Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2024-149

PDF version

References: 2022-325, 2022-325-1, and 2022-325-2

Ottawa, 4 July 2024

Public record: 1011-NOC2022-0325

Broadband Fund – Project funding approval for the Government of Nunavut's transport fibre project in Nunavut

Summary

Canadians need access to reliable, affordable, and high-quality Internet and cellphone services for every part of their daily lives.

Through its Broadband Fund, the Commission contributes to a broad effort by federal, provincial, and territorial governments to address the gap in connectivity in underserved rural, remote, and Indigenous communities across Canada.

Today, the Commission approves the Government of Nunavut's (GN) funding application for up to $271,937,242 to build a 1,300-kilometre fibre connection to four remote Inuit communities in Nunavut, including one official language minority community.

Nunavut is Canada's largest, northernmost territory, and is one of the most remote regions in the country. The territory is only accessible by air or sea, with no land-based links connecting it to the rest of Canada and no roads between its 25 communities. Given the challenges and the significant costs associated with bringing fibre to Nunavut, as well as the potential for the project to enable future fibre deployments in the region, the Commission views the funding requested for this project as necessary.

The GN's project received significant support from the four communities that will be served by the fibre connection, including the local Hunters and Trappers Organizations, the Regional Inuit Associations, elected representatives from the hamlets, and many local businesses. Additional consultations with the communities and Inuit rights holders will take place pursuant to the Nunavut Land Claims Agreement (Nunavut Agreement), such as through assessments carried out by the Nunavut Land Planning Commission and the Nunavut Impact Review Board. Given the significance of this project, the Commission considers it important for the project to receive the support of Nunavut Tunngavik Incorporated (NTI), the Designated Inuit Organization responsible for ensuring that the rights and responsibilities set out in the Nunavut Agreement are respected. Accordingly, the funding is awarded to the GN with the condition that the applicant provides evidence of NTI's support.

The fibre transport infrastructure will provide high-speed Internet connections to over 80 essential public institutions, including six health care centres and fifteen schools, early learning centres, and community learning centres. It will help connect local businesses to national and international markets, opening up new opportunities for economic development. It will also lay the foundation for future fibre deployment both within the four communities and across Nunavut. Overall, its impact will improve the resiliency of the telecommunications infrastructure in the region.

As noted by the mayors of the hamlets of Kinngait and Kimmirut, the project "has the potential to create the infrastructure allowing further cultural, educational, and business relationships between the residents of [the] community and the rest of the world."

This decision builds on Telecom Decision 2023-418, in which the Commission approved a funding application from SSi Micro Ltd., as part of the third call for applications (Call 3), to increase satellite transport capacity to all 25 communities in Nunavut. Together, these projects contribute to the Commission's commitment to advancing reconciliation with Indigenous peoples in Canada and connecting all Canadians. The benefits associated with these projects will contribute to advancing the shared Inuit-Crown priorities identified in the *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan*.

With this decision, the Commission has now completed its evaluation and selection of projects proposing to serve Nunavut under Call 3.

Background

1. In Telecom Regulatory Policy 2016-496, the Commission established the universal service objective. This objective recognizes that all Canadians should have access to cellphone and Internet services on both fixed and mobile wireless networks.

2. To measure progress towards this objective, the Commission established several criteria, including that Canadians using Internet services should be able to (i) access speeds of at least 50 megabits per second (Mbps) download and 10 Mbps upload (50/10 Mbps), and (ii) subscribe to a service offering with an unlimited data allowance. Furthermore, the Commission found that the latest generally deployed mobile wireless technology (currently long-term evolution [LTE]) should be available not only in Canadian homes and businesses, but also on as many major transportation roads as possible in Canada.

3. To support the development of a telecommunications system that can provide Canadians with access to these basic telecommunications services, the Commission established the Broadband Fund pursuant to subsection 46.5(1) of the *Telecommunications Act* (the Act). The objective of the Broadband Fund is to help achieve the universal service objective and close the gaps in connectivity in rural, remote, and Indigenous communities across Canada. It does this by providing financial support to projects that (i) will build or upgrade access and transport

infrastructure for fixed and mobile wireless broadband Internet access services, and (ii) would not be financially viable without funding assistance.

4. The Commission established the Broadband Fund with $100 million in funding for the first year, rising to $150 million by the third year through annual $25 million increases, with future incremental increases to be contingent on a review of the Broadband Fund policy. In Telecom Notice of Consultation 2023-89, the Commission initiated that review, and decided to maintain an annual cap of $150 million for distribution until the conclusion of the review.

5. In Telecom Regulatory Policy 2018-377, the Commission established the criteria for evaluating proposed Broadband Fund projects and addressed matters relating to the Broadband Fund's governance, operating, and accountability frameworks.

6. The Commission has launched three calls for funding applications to the Broadband Fund to date. In the first two calls for applications, the Commission approved funding for projects that will improve access to high-speed Internet and cellphone services in 205 rural and remote communities, including 89 Indigenous communities. Building on this momentum, the Commission issued a third call for applications (Call 3) in November 2022.

Call 3

7. In Telecom Notice of Consultation 2022-325, the Commission issued Call 3 to fund certain types of projects proposing to serve any eligible area of Canada. The types of eligible projects include (i) transport infrastructure projects, (ii) mobile wireless infrastructure projects, and (iii) projects requiring operational funding to increase satellite transport capacity and to improve broadband Internet access service in satellite-dependent communities. Call 3 closed on 15 June 2023.

8. The Commission noted in Telecom Notice of Consultation 2022-325 that during the assessment phase of applications for Call 3, it would be placing increased emphasis on meaningful consultation with each community affected by a proposed project and on resiliency (i.e., the proposed network's capacity to maintain acceptable levels of service during network failures).

9. In response to Call 3, the Commission received 105 applications. The Commission is issuing multiple decisions related to this call in order to expedite the funding approval process to address the immediate need of Canadians for improved access to broadband infrastructure.

Application

10. The Government of Nunavut (GN) filed an application in response to Call 3 requesting $271,937,242 from the Broadband Fund to build undersea fibre transport infrastructure to Nunavut, enabling the delivery of the universal service objective to the communities of Iqaluit, Kinngait, Coral Harbour (Salliq), and Kimmirut via fibre,

reducing their reliance on satellite technology and laying the groundwork for faster and more reliable Internet services.[1]

11. This project proposed to improve the connectivity of over 80 anchor institutions such as schools, libraries, health care centres, and community learning centres that are already connected to the GN's network. Once the fibre connection is in place, other projects will be able to use it as a springboard to connect homes and businesses in the four affected communities, which comprise 4,235 households, and more broadly across Nunavut.

Commission's analysis

12. The evaluation of applications for funding from the Broadband Fund takes place in three stages. First, the Commission considers whether an application meets certain eligibility criteria; applications that do not meet these criteria are not considered further. Second, the Commission evaluates proposed projects based on certain assessment criteria to identify a set of selectable projects. Third, from the set of selectable projects identified, the Commission selects projects for funding based on certain project selection considerations. These eligibility, assessment, and selection consideration criteria were established in Telecom Regulatory Policy 2018-377 and are listed in the Application Guide.

13. The Commission has considered the GN's application in light of the eligibility, assessment, and selection consideration criteria applicable to all applicants and project types, as well as the eligibility and assessment criteria applicable to transport projects.

Eligibility criteria

14. For a project to be considered for funding, applicants must clearly demonstrate, with supporting evidence, how their applications meet the eligibility criteria regarding applicants, the eligibility criteria applicable to all project types, and the eligibility criteria applicable to specific project types.[2]

15. With respect to applicant type, applicants must demonstrate that they meet the requirements set out in the Application Guide regarding their acceptable legal structure, experience, and financial solvency. Paragraph 6.1.1(c) of the Application Guide sets out that as a territorial government, the GN is exempt from the financial

---

[1] The content of the application was designated confidential pursuant to section 39 of the Act, but certain details are being disclosed in this decision, consistent with section 11 – Confidentiality of the Application Guide, set out in the appendix to Telecom Notice of Consultation 2022-325, and as agreed to by the applicant. Other elements of the application remain confidential but were considered when the Commission evaluated the application.

