance the Anishnaabeg attached to preserving their cemeteries. In the Anishnaabeg belief system, it is the obligation of the living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. The 17th century Anishnaabeg believed that the dead needed to be sheltered and fed, to be visited and feasted and believed that failure to perform this duty harmed not only the dead but also the living. The Anishnaabeg also placed great importance to being buried in one's traditional territory. They believed that the everlasting connection between body and soul was grounded in a particular landscape.

Prof Johnston, Aff., paras. 18-21, 27

40. These beliefs and associated traditions continue to the present day. "Feasting the Dead" is one particular tradition from at least 17th century times that continues to be observed in many Anishnaabeg communities. This tradition is noted in many of the records left by the first Europeans to encounter the Anishnaabeg including French traders and the Jesuits. The Jesuit Father Brebeuf noted the Anishnaabeg belief that the souls of the dead remained in their bones: "the soul remains in some way attached to them for some time after death, at least that it is not far removed from them…"

Prof Johnston, Aff., paras. 22-29

41. This notion of the souls of bones is key to understanding both the reverence with which human remains are treated after death and the abhorrence of grave disturbance which persists among the Anishnaabeg. Professor Johnston has first-hand knowledge of the continued practice of these beliefs in many Anishnaabeg communities.

Prof Johnston, Aff., paras. 30-31, 36

42. Many Anishnaabeg communities, including the seven Applicant First Nations, continue to follow these ancestral burial customs and many First Nation members share in these beliefs. These beliefs and associated practices are part of the distinctive world view that gave the early Anishnaabeg communities their solidity and distinctive identity. They continue to be important in the same sense to present day Anishnaabeg communities, including the Applicant First Nations.

Prof Johnston, Aff., paras. 32-36

43. The Chiefs for each of the applicant First Nations have all expressed the importance for their respective communities of protecting the burials and cultural remains of their ancestors which they believe the Seaton lands contain.

Chief Cowie, Aff., paras. 36-39
Chief Knott, Aff., paras. 34-37
Chief Marsden, Aff., paras. 36-39
Chief Mongaue, Aff., paras. 36-39
Chief Stinson-Henry, Aff., paras. 34-37
Chief Mooney, Aff., paras. 36-39
Chief Gauthier, Aff., paras. 36-39

44. Kris Nahrgang, who is the ORC agent responsible for "consulting" with First Nations, stated that he had read Professor Johnston's affidavit and fully agreed with her statements. William Woodworth, an Aboriginal traditionalist and another ORC "consultation" agent, echoes Professor Johnston's evidence when he states that he believes there are burials and bones throughout the Seaton lands and that these lands are sacred and best left undeveloped to preserve the closer energy to the ancestors that undisturbed lands hold.

Nahrgang, T. I, qq. 394-398
Woodworth, T., qq. 169-185

D. THE CONSULTATION PROCESS

45. The applicant, David Sanford, successfully advanced a public prosecution against ORC for failing to conduct meaningful consultation with First Nations in *The Queen* v. *Ontario Realty Corporation*, May 17, 2004. The Court ruled that ORC's failure to conduct meaningful consultation with First Nations infected ORC's environmental assessment of lands in the Town of Markham, and fined ORC $7,500.00. This decision affirms that ORC has a Constitutional, common law and statutory duty to engage in meaningful consultation with

First Nations when its undertakings risk interference with First Nation cultural or territorial interests.

Decision of Justice Ng, dated May 17, 2004

(1) Acknowledged Consultation Obligations

46. At the outset of Appendix G to the ESR, ASI makes the following comments with regard to the design of the First Nations consultation process:

> The ASI and Lytwyn reports, in particular, highlighted the highly complex and dynamic nature of First Nations history and the fact that many different cultural and ethnic groups occupied the Seaton area at different times. It was therefore concluded that in developing any consultation process it would be most prudent to ensure that no assumptions were made concerning the specific identity of the people who formed the archeological record of the Seaton lands.
>
> Appendix G to ESR, Introduction, pp.1-2

47. The ESR identifies as "interested parties" in the Land Exchange the "various Ojibwe First Nations of the north shore of Lake Ontario" and, more specifically, Scugog, Georgina, Curve Lake, Alderville, Hiawatha and New Credit.

ESR, pp. 2-28 to 2-31
Appendix G to ESR, p. 1

48. The Ministry of Municipal Affairs and Housing wrote to INAC and ONAS for assistance in determining which First Nations had an identifiable interest in the Seaton lands. The request specifically asked whether the proposed Land Exchange would have an impact on aboriginal land claims. No specific inquiries were made with respect to traditional activity or aboriginal rights claims.

