COURT OF APPEAL FILE NO. CA43187

COURT OF APPEAL

ON APPEAL FROM the order of Justice Sewell of the Supreme Court of British Columbia pronounced on the 18th of September, 2015

BETWEEN:

PROPHET RIVER FIRST NATION and

WEST MOBERLY FIRST NATIONS

Appellants (Petitioners)

AND:

MINISTER OF THE ENVIRONMENT, MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS, and BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondents (Respondents)

APPELLANT'S FACTUM

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West Moberly First Nation

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CHRONOLOGY

Date	Event
1899	Treaty No. 8 is signed between Canada and the Chiefs of several First Nations at Lesser Slave Lake. The Treaty is later adhered to by many other First Nations including the Appellants.
1911	The Appellant Prophet River First Nation adheres to Treaty No. 8.
1914	The Appellant West Moberly First Nations adheres to Treaty No. 8.
1957	British Columbia establishes a flood reserve around the Peace River, including those lands that would be inundated by the Site C Project.
1968	Construction of the W.A.C. Bennett Dam on the Peace River is completed, creating the Williston Reservoir. No consultation takes place nor is compensation offered to the Treaty 8 First Nations.
1979	Construction of the Peace Canyon Dam is completed downstream of the W.A.C. Bennett Dam, creating the Dinosaur Reservoir. No consultation takes place nor is compensation offered to the Treaty 8 First Nations.
1980	BC Hydro applies for an Energy Project Certificate for the Site C Project.
1981-1982	The British Columbia Utilities Commission reviews the proposed Site C Project and concludes that the Project should not be approved because BC Hydro had not demonstrated that the Project was needed at that time nor established that Site C was the best project to meet the need for power.
1983	The BC Cabinet refuses the issuance of the Energy Project Certificate.
1989	The Province decides not to pursue the Site C Project indefinitely.
2004-2007	BC Hydro conducts a review of the feasibility of the Site C Project. In 2007, the Province approves continued investigation of the Project.
2007-2011	BC Hydro performs field studies and prepares a project description report to submit to the BC Environmental Assessment Office (“EAO”) and the Canadian Environmental Assessment Agency (the “Agency”).
November 2007	BC Hydro begins discussions with the Appellants regarding consultation on

	the Project.
December 2008	BC Hydro and the Appellants enter into a consultation agreement.
July 2009	BC Hydro begins providing substantive information and consultation with the Appellants begins in earnest.
June 2010	The *Clean Energy Act*, SBC 2010, c. 22 comes into force, exempting the Site C Project from the requirement to obtain a Certificate of Public Convenience and Necessity from the BC Utilities Commission and defines Site C as a "heritage asset".
May 2011	BC Hydro submits a project description report to the EAO and the Agency, initiating the environmental assessment process.
August 2011	The Executive Director of the EAO refers the determination of the scope of the assessment to the Minister.
September 2011	Canada and BC release a draft Joint Agreement for Cooperative Environmental Assessment (the "Joint Agreement"), which would establish the parameters and structure of the joint Federal-Provincial environmental assessment, including terms of reference for a Joint Review Panel (the "Terms of Reference").
November 4, 2011	The Appellants send a letter to the EAO and the Agency summarizing their understanding of Treaty 8 and the potential impact of the Project on the their treaty rights. This letter is supplemented by an additional letter sent on February 24, 2012.
December 2, 2011	The Appellants provide their formal response to the Joint Agreement and Terms of Reference. It expresses concern that the Terms of Reference prevent the Panel from making any conclusions or recommendations as to the nature and scope of treaty rights, whether the Crown has met its duty to consult and whether the Project infringes Treaty No. 8.
January 2012	BC Hydro submits the initial draft of the Environmental Impact Statement ("EIS") Guidelines, which would establish the information requirements for the environmental assessment. Consultation on the draft EIS Guidelines occurs from January to March 2012.
February 2012	Canada and BC finalize the Joint Agreement and Terms of Reference.

February 2012	The EAO and the Agency respond to the Appellants' letter of December 2, 2011 on the Joint Agreement.
March 2012	The EAO and the Agency provide all affected Aboriginal groups with letters outlining their preliminary review of Treaty 8 rights, potential impacts, and depth of consultation.
March 2012	Following meetings with the Appellants, the EAO and the Agency revise the EIS Guidelines. The EIS Guidelines are then released for a public comment period from April to June, 2012.
July-August 2012	The EAO and the Agency respond to the Appellants' comments on the EIS Guidelines.
September 2012	The EAO and the Agency finalize the EIS Guidelines.
December 21, 2012	The Appellants send a letter to the EAO and the Agency summarizing their outstanding concerns with the consultation process.
January 2013	BC Hydro submits the Draft EIS, which is provided to the Appellants for review and comment.
February 18, 2013	EAO sends letters to the Appellants with updated information on their view of the nature and scope of Treaty 8 rights.
February 19, 2013	The Working Group (including the Appellants, EAO, and the Agency) holds a meeting on the EIS.
April 13, 2013	The Appellants provide comments on the draft EIS, expressing concern over the accuracy of the summary, imbalance in the tone and content, and the scope of the assessment, as well as BC Hydro's failure to integrate the Appellants' documents into the EIS.
May 8, 2013	The EAO and the Agency provide the Appellants with BC Hydro's responses to comments received from Aboriginal groups on the EIS, including new technical memoranda.
June-July 2013	The Appellants meet with the EAO and the Agency to discuss the EIS.
July 2013	BC and Canada appoint the Joint Review Panel (the "JRP" or "Panel").
August 2013	The EAO and the Agency respond to the Appellants' concerns, explaining how BC Hydro would amend the EIS. The EIS is then referred to the Panel

	for assessment, subject to those amendments.
August-October 2013	The Panel invites Aboriginal groups to provide input on the sufficiency of the EIS.
September-November 2013	The Panel requests additional information from BC Hydro, then decides to proceed with the public hearing.
December 2013-January 2014	The Panel conducts public hearings.
February 3, 2014	The Appellants provide their closing submissions to the Panel. They say the Project will infringe Treaty 8, and urge the Panel to conclude the Project cannot be justified and is not in the public interest.
May 1, 2014	The Panel submits its Report on the Project to the EAO and the Agency. The Report is later provided to the Appellants on May 8, 2014.
June 10, 2014	The EAO and the Agency provide the Appellants with a draft Federal/Provincial Crown Consultation and Accommodation Report ("CAR").
June-July 2014	The Appellants provide comments to the EAO and the Agency on the Panel Report and the draft CAR.
July 2014	BC Hydro sends letters to the Appellants outlining proposed accommodation offers.
August 2014	The EAO and the Agency provide the Appellants with a revised CAR and draft conditions for the Environmental Assessment Certificate. The Appellants provide further comments.
September 2014	The Executive Director of the EAO submits a referral package to the Ministers of Environment and of Forests, Lands and Natural Resource Operations (the "Ministers") for decision containing: an Information Briefing Notes; the EAO Executive Director's Response to the JRP Report; the JRP Report; the draft Certificate; reference link for the Amended EIS; the CAR; letters offering accommodation; individual First Nation submissions to the Ministers, including a letter from each of the Appellants; the Pre-Panel Stage Report.
October 2014	The Ministers issue the Certificate.

December 2014	The Provincial government makes its Final Investment Decision to proceed with the Project.
April 23-24, April 27-28, and May 4-6, 2015	BC Supreme Court hearing before Sewell J.
September 18, 2015	Reasons for Judgment issued, dismissing the application for judicial review.

OPENING STATEMENT

This is an appeal from a decision of Justice Sewell, who dismissed the Appellants' application for judicial review of the Environmental Assessment Certificate issued by British Columbia for the Site C Project.

Site C is no ordinary project. Currently estimated to cost $8.8 billion, it would be the largest infrastructure project in BC history. The process by which it was approved by the BC government cannot be characterized as ordinary either.

From July 2010 onward, the British Columbia government was fixated on building the Site C Dam. British Columbia Utilities Commission oversight was removed, alternative sources of power were legislatively barred or inadequately assessed, and impacts of the Project on the environment and meaningful exercise of Treaty rights were minimized.

The BC Crown and the Federal government appointed a Joint Review Panel to conduct a review of the Site C Project. The JRP Report rejected the core claims of BC Hydro in regard to the purpose, need, costs and alternatives to the Project, as well as BC Hydro's minimizing the significance of the effects of the Project on the Appellants ability to exercise their Treaty rights in the last remaining stretch of the Peace River Valley.

In spite of an inadequate environmental assessment and deficient consultation process, the Ministers of Environment and Forests, Lands and Natural Resource Operations issued an Environmental Assessment Certificate for the Project.

The Crown had a legal duty to determine whether the approval of the Certificate would be an infringement of the Appellants' Treaty rights that would need to be justified under the *Sparrow* test. There was ample information provided during the process for the Crown to make that determination and they failed to do so.