[2] Specifically, the Commission used the eligibility criteria set out in sections 6.1.1(a) to (d) of the Application Guide, applicable to all applicants; in sections 6.1.2(a) to (c), applicable to all project types; and in sections 6.1.3(a) to (c), applicable to transport projects.

solvency criteria. The Commission considers that the GN has demonstrated that it meets the other requirements.

16. With respect to eligibility criteria applicable to all project types, applicants must demonstrate that each of the following is met: (i) project viability (i.e., that without funding from the Broadband Fund, the proposed project would not be financially viable); (ii) applicant investment (i.e., the applicant's ability to secure the amount of investment it has committed to); and (iii) community consultation (i.e., that the applicant has consulted or attempted to consult with communities affected by the project, either directly or through community representatives). The extent of consultation by the GN is considered in the assessment section below. The Commission considers that the GN has demonstrated that it meets all of the eligibility requirements applicable to all project types.

17. Finally, applicants must demonstrate that they meet certain criteria applicable to specific project types. The eligibility criteria for transport projects are (i) geographic eligibility (i.e., that the project involves building or upgrading infrastructure to an eligible community that is at least two kilometres away from a point of presence [PoP] with a minimum capacity of 1 gigabit per second [Gbps]); (ii) minimum capacity (i.e., that the project will offer a minimum capacity of 1 Gbps for any new builds and 10 Gbps for any upgraded transport infrastructure); and (iii) open access (i.e., that the applicant commits to offering wholesale and retail open access to transport infrastructure).

18. The Commission considers that the GN has demonstrated that it meets all of the requirements specific to transport projects.

Assessment criteria

19. Once a project is identified as having met the eligibility criteria, it is further analyzed under certain assessment criteria applicable to all project types and criteria applicable to specific project types.[3] When applying the assessment criteria, each criterion receives due consideration so that no one criterion in isolation determines whether an application is viewed to be selectable. In Call 3, however, the Commission is placing increased emphasis on certain criteria, notably meaningful community consultation and resiliency (i.e., the proposed network's capacity to maintain acceptable levels of service during network failures).

20. The assessment criteria applicable to all project types include (i) the technical merit of a project, (ii) the financial viability of a project, (iii) the level of funding from other sources, and (iv) community consultation and level of involvement. These criteria establish a high threshold to help ensure that the funded project is viable (in the present case, that the GN will bring transport infrastructure to the four affected

[3] The assessment criteria set out in the Application Guide in sections 6.2.1(a) to (d) apply to all project types, and those set out in sections 6.2.2(a) to (e) apply to transport projects specifically.

communities to enable delivery of telecommunications services that meet the universal service objective using fibre networks).

Technical merit

21. In assessing the technical merit of a project, the Commission takes into account the project’s feasibility (i.e., the appropriateness of the network technology and infrastructure); scalability (i.e., the technical ability of the project to meet or exceed the universal service objective using the proposed infrastructure); sustainability (i.e., the short- and long-term viability of the chosen technology); and resiliency (i.e., the proposed network’s capacity to maintain acceptable levels of service during network failures).

22. Based on these factors, the Commission finds that the GN’s project is technically sound and will enable the delivery of services consistent with the universal service objective. The proposed project is also capable of delivering the envisioned service and is scalable.

23. The project is designed to be resilient by ensuring several points of interconnection with existing or planned networks. In addition, the project will implement widely adopted and supported technologies with good long-term sustainability.

Financial viability

24. In assessing the financial viability of a project, the Commission examines the project’s net present value, internal rate of return, and business plan, including the risk assessment and risk mitigation plan. The Commission also considers the potential financial success of the proposed project, as well as the project’s long-term financial viability and sustainability. The Commission finds the GN’s project to be financially sound and the proposed project costs to be reasonable.

Funding from other sources

25. With respect to the level of funding from other sources, the Commission considers that the GN has made a significant commitment of its own funds to the project.

Consultation with affected communities

26. In Call 3, the Commission placed an increased emphasis on meaningful consultation with affected communities. As a result, in the assessment of the GN’s project, significant weight was accorded to evidence of meaningful engagement. The Commission considered the extent of the GN’s consultations with affected communities and the level of demonstrated community support at the assessment stage.

27. The GN provided evidence of direct notification setting out project details to Nunavut Tunngavik Incorporated (NTI),[4] the Qikiqtani Inuit Association, the Kivalliq Inuit Association, and the Kitikmeot Inuit Association.[5] Similar notification was also sent to the communities' respective Hunters and Trappers Organizations (HTOs)[6] as well as representatives of each of the affected communities.

28. The GN provided letters of support from the following Inuit Rights Holders and community representatives:

    - the Qikiqtani Inuit Association;
    - the Kivalliq Inuit Association;
    - the Amaruq HTO (representing Iqaluit);
    - the Aiviq HTO (representing Kinngait);
    - the Aiviit HTO (representing Coral Harbour);
    - the Mayukalik HTO (representing Kimmirut);
    - the Chief Administrative Officer for Iqaluit (which included a unanimous city council motion supporting the application);
    - the Mayor of Kimmirut;
    - the Senior Administrative Officer for Coral Harbour;
    - the Mayor of Kinngait; and
    - the Kativik Regional Government in the Nunavik region of Quebec, one of the planned interconnection points.

29. Evidence of support also came from various local businesses, telecommunications service providers, and the community of Arviat, Nunavut, which will not be directly

[4] NTI is the legal representative for all Inuit in Nunavut. As a Designated Inuit Organization, its role is to coordinate and manage Inuit responsibilities and rights under the Nunavut Land Claims Agreement and ensure that the federal and territorial governments fulfill their respective obligations. Regional management of those rights is delegated to the three Regional Inuit Associations.[5] These are the three Regional Inuit Associations under NTI, representing Inuit social, political, economic, and cultural interests.

[5] These are the three Regional Inuit Associations under NTI, representing Inuit social, political, economic, and cultural interests.

[6] Each community in Nunavut has an HTO. HTOs are responsible for regulating and managing rights relating to harvesting in Nunavut. They are also responsible for managing economic development opportunities that may arise from marine and wildlife resources. HTOs play a critical role in their communities in providing training, materials, food, and support to their members. By being direct gatekeepers of land rights through their harvesting and resource management responsibilities, HTOs represent the frontline of land management in Nunavut and are therefore crucial partners in assessing the impacts when building high-speed Internet networks.

affected by this project infrastructure build but may eventually benefit from a future project.

30. The letters of support for the project highlighted that building this fibre infrastructure will significantly improve connectivity in the territory and will have transformative effects on Nunavummiut. For example, this will open new opportunities for the territory's businesses through e-commerce, for its growing eco-tourism sector, and for its world-renowned artists. Improved connectivity will make access to public health services such as telemedicine easier. It will also open up new opportunities for education, so that Nunavummiut do not have to choose between leaving their communities and pursuing post-secondary programs.

31. Additional consultations on the project will be carried out in accordance with the assessment procedures set out in the Nunavut Land Claims Agreement (Nunavut Agreement).[7] For instance, the project may be subject to review by the Nunavut Planning Commission and the Nunavut Impact Review Board. As established in the Nunavut Agreement and the *Nunavut Planning and Project Assessment Act*, these assessments consider if a project proposal is consistent with the priorities and values of Nunavummiut. This includes consideration of the environmental, ecosystemic, and socio-economic impacts of a project proposal, and the impact it may have on encouraging sustainable economic development and supporting healthy communities. Meaningful consultation with impacted communities and rights holders forms part of these processes.

32. The Nunavut Agreement also provides that where a major development project stands to impact water or resources on Inuit lands, an Inuit Impact and Benefit Agreement must be finalized. Such benefits could relate to employment commitments, preferential hiring practices, or other benefits considered relevant to the needs of the project and Inuit. Inuit Impact and Benefit Agreements are negotiated with Designated Inuit Organizations.

