**Case Brief July 2017**

**The Site C Dam and the Duty to Consult & Accommodate First Nations**

***Prophet River First Nation v Canada (Attorney General),* 2017 FCA 15**

In this case, the Court confirms that it is first and foremost concerned with whether there has been adequate consultation and accommodation in relation to First Nation Treaty rights in the context of the Site C Project.

Prophet River First Nation and West Moberly First Nation applied for judicial review of the Governor in Council (“GIC”) decision-making authority under subsection 52(4) of the *Canadian Environmental Assessment Act, 2012*.[[1]](#footnote-1) The First Nations alleged that the GIC must consider whether their Treaty rights would be unjustifiably infringed when making a decision pursuant to subsection 52(4).

The Federal Court dismissed the application for judicial review and the Federal Court of Appeal upheld the decision. The application for leave to appeal to the Supreme Court of Canada was dismissed on June 29, 2017.

**Background**

The British Columbia Hydro and Power Authority plans to take up Treaty 8 lands on the Peace River for the Site C Clean Energy Project (“Site C Project”). The governments of Canada and British Columbia established a Joint Review Panel (“JRP”) pursuant to the *Canadian Environmental Assessment Act, 2012*, and the British Columbia *Environmental Assessment Act, SBC 2002,* to assess the impacts of the Site C Project.

The JRP incorporated the duty to consult and accommodate the First Nations into its procedure, and set the threshold for consultation at the deep end of the spectrum.[[2]](#footnote-2) The JRP concluded that the Site C Project would cause significant adverse effects on fishing, hunting, trapping, and on other traditional uses of Treaty 8 lands that could not be mitigated.[[3]](#footnote-3) The Minister also concluded that the Site C Project was likely to cause significant adverse environmental effects and referred the matter to the GIC.[[4]](#footnote-4) The GIC subsequently determined that the adverse effects were justified, and issued a federal authorization for the Site C Project.[[5]](#footnote-5)

**Issues**

The following issues were before the Federal Court of Appeal in relation to subsection 52(4) of the *CEAA 2012*:

1. What is the standard of review for the decision-making authority of the GIC?
2. Does the GIC have the jurisdiction to determine whether Treaty rights will be unjustifiably infringed?
3. Is judicial review the appropriate forum to determine Treaty rights?

**The Federal Court of Appeal Decision**

***The Standard of Reasonableness Applies to Subsection 52(4)***

Boivin J.A., for the Federal Court of Appeal, held that the Trial Judge applied the proper standard of review. The standard of correctness applied to matters of procedural fairness and questions of whether there was a duty to consult, and the standard of reasonableness applied to the decision-making authority of the GIC.[[6]](#footnote-6)

The First Nations took the position that the standard of correctness should have applied to the GIC decision since the question of whether their Treaty rights were unjustifiably infringed concerned constitutional obligations and jurisdictional limits.[[7]](#footnote-7)

However, Boivin J.A. ruled that the GIC decision-making authority under subsection 52(4) of the *CEAA 2012* was highly discretionary and fact driven as it flowed from a process of consultation and accommodation.[[8]](#footnote-8) As a result, the GIC decision was highly discretionary and fact driven. The role of the Courts in this process is to ensure that the GIC decision-making authority is exercised in a reasonable manner and within the framework of the *CEAA 2012*.[[9]](#footnote-9)

Boivin J.A. spoke of the reciprocal obligations owed by the Crown and First Nations during consultations. This includes the First Nation obligation to provide evidence to support their Treaty rights.[[10]](#footnote-10) While it was uncontested that the First Nations have Treaty rights to the 840,000 square kilometers of land covered by Treaty 8, there was insufficient evidence to demonstrate that the First Nations exercised their Treaty rights near the Site C Project.[[11]](#footnote-11)

In light of the fact that the First Nations had insufficient evidence to support their Treaty rights, and did not challenge the adequacy of the consultations, Boivin. J.A. held that the GIC decision was reasonable.[[12]](#footnote-12)

***The GIC Does Not Have Jurisdiction to Determine Treaty Rights***

The First Nations took the position that subsection 52(4) of the *CEAA 2012* did not prevent the GIC from determining whether their Treaty rights would be infringed pursuant to the *Sparrow* analysis.[[13]](#footnote-13)

