

## **Overview**

*The environmental assessment process chosen by the federal and provincial governments for the Site C Project did not consider or determine whether or not an approval of the Site C Project would constitute an infringement of First Nation rights under Treaty No. 8. In fact, at no point in the process, even when the Site C Project was before the federal and provincial governments for environmental approval, did any government decision-maker indicate publicly its consideration or determination, if any, of whether its decision to approve Site C would infringe Treaty rights. The same assessment process also did not comprehensively assess cumulative environmental effects and related cumulative impacts to First Nation rights under the Treaty. Given the large scale of development activity in the Peace River watershed, these matters are subject to ongoing litigation by two Treaty 8 First Nations, as well as a local landowner association. This has raised a range of significant issues, including whether any Treaty infringement resulting from the project could be justified according to the Sparrow test. Considering the importance of these issues, the Federal Government's stated commitment to reconciliation with First Nations and the Supreme Court's invocation of the 'honour of the Crown' as a key element of Crown-Indigenous relations, it would be inappropriate to proceed with the Site C Project, including issuing any further permits related to construction and operation of the Project, before a review has been conducted by the BC Utilities Commission, and before decisions have been rendered by the courts.*

## **Contents**

Our analysis is presented as follows:

- Historical and regulatory context (1.1)
- Environmental assessment of the Site C Project (1.2)
- Consultation and reconciliation opportunities (1.3)

### **1.1 *Historical and regulatory context***

#### **1.1.1 Treaty No. 8**

Treaty No. 8, first entered into on June 21, 1899, is one of several numbered treaties concluded between the federal government and various First Nations between 1871 and 1923 in order to facilitate the westward expansion of colonial settlement of the western half of what is now Canada.

Treaty No. 8 provides, in part:

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands ... TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors forever. ...

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Treaty No. 8 therefore provides for the protection of the First Nations' "usual vocations of hunting, trapping, and fishing" throughout the Treaty territory. The Crown, in order to assure the First Nations that their ways of life would not be negatively affected, also made a number of oral promises, including that:

- a. the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
- b. they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and
- c. the Treaty would not lead to "forced interference with their mode of life"<sup>1</sup>

Treaty No. 8 rights are, therefore, much more than rights to hunt or fish "for food".<sup>2</sup> In *Mikisew*, for example, the Supreme Court held that in consideration of the Crown's oral promises, Treaty No. 8 rights protect the continuity of traditional hunting practices:

*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed

<sup>1</sup> *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247 [2011], B.C.J. No. 942, para. 130 [citing *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39].

<sup>2</sup> *Ibid.*, para. 130.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

before it” (p.5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines. ...<sup>3</sup>

The Court held further that the Treaty protected a “meaningful right to hunt” within the local hunting grounds of a Treaty 8 First Nation, and not on a Treaty-wide basis:

The “meaningful right to hunt” is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation “no meaningful right to hunt” remains over *its* traditional territories, the significance of the oral promise that “the same means of earning a livelihood would continue after the treaty as existed before it” would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.<sup>4</sup>

The *Sparrow* case was the first to consider the application of Section 35 of the *Constitution Act, 1982*.<sup>5</sup> *Sparrow* recognized that the Section 35 right to fish is broader than a right to harvest. Such rights are *sui generis*, and include rights that are necessary to the meaningful exercise of the right at issue.<sup>6</sup> In this and subsequent cases, Canadian courts have clarified that existence of these rights is about preserving ways of life that depend on access to the resource as well as continuity in the resource being harvested, the manner of harvesting, and the habitat on which the resource depends.

In *West Moberly*, for example, the British Columbia Court of Appeal referenced the importance to the exercise of treaty rights of traditional territories and continuity in traditional patterns. The majority of the Court held that the right to hunt includes protection not only for hunting within a First Nation’s specific hunting grounds, but also for particular species forming part of the traditional seasonal round:

... while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a “continuity in traditional patterns of economic activity” and respect for “traditional patterns of activity and occupation”. The focus of the analysis then is those traditional patterns.<sup>7</sup>

<sup>3</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 47.

<sup>4</sup> *Ibid.*, paras. 47-48.

<sup>5</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>6</sup> See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, para. 22.

<sup>7</sup> *West Moberly*, *supra* note 1, para. 137.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

Thus, while the text, context, and oral promises determine the general nature and scope of the harvesting rights of all Treaty 8 First Nations, the Treaty also provides protection for important species and other aspects of harvesting practices traditionally exercised by a given Treaty 8 First Nation within its local hunting grounds.

### 1.1.2 ‘Taking Up’ and Infringement

Harvesting practices can be exercised "throughout the tract surrendered" to the Crown, "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The Supreme Court has held that Crown lands are considered "taken up" or "occupied" when they are put to an active use that is visibly incompatible with the treaty right in question.<sup>8</sup>

Neither party to the Treaty expected the amount of land eventually taken up would seriously affect hunting or fishing rights or the First Nation’s traditional means of earning a livelihood. As summarized in *West Moberly*:

Just as the right to hunt must be understood as the treaty makers would have understood it, so too must “taking up” and “mining” be understood in the same way. As the Supreme Court of Canada said in *Badger* at para. 55:

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners ... indicated that “it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap”. The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights.<sup>9</sup> [emphasis in original]

The majority went on to note the treaty makers would not have contemplated that “areas of important ungulate habitat” would be destroyed by large-scale mining operations:

... “some white prospectors [who] might stake claims”, to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as

<sup>8</sup> *Badger*, supra note 1, para. 59.

<sup>9</sup> *West Moberly*, supra note 1, para. 134.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures.<sup>10</sup>

Effectively, MEMPR [the provincial Ministry of Energy Mines and Petroleum Resources] regarded the petitioners' Treaty 8 right to hunt as subject to, or inferior to, the Crown's right to take up land for mining or other purposes. There are at least two problems with this approach. First, it is inconsistent with what First Nations peoples were told when the Treaty was signed or adhered to. They were given to understand that they would be as free to make their livelihood by hunting and fishing after the Treaty as before, and that the Treaty would not lead to “forced interference with their mode of life”. Second, the concept of mining, as understood by the treaty makers would never have included the possibility that areas of important ungulate habitat would be destroyed by road building, excavations, trenching, the transport of heavy equipment and excavated materials, and the installation of an “Addcar system”.<sup>11</sup>

This points to limits in the ability of the Crown to ‘take up’ within the terms of the Treaty. At some point what might appear to be taking up becomes a matter of infringement. Considering what Canadian courts have said about the nature of Treaty 8 rights and their protection, one should expect infringement would *not* be a remote possibility, arising only in rare circumstances. The rights protected are not just to ‘generic’ hunting and fishing activities, but to *ways of living* the Crown promised to maintain, as modes of living *continuous* with those enjoyed by First Nations before treaty-making. Questions of consultation and accommodation reveal that this line between taking up and infringement is extremely important to Treaty First Nations, and that this line *must* be determined should the Crown be able to assess whether it is acting honourably.

International human rights principles and international instruments, such as the *United Nations Declaration on the Rights of Indigenous Peoples*,<sup>12</sup> assist in defining the line between taking up and infringement and the Crown’s obligations to First Nations. The *Declaration* requires a high standard of protection for Indigenous peoples’ rights, including the right to traditional lands, territories and resources, to protection of cultural heritage, to maintenance of their cultural and spiritual traditions, to preservation of the economic integrity of their communities through connection to specific territories and exercise of traditional practices such as hunting, fishing and trapping, and to free, prior and informed consent respecting decisions that may affect or harm

<sup>10</sup> *Ibid.*, para. 135.

<sup>11</sup> *Ibid.*, para. 150.

<sup>12</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, Sixty-first session, UN Document A/RES/61/295 (2 October 2007). [‘Declaration’]

their rights and interests.<sup>13</sup> As a (now)<sup>14</sup> full adherent to the *Declaration*, Canada is obligated to protect the rights enumerated therein, and is *also* obligated to consult Indigenous peoples on matters that may affect their rights and interests.<sup>15</sup> The obligation to consult is a general principle of international law but, importantly, does not displace the Crown's obligation to ensure First Nations' substantive rights are protected, respected, and fulfilled.