In addition, the Crown did not engage in meaningful consultation and accommodation with the First Nations. While a process for the exchange of information was in place, the immitigable impacts of the Project on the Appellants' Treaty rights were never adequately addressed by the Crown.

PART 1 - STATEMENT OF FACTS

1. The Appellants are beneficiaries of Treaty No. 8, with Treaty rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.[1] Treaty No. 8 expressly grants all Treaty beneficiaries hunting, trapping and fishing rights within the Treaty territory, which includes the area within which the Site C Project is situated. [2]

2. The exercise of Treaty rights is dependent on the availability of specific places, species and means. The Appellants harvest preferred species in preferred locations, depending on the individual, the season, and preferred means of harvest.[3] The Peace River and Peace River Valley are preferred territory of the Appellants; unique areas with unparalleled ecological and cultural significance,[4] and one of the last remaining places for the Appellants to exercise Treaty rights and maintain their mode and way of life.[5]

3. The Peace River Region has been extensively impacted by industrial and hydroelectric development.[6] The cumulative effects of existing developments have had a devastating impact on the Appellants' ability to meaningfully exercise their Treaty rights and to carry out the mode of life promised by the Treaty No. 8 Commissioners.[7]

4. The Site C Project includes a hydroelectric dam on the Peace River with, among other infrastructure, an 83-kilometre long reservoir flooding more than 5550 hectares of land and resulting in a total reservoir surface area of approximately 9330 hectares,[8] as well as flooding the lower reaches of the Halfway River (15.3 km), Lynx Creek (1.3 km),

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[1] Schedule B to the *Canada Act 1982*, 1982, c 11 (UK) [*Constitution Act, 1982*].
[2] Aff. #1 of Roland Willson, Exhibit 1, *Treaty No. 8, made June 21, 1899 and Adhesions, Reports, etc*. at 11 [JAB Vol 1, p. 23].
[3] Aff. #1 of Jeffrey Richert, Exhibit 82, Document 2513 at 20 [JAB Vol 2, p. 2540].
[4] *Prophet River First Nation v British Columbia (Environment)*, 2015 BCSC 1682 [Reasons for Judgment] at para.10; Aff. #1 of Roland Willson, paras. 7-8, 25, 36 [JAB Vol 1, pp. 3, 4, 7, 9]; Aff. #1 of Susan Yu, Exhibit B, Document 2771, *Report of the Joint Review Panel: Site C Clean Energy Project,* (May 1, 2014) [JRP Report] at section 7.2.3, p. 102 [JAB Vol 10, p. 6503].
[5] Aff. #1 of Jeffrey Richert, Exhibit 82, Document 2451 at 9 & 11 [JAB Vol 2, pp. 2114 & 2116], Document 2530 at pp. 93-94, 97-99 [JAB Vol 2, pp. 2639-2640, 2643-2645], and Document 2120 at pp. 82-86 [JAB Vol 2, pp. 1520-1524]; Aff. #1 of Shane Ford, Exhibit A, Tab 5, Vol 5, Appendix A06 Part 5 at pp. 13-14, 28 & Maps [JAB Vol 4, pp. 4216-4217, 4231, 4285-4306]; Aff. #1 of Roland Willson, paras. 8, 24-25, 34 & 35 [JAB Vol 1, pp. 4, 7-9].
[6] Aff. #1 of Jeffrey Richert, Exhibit 82, Document 2111 at 21 [JAB Vol 2, p. 1438].
[7] Aff. #1 of Jeffrey Richert, Exhibit 82, Document 2120 at pp. 86-87, 124, 126, 223-224 [JAB Vol 2, pp. 1524-1525, 1562, 1564, 1661-1662], Document 2298 at 26-29, 42, 70-72 & 170 [JAB Vol 2, pp. 1757-1760, 1773, 1801-1803 & 1901], and Document 2073 at 98 [JAB Vol 2, p. 1417].
[8] *Reasons for Judgment* at para. 14.

Farrell Creek (3.6 km), Cache Creek (9.0 km), Wilder Creek (3.2 km), Tea Creek (1.2 km) and Moberly River (11.6 km).[9]

5. Seventy percent of the Peace River Valley has already been inundated by previous hydroelectric development. The Site C Project would flood approximately half of the remaining thirty percent of the Peace River Valley in British Columbia.[10]

6. BC Hydro began substantive consultation with the Appellants in 2009, when the Appellants raised serious concerns regarding BC Hydro's approach to consultation.[11] Following the acceptance of BC Hydro's Project Description in 2011, consultation continued under the joint federal/provincial environmental assessment process.[12]

7. The Terms of Reference for the JRP required it to assess alternatives to the Project, the environmental, economic, social, health and heritage effects of the Project and the significance of those effects, including cumulative effects, changes caused by the Project on the current use of lands and resources for traditional purposes by Aboriginal peoples.[13] The JRP was directed to receive information on the Project's adverse effects on established treaty rights; on the location, extent and exercise of Treaty rights adversely affected by the Project; and on potential mitigation measures for adverse effects of the Project on treaty rights.[14]

8. The JRP could not make conclusions or recommendations on the scope of the Crown's duty to consult Aboriginal groups, the adequacy of Crown consultation and accommodation, whether the Project was an infringement of Treaty No. 8, or matters of treaty interpretation.[15] The EAO took the position that treaty interpretation was a matter for government and that the assessment of the scope and nature of treaty rights was for the statutory decision-makers.[16] The Appellants were advised that determinations on Treaty interpretation and whether the Project "might infringe upon or impact established

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[9] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 19 [JAB Vol 10, p. 6420].
[10] Aff. #1 of Jeffrey Richert, Exhibit 82, Document 2530 at 120-121 [JAB Vol 2, pp. 2666-2667].
[11] Aff. #1 of Jeffrey Richert, para. 7-9 [JAB Vol 2, p. 202] and Exhibit 2 [JAB Vol 2, pp. 242-256].
[12] Aff. #1 of Jeffrey Richert, para. 20 [JAB Vol 2, pp. 203-204] and Exhibit 13 [JAB Vol 2, pp. 299-303].
[13] *Reasons for Judgment* at para. 35.
[14] *Ibid*.
[15] *Ibid*.
[16] Aff. #1 of Brian Murphy at para. 74 [JAB Vol 6, pp. 4893-4894].

treaty rights" would be made after the environmental assessment process.[17]

9. The Appellants made extensive submissions to the JRP, BC Hydro, and the Agency and EAO. These submissions included the nature and scope of the Appellants' Treaty rights, principles of treaty interpretation and the proper construction of Treaty No. 8, the "taking up" clause in Treaty No. 8 and limitations on Treaty rights, the impact of the Site C Project and current land use in the Project area, cumulative effects, and the need for and alternatives to the Project.[18]

10. The EAO did not respond to the Appellants' interpretation of the "taking up" clause or their repeated claims that the Site C Project would infringe Treaty rights.[19] The Crown Consultation Report ("CAR") provided to the Ministers acknowledged that the Crown's interpretation of Treaty No. 8 and the taking up clause differed from that of the Appellants, without detailing or attempting to address the differing views or the Appellants' position that the Project would constitute a Treaty infringement.[20]

11. The First Nations provided extensive evidence during the Panel phase that the Project will inundate or otherwise destroy 368 culturally important sites relating to harvesting, burial, medicine collection, teaching, ceremony, habitation, hunting, gathering, transportation, names, and oral history.[21] Other participants in the JRP process also made submissions on the cultural and ecological importance of the Peace River Valley.[22]

12. The JRP Report confirmed the cultural significance of the Peace River Valley to the Appellants and found that an alternate comparable natural setting could not be found nearby.[23] It rejected BC Hydro's attempts to minimize the significance of the

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[17] Aff. #1 of Jeffrey Richert, Exhibit 41 [JAB Vol 2, pp. 316-322].
[18] *Reasons for Judgment* at paras. 37, 38, 46, 53, 54.
[19] *Reasons for Judgment* at paras. 46 and 54;
[20] *Reasons for Judgment* at para. 72.
[21] Aff. #1 of Shane Ford, Exhibit A, Tab 5, Vol 5, Appendix A06 Part 5 [JAB Vol 4, pp. 4202-4306].
[22] See for e.g.: Aff. #1 of Jeffrey Richert, Exhibit 82, Document 92 at 1 [JAB Vol 2, p. 452], Document 980 at pp. 1-2 [JAB Vol 2, pp. 598-599], Document 1928 at pp. 22, 24-60, and 69 [JAB Vol 2, pp. 957, 959-995 and 1004]; and Aff. #1 of Jeffrey Richert, Exhibit 82, Document 2111 at 21 [JAB Vol 2, p. 1438].
[23] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 102 & 108 [JAB Vol 10, pp. 6503 & 6509].

adverse environmental effects and the impacts on the Appellants' Treaty rights.[24]

