

JUL 28 2011

S-115081



No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NESKONLITH INDIAN BAND

PETITIONER

AND:

**THE CITY OF SALMON ARM
SALMON ARM SHOPPING CENTRES INC.**

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO: The City of Salmon Arm
Box 40
500 – 2 Avenue NE
Salmon Arm, BC V1E 4N2

AND TO: Salmon Arm Shopping Centres Inc.
c/o McCarthy Tetrault LLP
Attention: Keith Edgar Burrell, Q.C.
PO Box 10424 Pacific Centre
1300-777 Dunsmuir Street
Vancouver, BC V7Y 1K2

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner,

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:

800 Smithe Street
Vancouver, BC V6Z 2E1

(2) The ADDRESS FOR SERVICE of the petitioner is:

c/o Mark G. Underhill
Underhill, Boies Parker Law Corporation Inc.
440 – 355 Burrard Street
Vancouver, BC V6C 2G8

Fax number address for service (if any) of the petitioner: (604) 696-9858

E-mail address for service (if any) of the petitioner:

munderhill@ubplaw.ca

(3) The name and office address of the petitioner's lawyer is:

Mark G. Underhill
Underhill, Boies Parker Law Corporation Inc.
440 – 355 Burrard Street
Vancouver, BC V6C 2G8

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. The Petitioner applies for the following orders:

- (a) An order in the nature of *certiorari* quashing the approval by the Respondent City of Salmon Arm ("City") of the Environmentally Hazardous Area Development Permit, on July 11, 2011 (the "Permit") issued to the Respondent Salmon Arm Shopping Centres Inc. (the "Developer") in respect of the proposed Smart Centres shopping centre development on the Salmon Arm Delta and Floodplain (the "Development");

- (b) In the alternative, an order staying all activities or actions carried out pursuant to the Permit pending adequate consultation with and, if necessary, accommodation of the Neskonlith Indian Band;
- (c) A declaration that the Respondent City owes a constitutional and legal duty to consult with the Neskonlith Indian Band in good faith, and endeavour to seek workable accommodations prior to the issuance of the Permit;
- (d) A declaration that the scope and content of the duty to consult with respect to the Permit includes consultation and, where appropriate, accommodation concerning the cumulative effects of prior development on the Salmon Arm Delta and Floodplain;
- (e) A declaration that the Respondent City failed to comply with its constitutional and legal duties, as described above;
- (f) Interim and/or interlocutory relief;
- (g) Such further and other relief as this Court deems just; and
- (h) Costs.

Part 2: FACTUAL BASIS

The Parties and the Impugned Decision

1. The Petitioner Neskonlith Indian Band is an Indian Band pursuant to the provisions of the *Indian Act*, R.S.C. 1985, c. I-5.
2. The Respondent City of Salmon Arm is an incorporated city municipality pursuant to the provisions of the *Local Government Act*, R.S.B.C. 1996, c. 323 and approved the impugned Permit on July 11, 2011.
3. The Respondent Salmon Arm Shopping Centres Inc. (“Developer”) is the holder of the impugned Permit and the proponent of the Development.
4. The Respondent City approved the Permit on July 11, 2011, which allows the Developer to proceed with the Development notwithstanding its location within an

“environmentally hazardous area” (ie. a floodplain), as that term is used in the City’s Official Community Plan.

The Secwepemc Nation and Secwepemculecw

5. The Neskonlith Indian Band is part of the Secwepemc (Shuswap) Nation. The Secwepemc are an Indigenous Nation and an Aboriginal People of Canada whose traditional territory, referred to as Secwepemculecw, spans approximately 180,000 square kilometres in the South Central Interior of British Columbia.

6. Secwepemculecw is intimately linked to the identity and culture of the Secwepemc people. Their oral histories and laws teach them about their connection to their lands and to protect their lands.

7. The Sexqeltkemoc, Lakes Division, is a traditional division of the Secwepemc Nation, bearing the responsibility for the part of Secwepemculecw that includes the Shuswap Lakes Watershed, including the Salmon River Delta and Floodplain. The Sexqeltkemoc Lakes Division is responsible for the protection and management of their part of Secwepemculecw, in accordance with Secwepemc laws, customs and traditions requiring that they act as caretakers of the land.

8. The Sexqeltkemoc Lakes Division consists of three member bands, the Neskonlith Indian Band, the Adams Lake Indian Band and the Little Shuswap Indian Band. Membership is also open to the Splotsin (Spallumcheen) and Shuswap Indian Bands.

9. The Secwepemc Nation exclusively occupied and exercised exclusive control over Secwepemculecw at the time of the assertion of British sovereignty and continues to maintain and assert Aboriginal Title over their traditional territory, including the Shuswap Lakes and the Salmon River Delta and Floodplain.

10. At the time of European contact, the Secwepemc People engaged in extensive use of Secwepemculecw, following a traditional harvesting calendar throughout the Interior Plateau, starting from the lakes and rivers, all the way to the alpine areas. These activities

continue today. The Secwepemc economy relies on access to their traditional territory and its ecological values. Traditional and current Secwepemc use activities include:

- Hunting and fishing, including different salmon stocks, many of which use the Salmon River as their habitat;
- Harvesting plants, roots and medicines for food, ceremonial and other purposes; and
- Harvesting timber and plants for shelter.