### **1.1.3 Consultation: Treaty-implementation and Treaty Infringement**

During consultation in relation to the Site C Project, Treaty 8 First Nations did not need to prove their treaty rights had already been established at law – treaty rights are established, existing rights. As held in *West Moberly*:

In examining the nature and scope of the petitioners' right to hunt, it must be remembered that it is not merely a right asserted and as yet unproven, as in cases of Aboriginal rights claims in non-treaty cases. Here the right relied on is an existing right agreed to by the Crown and recorded in a Treaty. While there may be disagreement over the limits on or the scope of the right, consultation must begin from the premise that the First Nations are entitled to what they have been granted by the Treaty.<sup>16</sup>

Consultation is at issue on both sides of this line between taking up and infringement in relation to the Site C Project. Considering existing treaty rights, when the Crown acts under its rights within the treaty (that is, in 'taking up') the Supreme Court has held that it still must consult about how it acts in this regard. In *Mikisew*, the Supreme Court faced a situation involving established rights under Treaty No. 8 and the Court held that the honour of the Crown required that, even when it was merely 'taking up' according to its abilities under the Treaty, the Crown would still be subject to the sort of spectrum of possible consultation obligations laid out in *Haida*.<sup>17</sup>

In addition, however, is the matter of infringement – when the Crown moves *beyond* what it is capable of doing within the Treaty to activities that *infringe* the First Nations' Treaty rights, it falls under a different set of legal obligations. There the Crown must act to justify its

<sup>13</sup> *Ibid.*, articles 3, 5, 8(1), 10-13, 15, 19-21, 25-28, 31(1).

<sup>14</sup> Indigenous and Northern Affairs Canada. May 10, 2016. "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples". Available at: [http://news.gc.ca/web/article-en.do?mthd=tp&ctr.page=1&nid=1063339&ctr.tpID=1&\\_ga=1.40822306.1066794629.1422563602](http://news.gc.ca/web/article-en.do?mthd=tp&ctr.page=1&nid=1063339&ctr.tpID=1&_ga=1.40822306.1066794629.1422563602).

<sup>15</sup> *Declaration*, *supra* note 12, preamble, articles 8(2)(b), 13(2), 18, 19, 26(3), 27, 31(2), 32(2).

<sup>16</sup> *West Moberly*, *supra* note 1, paras. 128-9.

<sup>17</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

infringement (if it can). One element of such justification involves the Crown demonstrating that it accorded sufficient weight to the First Nations' rights. Specifically, the Crown needs to demonstrate how it meaningfully consulted with the Treaty First Nations and accommodated the interests at stake, if legally required to do so. This, however, is just part of what might be required to show the Crown has acted properly.<sup>18</sup>

In *Haida*, the Supreme Court set out what consultation at the 'high end' of the spectrum requires for merely asserted rights (a matter carried over to treaty implementation in *Mikisew*):

At the [high end] end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.<sup>19</sup> [emphasis added]

The Federal Court has already determined that the requirements for consultation and accommodation lying on the Crown fall on the deep end of the spectrum in the context of the 'taking up' related to the Site C Project.<sup>20</sup> Despite the importance accorded by the Courts to deep consultation as a means for "finding a satisfactory interim solution" where the "potential infringement is of high significance to the Aboriginal peoples", in the case of the Site C Project several deliberate actions were taken by the Crown to undermine the depth of consultation. Furthermore, at no point was a public determination made as to whether the Site C Project would infringe upon the Treaty rights of First Nations (which would then engage *another* regime of consultation, embedded in general requirements on the Crown to justify any such infringement). These deliberate actions are discussed further below with respect to the policy and regulatory context surrounding the Site C Project. The opportunity remains to remedy some of these actions

<sup>18</sup> *Sparrow*, *supra* note 5, pp. 1113 & 1119.

<sup>19</sup> *Haida*, *supra* note 17, para. 44.

<sup>20</sup> *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030, para 57.

through referral of the Site C Project to the BC Utilities Commission. Other remedies require government action – reflecting an honourable approach, aimed toward reconciliation and respect for the principles embedded in the *Declaration*. This would begin with suspension of issuing permit approvals for construction and operation of the Site C Project pending vitally important determinations concerning the possible impacts on the constitutionally protected treaty rights of the Treaty 8 First Nations. Nothing less than this could possibly accord with the honour of the Crown.

This vitally important matter requires explication, but it is best positioned in a larger discussion, as contained below, concerning the policy-regulatory framework within which the impacts of the Site C Project on treaty rights would be measured.

#### **1.1.4 Two Rivers Policy**

The genesis for the Site C Project lies in a policy first formulated more than a half-century ago, in the 1950s. The Two Rivers Policy was conceived by the then Premier of British Columbia, W.A.C. Bennett, and formed the centrepiece of his government's electricity strategy. The policy called for large-scale hydroelectric development on both the Peace River and Columbia River systems.

The result of the Two Rivers Policy was the development on the Peace River of the GM Shrum Generating Station in 1968 (2730 MW) and the Peace Canyon Generating Station in 1980 (694 MW), as well as the creation of a large electricity surplus that powered industrial growth, served growing demand in the lower mainland, and provided revenues from exports.

In order to facilitate development on the Peace River, the BC government also established flood reserves over large tracts of Crown lands in the Peace River valley. With the removal in 1985 of the flood reserve downstream of the location of the Site C Project to the Alberta border, the remaining flood reserve consists only of the lands required for the Project. This flood reserve, coupled with BC Hydro's policy of purchasing lands that become available for sale within and adjacent to the flood reserve, has served to restrain First Nation's land use within the Peace River valley.

... the existence of the flood reserve has had an adverse impact on the Treaty rights of [Doig River First Nation], [Halfway River First Nation] and [West Moberly First Nations] to select reserve lands in the Peace River Valley in fulfillment of their outstanding Treaty Land Entitlement Claims. For over a decade the Federal Crown has acknowledged that it has not provided these First Nations with the amount of reserve land promised under the terms of Treaty No. 8. The First Nations face many challenges selecting suitable provincial Crown lands in

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

fulfillment of this promise, including competing with the Province's use of the available land for resource development. The loss of the Peace River Valley, either through the development of the Site C Project or the continuation of the flood reserve if the Project is not approved, contributes to these challenges. The lack of opportunity to select reserve lands within the Peace River Valley for the protection of valuable harvesting, cultural or spiritual sites prevents the First Nations from fulfilling a key objective of the settlement of their claims.<sup>21</sup>

The development context for the Site C Project is substantially the result of the Two Rivers Policy:

- 70% of the Peace River valley has already been inundated by the development of the WAC Bennett Dam and Peace Canyon Dam;
- the prior ability of the First Nations to exercise their Treaty rights in the inundated portion of the Peace River is effectively precluded by the development of these hydroelectric projects;
- of the remaining 30% of the Peace River valley within the territory of the most-affected Treaty 8 First Nations, the Site C Project will inundate half;
- the remaining 15% downstream of the location of the Site C Project is less extensively used by these First Nations, being less accessible and lacking the hunting, fishing and cultural significance of the portion proposed for inundation;
- there are no conservation lands or parks within the Peace River valley in which wildlife and First Nation land use values might be protected; and
- the potential for conservation in lands adjacent to the proposed reservoir for Site C is undermined by the road and transmission lines required by the proposed Project.<sup>22</sup>

The other important pieces of the policy-regulatory context concern recent legislative changes to how proposals such as the Site C Project are evaluated.

### **1.1.5 *Clean Energy Act***

The British Columbia *Clean Energy Act* came into force on April 28, 2010, and has played a pivotal role in the planning and evaluation related to the Site C Project. Specifically, the *Act* contains a number of requirements related to how electricity needs must be met, how planning is to be undertaken and how the Site C Project is reviewed, as discussed further in Briefing Note #3 *The Regulatory Process for the Site C Project*.