13. The JRP found that the Site C Project, in combination with past, present and future projects, would result in significant cumulative adverse environmental effects on fish, vegetation and ecological communities, wildlife.[25] The JRP Report and the CAR found that the Project would likely cause significant adverse effects on the Appellants' current use of land and resources including hunting, trapping and fishing, and that many of these impacts could not be mitigated[26] and would likely cause moderate to serious changes to the exercise of the Appellants' Treaty rights.[27]

14. The JRP also found that BC Hydro had not adequately demonstrated the need for the Project on the timetable set forth, and recommended that the government submit the Project for further review by the BC Utilities Commission.[28]

15. The CAR confirms that Treaty No. 8 rights are "proven" rights for the purposes of section 35(1) of the *Constitution Act, 1982* and the high probability that the Site C Project would impact the ability of First Nations to meaningfully exercise specific Treaty No. 8 rights in the area.[29]

16. In August 2014 the Appellants and other Treaty 8 First Nations advised the Ministers in writing that the Site C Project and resulting loss of the Peace River Valley would infringe their Treaty rights and required justification under the *Sparrow* test.[30]

17. In issuing the Certificate under the *Environmental Assessment Act*[31] (the *EAA*) the Ministers did not decide whether the Project constituted an infringement of the Appellants' Treaty rights.[32]

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[24] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at pages 108, 311-315, 321, 323-325 [JAB Vol 10, pp. 6509, 6712-6716, 6722, 6724-6726].
[25] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report, Executive Summary at page v [JAB Vol 10, p. 6394]; *Reasons for Judgment* at para.56.
[26] *Reasons for Judgment*, paras. 57-62.
[27] Aff. #1 of Shane Ford at para. 5 (f)(i) [JAB Vol 4, p. 3216] and Exhibit A, Tab 6A at 16 [JAB Vol 4, p. 4516]
[28] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 323-325 [JAB Vol 10, pp. 6724-6726].
[29] Aff. #1 of Shane Ford, Exhibit A, Tab 6A at 23 [JAB Vol 4, p. 4523].
[30] *Reasons for Judgment* at paras. 75-78.
[31] *Environmental Assessment Act*, S.B.C. 2002 c. 43 [*EAA*]
[32] *Reasons for Judgment* at para. 117.

PART 2 - ERRORS IN JUDGMENT

18. The Chambers judge erred in law in:

a. finding that the Ministers did not have jurisdiction to consider and determine whether the decision to issue the Certificate would violate Treaty No. 8 and the *Constitution Act, 1982*, in particular whether the Project constituted an unjustified infringement of the Appellants' Treaty rights; and,

b. failing to find that the Ministers, in the particular circumstances of this case, were legally obligated to ensure that their exercise of statutory discretion under the *EAA* did not unjustifiably infringe the Appellants' Treaty rights.

19. The Chambers judge erred in law or mixed fact and law in finding that the decision to issue the Certificate did not breach the Crown's duty to consult and accommodate the Appellants' Treaty rights.

20. The Chambers judge erred in law by misapplying the reasonableness standard of review, holding that the Ministers were entitled to a "high degree of deference".

PART 3 - ARGUMENT

A. Standard of Review

I. Appellate Standard of Review

21. The standard of review for questions of law is correctness. An appeal court may set aside a decision of the lower court if it finds an error of law or, for questions of fact, a palpable and overriding error.[33] However, in the context of judicial review, the appellate court's role is to "step into the shoes of the lower court".[34]

22. While the Chambers judge correctly identified the standards of review for the issues before this Court on appeal, he erred in the application of those standards. The Chambers judge identified a correctness standard for the issue of whether the Ministers were required to consider or determine infringement of the Appellants' Treaty rights, and for the determination of the depth of consultation required. The Chambers judge identified a reasonableness standard for the Ministers' decision that the consultation

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[33] *Housen v. Nikolaisen,* 2002 SCC 33 ["*Houson*"] at para. 8.
[34] *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness),* 2013 SCC 36 ["*Agraira*"] at para. 46.

and accommodation was adequate to issue the Certificate.

II. Deference and the Reasonableness Standard

23. In *Dunsmuir*, the Supreme Court of Canada recategorized the standards of review, collapsing the previous "reasonableness *simpliciter*" and "patent unreasonableness" standards into a single standard of "reasonableness", covering all decisions where deference is to be afforded to the decision maker by the courts.[35] The deference offered by the reasonableness standard was to reflect "respect for the decision-making process of adjudicative bodies";[36] it was not to be a return to the extreme deference offered by the patent unreasonableness standard.[37] In *applying* the reasonableness standard, the Chambers judge suggested that the Ministers' decision to issue the Certific*ate was ent*itled to "a high degree of deference", due to its nature as a "polycentric" decision subject to "a very wide discretion".[38] The Court's reasons appear to suggest that, notwithstanding the application of a single "reasonableness" standard, different decisions or decision-makers ought to receive different levels of deference. In doing so, the Court appears to be reintroducing the distinction between patent unreasonableness and reasonableness *simpliciter* that was expressly overruled in *Dunsmuir*. This same approach ("a high degree of deference") has been rejected by the Federal and Ontario Courts of Appeal for precisely this reason.[39] While some decisions will have a broader range of reasonable outcomes, the level of deference required is fixed.[40]

24. The lower court's application *of a* "high degree of deference" is an error of law that warrants appellate intervention in order to properly define the standard of review applicable to Ministerial decisions such as those in the case at bar.

B. The Honour of the Crown

25. The Crown's ability to take up land under Treaty and its concomitant

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[35] *Dunsmuir v. New Brunswick*, 2008 SCC 9 ["*Dunsmuir*"] at paras 34, 47-50.
[36] *Dunsmuir, supra* at para 48.
[37] *Dunsmuir, supra* at para 42.
[38] *Reasons for Judgment* at para. 187.
[39] *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194 at para. 32.
[40] *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para. 14-23.

obligations is subject to the honour of the Crown.[41] The Supreme Court of Canada recently set out how obligations that attract this principle must be fulfilled:

> …when the issue is the implementation of a constitutio*nal obligat*ion to an Aboriginal people, the *honour o*f the Crown requires that the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it.[42]

26. The question is whether, viewing the Crown's conduct as a whole, it acted with diligence to fulfill the purposes of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.[43] The purpose of the Treaty harvesting rights was to allow members of adhering First Nations to continue to meaningful exercise those rights in carrying out their traditional mode of life.

27. "A persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise."[44] The Aboriginal group must not be left with an empty shell of a treaty promise.[45]

28. The question in this case is whether the Ministers' decision upheld the honour of the Crown and if not, what was required in order for it to do so. Diligence in fulfilling the honour of the Crown required the Ministers to meaningfully consult with the Appellants with the aim of reconciling the Appellants' interests with competing interests, and to ensure that the Appellants' Treaty rights would not be unjustifiably infringed.

C. Infringement of Treaty Rights

I. The Ministers had Jurisdiction to Determine Infringement

29. The Ministers issued the Certificate without deciding whether they were authorizing an infringement of the Appellants' Treaty rights.[46] In doing so, the

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[41] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 ["*Haida"*] at para. 16; *R. v Sparrow*, [1990] 1 S.C.R. 1075 ["*Sparrow"*] at para. 75.
[42] *Manitoba Métis Federation v Canada (Attorney General)*, 2013 SCC 14 ["*Manitoba Métis"*] at paras. 65-66 & 69; quote at para. 75.
[43] *Ibid.* at paras. 73, 78-79.
[44] *Ibid.* at para. 82 [emphasis added].
[45] *R. v Marshall*, [1999] 3 S.C.R. 456 ["*Marshall*"] at para. 52.
[46] *Reasons for Judgment* at para. 117.

Ministers were indifferent to the possibility that their decision to issue the Certificate might unjustifiably infringe the Appellants' Treaty rights.

30. The Chambers judge erred in law in finding that the Ministers did not have jurisdiction to determine whether their approval of the Site C Project infringed the Appellants' Treaty rights. The Chambers judge's comparison between the role of the Ministers and the functions of the Forest Appeals Commission in *Paul v British Columbia*[47] highlights his error in the interpretation and application of the law.[48]

31. In *Conway*,[49] the Supreme Court of Canada categorized the jurisprudence on the determination of constitutional issues by administrative tribunals into three different streams, distinguishing between the *Mills* stream (an administrative tribunal is court of competent jurisdiction to grant section 24(1) remedies),[50] the *Cuddy Chicks* trilogy (an administrative tribunal can consider the constitutionality of its enabling legislation),[51] and the *Slaight Communications*[52] stream (exercises of statutory discretion must comply with the *Charter*).[53]

32. *Paul* falls under the "*Cuddy Chicks* stream" and required the Forest Appeals Commission to examine the constitutionality of its enabling legislation prohibition. Applying reasoning from *Martin*,[54] the Court considered whether the Commission's enabling statute allowed it to decide questions of law, legislative intent, and the adjudicative nature of the Commission, to determine if it could examine the constitutionality of its enabling statute.[55]

33. The correct framework to be applied in this appeal is the "*Slaight Communications* stream", not *Paul*/*Cuddy Chicks*. The Ministers must exercise discretion under section 17(3) of *EAA* within the bounds of the constitution, including section 35(1) of the *Constitution Act, 1982*. Exceeding those boundaries