The Secwepemc People assert constitutional rights to engage in and continue those traditional and current use activities.

11. Since the time of contact, Secwepemculecw has been heavily impacted by government authorized development, severely impacting the ability of the Secwepemc people to exercise their Aboriginal Title and Rights. These activities include:

- (a) development of large scale residential, commercial, industrial and recreational centres;
- (b) construction, expansion and upgrading of highways and railroads
- (c) substantive farming operations, including grazing and associated impacts on our watersheds;
- (d) large scale logging activities;
- (e) construction of mines and hydro-electrical developments; and
- (f) channelling of rivers and destruction of wetlands.

12. These government authorized activities are interfering with the Secwepemc's ability to exercise their Aboriginal Title and Rights by:

- (a) alienating their lands and limiting access to their traditional territory;
- (b) limiting the uses to which their lands can be put now and in the future;
- (c) limiting their ability to protect their lands and to maintain traditional practices;
- (d) limiting their ability to exercise their spiritual, cultural, and ceremonial practices;

- (e) using lands and resources for the exclusive benefit of the government and third parties, rather than Secwepemc People;
- (f) destroying, damaging and/or degrading habitat which is necessary to support plant and wildlife populations that are necessary to exercise their Aboriginal Rights and enjoy their Title; and
- (g) limiting Secwepemc economies and depriving them of the economic benefit of their lands and resources.

The Assertion of Secwepemc Title and Rights

13. Since the Crown started to authorize development in Secwepemc territory, the Secwepemc people have asserted and maintained their Secwepemc Title and Rights to their traditional territory.

14. As colonial governments unilaterally asserted authority over Secwepemc lands, without their consent, they continued to maintain and assert their Secwepemc Title and Rights. Over 100 years ago, in the summer of 1910, the Secwepemc Nation, along with other Interior Tribes, made a formal declaration to the then Prime Minister of Canada, Sir Wilfrid Laurier (the Laurier Memorial), which was delivered to him on August 25, 1910 at Kamloops in Secwepemc traditional territory.

15. The Laurier Memorial was re-signed by the Interior Tribes, to reassert the historic positions set out by their ancestors and leaders. Chief Judy Wilson, the current chief of the Neskonlith Indian Band, was one of the Secwepemc chiefs who re-signed the Laurier Memorial. A celebration was held in Kamloops on August 25, 2010 to commemorate the 100 year anniversary of the delivery of the Laurier Memorial.

16. Chiefs from the Interior Tribes, including the Chief of the Neskonlith Indian Band, traveled multiple times to Ottawa and England between 1912 and 1926 requesting that their land rights be recognized, efforts which were curtailed in 1927 when aboriginal peoples were banned from organizing around Indian land rights by way of an amendment to the *Indian Act*.

17. Under the leadership of the chief and the members of the Neskonlith Indian Band, rights continue to be asserted today. The Secwepemc people have never ceded their Aboriginal Title and Rights and they have not signed treaties. The Secwepemc people refuse to participate in the British Columbia Treaty Process due to the underlying federal policy and the narrow mandates of the federal and provincial governments which would require the Secwepemc to “modify”, surrender or extinguish their Title and Rights.

18. The Secwepemc people also continue to assert their Title and Rights by using their traditional lands. The Secwepemc people continue to hunt, fish and gather food throughout their traditional territory. The Sexqeltkenc, Lakes Division of the Secwepemc went logging in their traditional territory under the authority of the Secwepemc Nation without a provincial permit. The provincial government issued a stop work order and charged the bands and chiefs, including the chief of the Neskonlith Indian Band. An Aboriginal Title and Rights defence was raised, and after determining that there was a strong *prima facie* case for Secwepemc Title and Rights, the Court granted an advance costs order, a decision ultimately upheld by the Supreme Court of Canada.

Neskonlith Indian Band Switzmalph Reserve #3 and Sustainable Development

19. Historically the Lake Secwepemc People, living close to the Shuswap Lakes, from present day Chase to Salmon Arm and beyond, formed one community within the Secwepemc Nation. Unified under Chief Neskonlith, they were granted reserves, including joint reserves close to Salmon Arm.

20. In 1877, the Indian Reserve Commission allotted two reserves on Shuswap Lake near the current municipality of Salmon Arm to be used jointly by the Neskonlith, Adams Lake and Little Shuswap Lake Indian Bands, in an area that their ancestors traditionally used, with the understanding that the aboriginal people would continue to live in the area and use it to sustain their families.

21. The two Indian Reserves allotted in 1877 at Salmon Arm for the common use of the three Indian Bands were surveyed in 1885 as Salmon River Indian Reserve No. 1 and

Salmon River Indian Reserve No.2. Salmon River Reserve No. 2 being to the north of Salmon River Reserve No. 1, with the Salmon River Delta located on it.

