Prophet River First Nation & West Moberly First Nations
Site C Litigation
Summary of Court Proceedings and Decisions

October 5, 2015
Updated November 12, 2015

1. RECENT COURT DECISIONS

Injunction Application Decision

In early August, 2015, before any decision had been handed down from either the BC Supreme Court or the Federal Court of Canada, BC Hydro began construction on the Site C Clean Energy Project ("the Project") including clearing along the North Bank of the Peace River, followed closely with further clearings scheduled on the South Bank.[1] In an effort to preserve their rights pending a determination from either Court, the Treaty 8 First Nation Applicants ("T8FNs" or "Applicants") launched a further Judicial Review Petition in BC Supreme Court (BC Supreme Court Petition #2) attacking the inadequate consultation on the construction permits (the "Permits") and brought an injunction application to prevent BC Hydro from carrying out any work until resolution of their court cases.

In the weeks leading up to the injunction application, T8FNs had repeatedly asked BC Hydro to stand down in acting under the Permits which would result in the clearing of old and mature growth on the South Bank of the Peace River and along the length of the lower Moberly River, and which would also result in disturbance to countless sacred archaeological sites and relocation of numerous eagle nests along both the North and South Banks of the Peace River.

The areas scheduled for cutting consist of some of the most spiritually and culturally significant areas in all of Treaty 8 territory for the Applicants. Despite the Applicants' overtures, BC Hydro refused to even consider holding off on any it's proposed activities, and was unwilling to compromise on either the timeline or the sequence of scheduled construction activities.

In response to BC Hydro's inflexibility and unwillingness to work with the Applicants, the Applicants were left with no choice but to seek court intervention by way of injunction. On the eve of the injunction hearing, BC Hydro agreed to hold off on any clearing or any other works under the Permits such as archaeological disturbance or eagle nest relocation along the South Bank of the Peace River and the lower Moberly until late 2016.

This last minute about-face gave some much needed relief to T8FNs who continue to battle the Project with the legal tools available to them. Although the court ultimately declined to grant the Applicants with a full injunction, the Applicants were successfully able to use the injunction to force BC Hydro's hand into negotiating an enforceable delay in work at the most critical sites along the Peace and Moberly Rivers. BC Hydro has formally undertaken to refrain from carrying out any cutting in the lower Moberly until the earlier of the date upon which the Petition is heard and determined or October 31, 2016. Without the injunction application, all Permit works along the Peace and lower Moberly Rivers, originally slated for July and August 2015, would be in full swing.

The Applicants are moving forward with the judicial review of the construction Permits. That proceeding is discussed in further detail below.

[1] http://energeticcity.ca/article/news/2015/08/10/north-bank-construction-starting-today-for-site-c

Federal Court Judgment

T8FNs were informed on August 28, 2015 that their application for judicial review at the Federal Court had been dismissed. In this court case, the Applicants challenged the decision of the Federal Cabinet ("Cabinet") that the significant adverse environmental effects of the Project were "justified in the circumstances."

The Applicants chose to pursue a judicial review of the Cabinet's decision instead of filing a civil claim for a full trial against BC and BC Hydro because a civil claim and trial takes considerably longer to be heard and decided by the court, meaning any trial decision would likely come after all, or a significant portion of the dam was already built. In such a case, even if the Applicants won at trial, the court could only provide an after-the-fact remedy of damages for the Applicants - the immitigable environmental effects of the Project and the corresponding infringement of the Applicants' Treaty rights would have already occurred.

The Applicants' rights which they sought to protect were established over a hundred years ago when the Applicants adhered to Treaty No. 8, which clearly defines the Applicants' rights and the corresponding obligations on the Crown to respect and honour those rights.

While the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*") requires Cabinet to reckon with whether the environmental consequences of the Project were justified in the circumstances, the Applicants argued that Cabinet failed to deal with the infringement of their Treaty rights, rendering Cabinet's justification decision both incorrect and unreasonable.

The Federal Court found that while Cabinet had not even considered whether the Project infringed the Applicants' Treaty rights, it was sufficient to meet the Crown's legal obligations that the Applicants' rights were considered in the context of Cabinet's approval of the consultation process between Canada and the Applicants. The Federal Court ruled that consultation was both extensive and conducted in good faith,[2] despite the Applicants' evidence to the contrary.