Boivin J.A. did not agree with the First Nations position. He remarked that within the legislative framework of the *CEAA 2012*, the GIC does not have the express power to determine questions of law, such as whether First Nation rights are infringed pursuant to the *Sparrow* analysis.[[14]](#footnote-14)

Boivin J.A. was also not persuaded by the First Nations position that the Courts should apply theunjustified infringement analysis described in *Sparrow*. The Supreme Court of Canada moved away from the unjustified infringement analysis, and towards the consultation and accommodation analysis described in *Haida Nation* and *Taku River*.[[15]](#footnote-15) Boivin J.A. saw no justification to revert to the *Sparrow* test, since the consultation and accommodation analysis sought to resolve the complex and litigious nature of the unjustified infringement analysis.[[16]](#footnote-16)

***Judicial Review Is Not the Proper Forum to Determine Treaty Rights***

Lastly, Boivin J.A. ruled that judicial review is not the proper forum to determine Treaty rights. The only evidence before a Court on judicial review are the materials that were available to the decision-maker at the time the decision was made.[[17]](#footnote-17) Yet in order to determine the existence of a Treaty right, additional evidence is required such as a full discovery, oral history, and a wide range of expert reports.[[18]](#footnote-18) This type of evidence is not generally available on judicial review.

**Why This Case Matters**

In the view of the Courts, First Nations must provide significant evidence to determine the ambit of Treaty rights when challenging the adequacy of Crown consultation and accommodation. Otherwise, the Court may find that accommodations proposed by the proponent and Crown were adequate. In this case, the Court found that there was insufficient evidence that the First Nations used the territory that would be taken up by the Site C Project, and that the accommodations were sufficient.[[19]](#footnote-19)

This case highlights the shortcomings of the consultation and accommodation doctrine. Proponents and the Crown should aspire to seek the free, prior, and informed consent of First Nations when their Aboriginal and Treaty rights are infringed through development. This is a failure of the Crown to implement the principles of the *United Nations Declaration on the Rights of Indigenous Peoples*.

1. *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, at section 52(4) [*CEAA 2012*]. [↑](#footnote-ref-1)
2. *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 at para 11 [*Prophet River*]. [↑](#footnote-ref-2)
3. *Ibid* at para 13. [↑](#footnote-ref-3)
4. *CEAA 2012*, *supra* note 1, ss 52(2): If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances. [↑](#footnote-ref-4)
5. *Ibid*, ss 52(4): When a matter has been referred to the Governor in Council, the Governor in Council may decide: (a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or (b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances. [↑](#footnote-ref-5)
6. *Prophet River, supra* note 2,at para 21. [↑](#footnote-ref-6)
7. *Ibid* at para 27. [↑](#footnote-ref-7)
8. *Ibid* at para 30. [↑](#footnote-ref-8)
9. *Ibid*. [↑](#footnote-ref-9)
10. *Ibid* at para 49. [↑](#footnote-ref-10)
11. *Ibid* at paras 50 and 56. [↑](#footnote-ref-11)
12. *Ibid* at para 74. [↑](#footnote-ref-12)
13. *Ibid* at para 63; see *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385,at page 1114: Under the *Sparrow* analysis, once the First Nations establish an Aboriginal right and a prima facie infringement of that right, the Crown bears the burden of establishing that their infringement of that right: 1) is for a valid legislative objective; and 2) is consistent with the Crown’s fiduciary duty to towards First Nations. [↑](#footnote-ref-13)
14. *Ibid* at paras 68-69. [↑](#footnote-ref-14)
15. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*]. [↑](#footnote-ref-15)
16. *Prophet River, supra* note 2, at para 57. [↑](#footnote-ref-16)
17. *Ibid* at para 78. [↑](#footnote-ref-17)
18. *Ibid* at para 80. [↑](#footnote-ref-18)
19. Accommodations included: proposed Project modifications, Proponent commitments, proposals for federal and provincial conditions to be included as legally binding to any proposed Project approval, Impact Benefit Agreement offers from the Proponent, and offers from the Proponent and the Province regarding lands/land protection measures, financial contributions, and compensation funds. [↑](#footnote-ref-19)