Appendix H to ESR, pp. 1-8, 31-32
Dieterman, Aff., Exs. A-B
Dieterman, T., qq. 110-118

49. ORC admits that the only way to know of such claims or rights is to speak to the First Nation communities concerned.

Dieterman, T., qq. 93-99, 146

50. ORC admits that no one asked Hiawatha First Nation or Beausoleil First Nation what traditional use or aboriginal rights claims they have.

Dieterman, T., qq. 134-141

51. ORC admits that a professional consultation process should have discovered traditional activity and aboriginal rights claims and that to the extent that the Seaton consultation process did not identify such claims, it is not a success.

Dieterman, T,, qq. 144, 152-154

52. ORC admits that it is not the responsibility of First Nations to come to the government to advise of their rights.

Dieterman, T., q. 171

53. ORC did not seek opinions from any constitutional lawyers with respect to designing a consultation process which would comply with Section 35 of the *Constitution Act, 1982*.

Dieterman, T., q. 175

(2) Deficiencies in the Consultation Process

54. In June of 2004, ORC, through ASI, retained Kris Nahrgang to conduct the First Nations consultation process. Mr. Nahrgang was paid $100.00 per hour or $500.00 per day.

Nahrgang, T. I, qq. 270-282
Nahrgang Invoices to ASI

55. Mr. Nahrgang admits that he decided, all by himself, to not contact Georgina, Mnjikaning and Beausoleil as part of the consultation process.

Nahrgang, T. I, qq. 607-628
Nahrgang, T. II, qq. 2129-2151

56. Mr. Nahrgang admits that no one gave him the authority to limit the scope of the consultation process.

Nahrgang, T. III, qq. 2134-2137

57. Mr. Woodworth admits that he decided, all by himself, to not contact Tynedinaga with respect to the consultation and that he did not discuss his decision with anyone. Mr. Woodworth suggests that he excluded Tyendinaga simply on account of it being a Christian community in his opinion.

Woodworth, T., qq. 148-151

58. Mr. Nahrgang admits that he never gave New Credit any documentation whatsoever with respect to the Seaton lands or the proposed Land Exchange. The consultation record and the evidence provide no evidence that Mr. Nahrgang ever provided the applicant First Nations with any such documentation. The applicant First Nations (Scugog excluded) confirm that Mr. Nahrgang provided them with no documentation.

Nahrgang, T. II, qq. 1910
Chief Cowie, T., qq. 26-30
Chief Knott, T., qq. 18-30
Chief Marsden, T., qq. 93-97
Chief Mongaue, Aff., para. 12
Chief Stinson-Henry, Aff., para. 13
Chief Mooney, Aff., paras. 12, 25

59. Mr. Nahrgang admits that he never requested documentation relating to the Seaton lands or the proposed Land Exchange to assist him in consulting with First Nations. ORC admits that neither ORC nor ASI provided Mr. Nahrgang with any documentation until after the archeological surveys were completed in late 2005. Even if he wanted, Mr. Nahrgang had no documentation to give to any First Nation.

Nahrgang, T. II, qq. 1360, 1362 1365-1372, 1385-1388, 1447-1452

60. Mr. Nahrgang admits that throughout the process he had no knowledge of how the EA process worked or that First Nations could request a 'bump-up' to full individual assessment if they had complaints about the process. Mr. Nahrgang admits that neither he nor ASI advised any First Nations about the possibility of making bump-up requests or the 30-day period within which they could be made after the completion of the ESR.

Nahrgang, T. II and III, qq. 1207-1220, 2619-2628

61. Mr. Nahrgang never advised any First Nation community that if they wanted to they would be permitted the opportunity to challenge or independently verify the archeological and historical reports.

Nahrgang, T. I, qq. 492-504, ARP

62. Mr. Nahrgang did not believe that the applicant First Nations required funding to enable them to participate in the consultation process. He suggests that they should have just relied on the professionals already retained by the ORC. Mr. Nahrgang states that the issue of funding never came up because no one requested it during the consultation process. Neither does Mr. Nahrgang provide evidence that he ever advised the applicant First Nations that funding was available.

Nahrgang, T. I, qq. 568-572

63. ORC admits that no one ever advised the applicant First Nations, New Credit or Tyendinaga that consultation funding might be available. ORC admits that no consultation funding was offered to the applicant First Nations, or New Credit and Tyendinaga.

Agensky, T. II, qq. 241-243
Dieterman, T., qq. 410-420

64. ORC admits its knowledge that First Nations typically do not have the financial resources to retain independent experts.

Dieterman, T., q. 420

65. ORC admits that interpreting the archeological record requires expert assistance. ORC admits that determining how to deal with archeological sites properly requires expert assistance.

Dieterman, T., qq. 423-426, 443-446

66. Apart from Scugog Island First Nation, Mr. Nahrgang claims that he was representing and protecting the interests of the applicant First Nations and New Credit in the consultation process but admits that he never asked for permission or authority to represent those interests.