<sup>21</sup> Treaty 8 Tribal Association. February 3, 2014. Site C Clean Energy Project. Joint Review Panel Hearings – Summary Report Treaty 8 First Nations, (CEAR #63919-2754), p.8.

<sup>22</sup> Treaty 8 Tribal Association. August 19, 2014. Treaty 8 First Nations Comments Post-Panel Stage Consultation, p.9

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

The *Clean Energy Act* also exempts the Site C Project from sections 45 to 47 of the *Utilities Commission Act*, removing the requirement for a Certificate of Public Convenience and Necessity (CPCN). By exempting the Project from the need to obtain a CPCN, the *Clean Energy Act* removes certain procedural requirements related to First Nation consultation that would allow the BC Utilities Commission to make an independent determination as to the adequacy of consultation with First Nations.

The Commission maintains a set of directions to Crown utilities, known as the First Nations Information Filing Guidelines for Crown Utilities (“FN Guidelines”),<sup>23</sup> which detail the usual requirements of a Commission process that in this instance did not occur as a result of the exemption of the Site C Project. The FN Guidelines address three key matters:

- a. the basis for the obligation on the Commission to make a determination respecting the adequacy of Crown consultation with First Nations;
- b. the issues that the Commission will take into consideration when deciding whether the duty to consult has been fulfilled up to the point of its decision; and
- c. the information that must be filed by Crown utilities to allow the Commission to determine whether the Crown’s duty to consult, and if necessary accommodate, First Nations has been fulfilled to the point of the Commission’s decision.

With respect to the basis for the obligation on the Commission, the Supreme Court determined in 2010 (in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650) that the BC Utilities Commission has been provided the mandate necessary to assess the issue of Crown consultation with Aboriginal groups:

It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal’s power ... Beyond its general power to consider questions of law, the factors the Commission is required to consider under s.71 of the *Utility Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups.<sup>24</sup>

Under its mandate and powers, the Commission would be able to consider whether the duty to

<sup>23</sup> British Columbia Utilities Commission. 2010. 2010 First Nations Information Filing Guidelines for Crown Utilities. Order Number G-51-10 [‘FN Guidelines’].

<sup>24</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, paras. 69-70.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

consult had been fulfilled up to the point of its decision (its guidelines essentially follow what was set out in *Haida* and other applicable case law.)

Of note, the Utilities Commission requires Crown utilities to file information that provides:

... the Crown utilities [sic] overall view as to the reasonableness of the consultation process with respect to the application or filing and whether the consultation duty has been adequately fulfilled to the point of the Commission's decision. In preparing the Crown utility's view, consider the evidence along with the following questions:

(i) Whether the consultation process been carried out in good faith and whether it was appropriate and reasonable in the circumstances;

...

(iii) Whether approvals have been obtained from provincial and federal agencies. If so, identify to the extent relevant, any issues raised by First Nations during consultations related to these approvals;

(iv) Whether further provincial government and/or federal government approvals are required where there would be opportunities for further Crown-First Nation consultation; and

(v) Where there are unmitigated potential effects on Aboriginal or treaty rights, what is the broader societal value of the project?<sup>25</sup> [emphasis added]

The process envisioned in the FN Guidelines, which process was evaded as a result of the *Clean Energy Act* exempting the Site C Project from the requirements of the *Utility Commission Act*, differs in fundamental ways from the First Nations consultation process adopted for the environmental assessment Joint Review Panel for the Site C Project, discussed in section 1.2.2 below. Specifically, the FN Guidelines:

- ensure that a determination is made respecting the adequacy of Crown consultation by a quasi-judicial body independent from both the Crown and First Nations;
- require information to be filed in the public domain respecting where the scope of the duty to consult falls on the *Haida* spectrum, including whether “the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high;”
- enable the Commission to explore “any issues raised by First Nations during

<sup>25</sup> FN Guidelines, *supra* note 23, pp. 6-7.

consultations related to these approvals”, which would arguably open the door to consideration of possible infringement of treaty rights; and

- require, where there are immitigable potential effects on Aboriginal or treaty rights (which is the case for the Site C Project), the filing of the Crown proponent’s perspective on the broader societal value of the project in light of those immitigable effects.

## **1.2 The environmental assessment of the Site C Project**

### **1.2.1 Regulatory context**

In May 2011, BC Hydro submitted a project description for the Site C Project to the Canadian Environmental Assessment Agency and the BC Environmental Assessment Office, initiating federal and provincial environmental assessments.

The Site C Project triggered an environmental assessment under the former *Canadian Environmental Assessment Act*, 1992, which was superseded by the *Canadian Environmental Assessment Act*, 2012 (*CEAA 2012*), which came into force on July 6, 2012.

The Site C Project was also reviewable under the British Columbia *Environmental Assessment Act*, and the *Reviewable Projects Regulation*, as a new hydroelectric power plant with a rated nameplate capacity greater than 50 MW.<sup>26</sup>

### **1.2.2 Joint Review Panel Agreement**

In February 2012, the federal Minister of the Environment and the provincial Minister of Environment finalized an agreement to conduct a cooperative environmental assessment, including the establishment of a review panel (“Panel Agreement”).<sup>27</sup> The purpose of the Panel Agreement was to establish the stages in the environmental assessment, determine the conduct of the assessment, and finalize terms of reference for the Joint Review Panel (JRP).

#### JRP Mandate

The JRP mandate with respect to Aboriginal and Treaty rights is specified in the Panel

<sup>26</sup> *Environmental Assessment Act Reviewable Projects Regulation* (B.C. Reg. 370/2002), Table 7. Available at: [http://www.bclaws.ca/Recon/document/ID/freeside/13\\_370\\_2002](http://www.bclaws.ca/Recon/document/ID/freeside/13_370_2002).

<sup>27</sup> The Minister of the Environment, Canada – The Minister of Environment, British Columbia. February 2012. Agreement to Conduct a Cooperative Environmental Assessment, including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project, (CEAR #63919-130) [‘Panel Agreement’].

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

Agreement.

2.3 The Joint Review Panel will receive:

- information regarding the manner in which the Project may adversely affect asserted or established Aboriginal rights and treaty rights;
- information provided by Aboriginal persons or groups regarding the location, extent and exercise of asserted or established Aboriginal rights and treaty rights that may be affected by the Project; and
- information regarding any measures to avoid or mitigate potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights.

2.4 The Joint Review Panel will ...:

- (a) make recommendations which, if implemented, would avoid or minimize potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights; and
- (b) inform its assessment of the potential environmental, economic, social, health or heritage effects of the Project.

2.6 The Joint Review Panel will describe any asserted or established Aboriginal rights and Treaty rights that are raised during the Joint Review Panel Stage and any impacts on those rights as articulated by those Aboriginal Groups in the Joint Review Panel Report.

As discussed in Briefing Note #2 *Assessing Alternatives – Environmental Effects*, the JRP reached 22 conclusions of significant adverse environmental effects in relation to the Site C Project, an unprecedented number in the history of the *Canadian Environmental Assessment Act*. Almost all of those conclusions concern direct and indirect implications for the use of lands and resources and the exercise of Aboriginal and treaty rights by the Treaty 8 First Nations. Key conclusions of the Panel include the following:

The Panel disagrees with BC Hydro and concludes that the Project would likely cause a significant adverse effect on fishing opportunities and practices for the First Nations represented by Treaty 8 Tribal Association, Sauteau First Nations, and Blueberry River First Nations, and that these effects cannot be mitigated.

The Panel disagrees with BC Hydro and concludes that the Project would likely cause a significant adverse effect on hunting and non-tenured trapping for the First Nations represented by Treaty 8 Tribal Association and Sauteau First Nations, and that these effects cannot be mitigated.

The Panel concludes that the Project would likely cause a significant adverse effect on other traditional uses of the land for the First Nations represented by Treaty 8 Tribal Association, Sauteau First Nations, and Blueberry River First Nations, and

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

that some of these effects cannot be mitigated.

