

Cause No.

IN THE COURT OF QUEEN'S BENCH OF  
NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF CAMPBELLTON

B E T W E E N :

**CHIEF SCOTT MARTIN ON BEHALF OF  
HIMSELF AND THE LISTUGUJ  
MI'GMAQ FIRST NATION &  
MI'GMAWEI MAWIOMI SECRETARIAT**

Applicants

- and -

**THE PROVINCE OF NEW BRUNSWICK  
& CHALEUR TERMINALS INC.**

Respondents

COUR DU BANC DE LA REINE DU  
NOUVEAU-BRUNSWICK

DIVISION DE PREMIERE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE

ENTRE:

Demandeur

- et -

Défendeur

**NOTICE OF APPLICATION  
(FORM 16D)**

**AVIS DE REQUÊTE  
(FORMULE 16D)**

TO: The Province of New Brunswick  
c/o Hon. Brian Kenny, Minister of  
Environment and Local  
Government  
Marysville Place  
P. O. Box 6000  
Fredericton, NB E3B 5H1

DESTINATAIRE:

AND TO: Chaleur Terminals Inc.  
1154 St. Peter Ave  
Suite 200  
Bathurst NB E2A 2Z9

LEGAL PROCEEDINGS HAVE  
BEEN COMMENCED AGAINST YOU  
BY FILING THIS NOTICE OF  
APPLICATION.

PAR LE DEPOT DU PRESENT  
AVIS DE REQUÊTE, UNE POURSUITE  
JUDICIAIRE A ETE ENGAGEE.

The Applicants will make an application before the Court at 157 Water Street, Suite 202, Campbellton, New Brunswick, on the \_\_\_\_\_ day of \_\_\_\_\_, 2015, at \_\_\_\_\_ a.m./p.m. for an order as set out hereunder.

If you wish to oppose this application you must appear at the hearing of the application at the place, date and time stated, either in person or by a New Brunswick lawyer acting on your behalf.

If you intend to appear on the hearing of the application, and wish to present to the Court at that time affidavit or other documentary evidence to support your position, you must serve a copy of such evidence on the Applicants or the Applicants' lawyer and, with proof of such service, file it in this Court Office prior to the hearing of the application.

If you fail to appear on the hearing of the application, AN ORDER WHICH MAY AFFECT YOU MAY BE MADE IN YOUR ABSENCE.

Le requérant présentera une requête à la Cour à ....., le ..... 20.... à ..... h ..... en vue d'obtenir l'ordonnance décrite ci-dessous.

Si vous désirez contester cette requête, vous devrez comparatre à l'audition de la requête aux lieu, date et heure indiqués, soit en personne ou par l'intermédiaire d'un avocat du Nouveau Brunswick chargé de vous représenter.

Si vous prévoyez comparatre à l'audition de la requête et désirez présenter à la Cour un affidavit ou une autre preuve littérale en votre faveur, vous devrez signifier copie de cette preuve au requérant ou à son avocat et la déposer, avec une preuve de sa signification, au greffe de cette Cour avant l'audition de la requête.

Si vous ne comparez pas à l'audition de la requête, UNE ORDONNANCE POUVANT VOUS CONCERNER POURRA ETRE RENDUE EN VOTRE ABSENCE.

You are advised that:

- (a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;
- (b) the Applicants intend to proceed in the English language; and
- (c) if you require the services of an interpreter at the hearing, you must advise the Clerk at least 7 days before the hearing.

**THIS NOTICE** is signed and sealed for the Court of Queen's Bench by Johanne L. Martin, Clerk of the Court at Campbellton on the \_\_\_\_ day of June, 2015.

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Johanne L. Martin

City Centre Mall, Suite 202  
157 Water Street  
P.O. Box 5001  
Campbellton NB E3N 3H5

Sachez que:

- (a) vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;
- (b) le requérant a l'intention d'utiliser la langue \_\_\_\_\_ ; et
- (c) si vous avez besoin des services d'un interprète à l'audience, vous devez en aviser le greffier au moins 7 jours avant l'audience.

