IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prophet River First Nation v. British Columbia (Environment),* 2015 BCSC 1682

Date: 20150918
Docket: S153242
Registry: Vancouver

Between:

Prophet River First Nation and West Moberly First Nations

Petitioners

And

Minister of the Environment and Minister of Forests, Lands and Natural Resource Operations

Respondents

And

British Columbia Hydro and Power Authority

Respondent

Corrected Judgment: The text of the judgment was corrected at para. 119 on September 22, 2015

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. April 23-24, 27-28, 2015 May 4-6, 2015
Place and Date of Judgment:	Vancouver, B.C. September 18, 2015

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I: INTRODUCTION

[1] On Oct 14, 2014, the Ministers of Environment and of Forests, Lands and Natural Resources Operations (the “Ministers”), issued an Environmental Assessment Certificate (the “Certificate”) to the British Columbia Power and Hydro Authority (“BC Hydro”) for a project to construct a dam, power house and related infrastructure on the Peace River at what is known as Site C (the “Project”). Site C is located downstream from two existing hydro-electric dams on the Peace.

[2] The petitioners seek an order quashing the Certificate. They are two of eight First Nations located in British Columbia who are signatories or adherents to Treaty 8. Treaty 8 is one of the numbered treaties entered into in the nineteenth and early twentieth century between the Crown, represented by Canada, and many First Nations.

[3] The petitioners say that the Project infringes their treaty rights under Treaty 8 and the government has not justified that infringement. They also submit that the Ministers’ decision to issue the permit was unreasonable on the record before them and that the Ministers were biased in favour of the Project and the Certificate should also be quashed on those grounds.

[4] The respondents submit that the Ministers acted properly and within their discretion in issuing the Certificate and that the petitioners have shown no grounds on which this court should make any order.

[5] In the course of the hearing of this petition the parties objected to the admissibility of certain parts of the affidavit evidence. On the view I take of the issues in this petition, I do not find it necessary to rule on the objections. My reasons are based on the evidence to which no objection has been made.

[6] For the reasons that follow I have decided that the petition must be dismissed.

II: BACKGROUND

Petitioners

Prophet River First Nation

[7] Prophet River adhered to Treaty 8 in or about 1910. It has one reserve, located approximately 100 kilometres south of Fort Nelson and approximately 240 kilometres north of Site C. As of 2014, Prophet River had a population of 264, with 104 members living on reserve.

[8] Prophet River's traditional lands encompass over 25,000 square kilometres from the Rocky Mountains to the boreal forest east of the Prophet River. Although Prophet River has treaty rights to hunt, trap, and fish throughout the entire Treaty 8 lands, its members appear to principally exercise hunting, trapping, and fishing rights around 200 kilometres north of the area that will be directly impacted by the Project. Prophet River's key use of the Project area is for spiritual and cultural sites that will be inundated by the proposed reservoir.

West Moberly First Nations

[9] West Moberly adhered to Treaty 8 in 1914. It has one reserve situated on 2,000 hectares of land at the west end of Moberly Lake. The reserve is located halfway between Hudson's Hope and Chetwynd, roughly 90 kilometres southwest of Fort St. John. The community is approximately 15 kilometres from the transmission corridor for Site C and 75 kilometres from the proposed dam site. As of February 2014, West Moberly had a registered population of 274, including 109 members living on reserve.

[10] West Moberly describes the Peace River sub-basin as its preferred treaty territory and defines an Area of Critical Community Interest for its members within the sub-basin. This area includes the entirety of the Upper Moberly River watershed and all of the lands on the south side of the Peace River from the Carbon River watershed east to the Pine River confluence. Within this area, West Moberly has identified an area of particularly significant concern, known as the Peace Moberly

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Tract. The Tract comprises around 1,090 square kilometres of land between Moberly Lake and the Peace River. The northern boundary of the Tract follows the Peace River between the Dinosaur Reservoir created by the Peace Canyon Dam and the Peace Boudreau protected area. The southern boundary follows the Moberly River watershed upstream and downstream from Moberly Lake.

[11] Prophet River and West Moberly did not produce maps of their traditional territories. During the environmental assessment process they, along with Halfway River and Doig River First Nations, submitted a map highlighting the combined territories of all four bands. This area covers 121,818 square kilometres surrounding Site C.

Treaty 8

[12] Treaty 8 was signed in 1899. I will return in detail to the terms of Treaty 8 relevant to this petition later in these reasons. However, the basic structure of all of the numbered treaties was that the Aboriginal peoples who signed the treaties were guaranteed a number of rights in exchange for surrendering their lands to the Crown. One of the most important was the right to hunt, trap and fish throughout the lands covered by the treaties in the same manner as they had before surrendering the lands. This right was, in turn, subject to the right of the Crown to "take up" land from time to time for purposes of settlement and exploitation.

[13] The critical issue in this petition revolves around the relationship of these two rights. The following provisions of Treaty 8 are the focus of this petition:

> AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:
>
> …
>
> And Her Majesty the Queen hereby agrees with the said Indians that they shall have 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.

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The Project

[14] This petition was heard immediately following a petition brought by the Peace Valley Landowner Association for judicial review of the decision to issue the Certificate. In reasons released in that petition (*Peace Valley Landowner Association v. British Columbia (Environment)* indexed at 2015 BCSC 1129), I outlined the scope of the Project, the relevant statutory scheme and the environmental assessment process. In brief, the Project includes the creation of a hydroelectric dam located seven kilometres southwest of Fort St. John, a reservoir with a projected total surface area of 9,330 hectares, a generating station, transmission lines and other related construction components. At the time of the environmental assessment, BC Hydro estimated the Project would cost $7.9 billion and would be operational by 2024.