The Panel concludes that the Project would likely cause significant adverse cumulative effects on current use of lands and resources for traditional purposes.

The Panel concludes that residual adverse effects on physical heritage resources caused by the Project would be adverse and significant.

The Panel concludes that the cumulative adverse effects on heritage resources would be significant.

The Panel concludes that there would be significant adverse effects of the Project on cultural heritage resources for both Aboriginal and non-Aboriginal people.<sup>28</sup>  
[emphasis added]

### Preclusions on the JRP mandate with respect to consultation and infringement

The Panel conclusions, and its decisions to directly rebuke BC Hydro's findings, raise questions as to whether the Panel had views regarding the adequacy of the consultation undertaken by BC Hydro, as an agent of the Crown. The conclusions of the Panel regarding the project-specific and cumulative effects of the Project on use of lands and resources of the Treaty 8 First Nations, especially when viewed in the historical context of the effects arising from the existing hydroelectric projects on the Peace River, also raise questions about the potential that the Site C Project may be an infringement of Treaty No.8.

The *Sparrow* justification test seeks to determine whether a right has been infringed, and then to assess whether such infringement is justified.

To determine whether the ... rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.<sup>29</sup>

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the

<sup>28</sup> Site C Joint Review Panel. May 2014. Report of the Joint Review Panel: Site C Clean Energy Project BC Hydro, Appendix 1 List of Panel's Conclusions and Recommendations (CEAR #63919-2771).

<sup>29</sup> *Sparrow*, *supra* note 5, p.1112.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

department to enact regulations regarding fisheries is valid.<sup>30</sup>

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here we refer back to the guiding principle ... That is, the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>31</sup>

If the JRP had views on the adequacy of the consultation with Aboriginal groups or on the potential that the Site C Project constituted an infringement of Treaty No.8, the mandate given to the Panel by the Ministers in the Panel Agreement forbid them from expressing those views.

2.5 The Joint Review Panel will not make any conclusions or recommendations as to:

- a) the nature and scope of asserted Aboriginal rights or the strength of those asserted rights;
- b) the scope of the Crown's duty to consult Aboriginal Groups;
- c) whether the Crown has met its duty to consult Aboriginal Groups and, where appropriate, accommodate their interests in respect of the potential adverse effects of the Project on asserted or established Aboriginal rights or treaty rights;
- d) whether the Project is an infringement of Treaty No. 8; and
- e) any matter of treaty interpretation.<sup>32</sup>

This language in the Panel Agreement, coupled with the exclusion of the Site C Project from review by the BC Utilities Commission, ensured that there would be no independent determination as to whether the Crown met its duty to consult or whether the Site C Project is an infringement of Treaty No. 8.

### Objections of Treaty 8 First Nations

The Treaty 8 First Nations objected to the inclusion of this section in the Panel Agreement, particularly the exclusion from the purview of the JRP the determinations respecting the adequacy of consultation and the potential for infringement.<sup>33, 34, 35</sup> In their response to the Treaty

<sup>30</sup> *Ibid.*, p.1113.

<sup>31</sup> *Ibid.*, p. 1114.

<sup>32</sup> *Panel Agreement*, *supra* note 27.

<sup>33</sup> Treaty 8 Tribal Association. December 2, 2011. Letter from Tribal Chief Liz Logan to Analise Saely, Canadian Environmental Assessment Agency and Brian Murphy, British Columbia Environmental Assessment Office (CEAR #63919-117).

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

8 Tribal Association, the Crown agencies committed as follows:

Neither the Canadian Environmental Assessment Act or the BC Environmental Assessment Act gives powers to a Joint Review Panel (JRP) to address constitutional questions relating to the Crown's duty to consult on potential adverse impacts to asserted and established Aboriginal rights and treaty rights protected by section 35 of the Constitution Act, 1982. The federal and provincial government will retain the obligation to consult with Aboriginal groups who have the potential to be adversely affected by the Project. The JRP will collect information about asserted or established Aboriginal rights and treaty rights which will be used by the Crowns in their respective adequacy of consultation assessment.<sup>36</sup> [emphasis added]

The federal and provincial Crown are ultimately responsible for the legal duty to consult, and before provincial or federal Ministers' make a decision with regards to this project, they will consider the seriousness of adverse impact to Aboriginal rights and accommodation measures if appropriate. The federal and provincial Crown will retain the duty to consult and use the JRP process to the extent possible to collect information about any Aboriginal or treaty rights that may be adversely impacted by this project.<sup>37</sup> [emphasis added]

The Crown agencies rendered their determination respecting the adequacy of their own consultation process, and that of the provincial Crown utility BC Hydro, in the final Consultation and Accommodation Report provided to the Ministers for the purposes of decision-making respecting the Site C Project at the conclusion of the environmental assessment:

The Agency and EAO consider the consultation with Aboriginal groups during the EA process for the proposed Project ... to be procedurally adequate to allow for informed decisions regarding potential impacts arising from contemplated Crown decision making to Aboriginal Interests.<sup>38</sup>

With respect to whether or not the Site C Project constitutes an infringement of the rights under

<sup>34</sup> Albert C. Peeling Law Corporation (on behalf of McLeod Lake Indian Band). December 2, 2011. Letter to Analise Saely, Canadian Environmental Assessment Agency and Brian Murphy, British Columbia Environmental Assessment Office (CEAR #63919-119).

<sup>35</sup> Dene Tha' First Nation. December 1, 2011. Letter to Brian Murphy, British Columbia Environmental Assessment Office and Analise Saely, Canadian Environmental Assessment Agency (CEAR #63919-147).

<sup>36</sup> Canadian Environmental Assessment Agency – British Columbia Environmental Assessment Office. February 2, 2012. Letter from Brian Murphy, British Columbia Environmental Assessment Office and Analise Saely, Canadian Environmental Assessment Agency, to Tribal Chief Liz Logan, p.1.

<sup>37</sup> *Ibid.*, p.1.

<sup>38</sup> Canadian Environmental Assessment Agency – British Columbia Environmental Assessment Office. September 7, 2014. Federal/Provincial Consultation and Accommodation Report Site C Clean Energy Project.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

Treaty No. 8, the Crown made no such determination in the Consultation and Accommodation Report. While the Crown prevented the JRP through the Panel Agreement from both i) determining whether the Crown has met its duty to consult and, where appropriate, accommodate Aboriginal Groups, and ii) determining whether the Project is an infringement of Treaty No. 8 and, if so, whether that infringement is justified at law, only a determination whether the Crown met its duty to consult is eventually made by the Crown agencies in their Consultation and Accommodation Report. The question of infringement, despite reassurances during the environmental assessment to the contrary, goes unaddressed in the Consultation and Accommodation Report, is not mentioned in either the federal government's Decision Statement<sup>39</sup> or the provincial government's Environmental Assessment Certificate,<sup>40</sup> and is absent from the federal order in council.<sup>41</sup>

Despite consistent concerns on the part of the potentially-affected First Nations throughout the environmental assessment process for the Site C Project that the issue of the potential for infringement of Treaty No. 8 be addressed, no determination was made as to whether the Project is an infringement of Treaty No. 8, and no *Sparrow* justification test was applied at any time. A proper *Sparrow* analysis would have considered, *inter alia*, whether the means (i.e. the Site C Project) was the least infringing way of attaining the justifiable purpose (i.e. the need for electricity).

THE CHAIRMAN: We can make recommendations, which, if implemented, would avoid or mitigate potential adverse effects of the project on these rights.

However, the Panel cannot make any determination on the nature and scope of Aboriginal rights or Treaty rights or the strength of those asserted rights or on the scope of the Crown's duty to consult or whether the Crown has met its duty to consult and accommodate.

The Panel also cannot make determination on Treaty interpretation or whether elements of the project infringe on Treaty number 8; wiser people will do all that.<sup>42</sup>

<sup>39</sup> Canadian Environmental Assessment Agency. November 25, 2014. Decision Statement Issued under Section 54 of the *Canadian Environmental Assessment Act, 2012* for the Site C Clean Energy Project (CEAR #63919-2781).