CET AVIS est signé et scellé au nom de la Cour du Banc de la Reine par \_\_\_\_\_, greffier de la Cour à \_\_\_\_\_, ce \_\_\_\_\_.

---

Greffier

## APPLICATION

On the hearing of this Application, the Applicants intend to apply for an order that:

## REQUÊTE

A l'audition de la présente requête, le requérant a l'intention de demander qu'il soit ordonné que .....

- i) quashes the Approval to Construct Permit No. I-8958, issued on or about April 9, 2015 by the Minister of Environment and Local Government to the Respondent, Chaleur Terminals Inc., pursuant to the *Water Quality Regulation*, Regulation 82-126 under the *Clean Environment Act*, R.S.N.B. 1973, c. C-6 and relating to the construction of the Belledune Rail Terminal and Transfer System Project – Phase 1;
- ii) quashes the Environmental Approval Permit No. 1/840, issued on or about April 23, 2015 by the Minister of Environment and Local Government to the Respondent, Chaleur Terminals Inc., pursuant to the *Petroleum Product Storage and Handling Regulation*, Regulation 87-97 under the *Clean Environment Act*, *supra* and relating to the installation of a petroleum storage system at 1160 Main Street, Belledune, and more specifically for the installation of nine aboveground crude oil tanks, one 14,308,856 L aboveground steel furnace oil tank, and secondary containment;
- iii) quashes the Site Approval issued on or about April 23, 2015 by the Minister of Environment and Local Government to the Respondent, Chaleur Terminals Inc., to install a petroleum storage system at 1160 (approximate), Main Street (Route 134), Belledune;
- iv) declares that the Respondent, the Province of New Brunswick, has breached its duty to consult and accommodate the Applicants and that the Respondent, the Province of New Brunswick, has an ongoing duty to consult and to seek to reach a reasonable accommodation with the Applicants;
- v) prohibits the Respondent, the Province of New Brunswick, from issuing any further permits, approvals and authorizations to the Respondent, Chaleur Terminals Inc., until such time as the Province of New Brunswick has fulfilled its obligations to the Applicants;
- vi) costs in this Application; and
- vii) such further and other relief as this Honourable Court may deem just and appropriate.

## GROUNDS FOR THE APPLICATION

### Background on the Applicants, their Communities, and their Aboriginal and Treaty Rights

1. The Applicant, the Listuguj Mi'gmaq First Nation ("LMFN" or "Listuguj"), is a Mi'gmaq community which holds various rights recognized and affirmed by Section 35 of the *Constitution Act, 1982* and is a "band" as defined in the *Indian Act, RSC 1985, c I-5*.
2. The LMFN has an elected government, the Listuguj Mi'gmaq Government ("LMG"), of which Scott Martin is the duly elected Chief. Chief Martin represents both himself and Listuguj in these proceedings.
3. The Applicant, Mi'gmawei Mawiomi Secretariat ("MMS"), is a not-for-profit corporation governed by the Mi'gmawei Mawiomi ("MM"). The MM was founded in 2000 by the leaders of the Mi'gmaq communities of Gesgapegiag, Gespeg, and Listuguj as an assembly of Chiefs and councils of those communities.
4. The mission of the MM, as carried out through the MMS, is to uphold, reaffirm, and ensure respect for the Treaty and Aboriginal rights and aspirations of the Mi'gmaq people. The communities of the MM have agreed to allow the MMS to facilitate consultation and accommodation on their behalf.
5. Altogether, the Applicants bring this Application on behalf of the three MM member Communities that inhabit what is today known as the Gaspé Coast of Québec.
6. The communities of Gesgapegiag, Gespeg, and Listuguj lie within the territory of the Mi'gmaq, known as "*Mi'gma'gi*". Mi'gma'gi is comprised of seven Districts.
7. The MM Communities inhabit part of the Seventh District, known as "*Gespe'gewa'gi*", which includes what we know today as the Gaspé Peninsula, part of Québec (including Anticosti Island), New Brunswick (north of the St. John watershed), part of Maine and the Islands in the Baie des Chaleurs, as well as their surrounding coastal and marine areas (including much of the Gulf of St. Lawrence).
8. The ancestors of the members of the MM Communities exclusively occupied and used Gespe'gewagi from before the time of contact with Europeans. The members of the MM Communities and their ancestors have continuously occupied and used Gespe'gewa'gi up to the present day for the exercise of customs, practices and traditions of their distinctive way of life and culture.
9. The Mi'gmaq of Gespe'gewa'gi are descendants of the signatories to the Peace and Friendship Treaties, a series of Treaties signed with the British Crown between at least 1725 and 1779. These Treaties are solemn agreements that set out long-standing promises, mutual obligations, and benefits for both parties. The MM Communities are beneficiaries of these Treaties.