33. As set out in the Application Guide, the Commission acknowledges that appropriate and meaningful consultation takes time and recognizes that further consultation between the the GN and NTI is provided for pursuant to the Nunavut Agreement and other existing protocols. Given the significance of the proposed project, the Commission considers it important for the project to receive the support of NTI.

Specific criteria for transport projects

34. Finally, as with the eligibility criteria, certain assessment criteria apply to specific types of projects. The assessment criteria for transport projects are (i) the level of improvement in network and capacity offered (i.e., the difference between the

---

[7] The Nunavut Agreement establishes a number of Institutions of Public Government (IPGs) with the mandate to manage land use, wildlife, wildlife habitat, water, and environmental assessments. Examples of IPGs include the Nunavut Impact Review Board, the Nunavut Planning Commission, the Nunavut Surface Rights Tribunal, the Nunavut Water Board, and the Nunavut Wildlife Management Board.

interconnection service speeds that are currently offered in the eligible geographic area[s] and those that would be offered as a result of the proposed project); (ii) the number of PoPs for wholesale and retail transport services along the proposed route (i.e., how many PoPs will serve eligible communities); (iii) the number of communities and households that could be served (i.e., how many communities and households may receive access to new or improved broadband services as a result of the project); (iv) the presence, type, and number of anchor institutions that could be served (i.e., whether broadband services are likely to be provided to anchor institutions as a result of the project); and (v) the open access service offerings (i.e., whether varied and competitive services would be available in new or upgraded PoPs as a result of the project).

35. On the basis of its evaluation of the GN's project against the assessment criteria, including the specific criteria applicable to transport projects, the Commission finds the GN's project to be selectable.

Selection considerations

36. Once a set of selectable projects has been identified based on the eligibility and assessment criteria, the Commission selects a subset of projects for funding. In deciding between selectable projects, the Commission considers whether individual projects will contribute to meeting the universal service objective and whether they will have a significant positive impact on Canadians. This approach is in accordance with Telecom Regulatory Policy 2018-377 and the related Application Guide and takes into account the telecommunications policy objectives set out in section 7 of the Act.

37. The selection considerations set out in the Application Guide include the efficient use of funds and whether the communities affected by proposed projects are Indigenous or official language minority communities.[8]

38. With respect to the efficient use of funds, the Commission considers the amount of funding required for a project, when such funding would be distributed, and the amount of funding currently available for distribution from the Broadband Fund. When selecting projects, the Commission also considers whether the distribution of funds would cause overlap between projects or overlap with alternative funding sources.

39. The Commission notes that Nunavut is perhaps the most challenging area of Canada in which to build resilient, high-quality networks. It is Canada's largest and northernmost territory, and one of the most remote regions in the country. There are no roads connecting Nunavut to the rest of Canada, and no roads connecting its 25 communities. Given the challenges and the significant costs associated with bringing fibre to Nunavut, as well as the potential for the project to enable future fibre deployments in the region, the Commission views the funding requested for this

---

[8] The selection considerations are set out in sections 6.3 to 6.3.4 of the Application Guide.

project as necessary. Furthermore, the funds requested are available in the Broadband Fund.

40. This project does not overlap with any other fibre infrastructure projects funded by the Commission or other funding programs. Once built, it will enable a stronger backhaul technology and free up satellite capacity for the remaining communities in Nunavut.

41. On the basis of these considerations, the Commission is of the view that funding the GN's project is an efficient use of funds.

42. Finally, the GN's project will benefit four Inuit communities, one of which (Iqaluit) is an official language minority community.

Conclusion

43. The Commission finds that the GN's project (i) is consistent with the universal service objective by providing broadband Internet infrastructure capable of delivering services with speeds of at least 50/10 Mbps with an unlimited data allowance, and (ii) will have a significant positive impact on the communities to be served.

44. The project presents an opportunity to offer what could be transformational infrastructure in Nunavut. Better telecommunications can mean better access to education and health services. It will contribute to economic reconciliation by supporting local economies and access to opportunities beyond what is currently available.

45. Approval of this project is consistent with the Commission's commitment to advancing reconciliation with Indigenous peoples and aligns with the priorities identified in the *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan*. Extensive consultation will continue in accordance with the regulatory provisions mandated by the Institutions of Public Government as established in the Nunavut Agreement. The Commission recognizes the consultation efforts undertaken by the GN to date and considers it important for the project to receive the support of NTI.

46. In light of the above, the Commission approves, by majority decision, to the extent and subject to the directions and conditions set out below, up to $271,937,242 from the Broadband Fund. This amount is to be distributed to the GN for the purpose of the transport project described above and as set out in the statement of work to be approved. This funding is awarded with the condition that the GN provides evidence of NTI's support before the Commission approves the project's statement of work.

47. Consistent with paragraph 305 of Telecom Regulatory Policy 2018-377, the Commission expects project construction to be completed within **three years** of the date of the decision.

48. With this decision, the Commission has completed its consideration and selection of projects proposing to serve Nunavut under Call 3.

49. The dissenting opinion of Commissioner Claire Anderson is attached.

Statement of work

50. To be eligible to receive funding, the recipient must obtain approval from the Commission for its statement of work. This will ensure that the planned work will be undertaken to implement the project as described in the application and approved for funding by the Commission.

51. The statement of work must be submitted in the format provided by the Commission and include detailed information on the project plan, such as detailed project information (e.g., logical network diagrams, network descriptions, service designs, project sites, equipment details, specific costs, and an updated project budget). In addition, the project plan must set out a project implementation schedule, including project milestone dates that will include key construction and implementation dates to monitor the project's progress. Up-to-date project mapping must also be provided. Following approval of the statement of work, in order for the recipient to receive funding, any changes that materially affect the project to be delivered must be approved by the Commission.

Directions

52. The Commission's approval is subject to the conditions that the recipient

    (a) confirm in writing, within **10 days** of the date of this decision, its intent to submit a statement of work package to the Commission and to proceed with the project;

    (b) file for Commission approval, by **1 November 2024**, a completed statement of work package in the format provided by the Commission, which includes accompanying workbooks that set out the project budget, key project dates and schedules, and detailed project information, such as logical network diagrams, network descriptions, service designs, project sites, equipment details, maps, specific costs, and milestones; and

    (c) provide to the Commission a letter of support, or other evidence of support, for the project from NTI, which must be received before the Commission will review the statement of work for approval.

53. As set out in the Application Guide, the recipient may not apply for reimbursement of its costs until its statement of work for the project has been approved by the Commission. Any eligible costs incurred prior to Commission approval of the recipient's statement of work but following the issuance of this decision are at the recipient's risk and will not be reimbursed if the statement of work is not approved.

54. In order for the Central Fund Administrator to be able to distribute funding, the recipient must sign the National Contribution Fund Administration Agreement if it has not already done so.

55. The recipient may not apply for reimbursement of, and funding will not be issued for, ineligible expenses, expenses that have yet to be incurred, or expenses that are not related to the activities described in the statement of work as approved by the Commission.

56. Should the recipient fail to demonstrate during the statement of work development phase that the project has adequately considered cyber security, it will be required to mitigate the cyber security risk to the Commission's satisfaction. Failure to propose a mitigation plan that is satisfactory to the Commission could result in the refusal to approve the statement of work.

Conditions of funding

57. Following Commission approval of the statement of work, the Commission will direct the Central Fund Administrator to release funds to the recipient, provided that the recipient is in compliance with the following conditions:

    (a) The recipient must file a progress report, in the format provided by the Commission, outlining the progress made in the implementation of the project and any variances in the project schedule included in the statement of work. This report is to be filed every **three months** beginning on the date established in the statement of work and continuing until the final implementation report is submitted.

    (b) The recipient must file with the Commission every **three months** a Broadband Fund claim form signed by its chief financial officer, or by an equivalent authorized official of the recipient, certifying that all costs claimed were actually incurred and paid, and are eligible costs related to the activities described in the statement of work, along with such supporting documentation as is requested by the Commission. Further supporting documentation may be requested by the Commission. Each claim form must be accompanied by a progress report.