<sup>40</sup> British Columbia Environmental Assessment Office. October 14, 2014. British Columbia Hydro and Power Authority for the Site C Clean Energy Project, Environmental Assessment Certificate #E14-02.

<sup>41</sup> Privy Council Office. October 14, 2014. BC Hydro Site C Clean Energy Project. PC Number: 2014-1105.

<sup>42</sup> Canadian Environmental Assessment Agency – British Columbia Environmental Assessment Office. 2014. In the Matter of the Joint Review Panel Established to Review the Site C Clean Energy Project Proposed by British Columbia Hydro and Power Authority, Proceedings at Hearing, December 18, 2014, Volume 10, p.7 (CEAR #63919-2220).

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

THE CHAIRMAN: Second, I would draw your attention to our terms of reference which prohibit us from finding infringement or interpreting the duty to consult and that sort of thing. That is left to much more learned minds than ours at the end of the day.<sup>43</sup>

Notwithstanding the Panel Chairman's expectations and reassurances to First Nations during the environmental assessment process, it remains unclear how these "wiser people" or "learned minds" turned their attention toward these matters. Any advice that the federal Department of Justice provided to the Minister or to Cabinet with respect to whether the numerous significant adverse environmental effects of the Site C Project and its commensurate impacts on Treaty rights of the affected First Nations might constitute an infringement of Treaty No. 8, particularly when viewed in the historical context of the environmental effects of the existing hydroelectric facilities on the Peace River, are protected by solicitor-client privilege.

Following from their work with Treaty 8 First Nations concerning the environmental assessment process, Booth and Skelton (p.395) provide one possible explanation for the Crown's inaction:

The procedural concerns are well documented in published literature, what appears to be lacking is any appetite on the part of government to either acknowledge the need or undertake any re-mediation.

We are not certain why such well documented issues continue to remain unaddressed. The Canadian courts have repeatedly indicated that the onus is upon the government to ensure that consultation and accommodation of rights occurs, yet government has not acted. This is why, as researchers and observers, we came to the theory of "institutionalised sociopathy." The units of government overseeing industrial development and their environmental assessments appear to be unable to view First Nations as having standing and as deserving of fair consideration.<sup>44</sup>  
[emphasis added]

Treaty 8 First Nations remain before the courts, seeking a judicial review of the provincial and federal governments' decisions to proceed with the Site C Project, and in the latter case requesting that the decision be returned to the Governor in Council for reconsideration. Now at the appeal stage, the First Nations have placed the following questions, *among others*, before the Federal Court of Appeal in the *Prophet River* litigation:

<sup>43</sup> *Ibid.*, p.122.

<sup>44</sup> Booth A. and N.W. Skelton. 2011. "We are fighting for Ourselves" – First Nations' Evaluation of British Columbia and Canadian Environmental Assessment Processes. *Journal of Environmental Assessment Policy and Management*, 13(3):367-404.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

26. Did the Federal Court err by incorrectly stating the issue to be decided as the jurisdiction of the GIC to determine infringement, rather than the constitutional limits of the GIC's decision?

27. Did the Federal Court err by allowing the issue of judicial forum, particularly, whether infringement could be determined on judicial review, to determine the answer to the constitutional question? And, if judicial forum was the correct issue to be decided, did the Federal Court err in finding that infringement could not be determined on judicial review?

28. Was the GIC required as a result of section 35(1) of the Constitution Act, 1982 to determine if the Site C Project would unjustifiably infringe the Appellants' Treaty rights prior to issuing its decision under section 52(4) of CEEA, 2012?<sup>45</sup>

The recent actions of the federal and provincial governments are analogous to those prior to the *Haida* decision. The provincial government, in the years leading up to that decision, had been 'running roughshod' over First Nations' interests, using the argument that until Aboriginal rights were defined, either through court action or the settlement of a modern treaty, there were no definitive legal interests to be respected. The response of the Supreme Court in *Haida* was to put emphasis on the *honour of the Crown* (intimately tied to notions of reconciliation and justice the Court had been developing since *Sparrow*). Duties to consult and accommodate in relation to 'merely asserted' Aboriginal rights emerged out of that decision, while in *Mikisew* the Supreme Court expanded these legal obligations to address the implementation of treaty promises.

Following from *Mikisew*, the Treaty 8 First Nations can make arguments respecting the duties to consult and accommodate (as matters of treaty implementation). However, First Nations once again find their interests subject to federal and provincial governments 'running roughshod'. With the exemption of oversight from the BC Utilities Commission, with the restricted mandate of the JRP, with the handing over of the final decision to the Governor-in-Council (making such determinations subject to potential judicial deference), the Treaty 8 First Nations find themselves powerless to defend their lands, powerless to defend their treaty rights. The Federal Court speaks of the ability of treaty nations to protect their interests using direct legal challenges to the decisions of the Governor-in-Council, but by the time these work their way through the courts the Site C Project will be operational, or beyond the "point of no return".<sup>46</sup> *How does this*

<sup>45</sup> Prophet River First Nation and West Moberly First Nations. February 17, 2016. Memorandum of Fact and Law. File No.: 1001-19. Court File No.: A-435-15.

<sup>46</sup> Alaska Highway News. April 16, 2016. "Justice minister, courts won't derail Site C, Christy Clark says". Available at: <http://www.alaskahighwaynews.ca/regional-news/site-c/justice-minister-courts-won-t-derail-site-c-christy-clark-says-1.2226753>

*accord with the honour of the Crown?*

### **1.2.3 Environmental Impact Statement (EIS) Guidelines**

On September 5, 2012, EIS Guidelines were approved and issued by the Executive Director of the British Columbia Environmental Assessment Office and, in accordance with Section 19 (2) of the *CEAA*, by the Minister of Environment of Canada. The EIS Guidelines were “deemed to be incorporated” into the terms of reference for the JRP and, therefore, form part of the Ministerial direction to the JRP through the Panel Agreement.

The purpose of the EIS Guidelines was to set out the scope of the factors to be taken into consideration in the environmental assessment of the Site C Project.

#### Approach to cumulative effects assessment

The EIS Guidelines for the Site C Project indicated the intentions of BC Hydro with respect to the cumulative effects assessment to be provided in its environmental impact statement:

To assess the cumulative effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out, the Proponent proposes to present the following in the EIS:

**Baseline Case:** The Baseline Case will demonstrate the current status of the VC. In doing so, it will reflect the effect of all projects and activities that have been carried out.

**Future Case without the Project:** To identify the potential adverse effects of projects and activities that will be carried out, the Future Case without the Project will be developed to predict the status of the VC by taking into account the Baseline Case and projects and activities that are at least as foreseeable as the Project. This will demonstrate the potential residual effects of projects and activities that have been and will be carried out.

**Project Case:** To demonstrate the cumulative effects that are likely to result from the Project, the Project Case will demonstrate the status of the VC, taking into account the residual effects of the Project that are likely combined with those identified in the Future Case without the Project.<sup>47</sup>

The requirements for the “baseline case” provide fundamental direction to the cumulative effects

<sup>47</sup> BC Environmental Assessment Office – Canadian Environmental Assessment Agency. 2012. Site C Clean Energy Project Environmental Impact Statement Guidelines Pursuant to the *British Columbia Environmental Assessment Act* and the *Canadian Environmental Assessment Act*, p.35 (CEAR #63919-404).

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

assessment for the Site C Project. The approach to the baseline case used in the EIS Guidelines is identical to that proposed by Nalcor Energy for the Lower Churchill Hydroelectric Generation Project.<sup>48</sup> The Lower Churchill Joint Review Panel raised concerns about this approach that would have been known to the government agencies approving the EIS Guidelines, particularly the Canadian Environmental Assessment Agency:

At the end of this process, it is the view of the Panel that Nalcor's approach to cumulative effects was less than comprehensive and that participants raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project.

