

LEGAL BACKGROUNDER: SITE C DAM – THE CROWN’S APPROACH TO TREATY 8 FIRST NATIONS CONSULTATION¹

West Coast Environmental Law©

Summary

The Site C Dam project proposal engages the jurisdiction and lawful authority of Treaty 8 First Nations. Both the BC and federal governments have a constitutional duty to consult and accommodate Treaty 8 First Nations in making decisions about the project. The province’s decision to proceed with the Site C Dam was taken without proper consultation with Treaty 8 First Nations. There have been numerous flaws in the way the Crown has approached First Nations consultation on the Site C Dam. For example, the Crown’s unilaterally decided on the process it would use to consider and approve the Site C Dam, disregarding the mutually binding promises contained in Treaty No. 8. The Crown has also failed to involve First Nations at a high level of strategic decision-making about the use of the Peace River to generate electricity when it made early decisions about the dam’s feasibility. The commitment to build the Site C Dam without achieving the free, prior and informed consent of Treaty 8 First Nations is likely a violation of Canada’s commitments under international law.

SITE C PROJECT

The proposed Site C Dam will flood over 5000 hectares of Treaty 8 First Nations’ territories, creating a reservoir over 80 kilometres long, and deeper in some locations than Vancouver’s tallest skyscraper. The dam will further disrupt the flow of the Peace River that has already been disturbed by two other dams. The Site C Dam project proposal engages the jurisdiction and lawful authority of Treaty 8 First Nations. If it is built, the dam is certain to have significantly negative impacts on the ability of First Nations to exercise their constitutionally-protected Treaty rights to harvest and to carry on other activities on the flooded land and rivers, and on the areas of land surrounding the reservoir that will be affected by this development. Decision-making about this project brings into play section 35(1) of the Canadian constitution, which recognizes and affirms Aboriginal and Treaty Rights and imposes a duty of honourable consultation and accommodation on the Crown.

BC’S PROPOSED PROCESS TO APPROVE SITE C

The BC government has established a five stage process to move the Site C Dam proposal from the drawing board to regulatory approval. Stage 1 consisted of a determination of whether the project is feasible, based on existing studies. Stage 2 involved “consultations with the public, stakeholders, communities, Aboriginal groups and property owners”, and a technical review that included “field studies to better understand current conditions related to the physical, biological and socio-economic environment, and to gather engineering and technical information regarding the design, construction and operation of the potential project.”² The BC government has recently announced that it is in favour of the Site C Dam and that it is proceeding to Stage 3, the Environmental and Regulatory Review (discussed below), which the government expects to

¹ This backgrounder was prepared by the West Coast Environmental Law Association ©, 200-2006 West 10th Ave., Vancouver, BC V6J 2B3 for education purposes only.

² BC Hydro, *Peace River Site C Hydro Project – Stage 2 Summary Report*, Fall 2009, available at http://www.bchydro.com/planning_regulatory/site_c.html. 2.

take two years. The government indicates that Stage 3 will include refining the project design, “[c]onsulting with Aboriginal groups, the public, communities and property owners”, as well as “[a]dvancing environmental and socio-economic studies from baseline work to impact assessment, including measures to avoid or mitigate impacts.” Stage 4 will follow the regulatory review and approval, and will consist of detailed design and engineering work, and Stage 5 is the Site C Dam’s construction. The BC government has indicated that construction of the dam will depend on ensuring that the Crown’s constitutional duties to First Nations are met. The government anticipates that the dam will be completed by 2020.