22. Later, the joint Indian reserves were divided between the three Indian Bands. The northern reserve, which the 1885 survey referred to as Salmon River Reserve No. 2, was assigned as an exclusive reserve of the Little Shuswap Lake Indian Band. Salmon Arm Indian Reserve No. 1 was divided into Parcels A, B and C. The northern and southern blocks, A and B respectively, were given over to the Adams Lake Indian Band while block C – between Adams Lake Band's Blocks A and B - was given over to the Neskonlith Indian Band. Blocks A and B of the Adams Lake Indian Band became their current Reserves 6 and 7 respectively, while Block C became what is now known as Neskonlith Indian Band Switzmalph Reserve No. 3 (the "Neskonlith Indian Reserve #3").

23. The Salmon River Delta and part of its floodplain are located on the Neskonlith Indian Reserve #3. The Neskonlith Indian Band and its members have ensured the protection of the Salmon River Delta and Floodplain, which remains the last unregulated river delta in the Shuswap Lake watershed and an important traditional and current use area for the Lake Secwepemc People.

24. The Neskonlith Indian Reserve #3 consists of band land and land held by individual band members by way of certificates of possession. A number of Neskonlith Indian Band members and families hold certificates of possession along the Salmon River and its Delta and more are located in the Floodplain.

25. These Indian reserve lands and properties are subject to flooding, and would be vulnerable to any flood hazard that might be created by the proposed Development. Many Neskonlith Indian band members have their family homes located in the Floodplain. Properties in the immediate vicinity of the Salmon River flood regularly.

26. A number of homes and the Neskonlith Indian Band Health Centre are located along First Nations Road on Neskonlith Indian Reserve #3, and are all subject to flood risk. The intention of the Neskonlith Indian Band is to mitigate flood risk, and they are

concerned about any development which might constitute a flood hazard in the Salmon River Delta Floodplain.

27. The Switzmalph Cultural Centre is located on 1st Avenue SW, which constitutes the Eastern Boundary of the Neskonlith Indian Reserve #3. It is currently located in two trailers (on blocks) set up for cultural education activities and meetings.

28. The Switzmalph Cultural Society (“SCS”) was established by members of the Neskonlith Indian Band and local citizens from Salmon Arm under the guidance of revered Neskonlith Indian Band elder, Dr. Mary Thomas, who was a key knowledge holder of the Secwepemc Nation.

29. Dr. Mary Thomas was born as a member of the Lake Secwepemc people in 1918. She grew up on the Neskonlith Indian Reserve and learned about indigenous uses of plants and animals in Secwepemculecw, including the Salmon River Delta, from her grandparents, who were also Secwepemc elders. She spent a lot of time harvesting plants, fishing and learning traditional activities in the Salmon River Delta. In her adult life she worked with many Secwepemc elders to share and help protect their knowledge and started sharing it herself, passing it on to her children, family, community and scholars, including Professor Nancy Turner and her students. She dedicated much of her time and later life to protecting the Salmon River Delta and floodplain, recognizing its importance as an important ecosystem for regeneration of our traditional plants, for the animals and as an important cultural and spiritual place for Secwepemc people. She received honorary doctorates from the University of Victoria and the Thompson Rivers University for her work and passed away in 2007.

30. Dr. Mary Thomas was also instrumental in setting up the Salmon River Watershed Roundtable, to protect the Salmon River Delta and also the entire Salmon River Watershed.

31. Mary Thomas’ family, the Neskonlith Indian band and local supporters continue to implement the vision of Mary Thomas to protect the Salmon River Delta, share

indigenous knowledge and provide cultural education for indigenous peoples and non-indigenous persons.

32. SCS has played a very important role in preserving the cultural heritage of the Secwepemc people and protecting the natural values of the Salmon River Delta and floodplain. Over more than a decade the SCS has worked towards establishing cultural programme for the general public in and around the Salmon River Delta and floodplain. Dr. Mary Thomas dedicated 26 acres of her land for this purpose. A network of trails into the Salmon River Delta has been set up, along with a number of cultural structures, which include traditional Secwepemc winter homes (kekulis), temporary shelters and smokehouses built from traditional materials retrieved from the Salmon River Delta. Members of the Switzmalph Cultural Society and Neskonlith Indian Band members offer tours to those cultural structures and trails, which includes sharing of Secwepemc traditional knowledge.

33. A number of Band members are allowing use of their certificate of possession lands along the Salmon River and its Delta for restoration activities, including reintroduction of traditional plants such as wapato, greenhouses and for cultural activities.

34. This all constitutes an important and growing opportunity for economically, culturally and environmentally sustainable development on the Neskonlith Indian Reserve #3 which includes cultural and eco-tourism. The Neskonlith Indian Band is involved in a comprehensive community planning process that aims at increasing such sustainable development consistent with Secwepemc values, including on Neskonlith Indian Reserve #3.

35. The Neskonlith Indian Band supports the proposal of the Switzmalph Cultural Society to develop the Mary Thomas Cultural Centre and Heritage Sanctuary, which has also been supported by Community Futures. It has been described as creating a hub of economic opportunity within the Shuswap Region, benefitting Neskonlith Indian Band members and the entire Shuswap Region.