    (c) With respect to eligible and ineligible costs, as described in Telecom Regulatory Policy 2018-377, the recipient must

        (i) include eligible costs in a claim form submitted within **120 days** of the costs being incurred, unless the costs were incurred after the date of this decision but prior to the approval of the statement of work, in which case the costs must be claimed on the first claim form submitted after the approval of the statement of work;

        (ii) ensure that all goods and services are claimed for reimbursement at amounts not greater than fair market value after deducting all trade

discounts and similar items. Only the fair market value of the goods and services acquired is eligible for reimbursement; and

(iii) measure and claim all goods and services received from related parties, as defined under International Financial Reporting Standards, at cost, with no profits or markups from the supplier.

(d) In order to receive funding, the recipient must obtain Commission approval for

(i) any material changes to the project, as set out in the approved statement of work; and

(ii) any changes to the recipient that would materially affect the legal or financial documents it provided during the application process.

(e) The recipient (including each member of a recipient partnership, joint venture, or consortium) must notify the Commission in writing as soon as possible and within no more than **five days** of becoming insolvent.

(f) If it receives any additional funding for the project from any source, the recipient must notify the Commission in writing as soon as possible and no later than **10 days** after receiving confirmation of the funding. The Commission may proportionately reduce the amount of funding it has approved.

(g) The recipient must not claim in excess of 25% of the approved amount for costs incurred after the date of the decision but prior to the approval of the statement of work unless otherwise approved by the Commission.

(h) The recipient must ensure that its travel costs, such as meal per diems, comply with the National Joint Council Travel Directive.

(i) The recipient must publicize, including by publishing on its website, the wholesale open access service packages to be offered as a result of the project at least **90 days** prior to the planned date on which wholesale open access service will be available as detailed in the statement of work. This shall include the proposed location of any PoPs, capacity available for open access, service plans, prices, and terms and conditions.

(j) Where a risk of adverse impact on an Aboriginal or treaty right becomes known and a duty to consult exists, the recipient must advise the Commission within **20 days** and submit a plan detailing the form and process for fulfilment of the duty. Release of any additional funding will be contingent on demonstration that any necessary consultations were held to the Crown’s satisfaction.

(k) The recipient (including each member of a recipient partnership, joint venture, or consortium) must file its annual financial statements with the Commission upon request. The financial statements would accompany the next progress report filed after the annual financial statements are completed and approved.

(l) The recipient must file for Commission approval a final implementation report within **90 days** of construction being complete and broadband services being offered. In the report, the recipient must confirm that project construction is complete and that broadband services are being offered. The date on which the final implementation report is submitted will be considered the project completion date. The recipient must also demonstrate in the report that the project has met the requirements set out in all related decisions. The report is to be in a format specified by the Commission.

(m) The recipient must file a project holdback report **one year** after the project completion date demonstrating to the Commission's satisfaction that the recipient has offered broadband services for one year in accordance with the conditions of service established in the decision and described in the approved statement of work. Holdback funds will be released only once the Commission is satisfied that the recipient has offered the services described in the approved statement of work in accordance with the conditions of service established in the decision.

Section 24 conditions

58. In Telecom Regulatory Policy 2018-377, the Commission determined that it would impose, pursuant to section 24 of the Act, certain conditions regarding the offering and provision of broadband services using facilities funded through the Broadband Fund that would apply once the infrastructure is built. These conditions relate to the speeds and capacity of broadband services provided and the level of retail pricing, reporting, and associated open access service offerings. The conditions imposed on the offering and provision of broadband services will apply to the recipient and to any other Canadian carrier operating the funded infrastructure.

59. The Commission may conduct periodic audits and require measurements of the project's performance to verify compliance with the conditions of funding and the conditions imposed pursuant to section 24 of the Act on the provision of services using the funded infrastructure. To that end, as a condition of offering and providing telecommunications services using the funded infrastructure, the Commission requires, pursuant to section 24 of the Act, that the recipient, or any Canadian carrier operating the funded infrastructure, (i) retain all books, accounts, and records of the project, including administrative, financial, and claim processes and procedures, and any other information necessary to ensure compliance with the terms and conditions of the decision, for a period of **eight years** from the project start date; and (ii) provide the Commission with measurements of the performance of each of the recipient's implemented projects within **five years** of the project's completion date using methodology that the Commission may determine. The Commission may request that

external auditors or a Commission-approved auditor certify any related report, form, or documentation, or that a third-party professional engineer certify any required measurements.

60. In addition, pursuant to section 24 of the Act, as a condition of offering and providing telecommunications services using the funded infrastructure, the recipient, or any Canadian carrier operating the funded infrastructure on behalf of the recipient, must

    (a) provide transport capacity at each eligible PoP funded by the Broadband Fund with total capacity no lower than that proposed in the application and described in the approved statement of work; and

    (b) offer and provide, in a fair, transparent, timely, and non-discriminatory manner, wholesale and retail open access to the transport infrastructure at each eligible PoP funded by the Broadband Fund. Terms and conditions that are the same as or better than those applied to the services of subsidiaries, affiliates, or partners must be applied to other service providers requesting access to project sites. Such wholesale and retail open access services must be offered at rates no higher, and a capacity no lower, than those proposed in the application and detailed in the approved statement of work.

Secretary General

Related documents

- *Broadband Fund – Project funding approval for SSi Micro Ltd.'s satellite project in Nunavut*, Telecom Decision CRTC 2023-418, 20 December 2023

- *Call for comments – Broadband Fund policy review*, Telecom Notice of Consultation CRTC 2023-89, 23 March 2023; as amended by Telecom Notice of Consultation CRTC 2023-89-1, 17 April 2023

- *Broadband Fund – Third call for applications*, Telecom Notice of Consultation CRTC 2022-325, 30 November 2022; as amended by Telecom Notices of Consultation CRTC 2022-325-1, 13 March 2023; and 2022-325-2, 15 May 2023

- *Development of the Commission's Broadband Fund*, Telecom Regulatory Policy CRTC 2018-377, 27 September 2018

- *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016

Dissenting opinion of Commissioner Claire Anderson

1. While I wholeheartedly understand the essentiality of connectivity as it pertains to remote and Indigenous communities, and particularly within Nunavut where communities are only accessible by air or sea, I cannot agree with the approach taken by my colleagues to approve the Government of Nunavut's (GN) application under the condition that the applicant provide evidence of support from Nunavut Tunngavik Incorporated (NTI) **after** this conditional approval.

2. As the Nunavut Inuit rightsholder that has publicly asserted the right to self-government, NTI must be meaningfully consulted **prior** to the approval of this application in accordance with their constitutional rights and their rights under the United Nations (UN) Declaration on the Rights of Indigenous Peoples (the UN Declaration). Any time we look at whether our decisions advance reconciliation, we must consider the concerns and interests of Indigenous representatives, which was not fully contemplated by the majority in this decision (the Decision).

3. I set out these views in more detail below.

Background

Section 35 and NTI's established and asserted rights

4. In 1982, Canada patriated the Canadian Constitution (the Constitution) and in so doing, formally entrenched the recognition of First Nations, Inuit, and Métis rights in its section 35:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

5. In 1992, the Tungavik Federation of Nunavut (now NTI) entered into a land claims agreement with the Government of Canada (the Nunavut Agreement) on behalf of the Nunavut Inuit, leading to the creation of the Government of Nunavut in 1999.

6. There are indications that NTI's relationship with the GN has been imperfect, to say the least, as NTI articulated in a recent lawsuit against the GN in 2021, claiming that the territorial government discriminated against the Inuit by failing to provide education in Inuktut, leading the President of NTI to claim that

> the whole purpose, I would say, of the creation of Nunavut was to create a jurisdiction that would be Inuit-centred and friendly to Inuit and Inuit language and culture… yet we have a government that is asserting that we don't have these rights and that we're not being discriminated against.[1]

[1] CBC News, "Nunavut gov't says judge made a mistake by allowing language lawsuit to go ahead," 5 May 2023.

