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What do the Recent Site C Decisions Mean for Major Projects in British Columbia?

Over the past month, the British Columbia Supreme Court and the Federal Court have rendered a set of decisions pertaining to the Site C Clean Energy Project. In doing so, the Courts have made clear that there is no requirement for First Nations to agree that consultation has been adequate, and they have made clear that governments can continue to govern in the public interest provided proper consultation has occurred. These decisions are important not only for the Site C Hydroelectric project – but also for any major project in British Columbia where the Crown and First Nations may disagree on whether consultation was adequate.

Background

The Site C Clean Energy Project is a proposed dam and hydroelectric generating station that would be constructed on the Peace River near Fort St. John, BC. The Project components include a 1050 metre long dam, an 1100 megawatt generating station and associated structures, an 83 kilometre long reservoir, a transmission line, and the realignment of four sections of Highway 29. At the time of its environmental assessment, the project had an estimated cost of $7.9 billion dollars (an estimate that has subsequently increased to at least $9 billion).

In late 2011, the British Columbia Environmental Assessment Office and the Canadian Environmental Assessment Agency announced their agreement to conduct a cooperative environmental

assessment and established a joint review panel. Public hearings were held over 26 days in late 2013 and early 2014, and on May 1, 2014, the joint review panel released its report. In its report, the panel found that the project would likely cause various significant adverse environmental effects that could not be mitigated, including on fishing opportunities and practices, hunting and trapping, and traditional uses of land by First Nations. The panel also found that the project was likely to cause various significant adverse cumulative effects including on current use of land and resources for traditional purposes and on cultural heritage resources.

The Federal Minister of the Environment issued a decision statement on October 14, 2014 (re-Issued on November 25, 2014) concurring with the panel's position that the project was likely to cause significant adverse environmental effects and communicating the Governor in Council's decision that those potential significant adverse environmental effects were "justified in the circumstances".

Simultaneously, on October 14, 2014 the BC Minister of the Environment issued a provincial environmental assessment certificate for the project, deciding that, after considering the panel's report, the benefits of the Site C project outweighed the risks of significant adverse environmental, social and heritage effects.

The environmental assessment outcome and subsequent permitting have prompted an array of litigation. Several judicial reviews have been commenced before the British Columbia Supreme and Federal Courts by the Treaty 8 First Nations Prophet River and West Moberly (the Doig River First Nation is also a party to the Federal Court proceeding, and the McLeod Lake Indian Band was initially a party to two of these proceedings but subsequently withdrew). A further two judicial review applications were commenced by the Peace Valley Landowners Association, one before each of the courts mentioned above, and two judicial review applications were commenced in Federal Court by the Alberta First Nations Mikisew Cree First Nation and Athabasca Chipewyan First Nation. The Peace

Valley Landowners Association's proceedings were both dismissed (though they have appealed the dismissal of the British Columbia Supreme Court proceeding) and the Alberta First Nations withdrew their judicial review applications before the Federal Court.

Recent Court Decisions

In decisions issued August 28 and September 18, 2015, the Federal and British Columbia Supreme Courts, respectively, dismissed judicial review applications pursued by the Prophet River First Nation and West Moberly First Nation (the "Applicant First Nations") in relation to the environmental assessment of the Project (a further judicial review challenging post-EA permits has been filed before the British Columbia Supreme Court but is yet to be heard in full as of writing). The Applicant First Nations had expressed strong opposition to the Project, and central to both proceedings was the issue of whether the duty to consult and accommodate had been met.

In the Federal Court proceeding, the Court recognized that there was no underlying requirement that First Nations and the Proponent reach agreement. The Honourable Justice Manson cited heavily from the recent decision in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations*), 2015 BCCA 352, where the Court, itself citing Haida, noted that *"The focus is not on the outcome, but on the process of consultation and accommodation"* and that *"Fundamentally, the Crown is not under a duty to reach an agreement; the commitment is to a meaningful process of consultation in good faith"*.

To determine the depth and sufficiency of consultation, Justice Manson considered the record before him. He noted that over a seven year process of consultation, BC Hydro had met with the interested Treaty 8 First Nations 177 times and provided nearly $6 million in capacity funding, which was in addition to funding provided by the provincial and federal governments. BC Hydro had consulted with them prior to preparing the first draft of the

Environmental Impact Guidelines, prior to designing and implementing field studies, prior to finalizing the design of the project, prior to preparing the EIS, and prior to the Province's decision as to whether to proceed with the project. Further, the Minister and Cabinet had reached their decisions after extensive input from the public, government agencies and Aboriginal groups, including the applicant Treaty 8 First Nations.

Justice Mason noted that consultation with the Applicant First Nations had been a lengthy process, conducted in good faith, and was extensive both qualitatively and quantitatively. He also noted that it was apparent from the record that while the Crown engaged with the Applicant First Nations to address mitigation measures to be taken after the joint review panel released its report, the Applicant First Nations had refused to engage in that dialogue after deciding that the only viable solution for them was for the Project not to proceed. After noting that a commitment to the consultation process does not require a duty to agree, Justice Mason explained that what was required was "good faith efforts to understand the concerns of the Applicants", and proceeded to hold that the Respondents had made such efforts.

In the British Columbia Supreme Court Proceeding, the Honourable Justice Sewell similarly canvassed the fairly extensive consultation history, and noted that among the 77 conditions included on the environmental assessment certified issued by the Ministers were a number of accommodation measures intended to avoid or reduce potentially significant adverse impacts on Aboriginal rights and further noted that BC Hydro had made a number of modifications to the Project during the environmental assessment for the same purpose. Justice Sewell also discussed the financial payments and contributions offered by BC Hydro and the Province to the Applicant First Nations (though not accepted by them), which involved lump sum and installment payments likely totaling in the tens of millions of dollars.

As Justice Mason had, Justice Sewell cited prior jurisprudence for the position that the consultation process does not require acceptance of a First Nation's position and that it is not necessary to reach agreement with them. Meaningful consultation requires a respectful consideration of the position put forward by a First Nation. In this case, Justice Sewell was satisfied that the government had made reasonable efforts and acted in good faith with respect to consultation with the Applicant First Nations, and noted that following with respect to the outcome of those consultation efforts:

> [159] In the end the parties were unable to reconcile their differences over the Project. However, I conclude that they failed to achieve reconciliation because of an honest but fundamental disagreement over whether the Project should be permitted to proceed at all. I am satisfied that the government made a good faith effort to understand the petitioners' position on this issue and made reasonable efforts to understand and address the petitioners' concerns.
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> [160] The object of consultation and accommodation is reconciliation between governments and First Nations. In this case, that reconciliation was not achieved because the government has concluded that it is in the best interests of the province for the Project to proceed and the petitioners have concluded that there is no adequate accommodation for the effects of the Project.

Conclusion

These decisions illustrate that just as the duty to consult does not imply a duty to agree on the substantive issues, there is similarly no requirement that parties agree on the sufficiency of consultation itself. While the Court will indeed supervise the Crown's actions to ensure the duty to consult has been met, that is not the same as requiring agreement.

None of this is to say that the Crown or proponents should take the duty to consult lightly, and concerns expressed by First Nations about the adequacy of consultation should be considered as genuinely as concerns about the effects of a project. But provided that is done, the lesson of these cases is that major projects will not necessarily be "tied up in court" simply because there is a lack of consensus. Given the diverse views associated with major project development generally, this is a very important point for governments, industry and First Nations to all keep in mind. Governing in the public interest may not always be easy, but despite frequent assertions to the contrary, the courts have given enough guidance to make clear that it can be done.

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a cautionary note