Nahrgang, T. I and II, qq. 858, 2400-2408

67. Mr. Nahrgang admits that the Power Point presentation made to New Credit First Nation is really just a description of how he envisioned consultation taking place. The presentation does not advise of any recent archeological work done on the Seaton lands or how the proposed Land Exchange is likely to impact on the concerns that the First Nations might

have. There is no real archeological information provided apart from dots on a map with no explanation. The sites and artifacts depicted in the pictures are not even from the Seaton lands. The presentation simply gives an overview of the history of southwestern Ontario. There is not enough information imparted to properly alert First Nations as to what their concerns might be with regard to the Seaton lands and the proposed Land Exchange.

Nahrgang, T. II, qq. 1500-1526
Nahrgang, Suppl. Aff., Ex. A

68. Apart from Scugog First Nation, the consultation record demonstrates that there were no meetings whatsoever with the applicant First Nations or Tyendinaga during the consultation process.

ESR, Appendix G (Appendix B)

69. In sum, Mr. Nahrgang claims that he was properly representing the interests of the Anishnaabeg in the consultation process despite the following:

- he never properly reviewed the archeological surveys;
- he had never visited the Seaton lands;
- he never properly advised the applicant First Nations or New Credit about the archeological surveys or what any potential concerns might be;
- he never advised the applicant First Nations or New Credit that they could challenge the archeological conclusions;
- he never advised the applicant First Nations or New Credit that funding was available to retain independent experts to assist them in the consultation. (Nahrgang knew funding was available because he visited the Hurons with the consultation team where a budget for lawyers, archeologists and historians was offered and accepted); and
- he was in a conflict of interest with respect to the duties he owed the ORC and ASI on the one hand and the duties he owed to the applicant First Nations on the other.

Nahrgang, T. II and III, qq. 1671-1692, 1694-1701, 1721, 1707-1711, 1715-1723, 1229, 2400-2408
A. Johnson, Aff., paras.16-28
Chief Gros-Louis, T., qq. 83-99

(4) Evidence of the Chiefs

70. The consultation record is erroneous when it suggests that any of the applicant First Nations delegated authority to consult. The Chiefs of Hiawatha, Alderville and Curve Lake testified explicitly that they did not advise Mr. Nahrgang by telephone that they were authorizing Scugog to represent their communities' respective interests in this consultation process. Nor could they. Such decisions require First Nation Council Resolutions. No such resolutions were ever made.

ESR, Appendix G (Appendix B), page 3
Chief Cowie, T., qq. 138-138
Chief Marsden, T., qq. 323
Chief Knott, T., qq. 328
Chief Cowie, Aff., paras. 16, 19(d)
Chief Marsden, Aff., paras. 4, 17, 20(b)
Chief Knott, Aff., paras. 16, 19(d)

71. Mr. Nahrgang advised Scugog that he would keep the other applicant First Nations advised of issues relating to the Seaton lands. Scugog never purported to have any authority to represent other First Nations in the consultation process.

Councilor Johnson, T., qq. 453-459

72. Mr. Nahrgang acknowledges that individuals cannot circumvent the authority of the First Nation council to make decisions on behalf of their community.

Nahrgang, T., qq. 1275-1281

(5) Notices Are Not Consultation

73. The applicant First Nations frequently receive EA notices, sometimes many a week. The notices typically contain very little information to make them of any value.

Chief Marsden, T., qq. 59, 232-237
Chief Gauthier, T., qq. 177-180
Chief Knott, T., qq. 73

74. One notice sent (out of the hundreds that are directed to applicant First Nations) is that which the ORC purports to have faxed on July 7, 2004, to Hiawatha, Alderville, New Credit, Georgina, Scugog and Tyendinaga.

75. This July 7, 2004 notice is problematic for the following additional reasons:

- It refers to decisions which have apparently already been made in the consultation process without the involvement of the applicant communities;
- It does not clearly mention the fact that the lands to be transferred will be developed into subdivisions;
- It does not identify how the transfer might have an adverse impact upon the applicant communities' interests;
- It employs technical language;
- The Class EA process is not explained at all;
- There is no indication that the Stage 1 archaeological assessment can be challenged;
- There is no indication that funding is available to assist the applicant communities in fully engaging in the process; and,
- It indicates (what is not true) that all First Nations that may have an interest in archeological finds will be advised of such finds.

Dieterman, Aff., Ex. H
Agensky, Aff., Ex. A

76. As a consequence of the applicants' lack of financial and technical resources, they are not always able to respond to the deluge of the notices received. ORC is aware of these circumstances

Chief Cowie, Aff., paras. 25-32
Chief Knott, Aff., paras. 24-30
Chief Mooney, Aff,, paras. 24-31
Dieterman, T., q. 420

77. Mr. Nahrgang acknowledges this when he states that responses from First Nation communities are not quick and that sometimes they take months to a year to respond to notice of EA processes. Mr. Nahrgang explains that this is why he took such exceptional measures to bring the Hurons into this process.