10. The MM Communities hold Aboriginal and Treaty rights and Title over Gespe'gewa'gi.
11. In 2007, the MMS issued its *Nm'tginen Me'mnaq ejiglignmuetueg gis na naqtmueg*, a Statement of Claim by the MM Communities to the Gespe'gewa'gi. The *Nm'tginen* asserts Aboriginal rights and title to Gespe'gewa'gi and reiterates that, as signatories to the Covenant Chain of Peace and Friendship Treaties, the Mi'gmaq have never abrogated, surrendered, or ceded title or rights to their lands, waters, and resources.
12. The project located at Belledune that is the subject of this Application is entirely located within Gespe'gewagi and the territory claimed by the MMS in the *Nm'tginen*. The Respondent, the Province of New Brunswick ("New Brunswick"), has real and constructive knowledge of this fact.
13. The members of the MM Communities, including the LMFN, exercise their Aboriginal and Treaty rights within Gespe'gewa'gi in a number of ways, including through hunting, fishing and harvesting on their own behalf and on behalf of their families and communities. These traditional activities are relied on for survival and are vital to the distinct Mi'gmaq way of life and culture.
14. The Baie des Chaleurs in particular, and the river systems that flow into it, including the Matapedia and Restigouche rivers, are central to the culture, subsistence and livelihood of the MM Communities. The members of the MMS Communities harvest a variety of species in these waters, including but not limited to, salmon, trout, turbot, eels, snow crab, lobster, shrimp, mussels, mackerel, bass, turtle and clams.
15. The LMFN's reserve is located on the banks of the Restigouche River, near where the river enters the Baie des Chaleurs (known to the Mi'gmaq people as "*Mawipogtapeg*").
16. Archaeological evidence, historical documents and Mi'gmaq place names show that the ancestors of the Listuguj Mi'gmaq, at different times, inhabited both the south and north shores of the Restigouche River, including the vicinity of what is today known as Atholville, New Brunswick.
17. The Listuguj Mi'gmaq have depended and continue to depend on the resources of the Restigouche River, including its watershed, neighbouring lands and waters, plants, mammals and fish species, to provide the necessities of life.
18. One species of fish that is particularly cherished by the members of the MM Communities is the salmon, which is not only a staple of their Mi'gmaq diet, but intimately tied to their cultural and spiritual practices. Listuguj governs the fishery under its own Law on Fisheries and Fishing and its own Fishing Plan, and has taken a number of steps over the years to help protect and preserve the Atlantic salmon population.