36. The plan includes construction of a permanent cultural centre in a manner that is consistent with proper planning and building processes in the Floodplain. A number of the cultural demonstration projects have shown how to take into account both ground and surface water flows.

37. The City of Salmon Arm's official community planning process did not include any information about the community planning of the Neskonlith Indian Band and their reserves, including Neskonlith Indian Reserve #3, appeared as blank spots in the planning maps. The economically, culturally and environmentally sustainable development activities planned by the Neskonlith Indian Band in the area were not taken into account during the City's planning process, including the official community plan amendment regarding the proposed Development.

Salmon River Delta and Floodplain and the Development Property

38. The Salmon River Delta and Floodplain is delineated by the Shuswap Lake to the North and Highway #1 to the South. The Highway and the CPR railroad tracks/belt have restricted the Salmon River Delta. The Salmon River between Highway #1 is unregulated and meanders extensively. There are also a number of flood channels in the area, which flood in periods of high water and serve as fish habitat and important riparian areas.

39. The Neskonlith Indian Reserve #3 is located downstream from and borders on the proposed development property for the Development in its north-west corner (the "Development Property").

40. The Salmon River Delta and Floodplain is located in the heart of Secwepemc territory and constitutes a key traditional and current use area.

41. The Development Property criss-crosses the Salmon River and does not follow natural boundaries. In addition, a number of important flood channels of the Salmon River Delta are located on the Development Property.

42. The Development Property is located within an area designated as an "environmentally hazardous area", namely a floodplain, which also covers the Neskonlith

Indian Reserve #3 and the entire area between the Shuswap Lake shore and Highway #1 and beyond.

43. Until 2005, the majority of the Development Property, except for a narrow strip along the highway, formed part of the Agricultural Land Reserve (ALR). This designation ensured that the land would not be significantly altered by commercial industrial development. No consultation process was initiated with the Neskonlith Indian Band regarding removal of the Development Property from the ALR.

The RAR and OCP Amendment Processes

44. The Development Property was subsequently purchased by the Developer with the intention of constructing a large scale shopping centre, which in turn required an amendment of the City's Official Community Plan ("OCP") and rezoning of part of the Development Property as "commercial-industrial". In addition, because the Development Property borders on the Salmon River and a number of its flood channels are located on the Development Property, a Riparian Area Regulation ("RAR") Assessment is required before any development can proceed.

45. In September of 2009, the Neskonlith Indian Band became aware of fill being illegally placed by the Developer on the Development Property. On September 21, 2009, Chief Wilson wrote a letter on behalf of the Neskonlith Indian Band regarding the proposed Development, in which concerns were raised about the impacts of the proposed development on Neskonlith Indian Band lands downstream from the Development Property and the potential infringement of Aboriginal Title and Rights.

46. On October 19, 2009, the City responded by way of letter, in which it advised that that the Ministry of the Environment had approved the RAR report and that the Developer had submitted an application for an OCP amendment.

47. On November 23, 2009, the Director of Operations for the Neskonlith Indian Band sent a follow-up letter, and raised concerns about a lack of consultation on various issues, including impacts on the Salmon River Delta and Floodplain.

48. On December 14, 2009, Chief Wilson made a presentation regarding the proposed Development to the City.

49. On May 26, 2010, Chief Wilson sent a letter to the City of Salmon Arm, setting out the concerns of the Neskonlith Indian Band regarding the Development in detail.

50. On July 14, 2010, the Shuswap Nation Tribal Council sent a letter regarding the Development, in which concerns were expressed about the lack of a proper engagement process with the Secwepemc people. The Neskonlith Indian Band is a member of the Shuswap Nation Tribal Council and agrees with the content of that letter.

51. The City of Salmon Arm conducted the first and second hearing of the application for the OCP amendment and rezoning regarding the Development in June of 2010, and the public hearing commenced on July 20, 2010.

52. Members of the Neskonlith Indian Band participated in the public hearing, raising concerns about the potential impacts of the proposed Development on the neighbouring Neskonlith Indian Reserve lands and ongoing Secwepemc uses of the Salmon River Delta and Floodplain. They, along with numerous other speakers, also raised concerns about the lack of a proper consultation process with the Neskonlith Indian Band.

53. The City advised that no further information would be received by Salmon Arm City Council until a final decision regarding the applications for an OCP amendment and rezoning of part of the development properties was taken. The applications passed third reading in July 2010. Salmon Arm City Council conducted the fourth reading and approved the OCP amendment and rezoning application by the Developer on December 20, 2010.

The Environmentally Hazardous Area Development Permit Application

56. On December 17, 2010, Chief Wilson sent a letter to the City raising ongoing concerns about flooding and lack of a proper consultation process.

57. By letter dated January 24, 2011, the City's Acting Mayor advised Chief Wilson that three separate development permit applications were required for the Development;

namely, a highway corridor development permit; a development permit; and a hazardous area development permit. He also noted that with regard to a floodplain hazardous area, it is the consulting engineer's responsibility to meet all applicable bylaws and best practices, including the guidelines of the Association of Professional Engineers and Geoscientists of BC (APEGBC).