The federal and provincial Crown’s decision-making responsibility over the dam, which comes from statutes including the *Canadian Environmental Assessment Act (CEA Act)* (where the federal government is concerned), and BC’s *Environmental Assessment Act* (for the provincial government), is different from and subject to its constitutional duty to consult. As a result, the Crown must complete its consultation with affected Treaty 8 First Nations, in a way that fulfills the duty, before it makes a decision on the project.³

THE CROWN’S APPROACH TO FIRST NATIONS CONSULTATION IS FLAWED

The BC government is taking the lead on the Site C Dam project. It is both the decision-maker on this project, as well as the proponent, because it owns BC Hydro which will operate the dam. BC Hydro is the Crown’s agent and must carry out the Crown’s obligations towards First Nations.⁴ The approach employed by the Crown has a number of serious shortcomings when viewed in light of Crown’s constitutional duties to First Nations. These concerns can be summarized as follows:

- (1) The Crown’s unilateral decision to proceed with its multi-stage evaluation of the Site C Dam disregards the solemn and mutually binding promises of Treaty No. 8.** The proposed Site C Dam project would involve the “taking up” of Treaty 8 First Nations lands, and have significant impacts on the harvesting and land use rights guaranteed by the treaty and still exercised today (both during construction of the dam and related infrastructure, and as a result of the flooding of Treaty 8 lands and the operation of the dam). The Site C Dam will also flood sites of significance cultural and spiritual value to the First Nations, as the Peace River Valley is rich in cultural history and archaeological resources. The Supreme Court of Canada has held that in such circumstances the Crown is required to provide a consultation and decision-making process that is “compatible with the honour of the Crown,”⁵ and that this obligation is embedded within Treaty No. 8 itself.⁶ The honour of the Crown infuses Treaty 8, and the performance of every treaty obligation. The Crown unilaterally developed its multi-stage process to review the Site C Dam proposal without any involvement from First Nations. Canada’s courts have held that “the first step in the consultation process is to discuss the process itself.”⁷ In particular, there was no

³ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 67.

⁴ *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68.

⁵ “The Court must first consider the process by which the “taking up” is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister’s order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights”: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 59.

⁶ *Ibid.* at para. 57.

⁷ *Gitksan First Nation v. BC (Minister of Forests)*, 2004 BCSC 1734 at para. 113; *Huu-Ay-Aht First Nation v. BC (Minister of Forests)* 2005 BCSC 697 at para. 123. Recent litigation with respect to the Mackenzie Gas Pipeline

meaningful consultation on the preliminary question of the appropriate role to be played by the environmental assessment process in meeting the Crown's constitutional duties. By deciding to embark on the 5-Stage process without consulting First Nations, the Crown has likely breached its treaty obligation to provide a process that deals honourably with First Nations.

- (2) **The Crown failed to involve First Nations in high level, strategic decision-making about the use of the Peace River for power generation.** The Crown began its process at Stage 1 by examining the feasibility of the Site C Dam, based on existing studies and data, including information about past First Nations consultations. No First Nation was involved in this phase of the process, in which "BC Hydro determined that Site C was feasible and recommended to the B.C. government that the project advance to the next stage of planning and development."⁸

The Site C Dam raises issues that require higher, strategic-level assessment and consultation beyond the scope of the environmental and regulatory review process. According to the Supreme Court of Canada's *Haida* decision, the Crown has a duty to consult at high level of strategic planning for utilization of resources.⁹ Consultation at the operational or project-specific level may have "little effect" if First Nations have not been honourably consulted at the strategic level.¹⁰ For the Site C Dam, a strategic level assessment process is required that first addresses policy considerations relevant to "whether" the project should proceed, rather than "how." Such strategic questions include whether the additional electricity from the Site C Dam is truly needed, whether large-scale or smaller-scale renewable are appropriate to meet additional demand, whether BC should be building its generation system for export, and whether and how the outstanding claims of Treaty 8 First Nations in respect of the construction of the last two dams on the Peace River should be honourably resolved before compounding the impact of those past projects by submerging even more of Treaty 8 First Nations' traditional territory. First Nations were not involved in any such higher-level strategic discussions by the government, whether at Stage 1 of the government's process, or prior to that.