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[47] 2003 SCC 55 ["*Paul*"].
[48] *Reasons for Judgment* at paras. 114-135.
[49] *R. v. Conway*, 2010 SCC 22 ["*Conway"*].
[50] *Ibid.* at paras. 24-40.
[51] *Ibid.* at paras. 49-77.
[52] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 825 ["*Slaight Communications*"].
[53] *Conway, supra* at paras 41-48.
[54] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 ["*Martin*"].
[55] See *Conway*, *supra* at paras. 63-75.

results in a reversible error of law.[56] In *Slaight Communications*, the Court explained:

> The adjudicator is a statutory creature…and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter…Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter, and he exceeds his jurisdiction if he does so.[57]

34. The Ministers' authority to issue the Certificate is statutory. Like all administrative decision-makers, the Ministers must operate within the bounds of section 35(1) of the *Constitution Act, 1982*.[58]

35. The application of *Slaight Communications* to the within appeal is confirmed by numerous aboriginal law cases, which hold that the Crown's constitutional duties to Aboriginal peoples lie upstream of the statutory mandate of the decision-maker.[59] The constitution is not a mere statute but the very document by which the Crown asserted sovereignty notwithstanding prior Aboriginal occupation.[60]

36. A useful analogy can be made to the extradition context, which is a politically-driven, administrative process that requires the Minister to decide *Charter* issues in exercising statutory discretion. In *Kwok*, the Supreme Court of Canada confirmed that the Minister must respect a fugitive's constitutional rights in the exercise of ministerial discretion to ensure that its decision complies with the constitution.[61] The Minister's decision in *Kwok* is not unlike the decision of the Ministers in this case, which must also comply with constitutional limits.

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[56] *Ibid.* at para. 43.
[57] *Slaight Communications*, *supra* at 1077-1078 [emphasis in original].
[58] *Conway, supra* at paras. 41-48.
[59] *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 ["*Beckman*"] at para. 48; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* 2011 BCCA 247 ["*West Moberly"*] at para. 106; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 ["*Halfway*"] at para. 177; *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at paras. 18-19.
[60] *Manitoba Métis*, *supra* at paras. 68-69, citing *R. v. Badger*, [1996] 1 S.C.R. 771 ["*Badger*"] at para. 41; *Haida, supra* at paras. 17 and 42.
[61] *United States of America v. Kwok*, 2001 SCC 18 ["*Kwok"*] at para 80.

37. Regardless of the polycentric nature of its decision, the Ministers cannot issue a Certificate without first determining that it is constitutionally compliant.[62] While section 17(3) of the *EAA* gives the Ministers broad discretion,[63] broad grants of statutory power and open-ended language do not authorize constitutional breaches.[64] By relying on *Paul*, the Chambers Judge incorrectly focused on legislative intent and the nature and function of the Ministers' decision, allowing his assessment of the mechanics of the statutory scheme to determine what is required of the Ministers to ensure that their decision survives constitutional scrutiny.

38. In *Kwikwetlem*, and in the case on appeal, BC Hydro acknowledged that the ministers had a constitutional duty to assess the adequacy of the Crown's consultation and accommodation efforts under s. 17 of the *EAA* and had the authority to deny the Environmental Assessment Certificate if they determined that the honour of the Crown was not maintained in the consultation process.[65] There was no issue raised in that case, or in the within appeal,[66] of the Ministers' jurisdiction to consider this related constitutional question.

39. The *Paul* framework would apply to the question of whether the Ministers' had the jurisdiction to examine the constitutionality of the environmental assessment procedures set out in the *EAA*. However, the constitutionality of the environmental assessment process was not the issue before the Ministers or the issue before the Court on judicial review. The issue was the content of the Ministers' constitutional obligation in the issuance of the Certificate and whether that obligation extended beyond determining the adequacy of the consultation to determining whether their decision would infringe Treaty rights.

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[62] *Conway*, *supra* at para. 42.
[63] Section 17(3) has been interpreted by the Courts to require the Ministers to consider environmental, economic, social heritage or health effects, and, in environmental assessments involving the rights of Aboriginal peoples, the potential adverse effects of the project in question on the rights of Aboriginal peoples. See: *Kwikwetlem v. British Columbia (Utilities Commission*), 2009 BCCA 68 ["*Kwikwetlem*"] at paras. 57-58.
[64] *Ibid.* at para. 44; *Conway*, *supra* at paras. 43- 44, citing *Slaight Communications*, *supra* at 875 and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 3.
[65] *Conway, supra* at para 45.
[66] See *Reasons for Judgment* at para. 147, 163-165, 170.

40. Where a duty exists the Crown is obligated to design a process that meets the needs for discharge of its duty [67] and the *EAA* allows the Ministers and the Crown this flexibility.[68]

41. The principle of constitutional supremacy applies to the *EAA*. Any suggestion that the *EAA* process is inadequate to permit the Ministers to determine the constitutionality of their decision, including whether their decision infringes Treaty rights, is in effect an attack on the constitutionality of the *EAA*.[69]

II. The Ministers' Obligation to Determine Infringement

42. Finding that the Ministers lacked jurisdiction to decide whether the Project infringed the Appellants' Treaty rights, the Chambers Judge declined to consider the Ministers' obligation in the circumstances to make that determination.

43. Consistent with *Slaight Communications*, the Ministers were required to ensure constitutional compliance of their decision. They determined the adequacy of consultation for that reason. The question for this Court then becomes what "constitutional compliance" on the part of the Ministers would entail. The Appellants say that determining the adequacy of consultation alone will not ensure the constitutionality of a statutory decision in all circumstances, and was not sufficient in respect of the Ministers' decision under the *EAA* to permit the Project to proceed. They also had to determine whether more than consultation was required and whether the Project was an infringement of Treaty rights to which the *Sparrow* justification standard must be applied.

44. Particular circumstances existed that compelled the Ministers to determine whether a Treaty infringement would arise from their proposed action, including: the magnitude, location and nature of the proposed Crown action;[70] the existing cumulative impacts in the Project area, including two existing hydroelectric dams on the Peace River, widespread oil and gas development and the resulting

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[67] *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 at para. 113; *Kwok, supra* at paras. 73-79.
[68] See *EAA*, *supra*, sections 11, 13, 17(3)(b) and (c)(iii), 21 and 30.
[69] *Conway*, *supra* at para 65; *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 54.
[70] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report, Executive Summary at iv-v, p. 8-10 [JAB Vol 10, pp. 6393-6394, 6409-6411].

restrictions on the Appellants' ability to meaningfully exercise their Treaty rights;[71] the JRP's extensive findings of significant adverse impacts, many of which directly related to the Appellants' use of lands and resources and could not be mitigated;[72] the JRP's findings of the unique character and the cultural significance of the Peace River Valley to the Appellants;[73] the CAR identifying that the adverse effects of the Project would seriously impact and change the ability of First Nations to meaningfully exercise Treaty No. 8 rights;[74] and the fact that the Appellants' continually raised concerns about infringement throughout the consultation and environmental assessment process.[75]

45. A Treaty infringement is a form of adverse impact on a Treaty right that infringes or legally violates the Treaty. It will occur if there is a meaningful diminution of a Treaty right that is not exempted by the Crown's ability to "take up land" under Treaty "from time to time for settlement, mining, lumbering, trading or other purposes".[76] Such infringements or violations of Treaty must be justified in accordance with the test set out by the Supreme Court of Canada in *Sparrow*.

46. In *Mikisew*, the Supreme Court of Canada considered the Treaty No. 8 Harvesting Rights clause and its relationship to the taking up provision:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the 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.[77]

47. Rejecting the argument that all meaningful diminutions of Treaty rights

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[71] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report, Executive Summary at v, p. 55-56, 70-71, 90-91, 117-120, & 256-261 [JAB Vol 10, pp. 6394, 6456-6457, 6471-6472, 6491-6492, 6518-6521 & 6657-6662].
[72] *Reasons for Judgment* at paras. 57-62.
[73] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 63, 84, 87, 94-96, 102, 108 [JAB Vol 10, pp. 6464, 6485, 6488, 6495-6497, 6503, 6509].
[74] Aff. #1 of Shane Ford, Exhibit A, Tab 6A at pp. 23, 91 [JAB Vol 4, pp. 4523, 4591] and Appendix A28 at 16 [JAB Vol 4, p. 4749].
[75] *Reasons for Judgment* at paras. 32, 54 and 75-78.
[76] Aff. #1 of Roland Willson, Exhibit 1 at 11 [JAB Vol 1, p. 23].
[77] *Ibid* [JAB Vol 1, p. 23].

caused by the Crown exercising its authority to take up land would infringe the Treaty, the Court noted that "not every subsequent 'taking up' by the Crown constitutes an infringement of Treaty No. 8 that must be justified according to the test set out in *Sparrow*."[78] This is due to the effect of the taking up provision included in the Harvesting Rights clause.