## Background on the Project and Approvals

19. The Respondent, Chaleur Terminals Inc. (“CTI”), is the proponent behind a project in Gespe’gewa’gi that involves the transport by rail, and the storage and transport by tanker vessel of heavy crude oil (the “Project”). In particular, the Project would include:
  - a. The passage of two trains a day made up of 120 rail cars each carrying the heavy crude oil to the CTI facilities to be constructed next to the Port of Belledune, a deep-water port with existing infrastructure and access to the Baie des Chaleurs;
  - b. The storage, handling and manipulation of the crude oil at CTI’s facility, which will include a low speed rail circuit railway system and a petroleum products terminal with eight high capacity steel tank storage facilities;
  - c. The transport by pipeline of the crude oil onto tanker vessels using a three kilometre pipeline to be installed between the facility and the marine terminals at the Port of Belledune; and
  - d. The transport by tanker vessel of the crude oil through the Baie des Chaleurs and the Gulf of St. Lawrence to international markets.
20. A planned second phase of the Project will aim to receive petroleum products by ship or barge, transfer it to the storage tank system and load it onto railcars for shipment back through Gespe’gewa’gi, in addition to an expansion of the tank farm.
21. On or about March 2014, CTI submitted its Environmental Assessment Registration for the Project to the New Brunswick Department of Environment and Local Government (“DELG”), as required by the *Environmental Impact Assessment Regulation - Clean Environment Act*, Regulation 87-83, s. 5(2).
22. All registered projects undergo a Determination Review, which is an Environmental Impact Assessment (“EIA”) aimed at identifying and evaluating the environmental issues surrounding a proposed project. The Determination Review is completed with the assistance of a specially constituted Technical Review Committee (“TRC”) comprised of experts and specialists from, *inter alia*, various departments and agencies of the Government of Canada and New Brunswick. The TRC for the Project included federal representatives from the Department of Fisheries and Oceans, Environment Canada, and Transport Canada.
23. Following its Determination Review, DELG decided in accordance with s. 6(6) of the *Environmental Impact Assessment Regulation* that the Project may proceed without the completion of a Comprehensive Review, subject to certain terms and conditions. On or about July 17, 2014, DELG issued to CTI a Certificate of Determination for the Project containing a list of terms and conditions.
24. In April 2015, New Brunswick issued three approvals to CTI, which are the subject of this Application (hereinafter the “Approvals”):

- a. Approval to Construct Permit No. I-8958 for the construction of the Belledune Rail Terminal and Transfer System Project – Phase 1, issued on or about April 9, 2015 pursuant to the the *Water Quality Regulations, supra*;
  - b. Environmental Approval Permit No. 1/840 for the installation of a petroleum storage system at 1160 Main Street, Belledune, and more specifically for the installation of nine aboveground crude oil tanks, one 14,308,856 L aboveground steel furnace oil tank, and secondary containment, issued on or about April 23, 2015 pursuant to the *Petroleum Products Storage and Handling Regulations, supra*; and
  - c. Site Approval to install a petroleum storage system at 1160 (approximate), Main Street, Belledune, issued on or about April 23, 2015.
25. The Applicants submit that in issuing the Approvals, the Respondent, the Province of New Brunswick, has breached its duty to consult and accommodate the Applicants in respect of their Aboriginal and Treaty Rights and Aboriginal Title

### **Applicants' Engagement with the Respondents**

#### *Engagement with the Province of New Brunswick*

26. MMS representatives first heard of the proposed Project in late April 2014 through media reports.
27. Since it learned of the Project, the MMS has sent correspondence to New Brunswick on several occasions outlining its concerns and demanding that it be meaningfully consulted and accommodated.
28. On or about April 30, 2014, the MMS wrote to New Brunswick Premier, David Alward, voicing its concern that the risk of an oil spill in the waters of Gespe'gewa'gi has the potential to have significant adverse effects on its members' Aboriginal and Treaty Rights and Title in the region and requesting that it be meaningfully consulted with regard to impacts on its members' rights.
29. On or about June 26, 2014, DELG responded to the concerns voiced in the MMS' letter of April 30, 2014 advising that New Brunswick had concluded that consultation was an inter-jurisdictional matter that would be better addressed by the Government of Canada.
30. The MMS responded to New Brunswick's letter on August 20, 2014 continuing to assert that the government was required to honour its constitutional duties and consult with the MM Communities prior to issuing the permits and approvals required for the Project. There has never been any meaningful follow-up from New Brunswick to the MMS' request.
31. While the MMS disagrees with New Brunswick's position that the sole responsibility for the duty to consult lies with Canada, it has made numerous requests for consultation and accommodation from Canada and has received no response.