- (3) **The Crown's consultation with Treaty 8 First Nations came late in its overall public consultation process.** The Crown and a number of Treaty 8 First Nations negotiated consultation agreements to set out how First Nations would participate in assessing the project's feasibility at Stage 2 of the Site C process. However, BC Hydro had already begun Stage 2 and had made significant progress at that stage before even approaching the Treaty 8 First Nations. In fact, public pre-consultation at Stage 2 was complete before First Nations' involvement had been negotiated. By the time the consultation agreement for Stage 2 participation was complete with Treaty 8 First Nations, Stage 2 was more than halfway done, and project definition consultation with the public was

suggests that the duty to consult and accommodate with respect to the Site C project was likely triggered at a very early stage, when the agencies involved initially contemplated proceeding with the 5 phase project process, and other decisions about process design: *Ministry of Environment et al v. Dene Tha' First Nation*, 2006 FC 1354 at para. 110, aff'd 2008 FCA 20. In *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, the BC Court of Appeal recently confirmed that the process of consultation requires discussion at an early stage of a government plan that may impact Aboriginal interests, before a decision crystallizes, "so that First Nations do not have to deal with a plan that has become an accomplished fact": 2009 BCCA 67 at para. 52.

⁸ BC Hydro, *Fact Sheet – Planning, Evaluation and Development* (Site C Dam), available online at http://www.bchydro.com/planning_regulatory/site_c.html.

⁹ *Haida* at para. 76.

¹⁰ *Ibid.*

nearly completed.¹¹ The Crown's approach in this regard appears to treat First Nations consultation as an "afterthought" to its general consultation with the public at Stage 2. The Crown was content to consult with the public prior to speaking with First Nations, and to essentially complete its public consultations prior to beginning actual consultation with Treaty 8 First Nations under the consultation agreement. This is not consistent with the Crown's duties as outlined by the courts.¹²

- (4) **The Crown decision to build Site C Dam pre-empts results of consultation with Treaty 8 First Nations.** In addition to treating Treaty 8 First Nations dishonourably by consulting with them only after public consultations to define the scope of the project were completed, the Crown has publicly announced its decision to build the Site C Dam and to advance to Stage 3 of its process – the environmental and regulatory review – on the basis of public consultations alone, without having completed the consultation that was agreed with Treaty 8 First Nations for Stage 2. The Consultation Agreement indicated that "best efforts" would be made to complete Stage 2 consultation, and to identify potential impacts on First Nations rights and potential accommodation and mitigation options. In spite of this agreement, there have been delays in providing results of reports and studies to Treaty 8 First Nations, making it impossible for them to fully participate in consultation. Stage 2 was process-driven and lacking in substance. Ultimately, BC Hydro's delays in providing the reports and studies to the First Nations and its inability to engage in discussions about how to properly mitigate impacts that would be caused by the dam led to the failure to adequately complete Stage 2 consultations.

It is arguably inconsistent with the honour of the Crown for the government to announce it is moving ahead with the Site C Dam and proceeding to environmental assessment and regulatory review in spite of its failure to complete consultation with Treaty 8 First Nations according to the consultation agreement, and over their strenuous objections.¹³ The Crown has an obligation to make genuine efforts to address First Nations concerns about the process, and to be willing to alter its current process proposals in response to consultation.¹⁴ If the Crown is not responsive to First Nations objections to moving ahead with its process prematurely, it may be in breach of its constitutional duty to First Nations.

- (5) **The Crown's commitment to build the Site C Dam without achieving the consent of Treaty 8 First Nations violates Canada's International law commitments.** Treaty 8 First Nations have not been given the opportunity to provide their free, prior and informed consent to the decision to proceed with the Site C Dam. The Crown has delayed providing reports and data to Treaty 8 First Nations in Stage 2 of the process, and failed to provide resources for Treaty 8 First Nations to proceed with a Traditional Land Use Study at this stage of the process, which would provide the baseline data to assist the Nations to understand the Site C Dam's potential impacts on their Treaty Rights and other interests – even though other baseline data studies not involving First Nations traditional uses have already been completed. These failures have interfered with the ability of the

¹¹ *Treaty 8 First Nations' Report on Stage 2 Consultation*, pp. 2-3.