Participant input regarding the residual effects of the [existing] Churchill Falls development highlighted the limitations of Nalcor's approach of including the effects of past projects in baseline conditions, without clearly acknowledging these effects. Generally, Nalcor's approach illustrates the limitation of project-specific cumulative effects assessment, namely that the end result is the potential for incremental decline in the biophysical and socio-economic environments with each successive development.

It is the view of the Panel that the cumulative effects assessment process for this Project is an example of the poor track record of project-based cumulative effects assessment. The Panel also recognizes that there are some inherent limitations to a project-based approach to cumulative effects assessment. These include the following:

- limited information about the effects of past projects, such as the Churchill Falls development, that occurred prior to the advent of environmental assessment; and
- the disincentive for proponents to identify adverse cumulative effects when they are perceived as a potential threat to Project approval. [emphasis added]

A recent critical review of the cumulative effects assessment of Manitoba Hydro's Bipole III transmission line project presented a framework for consideration of cumulative effects, as shown in Figure 1.1.

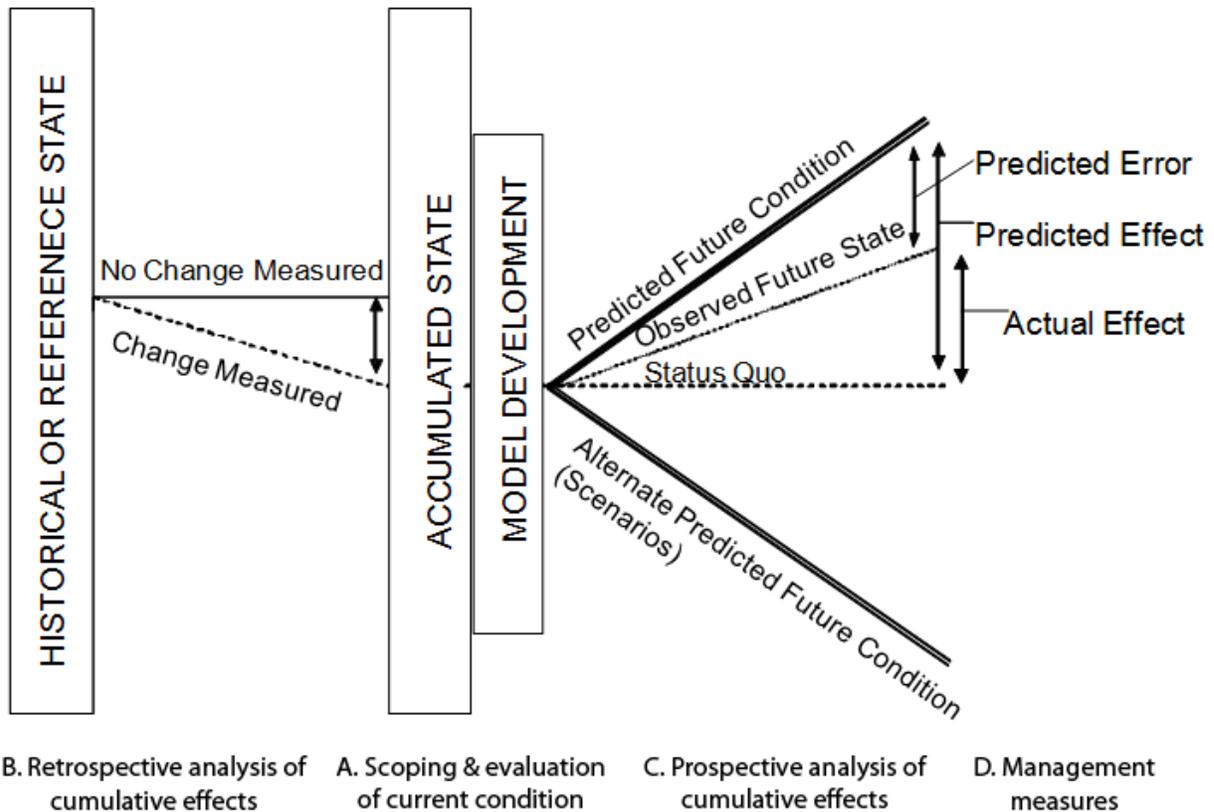
### **Figure 1.1 Conceptualization of a cumulative effects assessment model<sup>49</sup>**

<sup>48</sup> Nalcor Energy. 2010. Lower Churchill Hydroelectric Generation Project Environmental Impact Statement, Volume 1 Part A Project Planning and Description, p.9-28.

<sup>49</sup> Gunn, J. and B. Noble. November 5, 2012. Critical Review of the Cumulative Effects Assessment Undertaken by Manitoba

**BRIEFING NOTE #1: First Nations and Site C**

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*



A striking difference between this model, and the approach used for the Site C Project cumulative effects assessment is the lack of any retrospective analysis in the latter case. This was not for lack of effort on the part of interveners or First Nations during the review of the draft EIS Guidelines to attempt to convince government agencies to ensure that such an analysis was completed.

In order to assess the cumulative environmental effects of the proposed Project and the cumulative implications for Section 35(1) rights, the initial case for consideration or the “baseline case” must include the historical circumstances, since these circumstances are essential to the understanding of the seriousness of the potential impacts on established Treaty rights, and which circumstances would include the WAC Bennett Dam, Peace Canyon Dam and the Peace Project Water

Hydro for the Bipole III Project. Prepared for the Public Interest Law Centre, Winnipeg, Manitoba, p.8.

Use Plan.<sup>50</sup>

In their critical review, Gunn and Noble argue the importance of the retrospective analysis, or the “historical circumstances” referred to above by the Treaty 8 Tribal Association:

The development of a baseline for evaluation of cumulative effects is more than a description of current conditions, which alone can discount the effects of past changes as simply the ‘new normal.’ Baseline development requires a retrospective analysis of how VEC conditions have changed over time and whether that change is significant in terms of the sustainability of the VEC. ...

Such thresholds or limits are considered when examining in the accumulated state (i.e., baseline) in order to understand the significance of past cumulative effects and the significance of potential future stress on the VEC of concern. It may be that a VEC is already in an unhealthy condition, thus any future changes in VEC condition would be considered significant. In many cases cause-and-effect relationships between disturbances and VEC responses may not be known, but correlations or qualitative associations can be relied upon.<sup>51</sup> [emphasis added]

The “new normal” for the cumulative effects assessment in the case of the Site C Project is that the effects of the W.A.C. Bennett Dam and the Peace Canyon Dam, which inundated 70% of the Peace River within the lands used by the Treaty 8 First Nations to exercise their rights, are presumed to be “reflected in the baseline” and not additive to any further environmental effects or additional impacts to Treaty Rights resulting from development of the Site C Project. The contribution of the prior hydroelectric projects to threshold effects and irreversible changes is therefore not properly included in the cumulative effects assessment.

#### Consequences of the approach to cumulative effects assessment

The application of this approach can be seen in the EIS Guidelines for the assessment on fish and fish habitat where the regional assessment area commences downstream of the existing Peace Canyon Dam. As well, for the assessments of wildlife, vegetation and ecological communities, and current use of lands and resources for traditional purposes by Aboriginal peoples, the regional assessment area excludes the entirety of the Williston Reservoir as well as lands north of the reservoir (see Figure 1.2 below). This has the effect of excluding from consideration in the cumulative effects assessment any effects of the prior hydroelectric projects on fish, fish

<sup>50</sup> Treaty 8 Tribal Association. June 11, 2012. Letter from Tribal Chief Liz Logan to Analise Saely, Canadian Environmental Assessment Agency and Brian Murphy, British Columbia Environmental Assessment Office.