58. On March 17, 2011 Chief Wilson sent a letter to the City of Salmon Arm in which she raised the lack of studies regarding the impacts of the proposed Development, and in particular with respect to the potential increased risk of flooding on downstream lands. Chief Wilson requested that the requisite studies be conducted, the City advise about the process they intend to follow to engage in meaningful consultation with the Neskonlith Indian Band, and that no permit be approved until such a process had been established.

59. The City's mayor responded by letter March 30, 2011, in which he stated that once the environmentally hazardous area development permit application was received, it would be referred to the Band for comment. The letter did not address the request for the establishment of a consultation process.

60. By letter dated April 1, 2011 (sent before receipt of the mayor's letter of March 30, 2011), Chief Wilson reiterated the concerns of the Neskonlith Indian Band concerning the Development, and emphasized that the Band was still awaiting a response regarding the establishment of a proper consultation process about the proposed Development.

61. A further letter dated April 11, 2011 was sent to Chief Wilson by the City's mayor, but the letter did not respond to the Band's requests regarding the establishment of a consultation process.

62. On April 12, 2011, Chief Wilson sent a further letter to the City requesting information regarding the environmentally hazardous area development permit application and the highway permit application; and again inquired about the establishment of a proper consultation process.

63. By letter dated May 9, 2011, the City advised that the hazardous area development permit application had been received and would be forwarded to the Band, but the letter made no reference to the establishment of any sort of consultation process.

64. The City subsequently sent a referral for the environmentally hazardous area development permit application, which included a May 6, 2011 report prepared by Stantec, a consulting firm retained by the Developer.

Neskonlith Concerns about the Development

65. The Neskonlith Indian Band has long been concerned about development in the Salmon River Delta and Floodplain which might constitute a flooding risk or hazard to their reserve lands and traditional uses of the area. Accordingly, the Band thought it essential that, in the absence of any proper consultation process having been established, they obtain independent advice on these critically important issues respecting the proposed Development.

66. Accordingly, the Band retained Professor Michael Church, a pre-eminent fluvial geomorphologist and geoscientist, to prepare a report about the potential flooding risk posed by the Development Property and the potential impacts on neighbouring lands and ecological values.

67. Professor Church prepared a report dated May 31, 2011 (the "Church Report"). His opinions and conclusions can be summarized as follows:

- (a) the environmentally hazardous area development application materials, or any of the studies referenced therein, do not properly assess the potential flood hazard posed by the Development;
- (b) more specifically, the materials and studies to date do not adequately assess the potential flood hazard to the proposed development itself and the property on which it is located;
- (c) the flood hazard assessment undertaken by Stantec in its May 6, 2011 report was based on obsolete information gathered over twenty years ago,

and there is substantial evidence that the flood hazard has increased since that time;

- (d) because it was planned on the basis of obsolete information, the proposed Development lacks the expected freeboard factor of safety against the flood hazard, and is sited too low by more than 1 metre;
- (e) flood flows may well be increasing because of (i) land use changes in the drainage basin leading to more rapid runoff formation; (ii) forest harvesting and beetle kill may lead to more exposed terrain and more rapid snowmelt; and (iii) climate change may induce increased precipitation and consequent floods;
- (f) in order to adequately assess the potential flood hazard, the flood profile through the Salmon River Delta should be re-analyzed using updated hydrological and topographical data and current analytical methods, and with a reasoned consideration of possible further hydrological changes over the design life of the project that takes into account prospective changes in forest cover and upstream land use;
- (g) it would be in the interests of the community to have a more complete flood risk assessment undertaken;
- (h) if the Development were to proceed without further studies being done, and it was to subsequently flood, the value of the investment on the site would necessitate the establishment of flood mitigation measures, including either river channel modifications or dike construction;
- (i) if those measures were undertaken, water levels on unprotected adjacent properties would increase, particularly upstream, and they are likely to affect the pattern of river erosion and sedimentation throughout the delta. This would lead to ecological damage in an environmentally sensitive area, including damage to adjacent First Nations lands that carry important cultural values;
- (j) the permit application materials, and the studies referenced therein, do not adequately assess the risk from the proposed Development to neighbouring ecological values;

- (k) floodplains are complex ecosystems, and essential exchanges of nutrients and material do not stop at the five year flood boundary. There remains the possibility for disturbances to arise from intensive and obtrusive human activity on the site, noise, night lighting, weed invasion, drainage water leaving the site, disturbance of subsurface water flows, microclimate changes or from stimulation of further adjacent development;
- (l) no analysis of the risk to neighbouring ecological values from such disturbances has been conducted, and such an analysis should be conducted, including the potential consequences of future flood protection measures for the Development Property; and
- (m) detailed studies of potential site run off and subsurface groundwater should be conducted given that the Development Property is situated on a significant wetland and riparian zone which has exceptional ecological value.

68. Chief Wilson enclosed a copy of the Church Report with a letter dated June 3, 2011 to the City, in which she again raised the Band's concerns about the flood hazard and called for a proper study of the flood hazard and risk and immediate engagement in a proper consultation process.