7. On 16 November 2021, NTI announced that its members passed an Annual General Meeting (AGM) resolution to seek a negotiation mandate with the Government of Canada to begin the exercise of the inherent right to Inuit Self-Government.[2] The unanimous resolution states the following:

> WHEREAS Nunavut Inuit were self-governing long before Europeans arrived in what is now Canada, and were self-sufficient through their harvesting way of life based on their own language and worldview, economy, and systems of laws and governance, and deeply connected to and reliant on their homeland;
>
> AND WHEREAS in the 1970s Nunavut Inuit began their aspiration to create their own government because of the damaging effects and disruptions of colonialism and attempts to assimilate Inuit language and culture into the dominant Canadian society;
>
> AND WHEREAS Nunavut Inuit had hoped that the creation of a Nunavut Government, through the negotiation of the Nunavut Agreement, would reflect their right to self-determination, and that would continue and protect the connections to their homeland, language and cultural identity;
>
> …
>
> AND WHEREAS Nunavut Inuit opted for a public government to be created subsequent to the signing of the Nunavut Agreement, **but never ceded their inherent right to self-government, as recognized, affirmed and protected by sections 25 and 35 of Canada's *Constitution Act, 1982*, including jurisdiction and law-making authority over their own affairs**;
>
> AND WHEREAS the Government of Canada has renewed its commitment to respect that constitutional right to self-determination by having re-designed its comprehensive lands claim policy towards a more principled *Rights Recognition* framework of self-government,[3] and as further re-affirmed by the passing of the *Declaration on the Rights of Indigenous Peoples Act* on June 21, 2021 that now requires "minimum standards for the survival, dignity and well-being of Indigenous Peoples";
>
> AND WHEREAS the **socio-economic state of Inuit has not improved since the creation of the Nunavut Government in 1999, and has worsened in the areas of** educational attainment, employment under-representation resulting in significant

[2] Nunavut Tunngavik Incorporated, "Inuit Self-Government in Nunavut," 16 November 2021, and Nunavut Tunngavik Incorporated, Resolution No. RSA-21-11-07, Annual General Meeting, 15-17 November 2021.

[3] I believe this is a reference to the Prime Minister's 14 February 2018 announcement that Canada will develop a Recognition and Implementation of Indigenous Rights Framework through a national engagement process. Later that year, then-Attorney General of Canada confirmed that under the new framework, "the work of government will shift from processes primarily focused on assessing whether rights exist – which inevitably is adversarial and contentious – to seeking shared understanding about how the priorities and rights of Indigenous peoples may be implemented and expressed within a particular process, and its outcome," while recognizing the shift to recognition of rights includes Indigenous self-determination and the inherent right of self-government.

wage gaps, overcrowded housing conditions, food security, lower health indicators, **economic participation and other social inequities faced by Inuit**, as the Nunavut Government has not been able to fulfill Inuit aspirations and priorities on the delivery of Inuit language and culture within education, Inuit employment and other critical socio-economic conditions and social justice of Inuit;

AND WHEREAS **NTI has consistently tried to work with the Government of Nunavut in the meaningful implementation of treaty and Inuit rights with no satisfactory progress, and the exercise of self-government may offer Nunavut Inuit the means to improve their economic, social and cultural well-being where the Government of Nunavut has not been able to provide;**

NOW, THEREFORE, BE IT RESOLVED THAT **Members desire Nunavut Inuit to exercise the right of self-government to enable Nunavut Inuit to have direct decision-making and control over their own affairs**, and **direct NTI** to seek a negotiation mandate with the Government of Canada to begin **self-government discussions**… (emphasis mine)

The UN Declaration

8. Another pivotal moment of reconciliation occurred internationally, after Indigenous peoples fought for decades for international recognition of their inherent rights, in 2007, when the UN General Assembly passed a resolution adopting the UN Declaration.[4]

9. The UN Declaration provides that, among other things, Indigenous peoples have the right to maintain and **strengthen** their distinct political, legal, **economic, social and cultural institutions**… (Article 5); **participate in decision-making** in matters which would affect their rights, through representatives chosen by themselves… (Article 18); and that States **shall consult and cooperate in good faith** with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent **before adopting and implementing** legislative or **administrative measures that may affect them** (Article 19) (emphasis mine).

10. In May 2016, the Government of Canada endorsed the UN Declaration, without qualification, acknowledging that "[b]y adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada."[5]

11. The "full box" metaphor was reiterated again when the Government of Canada released its Principles Respecting the Government of Canada's Relationship with Indigenous Peoples (the Principles) in 2018. The Principles outline that they are a "**starting point** to support efforts to end the denial of Indigenous rights that led to disempowerment and assimilation

---

[4] Brenda Gunn, "Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada," *Windsor Yearbook on Access to Justice* 31,1 (2013): pages 147-162. (Gunn, Overcoming Obstacles).

[5] For an excellent overview of the history of the UN Declaration, please see John Borrows, Larry Chartrand, Oonagh E. Fitzgerald, and Risa Schwartz, eds, "Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples." (Waterloo: CIGI Press, 2019).

policies and practices" (emphasis mine),[6] and they guide the government's commitment to implementation of the UN Declaration.

12. The opening Principle states that "[t]he Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government," and notes this recognition "as a defining feature of Canada is grounded in the promise of section 35 of the *Constitution Act, 1982*, in addition to reflecting articles 3 and 4 of the UN Declaration."[7]

13. On 21 June 2021, the Government of Canada enacted the United Nations Declaration on the Rights of Indigenous Peoples Act (the UN Declaration Act), which further acknowledges the following in the recitals:

> …the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including right to self-government.

The CRTC's Third Call for Applications

14. In response to the CRTC's Telecom Notice of Consultation 2022-325 (the Third Call for Applications) to the CRTC's Broadband Fund, the GN submitted an application to receive $271,937,242 for a transport fibre project which has been approved by the majority in the Decision. Noting the significance of the project, the majority awards funding to the GN subject to the condition that the applicant provide evidence of NTI's support before the CRTC approves the project's statement of work (at paragraph 46 of the Decision).

15. I do not agree with the approach taken by my colleagues, that the funding of the GN's project ought to be awarded with evidence of NTI's support after the funding decision has been made. In my view, NTI is entitled to meaningful consultation **before** the funding decision is made, in accordance with their rights both under section 35 of the Constitution and under the UN Declaration, and with their own articulation of economic reconciliation in mind, as set out below.

16. I will begin by providing an overview of Nunavut Inuit's rights under section 35, as I believe the majority has confused those rights and our corresponding obligations under the Constitution before moving onto the central argument respecting the UN Declaration, as there are elements from the consultation analysis that help inform the discussion on the UN Declaration.

[6] The Principles at page 4.

[7] The Principles at page 5.

Adequate consultation with the Inuit rightsholder must occur prior to the decision to award nearly $300 million in funding to the GN's transport fibre project

17. In my view and in light of NTI's claims to self-government, the decision to award the GN's transport fibre project can only be made after adequate consultation has occurred with NTI to determine how the awarding of funds might adversely affect NTI's asserted right to self-government.

18. As noted in our Third Call for Applications and the appended Application Guide, a constitutional duty to consult and accommodate may arise where a project presents a risk of an adverse impact on an established or asserted Aboriginal or treaty right.

19. It is helpful to provide some background on the nature of this duty and the principle of the honour of the Crown before examining whether the decision to award nearly $300 million triggers the duty to consult and, if so, whether meaningful consultation took place.

The duty to consult and honour of the Crown

20. The Crown has a duty to consult (and at times accommodate) Indigenous groups when it has real or constructive knowledge of the potential existence of an asserted Aboriginal right and contemplates conduct that might adversely affect that right.[8]

21. The Supreme Court of Canada, in *Haida Nation v British Columbia (Minister of Forestry)* 2004 SCC 73 *(Haida*), noted that the duty to consult and, where indicated, accommodate, is grounded in the principle of the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation:

> 25. Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized, and respected.