In its review of the evidence and legal argument put forward by the Applicants on one hand, and Canada and BC Hydro on the other, the Federal Court was tasked with complex scientific, social, and legal issues in coming to a decision in whether to grant the T8FNs' application for judicial review. The Court arguably failed to grapple to any depth with the very complex and significant issues flowing from this Project. The Court's decision was a mere 25 pages in length, and characterized the Applicants' position as antagonistic. It failed to address the primary issue in the case, whether the law (*CEAA 2012*) required Cabinet to decide whether the Project infringed the Applicants' Treaty rights, as a part of its decision on whether the adverse impacts of the Project were justified in the circumstances. The dismissal of the case and the Court's failure to substantively address the legal arguments and evidence presented was a great disappointment to those involved.

BC Supreme Court Petition #1 Judgment

The T8FNs were informed on September 18, 2015 that their Petition to the BC Supreme Court was also dismissed.

[2] at para 62.

In their Petition to the Supreme Court, the T8FN Petitioners ("Petitioners") sought an order quashing the Environmental Assessment Certificate ("Certificate") issued by the Ministers of Environment and of Forests, Lands and Natural Resources Operations ("the Ministers"), which authorized BC Hydro to construct the Project. The Petitioners alleged that the Project infringes their Treaty rights under Treaty No. 8, and that the government has not justified that infringement. They also argued that the Ministers' decision to issue the Certificate was unreasonable based on the information they had in front of them and that the Ministers were biased in favour of the Project.

The BC Supreme Court found in favour of the Project proponents. It found that the Ministers, in deciding to issue the Certificate authorizing BC Hydro to construct the Project, were not required to decide the question of whether the Project infringed the T8FNs Treaty rights. The Court deferred to the Ministers' decision, which it found to be based on policy considerations and therefore within the government's sphere of expertise. In the circumstances, the decision to issue the Certificate was deemed reasonable by the Court.

Although the Applicants urged the Court to do so, the Court declined to assess and decide whether the Project infringed the Applicants' Treaty No. 8 rights, finding that the T8FNs claim of infringement relied on matters beyond the Project and the decision to issue the Certificate. As found by the Federal Court, the BC Supreme Court also suggested that an action commenced by notice of civil claim would be the proper forum for determination of the infringement issue, despite the fact that this would only provide the T8FNs with an "after the fact" remedy.

The BC Supreme Court found that the government correctly understood its obligations under Treaty No. 8, and made reasonable and good faith efforts to consult and accommodate the T8FNs with respect to the Project. The Court was satisfied that the Petitioners were provided a meaningful opportunity to participate in the environmental assessment process, and the process as a whole provided them with a reasoned explanation as to why their position was not accepted.

The T8FNs arguments alleging bias were also rejected, as the Court found there was simply no evidence that the Ministers had closed minds before they entered into consideration of whether to issue the Certificate.

2. ONGOING COURT CASES

BC Supreme Court Petition #2

The Applicants are moving forward with the judicial review of the construction Permits on the basis that the T8FNS were not adequately consulted prior to the BC Crown's issuance of the Permits, and that the consultation on the Permits violated the terms of the Site C Custom Consultation Process Negotiation Agreement (the "Consultation Agreement").

The Permits authorize initial clearing and construction activities, including road building and recontouring of the Peace River channel. They also allow BC Hydro to destroy archaeological sites, beaver dens, and eagles' nests, and will result in the destruction of important old growth forest habitat. The Applicants successfully secured a binding commitment from BC Hydro not to proceed with clearing in the sensitive Moberly River valley until the judicial review is resolved, but clearing of other areas as well as other approved works are already underway.

The potential impacts of the Permits are complex and multifaceted. Even if the Project is to go ahead, it is important that First Nations be adequately consulted about the manner in which the activities take place and the potential mitigation measures that could be implemented as the activities proceed. However, BC issued the construction Permits before the T8FNs had concluded their independent technical review of the Permits, which was a key aspect of the Consultation Agreement and was intended to serve as the basis for substantive consultation and discussions between BC and the Applicants. Although the Crown agreed to this new consultation process, they carried on as before and issued the Permits without waiting to see it through.

As a part of its opposition to this judicial review, the Crown claims that the Consultation Agreement was not a new, binding process, but rather a set of guiding principles to be applied to the existing process.

The Applicants are asking for the Court to cancel the Permits or at least suspend them until BC has properly consulted with, and if appropriate, accommodated the T8FNs. Hearing of this application is set for 3 days in Victoria, starting November 18, 2015.

Federal Court of Appeal

On September 30, 2015, the T8FNs filed a Notice of Appeal appealing the Federal Court's judgment of August 28, 2015, which dismissed the T8FN's application for judicial review.