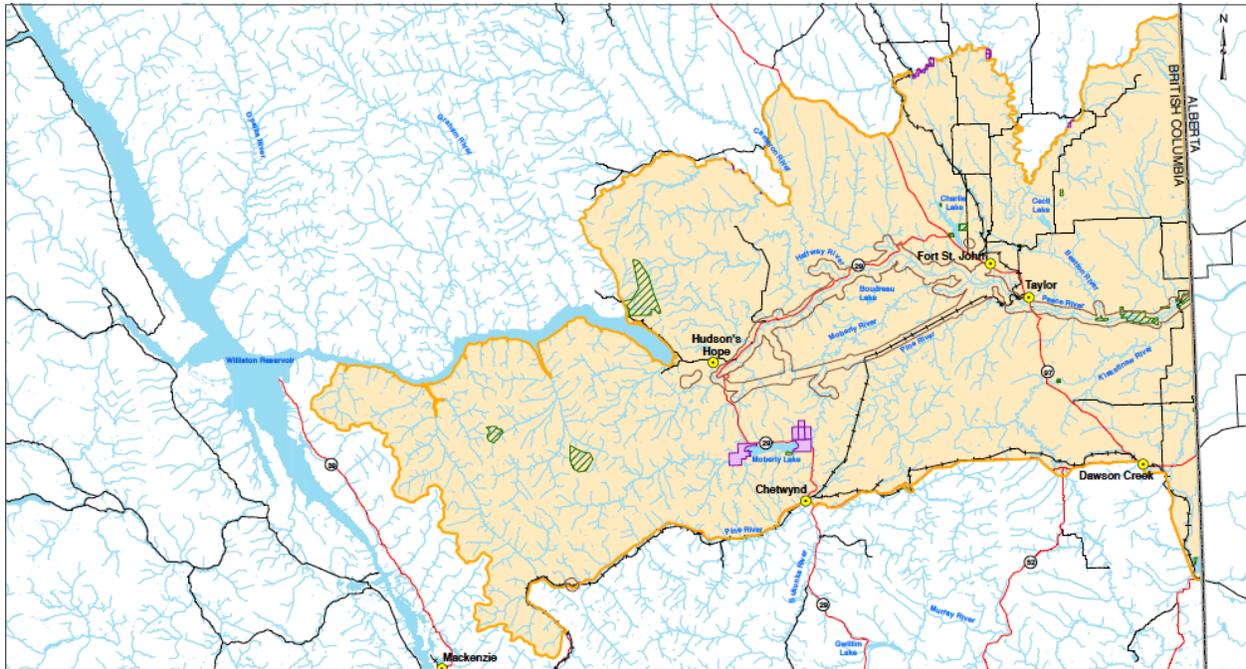
<sup>51</sup> Gunn, J. and B. Noble, *supra* note 49, pp.9-10.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

migration and habitat, aboriginal fishing, wildlife, wildlife migration and habitat, aboriginal hunting and trapping, riparian ecosystems and medicinal plant gathering, and residual effects on many other valued environmental components.

**Figure 1.2 Regional and local assessment area for wildlife, vegetation and ecological communities, and current use of lands and resources<sup>52</sup>**



In a letter to the government agencies, Treaty 8 Tribal Chief Logan commented further on this matter of the importance of retrospective analysis and historical context.

Both CEAA and the EAO have indicated on several occasions that the purpose of the environmental assessment is to gather the information necessary for conducting an assessment of the implications of the proposed Project on Section 35(1) rights. As you are aware, *West Moberly*<sup>[53]</sup> affirmed the core principles of cumulative effects assessment for the purpose of consultation about impacts on Treaty rights. The court held that the historical context is essential to understanding the

<sup>52</sup> BC Hydro. 2013. Site C Clean Energy Project Environmental Impact Statement. Volume 2: Assessment Methodology and Environmental Effects Assessment. Section 13: Vegetation and Ecological Communities, Figure 13.1 Regional and Local Assessment Areas (CEAR #63919-421).

<sup>53</sup> *West Moberly*, *supra* note 1, paras. 118 and 182.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

seriousness of the impacts from a current decision.<sup>54</sup> [emphasis added]

The government agencies responded to the concerns raised by Treaty 8 Tribal Association as follows:

For this project, the EIS guidelines will not require the proponent to create a pre-industrial baseline for the cumulative effects assessment. However the EIS guidelines will include direction to the proponent to provide a narrative discussion of the previous hydroelectric developments on the Peace River (WAC Bennett Dam and Peace Canyon Dam).<sup>55</sup>

The JRP for the Site C Project questioned the approach taken by the government agencies to determining the baseline case for the cumulative effects assessment, as well as the legitimacy of BC Hydro's position respecting the lack of adequate data to undertake a cumulative effects assessment inclusive of the existing hydroelectric facilities on the Peace River.

[JRP Member] M. BEAUDET: Thank you, Mr. Chair. Yes, a question on cumulative effects assessment again.

My query started with your response, ... and you indicated to us that the CEAA agency stated that for this project, the EIS guidelines will not require the proponent to create a pre-industrial baseline for cumulative effect assessment.

So I went back to look at different comments, some of them I was aware of already, when the EIS guidelines were prepared. And there were lots of comments of people asking that the two previous dams be included.

And I believe there was [sic] three: Treaty 8 Tribal Association, Saulteau [First Nation], and, what I found interesting, there was also Environment Canada. And they said that they recommended that the guidelines direct preparation of an Environmental Impact Statement that includes a thorough discussion of existing hydroelectric developments on the Peace River. The environmental effects that have occurred as a result of the effectiveness of measures taken to manage them.

And I also looked at the document. It's a very extensive document from BC Hydro that responded to public comments on the preparation of the guidelines, and with respect to cumulative effect assessment, you say -- and it's on page 3, the letter is June 26th, 2012 -- and you say here that you agree:

<sup>54</sup> Treaty 8 Tribal Association. June 11, 2012. Letter from Tribal Chief Liz Logan to Analise Saely, Canadian Environmental Assessment Agency and Brian Murphy, British Columbia Environmental Assessment Office.

<sup>55</sup> Canadian Environmental Assessment Agency – British Columbia Environmental Assessment Office. August 9, 2012. Site C Clean Energy Project. Draft Crown Responses to Treaty 8 Tribal Association's comments on the Site C Environmental Impact Statement Guidelines, pp.5-6.

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

"... that in characterizing any potential residual effect and any potential cumulative effect, it is helpful to characterize the extent to which an area has already been disturbed including a consideration of the existing hydroelectric generation projects on the Peace. However, the accumulated effects of all past projects and activities will be reflected in the current baseline condition."

Some groups said, you know, that there was existing data and you disagreed. ...

Now, the Lower Churchill also did the same thing as you did. And they had lots of participant views that disagreed.

I'd like to know more about the arguments that you've used and managed; they must be magical. And managed to convince the agency and environmental assessment office of the Province to go ahead and exclude the two dams. Because even if there's a narrative, it doesn't preclude the proponent to do a cumulative effect assessment, especially if in the narrative you acknowledge that the previous dams had effects.

...

Do I understand that the major argument was that you didn't have the data?

I mean, the Peace Canyon Dam had the Environmental Impact Assessment done. The Bennett Dam -- when you build a dam, you have data. I mean, even if it's 1957, you would have data.<sup>56</sup>

The decision on the part of the environmental assessment agencies to exclude a retrospective analysis from the cumulative effects assessment limits the understanding of threshold effects and irreversible changes as well as the understanding of the historical context that the court determined in *West Moberly* was essential to understanding the seriousness of the impacts on Treaty rights from the decision before the Crown, namely whether to authorize the Site C Project.

The JRP summarized the challenges to the cumulative effects assessment posed by the decision of the environmental assessment agencies.

The present developmental condition that lies behind the current and future fate of the ecosystems under review and the [valued components] VCs that depend on them is a concerning one. The Panel recognizes that BC Hydro made a laudable effort to thoroughly review existing and future projects for its assessment of

<sup>56</sup> Canadian Environmental Assessment Agency – British Columbia Environmental Assessment Office. 2014. In the Matter of the Joint Review Panel Established to Review the Site C Clean Energy Project Proposed by British Columbia Hydro and Power Authority, Proceedings at Hearing, January 21, 2014, Volume 26, pp.192-198 (CEAR #63919-2697).