Nahrgang, T., qq. 1318-1320

(6) Consultation With the Hurons

78. To facilitate the consultation process, ORC agreed to provide the Hurons with $112,000.00 to cover the cost of retaining independent historians, archeologists and lawyers. Mr. Nahrgang was present at the budget presentation in the Huron community.

Gros-Louis, T., qq. 148-147
Dieterman, T., qq. 413-416
The Consultation Budget Agreement between ORC and Hurons

79. ORC agreed to name parks on the Seaton lands after members of the Huron community.

Gros-Louis, T., qq. 247-249

E. IMPROPER DELEGATION OF CONSULTATION PROCESS

80. ORC left development of the consultation process entirely to Mr. Nahrgang. Mr. Nahrgang stated that he was provided with no guidance whatsoever in the design of this process.

Nahrgang, T. I, qq. 630-631

81. Kris Nahrgang was solely responsible for all contact with the Hurons and the Anishnaabeg within the consultation process.

Nahrgang, T. I, q. 487

82. Mr. Nahrgang was in a conflict of interest with respect to his role in the consultation process as evidenced by the following:

- He had entered into a paid retainer with Scugog to act as their archeological liaison;
- He had entered into a paid retainer with ORC to consult with First Nations on ORC's behalf with regard to the Seaton lands;
- Scugog believed that Nahrgang was their agent for dialogue with ORC;
- Scugog was not aware that Nahrgang was also ORC's agent for the Seaton lands; and,
- ORC was not aware that Nahrgang was paid by Scugog (until February 5, 2005);

Nahrgang, T. I, qq. 577-595
Councilor Johnson, Aff., paras.16-28
Agensky, T. I, qq. 224-229

83. Nahrgang purported to represent all Anishnaabeg First Nations when he made decisions with respect to the archeological record of the Seaton lands. This magnifies his conflict of interest.

Nahrgang, T. III, q. 2380

F. THE ARCHEOLOGICAL FINDINGS

(1) Position of ORC

84. Appendix G to the ESR states:

> The ASI and Lytwyn reports, in particular, highlighted the highly complex and dynamic nature of First Nations history and the fact that many different cultural and ethnic groups occupied the Seaton area at different times. It was therefore concluded that in developing any consultation process it would be most prudent to ensure that no assumptions were made concerning the specific identity of the people who formed the archeological record of the Seaton lands.

ESR, Appendix G, Introduction, page 1-2

85. Despite this warning, ORC concluded that all "significant" archeological sites on the Seaton lands are undoubtedly of Huron ancestry.

Dieterman, T., qq. 190-198

86. ORC admitted that archaic Mississauga burials have generally escaped detection and that a similar conclusion could be drawn with specific reference to the Seaton lands.

Dieterman, T., qq. 45-53

87. ORC admitted that for archeology to be effective in accommodating First Nations' concerns about sacred sites, the sites should be shown to the First Nations. Where this is not possible First Nations should be given proper descriptions of the sites.

Dieterman, T., qq. 200-205

88. ORC agreed that determining ethnicity in the archeological record is a daunting task.

Dieterman, T., q. 280

89. ORC admitted that there are probably Anishnaabeg sites within Seaton given the national historic site nearby.

Dieterman, T., q. 314

90. ORC admitted that not all sites have been located through the surveys.

Dieterman, T., qq. 350-352

91. ORC relied upon Mr. Nahrgang to dispute any conclusions with regard to ethnicity and never asked other Anishnaabeg persons for their comment.

Dieterman, T., qq. 363-369

92. ORC agreed with the PHI report that not finding Anishnaabeg villages does not mean they are not there.

Dieterman, T., qq. 376

(2) Preliminary Independent Review of the Archaeological Findings

93. Subsequent to commencing this application, the applicant First Nations retained a licensed archaeologist, William R. Fitzgerald, Ph.D., to provide commentary on ORC's archaeological survey work and the conclusions which were drawn from that work with regard to the Seaton lands.

94. Dr. Fitzgerald identified two problems with ORC's archaeological work: the reliability of the Stage 2 surveys and the attribution of ethno-cultural affiliation to Late Woodland period archaeological sites.

Dr. Fitzgerald Report, page 2, 8

95. Dr. Fitzgerald observed wide discrepancies in the reported size of the lands subject to Stage 2 surveys. The survey reports do not say how much land was "test-pitted" and how much was "surface collected". Test-pitting is unlikely to reveal burials or small ritual sites.