48. However, the taking up provision does not render Treaty harvesting rights inferior to the Crown's right to take up land for certain purposes.[79] Treaty rights are established, constitutionally protected rights that "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by section 35(1) of the *Constitution Act, 1982*."[80]

49. The Harvesting Rights clause and, in particular, the relationship between harvesting rights and the Crown's ability to take up land, must be interpreted in accordance with the principles of treaty interpretation.[81]

50. The Supreme Court of Canada in *Badger* applied many of these interpretive principles to the Harvesting Rights clause. In addition to the text of the Treaty, the Court considered the oral promises documented in the report of the Treaty Commissioners who negotiated the Treaty.[82] In summary, these promises (the "Crown's Oral Promises"), included representations that: the same means of earning a livelihood would continue after the Treaty as existed before it and the Indians would be expected to continue to make use of them; they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and the Treaty would not lead to "forced interference with their mode of life."[83]

51. The Crown's Oral Promises are significant to the interpretation of the written

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[78] *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, 2005 SCC 69 [*Mikisew*] at para. 31 [emphasis added].
[79] *West Moberly, supra* at para. 150; *Halfway*, *supra* at para. 134.
[80] *Haida*, *supra* at para. 20.
[81] *Badger*, *supra* at paras. 41, 52, 53 and 76; *Nowegijick v. R.,* [1983] 1 SCR 29 at 36; *West Moberly, supra* at para. 132; *R. v Sioui,* [1990] 1 S.C.R. 1025 at 1043; *Marshall, supra* at paras. 12 and 78; *R. v. Simon*, [1985] 2 S.C.R. 387 at 402; *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 32; *Guerin v. R.,* [1984] 2 SCR 335 at 388.
[82] Aff. #1 of Roland Willson, Exhibit 1, p. 5 [JAB Vol 1, p. 17].
[83] *West Moberly, supra* at para. 130.

text of the Treaty.[84] Courts have interpreted Treaty No. 8 with the assistance of the Crown's Oral Promises, as evidenced in official reports or documented by eye witnesses to Treaty,[85] which demonstrate the importance that the Aboriginal signatories placed on the harvesting rights provided by the Treaty.

52. Applying the principles of treaty interpretation to the Harvesting Rights Clause inexorably leads to the conclusion that reliance on the taking up provision cannot avoid infringements of Treaty rights in all circumstances. The Crown is only permitted to take up land "from time to time" for certain purposes without it being an infringement in law requiring justification under *Sparrow*. Essentially, "taking up" is an allowable exemption to infringement and justification under *Sparrow*.

53. The possibility remains that legislative and administrative Crown action can infringe Treaty rights requiring *Sparrow* justification. Unjustified infringements violate the Treaty and section 35(1) of the *Constitution Act, 1982*.

54. Crown actions that the Supreme Court of Canada has recognized would be outside the taking up provision are: legislative action that infringes Treaty rights;[86] taking up land to the point where no meaningful treaty right remains over a First Nation's traditional territories;[87] and taking up land in bad faith.[88]

55. Applying the principles of treaty interpretation to the taking up provision, other examples of the Crown acting beyond its authority to take up land would include when the Crown purports to take up land for a purpose not reasonably contemplated by the taking up provision and when the magnitude or frequency of the taking was not reasonably contemplated by the taking up provision.

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[84] *Badger*, *supra* at para. 55.
[85] See e.g. *Mikisew*, *supra*, where the Supreme Court of Canada relied on the Report of the Commissioners for Treaty No. 8 and *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, by Charles Mair.
[86] *Mikisew*, *supra* at para. 43: "The actual holding in *Badger* was that the Alberta licencing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the Treaty was expressly made subject to 'regulations as may from time to time be made by the Government'. The Alberta licencing scheme denied to 'holders of treaty rights as modified by the [*Natural Resources Transfer Agreement, 1930*] the very means of exercising those rights' (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899." [Emphasis added]
[87] *Mikisew*, *supra* at para. 48.
[88] *Mikisew*, *supra* at para. 48, quoting *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2004 FCA 66 at para. 18.

56. The taking up provision limits the Crown to taking up land "from time to time for settlement, mining, lumbering, trading or other purposes." In certain circumstances, the Crown may be taking up land at a frequency that exceeds the "time to time" frequency as authorized by the Treaty.

57. *Badger* held that land was "taken up" when it was put to a "visible and incompatible use".[89] The Court asked what Aboriginal people would have understood the term "taking up" to mean at the time of signing. It held that the words in the Treaty must not be interpreted in their strict technical sense or be subject to modern rules of construction.

58. The Court found that "the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping."[90] Given this finding, the frequency and extent of "takings" could exceed the Crown's authority granted under Treaty. This would be an infringement at law that the Crown would be required to justify under *Sparrow*.

59. The Supreme Court of Canada noted in *Mikisew* that a possible claim for Treaty infringement would arise when no meaningful Treaty right remained over a First Nation's traditional territories. However, the Court was not establishing the only circumstance in which an infringement could occur. The decision refers to two other circumstances which would give rise to an infringement, as described above. *Mikisew* does not support the Crown's ability to take up land until the last acre that would support the meaningful exercise of the Treaty right is about to be taken, effectively extinguishing the right.[91] Such an interpretation is contrary to the jurisprudence, which makes it clear that this is not what was bargained for.

60. This interpretation also does not accord with the *West Moberly* decision, which holds that the taking up provision does not "trump" harvesting rights. The provision must be interpreted in light of the mutual understanding of the treaty

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[89] *Badger*, *supra* at para. 52.
[90] *Ibid.* at paras. 52-57 [emphasis added].
[91] This is in spite of the fact that it is established law that the Crown does not have the constitutional authority to extinguish Treaty rights. See *Sparrow*, *supra* at pp. 1011 & 1111.

signatories and the Crown's Oral Promises.[92] Although land use change was foreseen,[93] neither party expected the land use contemplated in the *West Moberly* case (mining) would "harm anyone" or affect First Nations traditional practices.[94]

61. The taking up provision does not give the Crown a "free pass" to repeatedly take up land, never determining whether its action could result in an infringement requiring *Sparrow* justification. *Mikisew* contemplated possible infringements under Treaty, finding an obligation to consult "even when no infringement" of the Treaty right can be established.[95]

62. *Mikisew* does not say that the Crown is never required to determine whether its actions may result in an infringement requiring *Sparrow* justification. It only states that "not *every* subsequent "taking up" constitutes an infringement of Treaty No. 8 that must be justified according to the test set out in *Sparrow*."[96]

63. *Mikisew* also considered the order in which the courts should consider the issues of consultation and infringement. First, the court should assess the adequacy of the consultation as the failure to consult could result in the authorization being set aside regardless of whether the action could result in an infringement.[97] However, this does not preclude determining whether there is an infringement if the consultation is found to have been adequate. The same logic and efficiency was applied in *Tsilhqot'in*, a case of established Aboriginal rights and title where there is no Treaty with a taking up provision.[98]

64. The infringement assessment can take place during the preliminary assessment that determines the scope of the duty to consult.[99] The federal and provincial governments both completed preliminary assessments of the impact on the Appellants' Treaty rights for the Site C Project.[100] The provincial Crown

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[92] *West Moberly, supra* at para. 150.
[93] *Mikisew, supra* at paras. 30-31.
[94] *West Moberly, supra* at para. 134.
[95] *Mikisew*, *supra* at para. 57.
[96] *Ibid.* at para. 31 [emphasis added].
[97] *Ibid.* at para. 59.
[98] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para 77.
[99] *Haida*, *supra* at paras. 39-40.
[100] *Reasons for Judgment* at paras. 36-40. See also Aff. #1 of Jeffrey Richert at paras. 60-77 [JAB Vol 2, pp. 210-214] and Exhibits 49-66 [JAB Vol 2, pp. 323-441] for exchanges between the Appellants, the

previously conducted an infringement assessment for one of the Appellants as part of its preliminary assessment of the impact of another proposed project on Treaty rights. In the *West Moberly* decision, evidence was before the Court of the Province's preliminary assessment which determined that, if granted, the authorization would not result in an infringement of Treaty rights and, accordingly, a *Sparrow* justification was not required.[101]

65. The Ministers were provided with ample information throughout the environmental assessment and in the consultation process to enable them to determine whether their decision to issue the Certificate would result in an infringement. Even the preliminary assessments carried out in this case[102] would have gathered the information necessary for the Crown to make a preliminary determination on infringement. But the Ministers assumed that all that was required of them to meet their constitutional obligation was to assess the adequacy of the consultation. They were of the view that the taking up provision in the Treaty gave the Crown a free pass not to determine infringement. That decision is inconsistent with the law. In *Beckman*, the court recognized that consultation was intended to "head off" the consequences of infringement, not to dismiss the need to consider it.[103]

66. The Ministers' failure to address infringement fell far short of the diligence required to uphold the honour of the Crown and was indifferent to the potential of that failure to breach section 35(1) of the *Constitution Act, 1982*. In the circumstances, the Crown was aware that the Project was a potential infringement of the Appellants' Treaty rights. They were required to satisfy themselves that their decision would not unjustifiably infringe the Appellants' rights. They did not. The Ministers erred in circumscribing the Appellants' rights by limiting their assessment to whether the Crown had fulfilled its duty to consult.