22. The Supreme Court noted that consultation is necessary **before** making a decision that may have an adverse impact on asserted rights, describing the duty as "**prospective**, fastening on rights yet to be proven (emphasis theirs)."[9] This approach "preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred approach for achieving ultimate reconciliation."[10]

23. Knowledge of a credible but unproven claim suffices to trigger the duty; however, the content of the duty varies: "[a] dubious or peripheral claim may attract a mere duty of notice,

---

[8] *Haida Nation v British Columbia (Minister of Forestry)* 2004 SCC 73 at para 35 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74.

[9] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43 at para 35, citing *Haida*.

[10] *Haida* at para 38.

while a strong claim may attract more stringent duties."[11] While courts may address past infringements of Indigenous rights, adequate consultation **before** project approval is always preferable.[12]

24. The Supreme Court of Canada has noted that while precise requirements for the duty to consult vary with the circumstances, consultation may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.[13]

25. When independent regulatory agencies are tasked with a decision that could affect asserted Aboriginal or treaty rights, the regulatory decision would itself be Crown conduct that implicates the Crown's duty to consult and, as the final decision maker on certain matters, the administrative tribunal is obliged to consider whether consultation is adequate.[14]

26. Further, the honour of the Crown requires the Crown to act honourably in defining the rights it guarantees and in reconciling Indigenous rights with other rights and interests (*Manitoba Metis Federation Inc v Canada (Attorney General)* 2013 SCC 14 at para 67), as noted by the Nova Scotia Court of Appeal when it found that the Crown was required to consult with the affected First Nation on the potential impact of the Crown's funding agreements.[15]

The trigger for the duty to consult

27. In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43 (*Rio Tinto*), the Supreme Court of Canada summarized the three-part test used to determine when a duty to consult arises:

    (i) The Crown has actual or constructive knowledge of an asserted or established Aboriginal or treaty right;

    (ii) The Crown is contemplating conduct; and

    (iii) The contemplated Crown conduct may adversely affect an asserted or established Aboriginal or treaty right.[16]

28. As noted by the Nova Scotia Court of Appeal, "Crown conduct" and "adverse impacts" must be interpreted broadly in order to accomplish the reconciliatory objective of the Constitution.

---

[11] *Haida* at para 37.

[12] *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40 (*Clyde River*) at para 24.

[13] *Haida* at para 44.

[14] *Chippewas of the Thames First Nation v National Energy Board* 2017 SCC 41 at paras 35–36.

[15] *Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation* 2019 NSCA 75 (*Nova Scotia v Pictou Landing First Nation*); an application for leave to appeal was dismissed by the Supreme Court of Canada.

[16] *Rio Tinto* at para 31.

It found that the provision of funding to a proponent triggered the duty to consult in that case.[17]

Application of the duty-to-consult test to our decision to approve funding

i) Knowledge of NTI's asserted Aboriginal right to self-government

29. As discussed above, NTI made a public announcement of its AGM resolution outlining that Nunavut Inuit were self-governing long before Europeans arrived, and while they opted for the creation of the public territorial government, they "never ceded their inherent right to self-government, as recognized, affirmed and protected by sections 25 and 35 of Canada's *Constitution Act, 1982…*".

30. NTI members confirmed by unanimous resolution their desire for Nunavut Inuit to exercise the right of self-government to enable Nunavut Inuit to have "direct decision-making and control" over their own affairs and directed NTI's board of directors to oversee and report on any self-government negotiations with the Government of Canada. There is a dearth of information on the nature or content of that right beyond the AGM resolution, as neither the CRTC nor the GN made any consultation efforts to understand NTI's asserted right to self-government.[18]

31. As noted in the AGM resolution, the right to self-government has been asserted by NTI, the signatory to the Nunavut Agreement, and not by any of the organizations which my colleagues note support the GN's application. While I note the importance of those other entities, there is simply no evidence that NTI delegated self-government negotiations or action to any of those entities.

ii) Contemplating the provision of $272 million in funding to the GN when NTI put its support behind a different application for funding

32. As described earlier, when independent regulatory agencies or tribunals, like the CRTC, have final decision-making authority over a matter that could affect asserted Aboriginal or treaty rights, the tribunal itself is obliged to consider whether consultation is adequate.

33. The decision at hand is whether to award funding to the GN based on the evidence of consultation with rightsholders prior to the decision being made. I have already outlined that the rightsholder is NTI, not any of the other Inuit representatives listed in paragraph 28 or elsewhere in the Decision.

34. The GN confirmed that it provided evidence of direct notification setting out project details to NTI, amongst others; however, there does not appear to be any engagement or consultation with NTI beyond mere notification. As noted earlier, the Supreme Court of Canada outlined

---

[17] *Nova Scotia v Pictou Landing First Nation*.

[18] "As I stated (dissenting) in *Marshall*, *supra* at para. 112, one cannot 'meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope'." (*Haida* at para 36).

that while a dubious or peripheral claim may attract a mere duty of notice, a strong claim will attract more stringent duties.

35. Further, Crown conduct that may adversely affect Indigenous rights is not confined to decisions that have an immediate impact on lands and resources but extends to "higher level decisions that may have an impact on Aboriginal claims or rights."[19]

36. Based on the statements NTI articulated in its AGM resolution and the approach that the Government of Canada has taken with Indigenous rights and self-government,[20] I do not think mere notification amounts to adequate consultation with the NTI on its asserted right to self-government. The Crown's commitment to base all its relations with Indigenous peoples on the recognition and implementation of their right to self-determination, including the right to self-government, indicates that NTI's assertion of self-government rights is a credible claim grounded in existing Crown commitments that triggers the duty to consult further on the nature of this right and how it may be affected by the Decision.[21]

37. This need to consult is highlighted by the fact that NTI provided its full support to a different Inuit-owned and -led project which is no longer being considered by virtue of paragraph 48 of the Decision, which confirms the CRTC has completed its consideration and selection of projects proposing to serve Nunavut under Call 3. As part of its support for the other Inuit-owned and -led project, NTI emphasized the importance of Inuit ownership and control of critical infrastructure, including telecommunications infrastructure, and noted related economic benefits associated with an Inuit-owned network.

iii) The provision of funding may adversely affect NTI's self-government claim

38. As discussed, the content of the duty to consult varies according to the strength of the claim asserted and the seriousness of the impact of the underlying Aboriginal or treaty right.[22]

39. I have addressed the strength of NTI's claim to self-government above. However, I will note that there is a serious lack of consultation on this record either from us or from the GN as to what NTI's self-government rights entail. This is reminiscent of a decision where the Supreme Court of British Columbia found that

> [t]o fail to consider at all the strength of claim or degree of infringement represents **a complete failure of consultation** based on the criteria that are constitutionally required for meaningful consultation… In this case, the government did not misconceive the seriousness of the claim or impact of the infringement. **It failed to consider them at all** (emphasis mine).[23]

---

[19] *Rio Tinto* at para 44.

[20] The Principles and the UN Declaration Act.

[21] The Principles.

[22] *Haida* at para 32, reiterated in *Rio Tinto* at para 36.

[23] *Huu-Ay-Aht First Nation et al v the Minister of Forests et al*, 2005 BCSC 695 at para 126.

40. However, in its AGM resolution, NTI has asserted decision-making and control as aspects of self-government, and it strikes me that the decision to award nearly $300 million to the GN without **any** input from NTI on their asserted right to decision-making and control over their affairs necessarily denies them the opportunity to decide and control their affairs or to be involved in the decision-making process to any extent at all **prior** to the Decision being made.[24]

41. The analysis of how NTI's asserted right may be affected by approval of the GN's project (and denial of the Inuit-owned and -led project) is severely hampered as a result of the total lack of consultation or engagement (by either the CRTC or the GN)[25] with the Nunavut Inuit rightsholder.