Dr. Fitzgerald Report, page 2

96. Dr. Fitzgerald commented that the archaeological assessments of the Seaton lands revealed far less First Nations sites that would be expected from the 10,000 year human presence in the area. Dr. Fitzgerald attributed this to the Ministry of Culture's minimum standards for Stage 2 surveys which are biased towards the discovery of larger and longer-duration cultural manifestations, the remains of which may be on or close to the surface. This tends to limit the discovery to Late Woodland cabins and villages or euro-Canadian farmsteads. It

precludes discovery of small ritual and burial sites which are critically important to the applicant First Nations.

Dr. Fitzgerald Report, page 2

97. Dr. Fitzgerald takes issue with ASI's model for predicting where to find ossuaries associated with Late Woodland "Iroquois" villages. He criticizes ASI for failing to search for burial grounds prior to AD 500. He points out that Algonquian-speaking groups, including the Anishnaabeg, were in the Seaton area for 1700 years in this earlier time, and are likely to have left archeological remains.

Dr. Fitzgerald Report, page 5

98. Dr. Fitzgerald criticizes ORC's archaeology for failing to search for these very early Anishnaabeg remains. He criticizes ORC for ignoring the likely Anishnaabeg ethnicity of very early sites which ORC calls simply "archaic". Dr. Fitzgerald's basic point is that ORC failed to acknowledge the Anishnaabeg presence in Seaton prior to the Huron, and fails to identify as likely Anishnaabeg the very old pre-Huron remains which were discovered.

> While Seaton project archaeologists summarily identify all Late Woodland period (AD 900-1650) archaeological sites as being "Iroquoian" or "ancestral Huron-Wendat", no consideration has been given to the possibility that parts of, some of, or all of the Late Woodland sites may be "Algonquian (Anishnaabeg)" or "ancestral Algonquian (Anishnaabeg)". Nor are any of the pre-AD 900 archaeological sites identified as being "Algonquian (Anishnaabeg)" or "ancestral Algonquian (Anishnaabeg)" – instead, sites from this vast span of time are provided with such ethnic-neutral chronological and cultural identifiers as "Archaic" and "First Nations".
>
> Ontario archeological doctrine still maintains that groups who make certain styles of pottery, live in palisaded longhouse villages and grow corn are Iroquoian, despite indisputable archaeological and historical evidence from across the Great Lakes region that such stereotypes are unfounded. During the 17th century – and presumably earlier, certain Algonquian-speaking groups in southern Ontario made and decorated their pottery in a manner identical to those of Iroquoians, lived in palisaded longhouse villages as did Iroquoians, and grew corn as did Iroquoians.

Dr. Fitzgerald Report, page 6, 7, 9

99. Dr. Fitzgerald's findings show why it is indefensible for ORC and ASI to have assumed that the Hurons have a stronger cultural interest in the archaeological record of the Seaton lands than the applicant Anishnaabeg First Nations. ORC and ASI marginalized the applicants in the consultation process. This precluded the applicants from testing ORC's and ASI's dubious assumptions and conclusions about the ethnicity associated with the sites identified at Seaton.

100. ORC's ill-advised and lop-sided "consultation" has injured the Ojibwa First Nations applicants here. ORC's process errors undermine the reconciliation objectives which underlie the constitutional imperatives this Court must supervise in this proceeding.

PART III - ARGUMENT

A. LEGAL PRINCIPLES

(1) Crown's Duties to Consult and Accommodate

101. In three recent cases, the Supreme Court of Canada laid down imperative consultative obligations governments must fulfill when advancing projects that may impact inchoate aboriginal rights. The Court explained its underlying objective:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.
>
> *Mikisew Cree First Nation* v. *Canada*, [2005] 3 S.C.R. 388, ¶ 1
> *Taku River Tlingit First Nation* v. *Canada*, [2004] 3 S.C.R. 550, ¶ 24-5
> *Haida Nation* v. *British Columbi*a, [2004] 3 S.C.R. 511, ¶ 17

102. Inadequate consultation about inchoate aboriginal rights thwarts the reconciliation objective. For this reason, governmental processes that do not consult adequately will violate imperative constitutional requirements.

> In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the Constitution Act, 1982), was breached.
>
> *Mikisew Cree First Nation* v. *Canada*, [2005] 3 S.C.R. 388, ¶ 4

103. The Supreme Court's cases establish that the Crown's duties include consultation *and* accommodation.

> *Mikisew Cree First Nation* v. *Canada*, [2005] 3 S.C.R. 388, ¶ 53-4

104. The Crown's duties arise from the honour of the Crown. Accordingly, the Crown's duties arise before aboriginal rights are proven in court.

> *Haida Nation* v. *British Columbia*, [2004] 3 S.C.R. 511, ¶ 16-17, 25
> *Taku River Tlingit First Nation* v. *Canada*, [2004] 3 S.C.R.550, ¶ 24-5

105. The duty to consult, and the contents of the duty, are constitutional imperatives. They must be fulfilled.

> *Haida Nation* v. *British Columbia*, [2004] 3 S.C.R. 511, ¶ 25
> *Tzeachten First Nation* v. *Canada*, [2006] B.C.J. No. 656, ¶ 92

(2) Content of the Crown's Duties to Consult and Accommodate

106. The content of the Crown's duties to consult and accommodate lies along a spectrum. The Crown's duties in any particular case will be proportionate to a preliminary assessment of the

case supporting the existence of the right and the seriousness of the potentially adverse effect upon the right.