## BRIEFING NOTE #1: First Nations and Site C

*Embargoed until Tuesday, May 24th, 2016 at 10:30 am ET*

cumulative effects. However, the assessment excluded the Bennett and Peace Canyon Dams, which were also part of the anthropogenic development in the region that had environmental effects. The Panel agrees with participants who noted that the two previous dams should have been included explicitly in the cumulative effects assessment conducted by BC Hydro. The Panel believes that the assessment of cumulative effects would have benefited from evaluating the ongoing effects of the existing dams and from an evaluation of effects that have occurred in the past that may not be reflected in the current baseline (e.g. loss of riparian habitat).

In light of the information outlined above, the Panel considered the effects of the existing hydroelectric facilities as past and ongoing effects in its assessment of cumulative effects.

The Panel disagrees with BC Hydro's assertion that there was limited information available to conduct a cumulative effects assessment, particularly given the information from participants. The Panel received numerous testimonies from Aboriginal and non-Aboriginal participants about the effects of the Bennett and Peace Canyon Dams. This information was provided first-hand (by people who were alive at that time) or second-hand (by participants who learned of the effects from previous generations). The Panel understands that there is existing information in various formats such as air photos, environmental impact studies, research from various provincial and independent bodies, and historic maps of changing land tenure. With respect to missing biological data for plant species, fish and land animals, and their habitats, the Panel heard that there are anthropological studies done in the region, traditional knowledge passed on for generations, and historical knowledge of their environment. Considering that participants were aware of information that could be used, the Panel believes that BC Hydro could have done more to provide the "qualitative analysis and conclusions" that are missing in the assessment. [emphasis added]

The comments of Parks Canada during the Panel hearings, made in relation to the potential for downstream effects of the Site C Project to the Peace-Athabasca Delta (PAD), speak perhaps most clearly to this issue:

MR STEVE OATES [Parks Canada]: Okay. I think our main concern is that the -- by incorporating the flow regulation and the impacts associated with that with the existing two dams into the baseline, it assumes or presupposes that the impacts of the existing dam operations are to a certain extent acceptable, and I think we would rather have seen a more robust assessment ... specifically focused in on what is the

actual impacts of operating the two existing dams...<sup>57</sup> [emphasis added]

These comments from Parks Canada are consistent with those raised in their written submissions to the Panel:

BC Hydro's approach to cumulative effects assessment for the Site C project is based on accepting the present state of the Peace River and the PAD as the baseline condition upon which to add the incremental impacts from construction and operation of the Site C dam. This approach doesn't fully consider the cumulative impact from all BC Hydro's flow management operations against an unregulated, undammed river. The point here is that the WAC Bennett dam was proposed, and constructed, in a time when no environmental assessment legislation or process was in place. If the Bennett dam project was [sic] proposed today it is very unlikely that such dramatic regulation of the flow regime on the Peace River would be found to be justifiable in the circumstances. The project would then either be modified to limit the scope of the impact to the hydrology of the Peace River, or the project would be cancelled.<sup>58</sup> [emphasis added]

Though Parks Canada's comments are made in the context of cumulative effects on downstream hydrology, the limitations of the cumulative effects assessment for the Site C Project apply also to the residual environmental effects of other historical activities in the Peace region that contribute to the cumulative effects of the Site C Project, including: reservoir inundation, pipelines, seismic lines, agriculture, roads, railways, oil and gas exploration, mining exploration and development, and forestry.

### **1.3 Consultation and reconciliation opportunities**

There are two clear opportunities available to Canadian governments to respond to the serious inadequacies of the process to date – in effect to begin to live up to the requirements of the *UN Declaration on the Rights of Indigenous Peoples* and to the honour of the Crown. The first is to expose the Site C Project to a process of evaluation under the *Utilities Commission Act*. The second is to suspend issuing further permits for construction and operation of the Site C Project pending determination of its possible effects on the constitutionally protected treaty rights of affected First Nations, and of other issues currently before the courts and a regulatory appeals

<sup>57</sup> Canadian Environmental Assessment Agency – British Columbia Environmental Assessment Office. 2014. In the Matter of the Joint Review Panel Established to Review the Site C Clean Energy Project Proposed by British Columbia Hydro and Power Authority, Proceedings at Hearing, January 13, 2014, Volume 18, pp.293-294 (CEAR #63919-2420).

<sup>58</sup> Parks Canada. March 22, 2013. Parks Canada Comments on the Draft Environmental Impact Statement (EIS) for the Site C Clean Energy Project. (CEAR #63919-922)

tribunal.

### **1.3.1 Referral to the BC Utilities Commission**

As detailed above, the *Clean Energy Act* exempts the Site C Project from sections 45 to 47 of the *Utilities Commission Act*, removing the requirement for a Certificate of Public Convenience and Necessity. As detailed in Briefing Note #3 *The Regulatory Process for the Site C Project*, the Provincial Cabinet does have further discretion under section 5 of the *Utilities Commission Act* to refer the proposed Project to the Commission in order to address the recommendations of the JRP and other matters the Cabinet considers appropriate.

A referral of the Site C Project to the Commission under section 5 of the *UCA* could address several issues, including the following:

- Need, including:
  - Recommendation 49 of the JRP concerning the load forecast and demand-side management potential
- Costs, including:
  - Recommendation 46 of the JRP dealing with public scrutiny of the construction costs, unit energy costs and revenue requirements of the Site C Project
  - Updated costs and expected evolution in costs for alternatives to the Site C Project
- Revenues, including:
  - Recommendation 47 concerning long-term price forecasts, which would include export price forecasts
- Policy, including:
  - Investigation of the self-sufficiency objective, including whether adjustments to this objective, such as inclusion of the Canadian Entitlement as a domestic resource, are in the public interest
  - Investigation of the 93% clean energy objective, including whether it is preferable to abandon the objective and instead place a proper price on carbon in the electricity sector
  - Investigation of whether it is preferable to import higher-emission electricity to meet dependable capacity requirements in order to keep prices as low as possible to encourage greater electrification of higher emission activities in other sectors of the economy
- Aboriginal consultation, including:
  - A determination by the Commission as to whether consultation of potentially-affected Aboriginal groups has been adequate in relation to the Site C Project to the point of the date of the Commission's recommendations
  - requiring information to be filed in the public domain respecting where the scope of

- the duty to consult falls on the *Haida* spectrum, including whether “the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high;”
- o requiring the filing of a determination by the First Nations as to whether they are satisfied with the consultation and accommodation; and
  - o requiring, where there are immitigable potential effects on Aboriginal or treaty rights, which is the case for the Site C Project, the filing of the Crown proponent’s perspective on the broader societal value of the project in light of those immitigable effects.

### **1.3.2 Suspension of further action pending determination and justification of possible infringement**

The honour of the Crown clearly demands that both federal and provincial governments suspend actions that would further the development of the Site C Project. This would involve, among other things, deferring issuance of any federal or provincial permits required for the construction and operation of the Site C Project, until a review has been conducted by the BC Utilities Commission, and decisions have been rendered by the courts and regulatory bodies on the five currently outstanding proceedings relating to the Site C Project.<sup>59</sup> Questions of possible infringement of treaty rights – constitutionally protected under section 35 of the *Constitution Act, 1982*, and potentially at the heart of the rights protected within the *UN Declaration on the Rights of Indigenous Peoples* – have not been addressed in any form. These are questions that must be seriously addressed before further action to advance the Site C Project can occur – the honour of the Crown and moving toward meaningful reconciliation demand at least this minimal amount of restraint.

<sup>59</sup> *Peace Valley Landowner Association v Minister of the Environment et. al.*, Court of Appeal File No. CA 42977 (BCCA); *Prophet River First Nation et. al v Minister of Forests, Lands and Natural Resource Operations et. al.*, Supreme Court of British Columbia File No. 15-2987 (BCSC); *Prophet River First Nation et. al. v Minister of the Environment et. al.*, Court of Appeal File No. CA 43187 (BCCA); *Prophet River First Nation et. al. v Attorney General of Canada et. al.*, Court File No. A-435-15 (FCA); *West Moberly First Nations et. al. v Deputy Comptroller of Water Rights*, filed March 29, 2016 (Environmental Appeal Board).