III. The Jurisdiction of the Court to Decide Infringement

Agency, EAO and BC Hydro regarding the nature and scope of Treaty 8 rights.

[101] *West Moberly*, *supra* at para. 219.

[102] *Reasons for Judgment* at paras. 36-40.

[103] *Beckman, supra* at para. 53.

67. The Chambers Judge also addressed whether the Court should determine if the Project infringed the Appellants' Treaty rights.[104]

68. Contrary to the statement of the Chambers Judge[105], this question is not distinct from the question of whether the Ministers had the jurisdiction to decide infringement. It only arises if the Ministers had the jurisdiction to determine infringement but failed to do so, in which case "the decision to not decide" the issue would be subject to judicial review as would any other any statutory decision.[106] This is the context in which the Appellants raised this in the court below. On judicial review, in certain situations it is appropriate for a Court to make the decision that the decision-maker was obligated to, but failed to make, rather than send the matter back for reconsideration.[107]

69. Finding that the Ministers lacked jurisdiction to decide infringement, the Chambers Judge did not proceed to address the question of the Ministers' *obligation* to do so. Similarly, the Court had no reason to proceed to the issue of the Court's obligation to decide infringement because the Court's jurisdiction would only be engaged if the Ministers themselves were found to have jurisdiction.

70. While the Appellants contend that First Nations are entitled to have constitutional issues addressed and to obtain administrative law remedies by way of judicial review if those issues were before the statutory decision-maker,[108] it is trite law that a Court can only judicially review an administrative decision or an issue that was properly before a statutory decision-maker in the first place.

71. Further, in considering the Court's jurisdiction, the Chambers Judge erred in law, approaching it as a question of forum instead of one of administrative law and the Court's jurisdiction on judicial review. As a result, an assessment of judicial forum overtook what should have been a straightforward application of a fundamental principle of administrative law. If the Ministers had jurisdiction to decide the issue, the Court has jurisdiction to review that decision. If the Ministers

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[104] *Ibid.* at para 136.
[105] *Ibid*.
[106] *Dunsmuir*, *supra* at para. 26.
[107] See e.g. *Canadian Airlines International v. CALPA*, 1997 CanLii 3823 (BCCA) at para. 3.
[108] *Beckman, supra* at para. 47; *West Moberly*, *supra* at para. 98.

have no such jurisdiction, neither does the Court.

D. Consultation and Accommodation

I. Duty to Consult

72. In addition to substantive Treaty rights, Treaty No. 8 also provides the Appellants with procedural rights of consultation.[109]

73. The consultation process must be meaningful. Given that they are proven rights, the scope of the duty to consult depends on the seriousness of the potential adverse effects upon those rights. The more significant the potential impacts, the deeper the consultation and extent of accommodation must be.[110]

74. The *Haida* case contemplates a robust consultation framework that goes beyond the mere "right to be heard" standard. Recently this court confirmed in *Chartrand* that to uphold the honour of the Crown its processes must demonstrably promote reconciliation. When a government decision is challenged on the basis of the duty to consult, the courts must ask whether government by its conduct has actively sought to promote reconciliation. This demanding standard is necessary because the duty to consult is not simply an administrative requirement – it is a constitutional imperative.[111]

75. The Crown says it undertook "deep consultation" with the Appellants. In *Haida*, the Supreme Court of Canada explained the concept of "deep" consultation:

> At the other 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 in every case.[112]

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[109] *Mikisew, supra* at para. 57.
[110] *Haida, supra* at paras. 16, 39, 43 & 44.
[111] *Chartrand v. British Columbia,* 2015 BCCA 345 at paras. 68-69.
[112] *Haida, supra* at para. 44.

II. Meaningfulness of Consultation

76. The Crown is obliged to conduct consultation that is both procedurally and substantively adequate. The Crown's obligation to consult is not fulfilled simply by providing a process within which to exchange and discuss information.[113]

77. For consultation to be meaningful, the Crown must have a correct understanding of the nature of the established Treaty rights at issue. In the case of a treaty the Crown, as a party to the treaty, will always have notice of its contents.[114]

78. The consideration of specific practices exercised by First Nations and protected under the Treaty begins with an assessment of the "traditional patterns" of activity and includes the "aboriginal perspective" on the meaning of their rights.[115] The assessment must incorporate relevant cumulative effects in relation to the rights impacted.[116]

79. Thus, consultation may have both prospective – future ability to exercise rights - and retrospective – current state of the land base - elements. In the case of the Site C environmental assessment and the consultation that took place, it was necessary to review the existing state of the land base and the state of the Peace River as well as the continuing ability of the First Nations to meaningfully exercise their Treaty rights.

III. Accommodation

80. When the consultation process suggests amendment of Crown policy, accommodation is required. When a proposed activity may adversely affect Treaty rights in a significant way, the Crown is required to take steps to *avoid irreparable harm or minimize the effects of infringement*. The process of accommodation of a treaty right may best be resolved by consultation and negotiation.[117] If the parties cannot agree, balance and compromise will be necessary.[118]

81. The Crown has a positive obligation to reasonably ensure that aboriginal peoples

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[113] *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at paras. 170 & 178 ["*Wii'litswx*"].
[114] *Mikisew, supra* at para. 34.
[115] *West Moberly, supra* at para. 137; *Mikisew, supra* at para. 54; *Halfway, supra* at para. 159-160.
[116] *West Moberly*, *supra* at paras. 117-119; See also paras. 125 & 182; See also *Louis v. British Columbia,* 2013 BCCA 412 at para. 80.
[117] *Haida, supra* at para. 47.
[118] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 42.

are provided with all necessary information in a timely way so that they have the opportunity to express their interests and concerns and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.[119]

82. The duty to accommodate is a *substantive obligation* to avoid, mitigate or otherwise address potential impacts. The Crown must be open to accommodations proposed by the First Nation, and if rejecting First Nations proposals the Crown must have "persuasive reasons why such proposals are unnecessary, unreasonable, or impractical to implement."[120] In circumstances where impacts to Treaty rights cannot be adequately mitigated and irreparable harm or infringement is likely, the duty to accommodate may require cancellation, relocation, or deferral of the project at issue.[121]

IV. Application to this case

a) The Fix was in from the Outset – *Clean Energy Act*

83. In July, 2010, the Government enacted the *Clean Energy Act*.[122] Among other things, the Act established as an energy objective that British Columbia generate at least 93% of the electricity from clean or renewable resources in British Columbia.

84. In addition, the *CEA* exempted the Project from the requirement under the *Utilities Commission Act* that it receive a Certificate of Public Convenience and Necessity from the BCUC.[123]

85. The *CEA* also disallowed the use of the existing Burrard Thermal Plant, a natural gas fired facility that is capable of producing approximately 900 MW of power.[124]

86. Power from the Canadian Entitlement provided to British Columbia under the Columbia River Treaty is also not included in the determination of energy self-sufficiency under the *CEA*. British Columbia is entitled to 1,300 MW pursuant to the Treaty. Currently, British Columbia has a surplus of electricity and sells that power into a

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[119] *Halfway, supra* at para. 160.
[120] *Klahoose First Nation v. Sunshine Coast Forest District*, 2008 BCSC 1642 at paras. 122 and 135-136; *Mikisew, supra* at paras. 64 & 67; *West Moberly, supra* at paras. 47-48.
[121] *West Moberly* at para. 148.
[122] SBC 2010, c. 22 ["*CEA*"].
[123] *Clean Energy Act*, s. 7.
[124] *Clean Energy Act*, s. 13

saturated energy market currently for less than $30 MWh.[125] Thus, 2,200 MW of power, effectively two Site C Projects, already bought and paid for, are banned for domestic use by the *CEA*.