Haida Nation v. *British Columbia*, [2004] 3 S.C.R. 511, ¶ 39
Hupacasath First Nation v. *British Columbia,* [2005] B.C.J. No. 2653, ¶ 138, 234-5

107. Where aboriginal rights claims are weak, limited or the potential for infringement minor, the Crown may only have to give notice, disclose information, and discuss any issues raised in response to the notice. Where aboriginal rights claims are strong, potential infringement is significant and the risk of non-compensable damage is high, "deep consultation", aimed at finding a satisfactory interim solution, will be required.

Haida Nation, ¶ 43-5
Hupacasath First Nation v. *British Columbia*, [2005] B.C.J. No. 2653, ¶ 234-5

108. Consultation must be meaningful.

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed...
>
> *Haida Nation*, ¶ 46, referring to the New Zealand Minister of Justice's *Guide for Consultation*

109. Meaningful consultation includes an informational component. The Crown must provide aboriginal people concerned with information about the project that addresses specific aboriginal concerns and what the Crown anticipates might be the adverse impact on those interests.

Mikisew Cree First Nation v. *Canada*, [2005] 3 S.C.R. 388, ¶ 53-4, 64

110. The Crown must solicit aboriginal concerns proactively.

Mikisew Cree First Nation v. *Canada*, [2005] 3 S.C.R. 388, ¶ 64, approving
Halfway River FN v. *B.C.* (1999), 178 D.L.R. (4th) 666 (BCCA), ¶ 159-60

111. The Crown must listen carefully to aboriginal concerns, and attempt to minimize adverse impacts on legitimate aboriginal interests.

Mikisew Cree First Nation v. *Canada*, [2005] 3 S.C.R. 388, ¶ 64

112. The honour of the Crown requires "a process of balancing interests, of give and take".

Haida Nation, ¶ 48

113. In *Mikisew Cree*, the Crown proposed "to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the 'taking up' limitation [of Treaty 8]". The Court ruled that "the Crown's duty lies at the lower end of the spectrum." Nevertheless, the Supreme Court imposed on the Crown

> a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [emphasis added by SCC in original].

Mikisew Cree First Nation v. *Canada*, ¶ 64

(3) Aboriginal Duty to Reciprocate

114. Aboriginal people have a "reciprocal onus … to carry their end of the consultation". The duty to reciprocate requires Aboriginal people "to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution".

Mikisew Cree First Nation v. *Canada*, ¶ 65

115. Aboriginal people must "make their concerns known to government" once the consultation process "gets off the ground" by the government providing whatever relevant information it has.

> *Halfway River FN* v. *B.C.* (1999), 178 D.L.R. (4th) 666 (BCCA), ¶ 161 ("There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown")

116. The Aboriginal duty to reciprocate does not relieve the Crown from its duty to seek consultation proactively. Government cannot avoid its "positive obligation" to consult by issuing standard form notices or by making anaemic or ineffective gestures and then blaming Aboriginal people for failing to reciprocate. The reason why is that "the Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)".

> *Taku River Tlingit First Nation* v. *Canada*, [2004] 3 S.C.R. 550, ¶ 245

117. There are additional pragmatic reasons why the aboriginal duty to reciprocate arises only after government discharges its positive obligation to be proactive and to get consultation going by providing the information in its possession. Aboriginal people of limited means cannot, and are not expected to monitor all government activities like powerful industry lobbyists.

> *Mikisew Cree First Nation* v. *Canada*, ¶ 64-5

(4) Standard of Review

118. Courts should review on a correctness standard four questions of law that regulate the Crown's consultation obligation. These are: the existence of the Crown's duty to consult and accommodate, the extent of the Crown's duty; the seriousness of the claim of aboriginal rights; and the potential for infringement of aboriginal rights.

> *Haida Nation*, ¶ 61

119. Factual issues will attract deference to some degree. The Supreme Court explained that:

> a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal.
>
> *Haida Nation*, ¶ 61

120. The Supreme Court provided a helpful summary of standard of review issues:

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
>
> *Haida Nation*, ¶ 63

B. APPLICATION TO THE FACTS IN THIS CASE

(1) Preliminary Assessment of Applicant's Aboriginal Right

121. The evidence in this record is uncontradicted that ancestors of the applicant First Nations occupied the specific area of the Seaton lands since at least 1700; that Anishnaabeg occupation likely preceded contact with Europeans in the early 16th century; that pre contact Anishnaabeg communities had distinctive burial practices central to their world view of who and what they were; that these practices gave Anishnaabeg communities solidity and identity, and in that sense these practices were integral to the distinctive Anishnaabeg culture.

