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BARRISTERS & SOLICITORS

Site C: Litigating Infringement of Treaty Rights

PBLI Indigenous Law 2018: Current Issues

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Overview

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Background: Site C

- 1,100 MW hydroelectric generation station on Peace River, northeastern BC
- 83-km long reservoir; will flood over 5,000 ha (and impact another 13,000 ha)
- Latest cost estimate – $10.7 billion
- Third Dam on the Peace River

Background: Treaty No. 8

- Competing rights: hunting, fishing, trapping vs. Crown's **taking up land**:

  "...such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

- Oral Promises (Report of Treaty Commissioners), affirmed in *Badger*:

  "We pointed out . . . that the same means of earning a livelihood would continue after the treaty as existed before it"

  "We had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it…We assured them that the treaty would not lead to any forced interference with their mode of life."

Background: Treaty No. 8

Treaty 8 provides for both Procedural and Substantive rights:

- Duty to consult and potentially accommodate when Crown action may adversely affect Treaty rights – the procedural rights.
- Treaty rights to "carry on their usual **vocations** of hunting, fishing and trapping", along with incidental rights – the substantive rights.
- Site C litigation alleged breach of <u>both</u> the procedural and substantive rights under the Treaty.

Prima Facie Infringement

- *Sparrow* test:

  > To determine whether the fishing 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?

- *Badger*: *prima facie* infringement if it "erodes an important aspect of Indian hunting rights."
- *Halfway River*: "proposed activity would limit or impair some degree of exercise of that right."
- *Gladstone*: "meaningful diminution of an aboriginal right."
- Not a high burden.

Prima Facie Infringement

- Crown's view - *Mikisew* (para. 48) sets out the threshold for claims of infringement:

  > 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.

- Until such time as there is no meaningful right to hunt [fish or trap], the First Nation is only entitled to consultation and accommodation.
- Nations disagreed throughout the process that *Mikisew* established new "infringement test."

Justification

Sparrow/Tsilhqot'in test:

- "Public Interest" to vague to meet test for justification.
- Compelling and Substantial Objective.
- Action consistent with Crown's fiduciary obligations.

Three elements of fiduciary duty:

- Rational connection – incursion necessary to achieve objective.
- Minimal impairment – government goes no further than necessary.
- Proportionality of impact – benefits outweigh by adverse effects.

JRP Report Findings

Significant adverse effects on valued ecosystem components:

- Current use of land and resources for traditional purposes, ie. Treaty rights to hunt, fish and trap, as well as incidental rights **cannot be mitigated**;
- Fish and fish habitat;
- Vegetation – ecological communities, wetlands and rare plants;
- Species at risk;
- Migratory birds;
- Heritage resources.
    - Significant adverse **cumulative** effects cannot be mitigated.

JRP Report Findings

- Insufficient review of alternatives to Project.
- Project is **the least expensive** alternative in the long-term - $7.9 billion budget – now almost $3 billion over.
- Project was exempted from BCUC, nonetheless, recommended **independent** review by BCUC on economic issues – need, cost, etc.
- Power not needed in BC until at least 2028 (now looks like 2034 before any new power needed) would have to be exported at a significant loss.

JRP Report Conclusions

- JRP could not opine whether Site C was an infringement or adequacy of consultation/accommodation.
- First Nations advised these matters would be addressed by Ministers in their decisions.
- JRP was asked to opine on justification:
  - "The proponent has **not fully demonstrated the need for the project** on the timetable set forth."
  - "Justification must rest on an unambiguous need for the power and analyses showing its financial costs being sufficiently attractive as to **make tolerable the bearing of substantial environmental, social and other costs**."

Approvals Issued

1. Oct 14/14: BC grants EA Certificate
    - Rejected recommendations for BCUC review of economic issues.
    - Project is "**in the public interest**" and **benefits outweigh risks** of significant adverse environmental, social and heritage impacts.
2. Oct 14/14: Cabinet issued Order in Council
    - Project's significant environmental effects "**justified in the circumstances**" (no reasons provided).
    - No consideration by Cabinet whether Site C (on its own or cumulatively) would be infringement of Treaty 8.