In their Notice of Appeal, the T8FNs are alleging that the Federal Court looked at the wrong issue when it dismissed their Application. Instead of considering whether Cabinet had a constitutional obligation to determine whether its decision would unjustifiably infringe the T8FNs Treaty rights, the Court asked whether the Federal Cabinet had jurisdiction to decide whether the Site C Project was a potential infringement of the T8FNs Treaty rights. On this basis the Court held that Cabinet properly based its decision solely on the question of whether consultation was adequate. This ignores the federal government's responsibilities to T8FNs under section 35 of the *Constitution Act, 1982* to ensure that its decisions do not constitute an infringement of Treaty rights.

The T8FNs also allege that the Federal Court applied the wrong standard of review. In dismissing the T8FNs application, the Court held that Cabinet's decision to allow the Project to proceed only needed to be "reasonable," and granted great deference to Cabinet's decision. The T8FNs rely on a well developed body of case law to suggest that where a Court is dealing with purely legal questions, the standard is one of correctness. This means that Cabinet's decision was either right or wrong – whether the decision was reasonable is not a consideration. The T8FNs will argue on appeal that the failure to consider the question of whether unjustifiable infringement occurred was wrong and contrary to the government's constitutional obligations to T8FNs.

Finally, the T8FNs maintain that the Federal Court was wrong in finding that the issues brought before it, namely, questions surrounding infringement of Treaty rights, cannot be dealt with in the context of a judicial review, and instead require a full civil trial. The T8FNs argue that Cabinet, in making a statutory decision under *CEAA 2012* to allow the Project to proceed, brought itself within the realm of the Federal Court's exclusive jurisdiction on judicial review. By finding that a trial by civil action is the only judicial forum capable of addressing the question of whether the Project unjustifiably infringes the T8FNs Treaty rights, the Court allowed the question of judicial forum to limit Cabinet's obligation to make its justification decision in keeping with Canada's constitution.

The T8FNs are asking for the Federal Court of Appeal to set aside the decision of the Federal Court, and that the matter be returned to Cabinet for reconsideration on the question of whether the Project infringes the T8FNs Treaty rights, and if so, whether that infringement is justified under the *Sparrow* standard set out by the Supreme Court of Canada. The Site C Project cannot proceed without the Federal Cabinet finding that the adverse environmental effects of the Project are justified under section 52(4) of *CEAA 2012*.

The Respondents to the appeal, Canada and BC Hydro, have been served with the Notice of Appeal and have indicated their intention to oppose the appeal. Under the Federal Court Rules, the Respondents are not required to provide a substantive response until they file their written arguments. Under the currently estimated schedule, the Respondents will be filing their written arguments mid-February, 2016.

The parties are currently asking the Court for permission to conduct the appeal on a mostly electronic record, since a single copy of the record in paper form would comprise approximately 22 3 inch binders.

The hearing date of the appeal has not yet been set, however it is anticipated that the appeal will be heard by a three judge panel of the Federal Court of Appeal as early as spring 2016 an is expected to be in Vancouver. Federal Court of Appeal sitting dates for 2016 have not yet been released by the Court. We are considering options to ensure timely scheduling and hearing of the appeal. All parties have indicated their desire to have the appeal heard as soon as possible.

British Columbia Court of Appeal of BC JR #1

On October 19, 2015, the T8FNs filed a Notice of Appeal appealing the British Columbia Supreme Court's judgment of September 18, 2015, which dismissed the T8FN's application for judicial review.

In their Notice of Appeal, the T8FNs are asking that the Minister's decision to issue the Certificate under the EAA be quashed or set aside and that the matter be sent back to the Minsiters for reconsideration in accordance with the Court's directions. The Appellants are requesting the Court direct that the Ministers in exercising their statutory discretion under the EAA were legally obligated to ensure that their decision did not violate, or constitute an infringement of, Treaty No. 8, that the Corwn breached the Honour of the Crown and the Crown's duty to consult and accommodated the T8FN's Treaty rights, and that the Ministers may undertake whatever additional processes are necessary to obtain information the Ministers require in order to satisfy themselves of the constitutionality of their decision.

The Respondents to the appeal, BC and BC Hydro, have been served with the Notice of Appeal and have indicated their intention to oppose the appeal. Under the BCCA Rules, the Respondents are not required to provide a substantive response until they file their written arguments. Under the currently estimated schedule, the Respondents will be filing their written arguments mid-February, 2016.