122. The evidence in this record is uncontradicted that Anishnaabeg distinctive practices were continuously observed by successor Ojibwa communities in post contact times and that they are practiced today by the applicant First Nations.

123. The evidence in this record is uncontradicted that pre contact Anishnaabeg distinctive practices are integral to the belief systems, identities and distinctive cultures of the applicant First Nations today.

> Johnston Affidavit, ¶ 43
> Johnston Cross, Q. 146

124. On the uncontradicted evidence in this record the probability is very high that the applicant First Nations will establish aboriginal rights to continue their ancient, distinctive and integral traditions concerning their dead and to access the Seaton lands to visit their sacred sites.

> *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507
> *R.* v. *Powley*, [2003] 2 S.C.R. 207
> *R.* v. *Marshall*; *R. v Bernard,* [2005] 2 S.C.R. 220
> *Hupacasath First Nation* v. *British Columbia*, [2005] B.C.J. No. 2653, ¶ 231, 247-48

(2) Seriousness of the Potentially Adverse Effect upon the Applicants' Right

125. ORC commissioned archaeology of the Seaton lands to scope out sites of interest to Huron Aboriginal people. ORC assisted the Hurons to participate in the archaeology with a "deep consultation" apparatus that includes six-figure sums of money to hire independent experts, exchange of information, the employment of archaeological practices likely to find the large structures that were characteristic of Huron settlement, the assignment of Huron ethnicity to structures located despite archaeological controversy, and the assignment of Huron names to archaeological sites located despite archaeological controversy.

126. ORC took no proactive steps to engage the Ojibwa applicants in dialogue about the archaeological work and findings. The applicants did not know about the availability of funds for independent experts to participate in the archaeology, and were not told about this by ORC or its agents. Six of seven of the applicants received *no* information about the

archaeology from ORC at all. None of the applicants were invited to obtain an independent review of ORC's archaeological methods and findings (in distinction to the Hurons). None of the applicants were assisted to stimulate archaeological methods attuned to locating smaller Ojibwa burial sites of concern to them. None of the applicants were allowed to contest the admittedly controversial Huron ethnicity assigned to the sites found. In short, the Applicant Ojibwa Nations were shut out of ORC's archaeological processes altogether.

127. Even as respects the sites found, the Applicant Ojibwa Nations were excluded from ORC's analysis. ORC determined that many of the sites found were not significant; ORC did not consult Applicant Ojibwa Nations to test the significance of the "insignificant" sites to the applicants. Of the site deemed significant, ORC slated only half for mitigative strategies; ORC did not consult Applicant Ojibwa Nations to test the significance of the other sites to them. Nor did ORC seek the views of the Applicant Ojibwa Nations as to mitigative strategies to be employed.

128. ORC plans to transfer the Seaton lands to private developers for development. Once transferred the developers will be free to develop the Seaton lands without further archaeology or other efforts to locate sacred Ojibwa sites the Applicant Ojibwa Nations reasonably believe to exist there.

129. Large scale development will destroy forever the contact between the applicant Ojibwa Nations and their ability to continue practices integral to their distinctive culture at their sacred sites. Should this occur, the identity and solidity of the Ojibwa as a people will be weakened. The goal of reconciliation will have been harmed, not furthered – the opposite of the Courts require consultation to try to achieve.

(3) Deep Consultation Required and Violated

130. The combination of high probability that the applicants will establish aboriginal rights in the Seaton lands and the seriousness of the potential adverse effect on those rights from ORC's proposed land exchange requires a process of "deep consultation" for the applicant Ojibwa Nations, as least as deep as that accorded to the Hurons.

131. On this standard, ORC is required to give to the Applicant First Nations all relevant information it possess regarding the land exchange; enable the applicants to test the archaeology by funding them to retain independent experts, consider any objections to or concerns about the ORC's archaeological practices the Ojibwa applicants may have, factor those objections and concerns into the archaeological practices to the greatest extent possible, involve the Ojibwa in the archaeology, facilitate Ojibwa survey of the lands, consider Ojibwa concerns about assignment of ethnicity to sites located and take those concerns into account to the greatest extent possible, consider Ojibwa recommendations regarding naming of sites found and mitigative strategies and take those recommendations into account to the greatest extent possible.

132. Manifestly, ORC failed to fulfill its deep consultative duties.

(4) Even Weak Consultation Violated

133. Even if ORC laboured under the weakest form of consultative obligations, ORC violated those obligations. On the evidence in this record, it is impossible to conclude that ORC:

> provided [applicants] with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."
>
> *Mikisew Cree*, ¶ 64.