87. The JRP, in reliance on BC Hydro's own analysis, found that Site C would further add to this surplus for at least the first four years of operation, generating a loss of $800 million and adding 1100 MW to the Columbia River Treaty surplus.[126]

88. The debates of the Legislature show that the *CEA* was to facilitate development of the *Project.* Pat Bell, former Minister of Forests, stated in support of the bill:

> "…one of the key elements of this particular bill, the Clean Energy Act, is the Site C project. Again, I think this is a very good example of the difference between our government and the NDP. We are 100 percent supportive of the Site C project."[127]

89. The *CEA* coloured the consultation and environmental assessment that followed. The government's clearly stated objective remained throughout the process to build Site C. The effect of the *CEA* was not only to give the Project a free pass from independent oversight, but also to limit any consideration of existing alternatives to the Project, making the approval of the Project essentially a foregone conclusion.

b) Further Limitations on the Consultation Process – the "Maximization" Purpose

90. BC Hydro's EIS set out the purpose of the Project as the "maximization of the hydroelectric potential of the Peace River". The Panel rejected as a governing purpose the maximization of the hydraulic potential of the Peace River. The panel found that if accepted this objective would tilt the scales heavily in favour of Site C against any other supply alternatives.[128] However, that is exactly what happened - alternatives were never seriously considered by BC Hydro if they did not "maximize" the potential of the Peace

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[125] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 312 [JAB Vol 10, p. 6713], Aff. #1 of Philip Raphals, Exhibit 13, Figure 4 [JAB Vol 3, p. 3199].
[126] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 312 [JAB Vol 10, p. 6713].
[127] British Columbia, Legislative Assembly, *Hansard*, Vol. 19, No. 2 (27 May 2010) at 5904 (Hon. Pat Bell); and at 5910-5912 (John Rustad). Similar statements were made by several other members of the Liberal caucus as well.
[128] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 285-286 [JAB Vol 10, pp. 6686-6687].

River.[129]

91. The Panel concluded that a number of supply alternatives are competitive to Site C on a standard analysis. The Panel raised a number of methodological issues, concluding that it was not confident that such alternatives were accurately valued.[130]

92. BC Hydro continued to insist the cost of the Project would be $7.9 billion, but in making the Final Investment Decision, two months after the issuance of the Certificate, the BC Government revealed that the cost of the Project was now $8.8 billion.[131]

93. Given the rejection of this governing purpose of the Project and the increased cost of the project, it was incumbent upon the Crown to continue consultation with the First Nations.[132] The First Nations raised this concern in the post-panel phase.[133]

94. Post-panel report the First Nations approached BC Hydro and engaged in a discussion with them regarding potential alternatives to the Project.[134] During these discussions, and contrary to their consultation obligations, BC Hydro never informed the First Nations that their cost estimates for the Project were inaccurate. In addition, BC Hydro was unwilling to examine the vast majority of scenarios that the First Nations put forward on alternatives.[135]

c) Need for the Project not Established

95. The "need for the Project establishes its *fundamental justification* and rationale."[136] Usually, this is not a difficult threshold for a Proponent to meet. The JRP concluded that BC Hydro had not fu*lly demonstrated the need* for the Project on the 20 year time horizon for the environmental assessment, recommending that the Project be submitted to the British Columbia Utilities Commission to review.[137]

96. In the *Peace Valley Landowners* decision, Justice Manson held that:

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[129] Aff. #1 of Jeffrey Richert, Exhibit 92 at 9-13 [JAB Vol 2, pp. 2915-2919].
[130] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 307-312 [JAB Vol 10, pp. 6708-6713].
[131] Aff. #1 of Jeffrey Richert, Exhibit 98 [JAB Vol 11, pp. 6904-6906]
[132] The Panel was not allowed to address the adequacy of consultation by its Terms of Reference, s. 2.5. (Aff. #1 of Jeffrey Richert, Exhibit 75 at 13 [JAB Vol 11, p. 6896]).
[133] Aff. #1 of Jeffrey Richert, Exhibit 92 at 13 [JAB Vol 2, p. 2919].
[134] Aff. #1 of Philip Raphals, paras. 20-25 [JAB Vol 3, pp. 3127-3128].
[135] Aff. #1 of Philip Raphals, paras. 23-24 [JAB Vol 3, p. 3128], Exhibit 13 [JAB Vol 3, pp. 3193-3212].
[136] Aff. #1 of Jeffrey Richert, Exhibit 82, Document 404, EIS Guidelines s. 4.1.1 [JAB Vol 2, p. 490].
[137] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report, p. 320 [JAB Vol 10, p. 6721].

The Joint Review Panel determined that the *significant adverse effects of the Project are not justified*. The Panel determined:

a) Justification must rest on an unambiguous need for the power, but that *need had not been established*;

b) Justification must also rest on analysis showing that financial costs are sufficiently attractive to make tolerable the substantial environmental, social and other costs, but that the financial costs of the Project had not been sufficiently established.[138]

97. While the JRP opined that the Project may be needed some day, that was not based on any evidence that was before the JRP.[139]

98. Absent a clearly established "need for the Project", and given the unmitigable effects on the exercise of the Treaty rights of the First Nations, it cannot be reasonable for the Ministers to find that the Project can be "justified" or in the public interest.

d) No Deep Consultation with a View to Reconciliation

99. The Chambers Judge recognized that the Project involves the taking up of considerable amounts of land and water resources that were formerly available to the First Nations for exercise of their Treaty rights.[140] The Chambers Judge concluded that the Crown made reasonable and good faith efforts to consult and accommodate the Appellants with respect to the Project.[141] That finding only addresses one aspect of consultation. Consultation must be both procedurally and substantively adequate.[142]

100. While there is a significant record in this case, it is not the quantity of consultation that makes consultation meaningful, but the quality of such consultation. As stated in *Mikisew*, consultation that excludes from the outset accommodation is meaningless. Potential accommodations, such as alternatives, were excluded both legislatively and by the "maximization" approach to the Project. In order to meaningful, the process must be more than an opportunity for First Nations to "blow off steam" before the Crown proceeds with its pre-determined decision.[143]

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[138] *Peace Valley Landowner Association v. Attorney General of Canada*, 2015 FC 1027 at para. 34.
[139] Aff. #1 of Jeffrey Richert, Exhibit 92 at 91-93 [JAB Vol 2, pp. 2997-2999].
[140] *Reasons for Judgment* at para. 146.
[141] *Reasons for Judgment* at paras. 157 & 158.
[142] *Wii'litswx, supra* at para. 170 & 178.
[143] *Mikisew* at para. 54.

101. While the consultation in this case may have been procedurally fair, the government by its conduct did not seek to promote reconciliation of the competing rights at issue in this case. The consultation was heavy on process and light on substance.

102. The CAR supports the Crown's views that the consultation in this case was "procedurally adequate", without any mention of substance.[144]

103. The Crown's approach to consultation needed to be guided by two guiding principles, set out in the CAR: that the right is proven, and that the impacts on the meaningful exercise of the First Nations' rights as found by the Joint Review Panel are significantly diminished and immitigable.[145]

104. BC Hydro's assessment of Treaty rights needed to include a consideration of the "traditional patterns" of the First Nations' activity[146], including the "aboriginal perspective" on the meaning of their rights.[147]

105. BC Hydro prepared its EIS and participated in the JRP hearings on the misconception that Treaty rights are adaptable, the impacts would not be significant, both of which were rejected by the JRP and there could be no infringement of Treaty 8 as the Crown has a virtually unfettered right to take up lands in and "the Crown's actions do not require justification".[148]

106. Pre-Panel, BC Hydro conducted "consultation" with the First Nations on behalf of the Crown, but did not adequately respond to the First Nations' concerns and questions. As early as 2009, the Appellants raised concerns regarding BC Hydro's approach to consultation, including BC Hydro's approach to cumulative effects, environmental impacts, the lack of consideration of alternatives, and the "maximization" purpose of the project.[149] The Appellants also expressed their concern that the majority of the First Nations' comments during consultation procedures were ignored without explanation.[150]

107. The JRP Report identified many of the same concerns that the First Nations had

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[144] Aff. #1 of Shane Ford, Exhibit A, Tab 6A at 86 [JAB Vol 4, p. 4586].
[145] Aff. #1 of Shane Ford, Exhibit A, Tab 6A at 23 [JAB Vol 4, p. 4523]; Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 328-329 [JAB Vol 10, pp 6729-6730].
[146] *West Moberly, supra* at para. 137.
[147] *Mikisew* at para. 54; *Halfway*, *supra* at para. 159-160; *Haida*, *supra* at para. 36.
[148] Aff. #1 of Seanna McConnell, Exhibit 70 at para. 23 [JAB Vol 7, pp. 6115-6116].
[149] Aff. #1 of Jeffrey Richert, para. 9 [JAB Vol 2, p. 202] and Exhibit 2 [JAB Vol 2, pp. 242-256].
[150] *West Moberly, supra* at paras. 47-48. See also *Haida, supra at* para. 44.

raised – and BC Hydro and the Crown had ignored – throughout the consultation process.[151] Importantly, the Panel rejected BC Hydro's methodology for assessing the current use of lands and resources for traditional purposes.[152] The Panel also rejected its approach to cumulative effects, core issues that were raised by the First Nations in the consultation process from the outset.[153] As a result, the impacts on First Nations rights, while significant and immitigable, were likely underestimated.

108. The JRP confirmed and recognized the First Nations' strong cultural attachment to the Peace River environment and the high value of the area for the sustenance of the First Nations' Aboriginal lifestyles. The JRP identified a list of significant, severe, and immitigable impacts on Treaty 8 rights to hunt, fish and trap as well as impacts to their culture and immitigable impacts to fish, wildlife, and habitat.[154] In addition, the cumulative effects on Treaty rights remain unaddressed.