69. The Neskonlith Indian Band is very concerned about the potential impact of flood mitigation measures being put in place to protect the Development Property, such as channelling and dike construction. They are aware of the impacts even small changes in the river or flood channels have had on the Salmon River, and are concerned about losing useable land base and potentially experiencing increased flooding, particularly as there are no flood mitigation measures in place on the Neskonlith Indian Reserve #3.

70. The Neskonlith Indian Band has always recognized the importance of the Salmon River Delta and Floodplain as a highly important ecosystem with interconnected ground and surface water levels and flows. They have worked hard to protect and restore the ecological functions of the area and maintain it as a current and traditional use area. They have serious concerns about the impact the proposed development and associated

flood mitigation measures would not only have on neighbouring lands, such as the Neskonlith Indian Reserve #3, but also on ecological values.

71. The City forwarded the Church Report to the Developer, and Stantec provided a response dated June 24, 2011. Neither author of the June 24, 2011 Stantec report is a member of the Association of Professional Engineers and Geoscientists of British Columbia. The City did not forward a copy of the Stantec response to the Neskonlith Indian Band for comment, nor did they provide the Band with proper notice of the meeting of the City of Salmon Arm Planning Committee on July 4, 2011 when these reports were considered and discussed.

72. Representatives of the Neskonlith Indian Band, including Councillor Tammy Thomas, attended the City of Salmon Arm Planning Committee meeting, but were not provided an opportunity to address the meeting, which heard extensively from the Developer and Stantec staff. It was acknowledged during the meeting that the City did not have the expertise on staff to provide proper advice to Council on the competing opinions and reviews expressed in the various reports before them (including the Church Report). The Planning Committee ultimately voted to recommend approval of the Permit application to City Council, despite concerns being raised by dissenting councillors about the lack of consultation with First Nations and the age of the data being relied on by Stantec.

73. Professor Church prepared a reply to the Stantec report, dated July 5, 2011 (the "Church Reply"), and which contains the following opinions and conclusions:

- (a) the June 24, 2011 Stantec report does not change his opinion that the potential flooding hazard from the proposed development has not been properly assessed and that further work is required to properly assess the flood hazard and the resulting flooding risk;
- (b) Stantec continues to rely on obsolete figures, the hydrological analysis must be updated to include recent data, and the floodplain mapping redone. Alternative lake level scenarios that properly take into account joint probabilities for lake levels and river flows should be incorporated

and propagated upstream within the hydraulic model used to establish river water levels;

- (c) Stantec's dismissal of the 20 year trend of rising flows in the river on the basis that events in the watershed, such as forest regrowth, must eventually reverse the effect, is an irresponsible position to take;
- (d) he continues to disagree with Stantec's conclusions in its May 6th report that the proposed Development can be safely used for the intended purpose and there are no hazards that would preclude the construction of the proposed development in its current form;
- (e) Stantec has not provided a valid critique of his conclusion that there is a substantial likelihood for the Development Property to be inundated within the near future;
- (f) the June 24, 2011 Stantec report does not change his opinion that the potential impacts of the proposed development on neighbouring ecological values have not been properly assessed and that further work is required to properly assess those impacts; and
- (g) while Stantec has dismissed concerns about impacts on neighbouring ecological values as being outside their scope of work, this does not absolve them of advising the Developer that the proposed Development presents significant issues of environmental integrity. The absence of such a practice is a matter of considerable current concern to the Association of Professional Engineers and Geoscientists of British Columbia.

74. On July 7, 2011, Chief Wilson sent a letter to the City enclosing the Church Reply and reiterating the Band's concerns regarding the flood hazard resulting from the Development in its current form and the impact on neighbouring ecological values. The letter also contains a further call for a consultation process to be established. No response was ever received from the City.

75. The Salmon River Delta and Floodplain is a place of tremendous ecological and cultural importance to the Nesklonlith Indian Band. Nesklonlith Indian Band members

and other members of the Sexqelkemoc Lakes Division and the Secwepemc Nation hold extensive traditional knowledge regarding the use of traditional plants in the area, and have been working hard to protect and restore many of these plants and continue to use them.

76. Secwempec People have also fished and continue to fish in the Salmon River Delta and along the Salmon River, including along the Development Property, for numerous species of fish, including many salmon stocks. The Neskonlith Indian Band has worked hard to improve water quality, avoid erosion and protect fish habitat for endangered species such as the South Thompson Coho and different sockeye salmon runs.

77. The Neskonlith Indian Band is very concerned about the impacts that pollution and run off from the Development and potential increased flooding will have on the Salmon River Delta and Floodplain and the different plants and wildlife to which it is home and that their members continue to use.