32. On May 15, 2015, the MMS and the Assembly of First Nations Chiefs in New Brunswick Inc. (“AFNCNB”) delivered a joint letter to Premier Brian Gallant formally requesting that he immediately suspend the applicability of all permits issued for the benefit of the Project and formally requesting that New Brunswick engage in a meaningful process to enable the Mi’gmaq to be consulted and properly accommodated.
33. On or about June 2, 2015, the MMS and the AFNCNB received a response from the New Brunswick Aboriginal Affairs Secretariat stating that the Project is at the low end of the consultation spectrum and that the MMS’ concerns about potential environmental effects fall under federal jurisdiction and did not trigger a federal environmental impact assessment process.
34. To date, New Brunswick has failed to meaningfully engage either the MMS or the LMFN in any process of consultation or accommodation with regard to any step of the Project, including its decisions to issue the Approvals.

#### *Engagement with Proponent (CTI)*

35. On or about May 2, 2014, CTI held an information session with representatives of the Pabineau First Nation, Eel River Bar First Nation, and Listuguj Mi’gmaq First Nation. This meeting did not involve the participation of New Brunswick or Canada.
36. Since May 2014, CTI has provided some project updates to the MMS, LMFN, and the Gesgapegiag community, including through correspondence and meetings. These meetings did not constitute “consultation”, as that term is understood in its constitutional sense, but instead were opportunities for the parties to exchange information.
37. Under the terms and conditions of its Certification of Determination, CTI is required to provide construction and operational updates to LMFN.
38. MMS distinguishes between its engagement with CTI as the project proponent and its engagement with the Crown. It repeats and relies on *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, and subsequent decisions of the Courts, for the legal principle that although the Crown may delegate procedural aspects of consultation to third parties, it cannot delegate the honour of the Crown, and remains ultimately responsible for processes of consultation and accommodation.
39. Further, the Applicants state they have never been informed by New Brunswick, either orally or in writing, that it was delegating any aspects of its duty to consult with and accommodate the Applicants’ to CTI.

#### **Impacts of the Project on MM Communities’ Rights**

40. The Project has the potential to adversely affect the MM Communities’ Aboriginal Rights and Title and Treaty Rights.

41. The large number of risks and negative impacts associated with the Project include those related to:
  - a. the transport of oil by rail portion of the Project through Gespe'gewa'gi;
  - b. the shipping by tanker vessel of the oil through Gespe'gewa'gi, including the Baie des Chaleurs and the Gulf of St. Lawrence; and
  - c. the various steps involved in the unloading, storing, handling and loading onto tanker vessels of the oil within Gespe'gewa'gi.
42. CTI has not proposed adequate mitigation measures to address such risks and impacts.