109. Post-Panel, rather than substantively engaging with the First Nations on the myriad issues identified by the JRP, including incompleteness and inadequacies in the environmental assessment and the absence of justification for the Project, the Crown did not request further information or conduct further studies and rejected potential accommodations offered by the JRPas being "out of scope."[155]

110. The Crown had a mandated timeline. While there was a discussion of the JRP Report and potential conditions, there remain outstanding issues, including, among other things, immitigable impacts to hunting, fishing, trapping, culture and heritage, incidental rights as well as the cumulative effects on those rights, that are not addressed in conditions.[156] The conclusion of consultation, without addressing the significant outstanding issues, runs counter to the case law which provides that the Crown "may not conclude a consultation process in consideration of external timing pressures when

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[151] Aff. #1 of Jeffrey Richert, Exhibits 32, 77, 87, 88, and 92 [JAB Vol 2, pp. 309-315, 442-451, 2823-2824, 2825-2906 and 2907-3067] summarize the outstanding concerns of the Appellants.
[152] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 110 [JAB Vol 10, p. 6511]
[153] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 133-134 [JAB Vol 10, pp. 6534-6535].
[154] Aff. #1 of Susan Yu, Exhibit B, Document 2771, JRP Report at 314 [JAB Vol 10, p. 6715].
[155] Aff. #1 of Shane Ford, Exhibit A, Tab 2, Executive Director's Response to recommendations 20 & 43 [JAB Vol 4, pp. 3232 & 3239].
[156] Aff. #1 of Shane Ford, Exhibit A, Tab 6A at 91 [JAB Vol 4, p. 4591]; Aff. #1 of Jeffrey Richert, Exhibit 92 [JAB Vol 2, pp. 2907-3067] sets out outstanding issues.

there are outstanding issues to be discussed". [157]

111. There was never any consideration by the Crown or BC Hydro whether another alternative source of power, or location for a dam ought to be considered.[158]

112. In *Haida*, the Supreme Court of Canada explained that deep consultation "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."[159]

113. The Crown never adequately responded to the First Nations' concerns nor demonstrated any serious consideration of alternatives to the Project. The reasons for this are obvious. The *CEA* eliminated the consideration of existing resources, while the environmental assessment was based on the "maximization" principle.

114. The First Nations were not invited to participate meaningfully in the decision-making process and were not provided with written reasons to suggest "that their representations were seriously considered and demonstrably integrated into the proposed plan of action."[160]

115. While the *Haida* case confirms that "hard bargaining" does not offend the First Nations' right to consultation, what occurred in this case is more akin to "surface bargaining". The Crown and BC Hydro did not approach the consultation with any interest in compromise or reconciliation of the competing rights required by the Honour of the Crown.[161]

e) No Meaningful Accommodation

116. In this case, there is no dispute that accommodation is required. The Project will impact the ability of the Treaty 8 First Nations to meaningfully exercise their rights.[162] The government was obligated to *take steps to avoid irreparable harm or to minimize*

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[157] *Squamish Nation v. British Columbia*, 2014 BCSC 991 at para. 214.
[158] *Haida, supra* at para. 47; *West Moberly, supra* at para.148.
[159] *Haida, supra* at para. 44.
[160] *Halfway River*, *supra* at para. 160.
[161] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at paras. 104-105.
[162] Aff. #1 of Shane Ford, Exhibit A, Tab 6A at 23 [JAB Vol 4, p. 4523]

the effects of infringement.[163]

117. This golden thread that runs through Aboriginal cases is the principle of proportionality – government actions should be taken in a manner that minimally infringes the constitutional rights of First Nations. [164] The purported "accommodations" do not address the irreparable harm and the infringement that will result from the construction of the dam and the inundation of the Peace River Valley.

118. The Chambers Judge referenced a number of "modifications" that were designed to accommodate Aboriginal interests. However, all of these "modifications" were in response to the 1982 BCUC Application, were planned long before consultation with the First Nations began, and in most cases can be considered *de minimus*, given the massive impacts of the Project on the First Nations' Treaty rights. In regards to use of the existing transmission line, that purported change had been in BC Hydro's plans as far back as 1991. The downstream bridge was not part of the EIS and cannot be considered a modification as it was never part of the Project that was assessed.[165]

119. The Project approved by the Certificate was the Project that was submitted for the environmental assessment. No changes of any significance were made to address the myriad First Nations concerns and the 369 sites that were identified during the environmental assessment.

120. There are 77 conditions attached to the Certificate, which the Chambers Judge held are intended to avoid or reduce potentially significant adverse effects on Aboriginal interests.[166] All of BC Hydro's mitigation measures were before the JRP and considered in coming to a conclusion on significance.

121. In a Project of this sort, myriad conditions would be required of a proponent, particularly in light of the damning JRP Report. However, with the exception of the reference to "compensation program for loss of use and access to structures used in

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[163] *Haida, supra* at para. 47.
[164] Arvay J., Hern S. & Latimer, A., *Proportionality and the Public Law*, 28 Can. J. Admin. L. & Pac. 23, March 2015
[165] *Reasons for Judgment* at para. 81; Aff. #1 of Roland Willson, Exhibit 10 at 957 [JAB Vol 1, p. 55]; Aff. #1 of Jeffrey Richert, Exhibit 92 at 135 [JAB Vol 2, p. 3041]; Modifications are found in Aff. #1 of Shane Ford, Exhibit A, Tab 5, Vol 1, Section 4, Table 4.1 at 4-7 [JAB Vol 11, p. 6913]
[166] *Reasons for Judgment* at para. 80.

Aboriginal harvesting, none of these conditions address the immitigable effects on the hunting, fishing and trapping rights of the First Nations or the cumulative significant effects on their rights.[167]

122. The CAR recognizes that without additional mitigation or accommodation beyond the mitigation measures identified in the environmental assessment process, the potential adverse effects of the Project on the exercise of Treaty rights by the Appellants and other Treaty 8 First Nations will be serious.[168]

123. While various compensation offers have been made by BC Hydro, to date none of the Treaty 8 First Nations have accepted such offers. The position of the First Nations has been that there is no need for such compensatory measures, given the availability of alternatives that would avoid many of the significant immitigable environmental effects of Site C.

124. As the impacts of the Project on Treaty rights and the environment are immitigable and will result in infringement of the Treaty, the duty to accommodate should have included a meaningful consideration of the alternatives to meet British Columbia's purported need for new power, and included cancellation, relocation, or deferral of the Project.[169] That was never an option from 2010 onward. A meaningful process required the parties to work collaboratively to negotiate a compromise that balanced the conflicting rights at issue, in a manner that would minimally impair the First Nations' ability to meaningfully exercise their rights and continue with their mode of life.

125. British Columbia has a significant surplus of power that will continue for several years. Site C most certainly is not needed now and may never be required. In order to meet the "public interest" claims of British Columbia they have to show that there is a need for power and more importantly a need for the project. This need was required both as a matter of the environmental assessment and the common law. In light of the lack of justification for the project, the accommodation in this case does not come close to meeting this principle of proportionality.

126. The Chambers Judge held that the Ministers were not making a "rights-based

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[167] Aff. #1 of Shane Ford, Exhibit A, Tab 4B, EA Conditions 25-28 [JAB Vol 4, pp. 3260-3261].
[168] Aff. #1 of Shane Ford, Exhibit A, Tab 6A, Appendix A28 at 16 [JAB Vol 4, p. 4749].
[169] *West Moberly, supra* at paras. 149-151.

decision, but a political and policy one," effectively giving them very broad discretion.[170] While it is generally not the role of the courts to substitute their view when there are public policy considerations at play, the courts must not defer to government when constitutional rights are at stake, particularly when that public policy decision does not accommodate or infringes the section 35 rights of the Appellants. [171]

PART 4 - NATURE OF ORDER SOUGHT

The appellants seek the following relief:

1. An order that the appeal be allowed and the order of the Honourable Justice Sewell, pronounced the 18th day of September, 2015 be set aside;
2. An order under the *Judicial Review Procedure Act*, quashing or setting aside the decision of the Ministers to issue the Certificate;
3. A declaration that the Ministers in their exercise of statutory discretion under the *EAA* were legally obligated to ensure that their decision did not violate Treaty No. 8 and the *Constitution Act, 1982* , which in this case required the Ministers to consider and determine whether the decision to issue the Certificate constituted an unjustified infringement of the Appellants' Treaty rights;
4. A declaration that the decision to issue the Certificate was in breach of the Crown's duty to consult and accommodate the Appellants' Treaty rights;
5. An order that the matter be sent back to the Ministers for reconsideration in accordance with the Court's directions; and
6. Costs in this Court and in the Court below.

All of which is respectfully submitted.

Dated at the City of Victoria, Province of British Columbia, the 4th day of March, 2016.

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Allisun Rana, and Emily Grier
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[170] *Reasons for Judgment at para. 127.*
[171] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paras. 87 & 89. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para. 136, per McLachlin J., concurring.

LIST OF AUTHORITIES