42. While the majority imposes support from NTI as a condition prior to the approval of the statement of work, I note consultation ought to have occurred before the decision to provide such an unprecedented amount of funding. We note the benefits of early consultation in our Telecom Regulatory Policy 2018-377, which sets out community consultation as an eligibility criterion before a project may be considered:

> 219. Consultations between applicants and communities is a contributing aspect of effective project planning and successful project implementation. Such consultations establish a line of communication between the community and the applicant and **provide the opportunity for applicants to better understand the needs of the affected community. Consultations can assist with project planning activities (e.g. informing applicants of established or asserted Aboriginal or treaty rights that may be affected by the proposed project…)** and **help identify potential issues or challenges**. They are also an opportunity for an applicant to learn about competing or complementary proposed projects and to ensure that its business plan is as accurate as possible.
>
> 220. Similarly, **such consultations enable communities to communicate their needs to the applicant and participate in proposed projects, whether financially or in-kind** (emphasis mine).

43. Clearly, we have recognized the benefits of early consultation prior to project approval, which includes informing applicants of asserted Aboriginal rights that may be affected by the proposed project. But we also acknowledge that consultation prior to the submission of an application enables the affected community to participate financially or in-kind. Again, NTI emphasized the importance of Inuit ownership over telecommunications infrastructure as a means to create further economic opportunity, which is exactly the benefit we described in our eligibility criterion referred to above.

---

[24] Again, consultation must occur **before** any decision is made (see *Haida* and *Rio Tinto*).

[25] In *Haida*, the Supreme Court of Canada noted that while procedural aspects of consultation may be delegated to proponents, like the GN in this instance, the legal responsibility for consultation and accommodation rests with the Crown (at para 53).

44. Allowing a proponent to consult with a rightsholder after the approval of funding may negatively affect the Indigenous rightsholder's ability to participate financially in the project. Consultation before conditional approval might make it easier for rightsholders and project proponents to come to economic participation agreements, while conditional approval may tilt the negotiations in favour of the proponent by raising public expectations that a project would proceed, which may place pressure on the Indigenous rightsholder to agree to less than what they may have otherwise obtained.

45. While the engagement criterion was applied to affected communities in general, and not specifically to Indigenous communities, based on their constitutionally protected rights (and rights under the UN Declaration, which I will examine next), Indigenous communities ought to be afforded at least the same consideration as any other community which is entitled to consultation in order for a project to be considered eligible for funding.

46. While the Aboriginal right to self-government has not yet been articulated by the Supreme Court of Canada, it is a live issue and the right has recently been recognized in lower courts;[26] moreover, it is a right that has been confirmed copiously by the Government of Canada (in the Principles and the UN Declaration Act, for instance).

47. Again, the Supreme Court of Canada has noted that the content of the duty varies depending on the strength of the Aboriginal claim and the seriousness of the potential impact on the asserted right, and may include formal participation in the decision-making process[27] or financial assistance to participate in the decision-making process itself.[28] However, neither the CRTC nor NTI provided **any** evidence of consultation with NTI respecting the scope and nature of the asserted right to self-government (or any other asserted right) and how that right (or those rights) may be affected by the decision to award nearly $300 million to a non-Inuit entity, in spite of NTI's acknowledgement of the importance of Inuit ownership and control of telecommunications infrastructure. Given the amount of money involved in this decision and the evidence of support for the Inuit-owned and -led project, I would suspect that the duty to consult requirements are quite high, or that they at least exist, which has not been acknowledged in the Decision.

48. The Decision further remains silent on whether a consultation analysis was done respecting NTI's claim or whether the duty to consult in relation to the decision to award funding exists. However, under the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 at para 77, if the analysis was concluded, it ought to have been included in the reasons for the decision, so that NTI can properly understand the position taken by the CRTC.

49. Again, relying on consultation processes in the Nunavut Agreement to fulfill any consultation obligations, as the majority seems to do in paragraphs 31–33 of the Decision, is not appropriate, as the right to self-government has been asserted by NTI, and there is no

---

[26] *R c Montour* 2023 QCCS 4154; see also *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* 2024 SCC 5 (*Reference re An Act respecting Indigenous children).*

[27] *Haida* at para 44.

[28] *Clyde River* at paras 48–52.

indication that any other organization has been delegated the jurisdiction to handle matters involving self-government. But more importantly, NTI asserts that its inherent right to self-government was not surrendered by the Nunavut Agreement, so it is unclear whether the provisions of the Nunavut Agreement properly address NTI's asserted claim.

50. Therefore, I find that approval of the GN's application prior to consulting with NTI has the potential to negatively affect NTI's claim to self-government, and that it was deprived of the opportunity to participate in the project financially or in-kind prior to the approval of the project, in contravention of section 35 of the Constitution and under our own Broadband Fund policy set out in Telecom Regulatory Policy 2018-377.

The UN Declaration was not considered

51. The more pressing challenge in the Decision is that my colleagues did not adequately consider the rights and obligations flowing from the UN Declaration.

The UN Declaration

52. The UN Declaration is a document with 24 clauses in its preamble and 46 articles, which touches upon virtually all aspects of Indigenous peoples' lives. As noted by Brenda Gunn, "it begins by unequivocally stating that Indigenous peoples have the right to equality and non-discrimination – a right to all human rights and fundamental freedoms under international law."[29]

53. Gunn describes the necessity of the UN Declaration "in part due to the failure of the general existing human rights regimes to afford appropriate protection for Indigenous peoples' rights."[30]

54. The UN Declaration does not create new rights but elaborates on existing rights that are enshrined in various international treaties and instruments.[31] As Gunn notes,

> While a declaration does not create directly enforceable, binding legal obligations on a state in and of itself, "soft law cannot be simply dismissed as non-law" (citation omitted). According to the United Nations, "a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."[32]

---

[29] Gunn, Overcoming Obstacles at page 153.

[30] Brenda Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law," in UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws. Centre for International Governance Innovation, 2017 (Gunn, Beyond Van der Peet).

[31] Naiomi Metallic, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act" in Richard Alpert, Wade Wright, Kate Berger, and Michael Pal, eds, Rewriting the Canadian Constitution [forthcoming] (Metallic, Breathing Life) at page 8. See also Metallic, Breathing Life, where she describes the denial of the application of international human rights conventions to Indigenous peoples as "the impetus for Indigenous peoples worldwide to push for the creation of the UN Declaration" at page 5.

[32] Gunn, Beyond Van der Peet at page 32.

55. The UN Declaration was adopted by the United Nations General Assembly in 2007; 11 countries abstained from voting, while 144 countries voted in favour of its adoption, and 4 countries voted against: Canada, Australia, New Zealand, and the United States. As discussed, Canada has now fully endorsed its full support for the UN Declaration and has enacted the Declaration Act, assented to 21 June 2021.

56. While the Supreme Court of Canada recently confirmed that the "Declaration has been incorporated into the country's positive law by the *United Nations Declaration on the Rights of Indigenous Peoples Act*,"[33] many international and Indigenous legal scholars note that the UN Declaration has legal effect in Canada, even without legislative action, through customary international law.[34]

57. Gunn notes that the Rights of Indigenous Peoples Committee (the Committee) of the International Law Association, an association of leading academic international law experts on the subject, did a review of whether aspects of the UN Declaration had attained the status of customary international law. It concluded that

> even though it cannot be maintained as a whole [the *Declaration*] can be considered… customary international law, some of its key provisions can be reasonably regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are bound to comply with.[35]

58. The Committee found the following provisions reflective of customary international law:

> [I]ndigenous peoples have the right to self-determination, that secures to indigenous peoples have the right to decide [sic], within the territory of the State in which they live, what their future will be; indigenous peoples have the right to autonomy or self-government.... indigenous peoples have the right to recognition and preservation of their cultural identity....[36]

59. Gunn confirms the direct application of customary international law:

> Canadian courts have generally employed an adoptionist approach to customary international law, provided there is no express conflict in Canadian law. Justice Lebel recently confirmed this position in *R v Hape*. Justice Lebel's initial strong statement that customary international law automatically applies within Canadian law was somewhat qualified by making the application permissive not mandatory: "absent an express derogation, the courts may look to prohibitive rules

---

[33] *Reference re An Act respecting Indigenous children* at para 4.

[34] Brenda Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples," UBC Law Review Society, 53, 4 (2020) (Gunn, Legislation and Beyond). See also Gunn, Overcoming Obstacles at pages 160–163.