T8FN Court Challenges
a) Petition to Quash EAC (BCSC)

Dec 22/14: petition to quash EAC.

- **Infringes Treaty rights** – Ministers required to consider whether decision breaches treaty.
- Decision unreasonable based on information available.
- "Fix was in" with ***Clean Energy Act***.
- Consultation & Accommodation inadequate – Treaty rights not accommodated.

Sept 18/15: petition dismissed.

- Ministers not required to determine infringement.
- Infringement claims must be brought by civil action.
- Polycentric policy decision, so deference required.
- Good faith efforts to consult & accommodate.

T8FN Court Challenges
b) Judicial Review of OIC (FC)

Nov 5/14: application for JR of OIC.

- Cabinet obligated to **assess** if infringements on Treaty rights.
- Project would cause **infringement of Treaty rights**.
- Inadequate consultation and **no accommodation**.
- **Cannot be justified** under CEAA.

Aug 28/15: application dismissed.

- Crown not obligated to determine infringement.
- Must ***consider*** issue of infringement.
- Good faith and extensive consultation.
- Judgment did not address CEAA justification.

T8FN Court Challenges
c) BC Court of Appeal

- Appeal dismissed.
- Ministers did not have jurisdiction to determine infringements – EA Act does not give them power to consider questions of law.
- Must bring civil action for infringement/justification.
- Ministers do not have jurisdiction to make determination on adequacy of consultation and accommodation.
- Leave to Appeal to SCC dismissed.

T8FN Court Challenges
d) Federal Court of Appeal & SCC

- Appeal dismissed.
- Infringement must be determined in an Action.
- Decision-makers must *consider* infringement in context of consultation process.
- Administrative law cases that decided *Charter* issues distinguished.
- Leave to appeal to SCC denied.

BCUC Site C Inquiry

Damning Report Exposes BC Hydro's Creative Accounting:

- No new power needed until 2034, Site C surplus until 2041.
- Project already $3 billion over budget.
- Significantly more expensive than alternatives.
- NDP Government fell victim to the "sunk costs fallacy."
- BCUC Report shows Site C not in "public interest."
- Purported justification for Site C – cheap power that's urgently needed – exposed.

Infringement Actions

- West Moberly and Prophet River filed infringement action(s) - no claim for damages.
- Seeking injunction to halt construction until the hearing of their action(s) – to be heard sometime between July - September.
- Potentially several other applications.
- Aggressive timeline for bringing the matter(s) to trial.
- Blueberry River's infringement action on cumulative effects (including Site C) goes to trial this year.
- The *Mikisew* infringement test will hopefully be clarified and defined.

Conclusions

- Infringement still matters in the consultation/accommodation context (Prophet River, FCA, Gitxaala, FCA)
- Overarching purpose of consultation is to ensure that government decision-makers make decisions that consider both procedural and substantive rights.
- Ministers may not have "jurisdiction" to make binding determinations, but must be alive to the possibility that their decisions may unjustifiably infringe Aboriginal or Treaty rights.
- Site C approved without asking: "will this decision, if implemented, breach our obligations under the Treaty?"
    - Based on a faulty reading of *Mikisew* - that there could be no infringement until the rights have effectively been extinguished.

Conclusions

- Can Administrative tribunals that consider questions of law, eg. BCUC or NEB issue binding determinations on infringement/justification?
- *Paul* (SCC) and *Prophet River* (BCCA/FCA) suggests that they could.
- Had Site C not bypassed BCUC process – infringement issue may have been resolved prior to construction.
- The approach taken by the Crown and courts does not further reconciliation, leads to endless litigation, and creates artificial compartments, where Ministers can consider adequacy of consultation and accommodation, but not infringement.

Questions?

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