78. Accordingly, and in the absence of any proper consultation process having been established, the Neskonlith Indian Band obtained a report from Professor Nancy Turner, British Columbia's foremost ethnobotanist, regarding the ecological and cultural values and the ethnobotany of the Salmon River Delta and Floodplain, which is dated July 5, 2011 (the "Turner Report"). The opinions and conclusions contained in the Turner Report can be summarized as follows:

- (a) the Salmon River Delta and Floodplain, including the Development Property, has had – and continues to have – very high cultural and ethnobotanical importance;
- (b) this is based over 70 culturally important plants, the vast majority named in Secwepemcetsin and known to many Secwepemc elders, that have been documented in the area of Salmon Arm and the Salmon River estuary, or are presumed to occur there based on their habitat requirements and occurrence in similar habitats;

- (c) the Salmon River Delta and Floodplain incorporate a relatively rare ecosystem type – ranked as one of BC’s rarest plant communities – the Cottonwood Riparian Ecosystem;
- (d) the protected areas at the mouth of the Salmon River are rated as having the highest conservation value and highest vulnerability in the Okanagan Ecoregion;
- (e) Dr. Mary Thomas, the late Secwepemc Elder and knowledge holder, based on her own experience, recognized the Salmon River Delta and Floodplain as an area of high biodiversity with a number of key plant food species (eg. wapato, water parsnips, field mint, highbush cranberry, hazelnut), technology species (eg. cattail, Indian-hemp, skunk cabbage, cottonwoods, “swamp hay”), and medicinal species that once were abundant;
- (f) these species not only provided resources for people, but also served as critical habitat for many species of important birds (blackbirds, bluebirds, grebes, coots, mallards) and mammals (deer, bear, beaver, muskrat) and helped keep the water clean and suitable for fish, freshwater mussels, and aquatic insects and invertebrates;
- (g) in sum, the area has served as both a critically important ecological and cultural refugium and has been a quintessential “cultural keystone place”, even over a time of tremendous and unrelenting development, change and environmental deterioration;
- (h) Dr. Thomas has also identified a number of factors that have caused deterioration in the Salmon River Delta and Floodplain, including species loss and reduction, overgrazing and trampling by domesticated animals, mosquito suppression, road salt, alteration of river channels, water flow reductions and invasive species;
- (i) accordingly, the remaining areas of habitat that exist are all the more important both ecologically and culturally;
- (j) thorough studies of the vegetation, mammals, birds, fish and invertebrates of the area, along with the archaeological context and traditional use of the

- Salmon River Delta and floodplain have not been conducted and are necessary before a determination is made to further reduce the area of the Salmon River Delta and Floodplain through commercial development;
- (k) the potential impacts of the Development on the ethnobotany and indigenous uses of the area are unknown and require comprehensive examination and analysis;
 - (l) this includes an analysis of the impacts on the Neskonlith Indian Band's recent restoration and sustainable development activities;
 - (m) the connection between lost habits and lost resources and lost knowledge and practices is a close one, and even if damaged habitats and extirpated species are later restored, the cultural knowledge and practices may be lost once that connection is severed;
 - (n) in conducting additional studies on the impacts of the proposed Development, it is important to consider "invisible losses" for Indigenous Peoples, including cultural/lifestyle losses, loss of identity, health losses, loss of self-determination and influence, emotional and psychological losses, loss of order in the world, knowledge losses and indirect economic losses and lost opportunities;
 - (o) the current understanding of the vegetation and animal life of the Salmon River Delta and Floodplain is inadequate to allow informed planning and decision-making about any further alterations and reductions of the area through development. Further, the knowledge and practices of the Sexqelkemoc and other Secwempec Peoples relating to the area – past and current – have not been adequately or appropriately documented;
 - (p) a detailed traditional use study of the Salmon River Delta and Floodplain is required;

79. A copy of the Turner Report was also enclosed with Chief Wilson's letter of July 7, 2011 to the City.

80. Chief Wilson personally attended the public hearing regarding the Permit application that was held in Salmon Arm on July 11, 2011. At that hearing, she reiterated

the position of the Neskonlith Indian Band that the proposed Development should not be allowed to proceed without proper consultation with the Neskonlith Indian Band around the flood hazard and risk issues and the impacts on the ethnobotany and other cultural and ecological values. She also stated that the further studies called for by the experts on these important issues to the Secwepemc People had to be completed before the Development could be approved. Notwithstanding those submissions, the Permit application was approved by a majority of the City Council.

Part 3:LEGAL BASIS

81. The Petitioners will rely on s. 35 of the *Constitution Act, 1982*, the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 as amended, the *Flood Hazards Statute Amendment Act, 2003*, S.B.C. 2003, c. 72, the *Local Government Act*, R.S.B.C. 1996, c. 323, as amended, the *Land Title Act*, R.S.B.C. 1996, c. 250, as amended, and the British Columbia Supreme Court *Civil Rules of Court*, B.C. Reg. 168/2009 as amended, and such further and additional legislation and authorities as the Petitioner advises and this Honourable Court allows.

82. The Crown in the Right of the Province of British Columbia has a constitutional duty to consult with First Nations with respect to decisions taken about the use of land or other matters which might affect claimed, but unproven Aboriginal Rights or Title.

83. The nature of the required consultation depends on the strength of the claim and on the potential for the proposed use of land or other Crown authorized activity to have negative impacts. The consultation must be carried out in good faith, and may lead to duties to accommodate in appropriate cases.

84. The Crown is required to afford the First Nation a right of consultation that is meaningful. Consultation and accommodation are the concrete requirements mandated by the need for the Crown to act honourably in its dealings with First Nations.