[35] Gunn, Overcoming Obstacles at pages 162–163.

[36] Gunn, Overcoming Obstacles at page 161.

of customary international law to aid in the interpretation of Canadian law and the development of the common law" (citations omitted).[37]

60. Moreover, as noted by Naiomi Metallic, "[S]ince the [Supreme Court of Canada]'s decision in *Baker v Canada (Minister of Citizenship and Immigration)*, it is well established that government actors must carry out their duties while being mindful of Canada's international law obligations."[38]

Lack of application of the UN Declaration in the Decision

61. In paragraph 45 of the Decision, the majority simply notes that the Decision "aligns with the priorities identified in the [UN Declaration Act] Action Plan," but fails to consider the rights and obligations that flow from the UN Declaration itself.

62. The following Articles under the UN Declaration are particularly relevant to the matter at hand:

> Article 5
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> Article 20
>
> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and economic activities.

---

[37] Gunn, Overcoming Obstacles at page 164.

[38] Metallic, Breathing Life at page 21.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up on the effectiveness of this Declaration.

63. Articles 5, 20.1, and 21.1 affirm that Indigenous peoples have the right to strengthen their economy and participate in the economic life of the State. There is indication that NTI wishes to pursue this right through Inuit ownership of major infrastructure, including telecommunications. As noted above, they may have been in a stronger bargaining position if consultation with the rightsholder was required prior to the conditional approval of the non-Inuit-owned project at hand.

64. Articles 18 and 19 further emphasize the right of NTI to participate in decision-making matters on administrative measures which affect them. As noted by Risa Schwartz, "[t]he right for Indigenous peoples to participate in decision making… is an established principle of international human rights law."[39]

65. Gunn notes that "free prior and informed consent" goes beyond the obligation to consult before making their decision, but that it requires Indigenous peoples' participation in decision-making processes in order to be effective.[40] I also point out that this obligation goes beyond the duty to consult on matters which **may adversely** affect the Indigenous right by imposing the obligation on matters which **may affect** them; without the requirement, the conduct is adverse or antithetical to Indigenous peoples or their interests.

66. As noted in Article 42, States and their specialized agencies have the responsibility to promote respect for and full application of the provisions of the UN Declaration. While Canada has decided to begin its implementation and full application through the enactment of the UN Declaration Act and its UN Declaration Act Action Plan, as noted by Indigenous scholars, the rights exist regardless of any legislative action. As Gunn notes, "the goal is to ensure that when action to implement the UN Declaration occurs after legislation, international standards are maintained."[41]

---

[39] Risa Schwartz, "Toward a Trade and Indigenous Peoples' Chapter in a Modernized NAFTA," Centre for International Governance Innovation, 2017.

[40] Gunn, Legislation and Beyond at page 1092.

[41] Gunn, Legislation and Beyond at page 1090.

67. Additionally, the UN Declaration Act charges that the Government of Canada, in consultation and cooperation with Indigenous peoples, is to take all measures necessary to ensure that the laws of Canada are consistent with the UN Declaration (at section 5). In light of the UN Declaration Act, the CRTC is required, at a minimum, to interpret the statutes it administers, including the *Telecommunications Act*, and exercise its powers under those statutes in a manner that is consistent with the UN Declaration.

68. Following the principles of the UN Declaration, I believe that participation of NTI in our process would have breathed life into the obligations that fall unto States, state agencies, and state actors under the UN Declaration. Further, the approach taken by the majority does not maintain the standards set out in the UN Declaration and the UN Declaration Act, particularly as they relate to participation in the decision-making process.

Economic reconciliation

69. In *AltaLink Management Ltd v Alberta (Utilities Commission)* 2021 ABCA 342 at para 59, the Alberta Court of Appeal held that projects that increase the likelihood of economic activity on a reserve ought to be encouraged, as it is within the public interest. The Court went on to say that "[w]e should support Indigenous communities that want to participate in mainstream commercial activities" and cited the numerous benefits relating to the participation of Indigenous communities in commercial activities.

    In a concurring opinion, Justice Feehan directly addressed his views on reconciliation:

> (b) Reconciliation is in the public interest
>
> [117] While reconciliation is a foundational objective of s 35, it is part of the broader public interest and also applies to cases impacting Indigenous peoples outside the constitutional context. In ***Restoule v Canada (Attorney General)***, 2018 ONSC 114, paras 56, 58, the Court recognized that reconciliation must always be addressed in consideration by authorized government entities of the public interest: "... there is a deep and broad public interest in reconciliation with our Indigenous peoples"…
>
> [118] Any consideration of public goals or public interest must "further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective": ***Tsilhqot'in Nation***, para 82. Reconciliation requires justification of any infringement on or denial of Aboriginal rights, paras 119, 125, 139, and meaningful consideration of the rights of Indigenous collectives as part of the public interest.
>
> [119] As this Court said in ***Fort McKay***, the direction to all authorized government entities to foster reconciliation particularly requires that they consider this constitutional principle whenever they consider the public interest, para 68, and requires the Crown to act honourably in promoting reconciliation, such as by "encouraging negotiation and just settlements" with Indigenous peoples: ***Mikisew Cree***, para 26; ***Fort McKay***, para 81.

> [120] Aiming to achieve reconciliation is a continuing obligation, existing separately from honour of the Crown. An important aspect of reconciliation is the attempt to achieve balance and compromise, essential to the consideration of the public good. Reconciliation must be a consideration whenever the Crown or a government entity exercising delegated authority contemplates a decision that will impact the rights of Indigenous peoples.
>
> [121] **An administrative tribunal with a broad public interest mandate, such as the Commission, must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown by considering the concerns and interests of Indigenous collectives. This includes consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively** (emphasis mine).

70. While the case is not binding upon us, I find it informative to our Commission, which like the Alberta Utilities Commission, regulates on behalf of the public interest. While the majority in this Decision claims that approval of the non-Inuit owned project is consistent with the CRTC's commitment to advancing reconciliation with Indigenous peoples, there is no evidence that they've grappled with the economic interests that were emphasized by the Nunavut Inuit rightsholder itself.

71. Considering Inuit-ownership of major telecommunications infrastructure was highlighted by NTI, I am unable to agree that conditional approval of this non-Inuit-owned project is consistent with reconciliation or economic reconciliation, as those interests and concerns have been expressed by the rightsholder. Taking the rightsholder's specific views on economic reconciliation into account, rather than superimposing our own, is in line with Crown commitments to the recognition of Indigenous rights and self-determination, which includes the right to self-government.

Conclusion

72. I would have required that we or the GN consult with NTI before issuing the decision to approve the GN's project, as this is clearly the approach more in line with Nunavut Inuit's rights under the Constitution and the UN Declaration, and has the stronger potential to advance economic reconciliation under NTI's own articulation. Alternatively, I would have given more consideration to providing conditional approval to the NTI-supported Inuit-owned entity's application instead, with specific conditions to be met, if needed.

73. I would further caution my colleagues to note that, while the CRTC has taken steps to advance reconciliation on specific issues or files,[42] the duty to consult exists on all decisions the CRTC makes, and that we cannot rely on Indigenous-specific processes to meet our commitments to reconciliation and our legal obligations.

74. I also very respectfully point out that summaries of our decisions provide a useful overview to readers about the content of our decisions, and we have previously acknowledged in our decision summaries when a dissenting opinion is made,[43] which in my view is the more collegial approach to acknowledging the views of all Commissioners. This is also a standard practice followed by courts when court decisions are not unanimous.[44]

---

[42] See Telecom Notice of Consultation 2023-89, where we note that that "[t]his policy review is also an opportunity to advance reconciliation with Indigenous Peoples by ensuring that their specific economic and social needs are considered and addressed in the Broadband Fund policy. The CRTC is proposing to implement an Indigenous-specific funding stream to address those needs."

[43] See Broadcasting Regulatory Policy 2010-629, Telecom Decision 2015-78, and Broadcasting Decision 2022-175, for example.

[44] See *Dickson v Vuntut Gwitchin First Nation* 2024 SCC 10, for example.