*A) Transport of oil by rail*

43. The Project involves the transportation and export of bitumen oil from the Canadian oil sands, a form of heavy crude oil with the consistency of molasses, often thinned out for transportation.
44. Oil will be transported to the Project side along an old CN line running alongside and over the Matapedia and Restigouche rivers, as well as right along the banks of the Baie des Chaleurs in New Brunswick. The CN line was not designed to accommodate the transport of oil.
45. The Project provides for two oil trains a day made up of 120 rail cars each. The number of trains carrying dangerous goods as part of the Project will increase with CTI's planned future expansion of the Project.
46. This increased rail transport of dangerous substances on the CN line as part of the Project presents a number of serious risks, including but not limited to, train derailments causing oil spills into the rivers and the Baie des Chaleurs, as well as fire and explosions.
47. An oil spill would result in serious negative and irreparable impacts to the ecosystems of the rivers and the Baie des Chaleurs and lead to the destruction, loss, impairment, harm or contamination of habitats (including feeding and spawning sites) and wildlife (including plants, fish, birds, mammals and invertebrates).
48. The negative and long-term impacts resulting from a bitumen spill would be severe, as bitumen has been found to sink, and therefore risks contaminating the sediment at the bottom of the rivers and the Baie des Chaleurs over a prolonged period of time.
49. Even small spills could cause significant, long lasting and irreparable harm to the lands and waters of Gespe'gewa'gi as well as to the traditional activities of the members of the MM Communities.
50. The gravity of a potential derailment would also be heightened should the dangerous substances being transported ignite, as in the case of numerous recent train disasters, such as those in Lac-Mégantic and Plaster Rock.

*B) Transport of oil by ship*

51. The Project will also increase the risk of a tanker spill as a result of the increase in vessel traffic in the Baie des Chaleurs and the Gulf of St. Lawrence.
52. The Project's export of petroleum products by ship will increase the amount of vessel traffic at the Port of Belledune by a frequency of between 36 and 84 ships per year. Such marine vessels will have a capacity of between 250,000 to 650,000 barrels of oil.
53. A tanker spill in the Baie des Chaleurs or the Gulf of St. Lawrence would lead to the destruction, loss, impairment, harm or contamination of the habitats (including feeding and spawning sites) and wildlife of the Baie des Chaleurs and the Gulf of St. Lawrence, thereby causing serious, devastating and irreparable harm to Gespe'gewa'gi as well as to the traditional activities of the MM Communities.
54. More particularly, such a spill would also pose a grave threat to the Atlantic salmon travelling through the Baie des Chaleurs or the Gulf of St. Lawrence.
55. An oil spill in the Baie des Chaleurs would be extremely difficult to clean up and could contaminate the sediments on the seabed, thereby producing prolonged contamination of the seabed and the marine life that inhabits it.
56. The frequent presence of ice in the Baie des Chaleurs and the Gulf of St. Lawrence during winter would seriously complicate clean-up operations for a spill during this period of the year.
57. Another important negative impact of a tanker spill involves the toxic effects of the chemical products typically used to clean up a spill, such as dispersants.
58. The increase in the amount of tanker traffic as part of the Project will also result in greater acoustic disturbance in the Baie des Chaleurs and the Gulf of St. Lawrence, which will negatively impact marine wildlife.

*C) Handling/manipulation of oil*

59. In addition to the important risks and impacts involved in the transport by rail and by tanker vessel of the oil sands bitumen, there is a risk that a serious oil spill could occur in the handling and manipulation of the oil from the time the rail cars are unloaded until the time the oil is loaded onto tanker vessels.
60. If spilled in open water, oil can spread rapidly, causing the forms of contamination to the Baie des Chaleurs aquatic ecosystem detailed above.
61. If spilled on land, oil can find its way into streams and infiltrate into the ground and contaminate groundwater.