85. Prior to 2003, the Province had the authority to designate, protect and regulate areas at risk of flooding under section 82 of the *Land Title Act* ("LTA") and section 910 of the *Local Government Act* ("LGA").

86. Pursuant to section 82 of the *LTA*, the Province had the authority to designate flood plain areas, set conditions for approving subdivisions in those areas, and reject subdivision applications outside designated areas if that other area would likely be subject to flooding.

87. Pursuant to section 910 of the *LGA*, both the Province and local governments had the authority to designate lands as a floodplain, specify flood levels for a floodplain and specific setbacks from floodplains, but all local government decisions in that regard had to be approved by a provincial Minister.

88. By way of the *Flood Hazards Statute Amendment Act, 2003*, the Province repealed and/or amended section 82 of the *LTA* and s. 910 of the *LGA* and delegated authority to designate and regulate flood plains and other areas at risk of flooding to local governments. It was expressly acknowledged that the purpose of the legislative change was to allow for increased local government control and accountability over land use decisions associated with floodplain management (and to cut the “red tape” and costs associated with provincial approval of those land use decisions).

89. With the assumption of decision-making authority over land use decisions within floodplains, local governments also assumed the provincial Crown’s constitutional obligation to consult with First Nations about the impact of those decisions on asserted, but unproven Aboriginal Rights and Title.

90. The Neskonlith Indian Band is one of three member bands of the Sexqeltkemoc Lakes Division, a traditional division of the Secwepemc (Shuswap) Nation, an Aboriginal People of Canada holding unextinguished Aboriginal Rights and Title.

91. The Sexqeltkemoc Lakes Division bears the responsibility for the part of Secwepemculecw that includes the Shuswap Lakes Watershed, including the Salmon River Delta and Floodplain in which the Development Property is located. As part of the Sexqeltkemoc Lakes Division, the Neskonlith Indian Band is responsible for the protection and management of their part of Secwepemculecw, in accordance with Secwepemc laws, customs and traditions requiring that they act as caretakers of the land.

92. It is within that context that the Neskonlith Indian Band asserts Secwepemc Aboriginal Rights and Title, and has sought to be consulted in respect of the proposed Development. The Development Property is not only located within the part of Secwepemculecw for which the Sexqeltkemoc Lakes Division bears responsibility, but is also immediately adjacent to the Neskonlith Indian Reserve #3, which is not currently protected by flood mitigation measures.

93. In the case of the Development Property, before approving an Environmentally Hazardous Area Development Permit application, the City advised the Neskonlith Indian Band that they would be requiring the Developer to hire a consulting engineer to ensure that the Development can be used safely for the use intended, and it that met all applicable bylaws, legislation, guidelines and best practices, including the guidelines of the Association of Professional Engineers and Geoscientists of BC (APEGBC).

94. The City also advised that City staff would review the consulting engineer's report and, if satisfied, recommendations would be made to City Council to approve the Permit application. The City has subsequently acknowledged that it does not have the expertise on staff to provide proper advice to the Council with respect to engineering reports prepared in support of Environmentally Hazardous Area Permit applications.

95. That is particularly problematic in respect of the impugned Permit application as Stantec did not employ members of APEGBC in at least one of the reports put before Council in support of the application, while the Neskonlith Indian Band submitted a report from a pre-eminent fluvial geomorphologist (and APEGBC member), raising concerns about the lack of adequate assessment of flooding risk and potential impacts on neighbouring ecological values.

96. Despite repeated assertions of Aboriginal Rights and Title, and repeated requests for the establishment of a consultation process to discuss its concerns about the potential impact of the Development on asserted Rights and Title (and reserve lands), and notwithstanding the provision of two expert opinions which both confirm the need for further study of potential impacts on aboriginal interests, the City has refused to engage in any consultation process with the Neskonlith Indian Band.

97. Accordingly, the Permit must be quashed and a declaration issued respecting the necessity of establishing a meaningful consultation process with the Neskonlith Indian Band.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Chief Judy Wilson, sworn July 15, 2011
2. Affidavit #1 of Dr. Nancy Turner, sworn July 26, 2011
3. Affidavit #1 of Michael Church, sworn July 25, 2011
4. Such further and additional materials as the Petitioners may advise and this Honourable Court may allow.

The petitioner estimates that the hearing of the petition will take 2 days.

Dated: July 27, 2011.



 Mark G. Underhill
 Counsel for the Petitioner

<i>To be completed by the court only:</i>	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs <i>[specify]</i> of Part 1 of this notice of application
<input type="checkbox"/>	with the following variations and additional terms: <i>[specify]</i>
Date: <i>[month, day, year]</i>	_____ Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master

No. _____ Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NESKONLITH INDIAN BAND

PETITIONER

AND:

**THE CITY OF SALMON ARM
SALMON ARM SHOPPING CENTRES INC.**

RESPONDENTS



PETITION

**Mark G. Underhill
Underhill, Boies Parker
Law Corporation Inc.
Barristers
440 - 355 Burrard Street
Vancouver, BC V6C 2G8
Telephone: 604-696-9828
Facsimile: 604-696-9858
File No. 10285/MGU**