¹² *Mikisew Cree* at para 64.

¹³ Council of Treaty 8 Chiefs, "Council of Treaty 8 Chiefs Extremely Frustrated With British Columbia's Decision to Move Forward With Site C", Press Release, April 19, 2010. Accessed at <http://www.marketwire.com/press-release/Council-Treaty-8-Chiefs-Extremely-Frustrated-With-British-Columbias-Decision-Move-Forward-1150065.htm>.

¹⁴ "Responsiveness is a key requirement of both consultation and accommodation": *Taku River Tlingit First Nation v. BC (Project Assessment Director)*, 2004 SCC 76 at para. 25.

Treaty 8 First Nations to assess the project on the basis of free, prior, and informed consent – a requirement that they have consistently expressed to the Crown.¹⁵

Free, prior and informed consent is the international standard governing consultation with First Nations on issues such as approval of the Site C Dam project. This standard provides that Indigenous Peoples must be informed about and consent freely to resource development projects that will affect their lands and resources, prior to government approval of the project. This standard is set out in the *United Nations Declaration on the Rights of Indigenous Peoples*, which codifies the prevailing international legal norms on Indigenous rights. The government of Canada stated in the March 2010 Speech from the Throne that it will soon take steps to endorse the Declaration. Furthermore, through the general principles of international law,¹⁶ and the *American Declaration of the Rights and Duties of Man*, which Canada is obliged to respect as a member state of the Organization of American States,¹⁷ Canada has an existing international legal obligation to respect First Nations' ownership and control over their own territories and resources.¹⁸ A decision by the governments of BC or Canada to approve the Site C Dam, in the absence of First Nations consent, would violate Canada's international legal obligations, and make Canada vulnerable to a human rights challenge in an international (e.g., UN Human Rights Committee) or regional (e.g., Inter-American Commission on Human Rights) forum. If a First Nation takes international legal action against Canada for such a decision, there is a significant risk that a finding would be made against Canada, attracting negative world attention. In addition, international human rights bodies such as the Inter-American Commission can request Precautionary Measures, which may include a request that a project not proceed further until such time as the First Nation's petition can be heard and decided on its merits.

Federal Role Unclear

The federal government will also have to make a number of decisions for the Site C Dam project to proceed, including approvals under the *Fisheries Act* and the *Navigable Waters Protection Act*. The federal Crown also has a duty to consult First Nations in making any decision about the Site C Dam, and as stated above, this should require the federal government to involve First Nations from the earliest stages of decision-making. While BC Hydro states that it anticipates a federal environmental and regulatory review of the project, the federal government has yet to indicate how it will proceed. As discussed below, there is political pressure at the present time for the federal government to back away from its traditional and legally required role in conducting environmental assessments for federally-regulated projects in BC, and to pass legislation allowing Ottawa to leave matters to the BC's regulatory process. Any decision by the federal government to accept a provincial environmental assessment for the Site C Dam, instead of conducting its own process, would implicate the Crown's constitutional duty to consult with Treaty 8 First Nations.

Written by:
West Coast Environmental Law©

¹⁵ *Treaty 8 First Nations' Report on Stage 2 Consultation*, p. 3.

¹⁶ See Prof. S. James Anaya, *Indigenous Peoples in International Law* (2nd ed.) (Toronto: Oxford University Press, 2004) at p. 148.

¹⁷ *Hul'qumi'num Treaty Group v. Canada*, Inter-Am. C.H.R. Report No. 105/09 (2009) at para 27.

¹⁸ See, for example, *Mary and Carrie Dann v. United States*, Inter-Am. C.H.R. Report No. 75/02 (2002), and *Maya Indigenous Communities v. Belize*, Inter-Am. C.H.R. Report No. 96/03 (2003).