*D) Negative and irreparable impacts on the Mi'gmaq*

62. Given the above risks and negative impacts of the Project on the biophysical environment, the Project has the potential to negatively impact and irreparably harm MM Communities' Aboriginal Rights and Title and Treaty Rights, including in the following ways:
- a. serious and irreparable harm to the fishing of salmon, trout, turbot, eels, snow crab, lobster, shrimp, mussels, mackerel, bass, turtle and clams;
  - b. negative and irreparable effects on the gathering of plants for traditional medicines as well as sweet grass and cranberry;
  - c. negative and irreparable impacts on the hunting of waterfowl;
  - d. jeopardizing the right of the members of the MM Communities to a moderate livelihood by affecting their ability to commercially fish: snow crab, shrimp, lobster, turbot, herring, rock crab;
  - e. loss of livelihood options and forced transition to a wage-based economy;
  - f. reducing the availability and quality of resources and traditional staple foods, leading to dietary change, health problems and fewer opportunities to trade or sell harvested resources;
  - g. interference with Mi'gmaq ceremonies;
  - h. loss of cultural knowledge and wisdom;
  - i. loss of connection to Mi'gmaq waters and lands;
  - j. even the perception of pollution can keep community members away from the places used for cultural practices out of fear for their health or safety; and
  - k. violation of the integrity of the land.
63. The Project also risks increasing cumulative negative impacts on MM Communities' Aboriginal Rights and Title and Treaty Rights, from other industrial projects in the Restigouche and Matapedia river systems, as well as in the Baie des Chaleurs.

**Violations of New Brunswick's Duty to Consult and Accommodate the Applicants**

64. The Applicants repeat the foregoing and state that New Brunswick has failed in its constitutional duties to consult and accommodate the Gesgapegiag, Gespeg, and Listuguj Mi'gmaq communities with respect to the Project.
65. MMS specifically challenges New Brunswick's decision to issue the Approvals on the grounds that the Approvals were issued without any meaningful consultation or accommodation of the asserted Aboriginal and Treaty rights of the MM Communities.
66. New Brunswick did not consult with the LMG on its own or through the MMS, prior to DELG's decision to issue the permits, despite repeated requests that it do so.

67. According to the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, *supra*, and subsequent decisions including *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, the duty to consult is triggered when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
68. At least as early as 2002, the MMS put New Brunswick on notice of the MM Communities' Aboriginal and Treaty rights claims to the parts of Northern New Brunswick that lie within Gesge'gewa'gi.
69. The MMS has also publicized its asserted rights through its *Nm'tginen*, which has been publically available on the MMS website for at least the past five years, and which the MMS specifically brought to the attention of New Brunswick in April 2014.
70. New Brunswick's position that it was not responsible for consultation, and that consultation would be better addressed by the Government of Canada, is legally untenable. There is no principle in law that limits a provincial or territorial government's constitutional obligation to First Nations residing within its territorial boundaries. Where the Crown contemplates conduct that might adversely affect the exercise of Aboriginal and Treaty rights and Title, it owes a duty to consult affected First Nations regardless of where they live.
71. The Applicants further state that the duty to consult and accommodate owed by New Brunswick to the MM Communities is at the high end of the spectrum given the strength of their rights claims as well as the gravity of the potential adverse impacts arising from the Project, both as set out above.
72. The Applicants rely on the following statutory provisions or rules:
  - a. Rules 16.04, 38, 39, 59 and 69 of the *Rules of Court*;
  - b. *Clean Environment Act*, RSNB 1973, c C-6, as amended and the following Regulations passed thereunder:
    - i. *Water Quality Regulation*, Regulation 82-126, as amended;
    - ii. *Petroleum Product Storage and Handling Regulation*, Regulation 87-97, as amended; and
    - iii. *Environmental Impact Assessment Regulation*, Regulation 87-83, as amended.
73. The documentary evidence to be used at the hearing of the Application will be:
  - a. The original Affidavit of Chief Scott Martin, sworn on July 3, 2015 and filed with this Application;
  - b. Affidavit evidence to be filed in advance of the hearing from the following persons or groups:

- i. Experts on hazardous materials transportation safety, chemistry, biology, health, and related fields; and
  - ii. Rights holders and members of affected First Nations communities.
- c. The Approvals, and the Record before the decision-maker in issuing the Approvals;
- d. Such further and other evidence to be filed in advance of the hearing.

DATED at \_\_\_\_\_, New Brunswick,  
this \_\_\_\_ day of July, 2015.

FAIT à \_\_\_\_\_ le \_\_\_\_\_ .

---

Derek A. Simon  
**BURCHELLS LLP**  
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