(5) Standard of Review

134. On the issues discussed in paras. 121 ff, 125 ff and 130 ff *supra* (preliminary assessment of the applicants' aboriginal right, seriousness of the potential adverse effects on the right and the extent of consultation required), the standard of review is correctness.

Haida Nation, ¶ 61

135. ASI delivered a "First Nation … Consultation Record" (Appendix G to the ESR) which showed on its face that Georgina Island FN had never been contacted by ORC's consultation agent. ORC had identified Georgina as an "interested party" and one of the First Nations that should be consulted. It was patently unreasonable for ORC to accept the consultation as complete without some additional probing.

ESR, pp. 2-30 to 2-32, 6-6
ESR, Appendix G (Appendix B)
Canada v. *Southam*, [1997] 1 S.C.R. 748, ¶ 56-7

136. The patently unreasonable omission of Georgina should have alerted ORC to probe the consultation process. Had ORC probed, it would have discovered that other First Nations it had identified as "interested parties" had not been contacted either. For this additional reason, it was unreasonable for ORC to accept the ESR as proof of the required consultation.

Canada v. *Southam*, [1997] 1 S.C.R. 748, ¶ 56-7
Law Society of NB v. *Ryan*, [2003] 1 S.C.R. 247

C. REMEDY

137. ORC's agent issued a 'Notice of Completion' which represents that ORC "has completed the Environmental Study Report (ESR)…as part of…the approved Class Environmental Assessment Process." The ESR represents to the world that ORC's agents, Nahrgang and

Wordsworth, "held discussions with and made presentations to … all" of the applicant First Nations.

ESR, 6.8, p. 6-6

138. Concerning the applicant First Nations, whom the ESR names specifically as having been consulted, the representation in the Notice of Completion is untrue.

139. The Notice of Completion is untrue, not in some technical, legal sense of inadequate consultation measured against a refined juridical standard. The Notice of Completion is untrue in the troubling vernacular sense of being simply false – no one contacted the applicant First Nations at all (save for Scugog).

140. The Notice of Completion is published on the respondent's web site. It represents to the world the untruth that the applicant First Nations were consulted when the Applicant First Nations were not consulted. This is not a nit-picking technical violation of refined ideas of consultation. The Notice of Completion trumpets the fundamental misrepresentation that Mr. Nahrgang consulted with the Applicants when this record shows that neither he, nor any other ORC agent, ever contacted the Applicants at all.

Dieterman, T., qq. 698-699

141. The Notice of Completion, if allowed to stand, produces juridical consequences. The applicants' right to request a bump up, and the considerable rights attendant on the bump up request if granted, are tied to the Notice of Completion in that the bump up request must be made within 45 days after issuance of the Notice of Completion.

142. The Notice of Completion cannot stand. It represents as true that which is not true. It is manifestly unfair to deprive Applicant First Nations of their right to request a bump up on the basis of representations in the ESR which are false. It is manifestly unfair to the Applicant First Nations to presume how the EA process will turn out once they are contacted, and make their concerns known. In these circumstances it is unfair, as well as untrue, to state that the consultation process is completed when, as respects the applicants, it has never started.

Dene 'Tha First Nation v. *Canada et. al.*, F.C.T.D. T-867-05 (Nov 10, 2006), ¶ 125-134

PART IV – ORDER REQUESTED

143. Applicants request orders: quashing the Notice of Completion dated January 12, 2006; declaring that the respondent had duties to consult with the applicant First Nations and that these duties were not fulfilled; and prohibiting ORC from transferring the Seaton lands prior to engaging in a process of meaningful consultation with the applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY of NOVEMBER, 2006.

_____

Nicholas C. Tibollo, Joseph Eliot Magnet

Counsel for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

A. Jurisprudence

1. *Mikisew Cree First Nation* v. *Canada*, [2005] 3 S.C.R. 388.
2. *Taku River Tlingit First Nation* v. *Canada*, [2004] 3 S.C.R. 550.
3. *Haida Nation* v. *British Columbi*a, [2004] 3 S.C.R. 511.
4. *Tzeachten First Nation* v. *Canada*, [2006] B.C.J. No. 656.
5. *Hupacasath First Nation* v. *British Columbia,* [2005] B.C.J. No. 2653.
6. *Halfway River FN* v. *B.C.* (1999), 178 D.L.R. (4th) 666 (BCCA).
7. *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507.
8. *R.* v. *Powley*, [2003] 2 S.C.R. 207.
9. *R.* v. *Marshall*; *R. v Bernard,* [2005] 2 S.C.R. 220.
10. *Dene 'Tha First Nation* v. *Canada et. al.*, F.C.T.D. T-867-05 (Nov 10, 2006).
11. *Canada* v. *Southam*, [1997] 1 S.C.R. 748.
12. *Law Society of NB* v. *Ryan*, [2003] 1 S.C.R. 247.