Process

[15] To proceed, the Project required an environmental assessment certificate pursuant to s. 17 the *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EAA*]. The project is also subject to a federal assessment process under the *Canadian Environmental Assessment Act*, S.C. 2012, c. 19, s.52 [*CEAA*].

[16] The environmental assessment process for the Project was established by an agreement between Canada and British Columbia (the “Joint Agreement”), announced on September 30, 2011. The Joint Agreement provided for a three-stage assessment process, including the formation of a Joint Review Panel (the “Panel).

[17] In the first stage, (the “Pre-Panel Stage”), the provincial Environmental Assessment Office (“EAO”) and the federal Canadian Environmental Assessment Agency (“Agency)” oversaw the preparation of environmental impact statement guidelines (“EIS Guidelines”). The EIS Guidelines established the issues to be

addressed by BC Hydro in its environmental impact statement (“EIS”). The EIS Guidelines were finalized in September 2012. BC Hydro then prepared and submitted its EIS to the EAO and the Agency for review. In August 2013, the EAO and the Agency determined that the EIS was ready for review by the Panel.

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[18] In the second stage (the “Panel Stage”), the Panel assessed the sufficiency of the EIS and requested additional information from BC Hydro. The Panel then held public hearings over 26 days in December 2013 and January 2014. On May 1, 2014, the Panel delivered its Report to the EAO and the Agency.

[19] In the third stage, the EAO prepared a referral package to submit to the Ministers for consideration. The Ministers were required to consider the Panel Report and other information and to decide whether to issue an environmental assessment certificate. For the purposes of this petition, one of the key documents submitted to the Ministers was a Consultation and Accommodation Report (the “Consultation Report”), which informed the Ministers about BC Hydro’s and government’s efforts to consult with and accommodate First Nations with respect to the Project. On October 14, 2014, the provincial Ministers issued the Certificate, attaching 77 conditions with which BC Hydro must comply.

The *Clean Energy Act*

[20] The *Clean Energy Act*, S.B.C. 2010, c. 22 [*CEA*], is also relevant to this petition. The *CEA* establishes specific clean energy objectives for British Columbia. As well, the *CEA* limits the ability of the province to approve hydroelectric projects. Specifically, it provides:

> **10.** In this Part:
>
> **"approval"** includes a certificate, licence, permit or other authorization;
>
> **"prohibited projects"** means
>
> (a) a project of the authority, referred to in Schedule 2 of this Act, for electricity generation on a stream, and
>
> (b) a project for electricity generation on a stream with a storage capability in excess of a prescribed storage capability,
>
> but does not include the two-rivers projects;

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> **"stream"** has the same meaning as in section 1 of the *Water Act*;
>
> **"two-rivers projects"** means
>
> (a) the authority's facilities, on the Peace River and the Columbia River System, existing on the date this section comes into force and upgrades or extensions to those facilities, and
>
> (b) the project commonly known as Site C.
>
> **Project prohibitions**
>
> **11.** (1) Despite any other enactment, a minister, or an employee or agent of the government or of a municipality or regional district, must not issue an approval under an applicable enactment for a person to
>
> (a) undertake a prohibited project, or
>
> (b) construct all or part of the facilities of a prohibited project.
>
> (2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

[21] The *CEA* also modifies the assessment process which would otherwise be required for the Project. Sections 7(1)(d) and 7(2) exempt BC Hydro from certain provisions of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, with respect to the Project. As a result, BC Hydro is not required to obtain a “certificate of public convenience and necessity” from the British Columbia Utilities Commission (“BCUC”). The BCUC is also prohibited from exercising a power under the *Utilities Commission Act* that would directly or indirectly prevent BC Hydro from proceeding with Site C (s. 7(3)).

III: CONSULTATION HISTORY

[22] In the following paragraphs, I will summarize the environmental assessment process relevant to the constitutional and administrative issues raised by the petitioners. A chronology of events is set out in Appendix A to these reasons.

Early Development of the Project

[23] The petitioners are members of the Treaty 8 Tribal Association (“T8TA”), which coordinated consultation discussions with respect to the Project on their behalf.

[24] BC Hydro, as the Crown actor responsible for the development, construction and operation of the Project, was delegated certain procedural aspects of consultation with affected Aboriginal groups, including the petitioners.

[25] From 2004 to 2007, BC Hydro conducted a review of the feasibility of the Project. In 2007, the Province approved continued investigation of the Project. From 2007 to 2011, BC Hydro prepared a project description report to submit to provincial and federal environmental assessment agencies.

[26] BC Hydro's consultation with the petitioners began in the fall of 2007. During this period, BC Hydro held meetings with the petitioners, provided Project information and requested input to shape the development of Project plans. To that end, BC Hydro entered into a formal consultation agreement with T8TA on December 1, 2008.

[27] From 2007 to 2014, BC Hydro provided capacity funding of over $5 million to T8TA. The funding was designed to enable T8TA members to conduct their own traditional land use and community baseline studies, retain consultants, participate in the environmental assessment process, attend meetings with BC Hydro, review materials and prepare reports and comments.

[28] In May 2011, BC Hydro submitted a project description report to the EAO and the Agency initiating the environmental assessment process. During this process, BC Hydro continued consulting with the petitioners, as did the EAO and the Agency, on behalf of the provincial and federal Crowns. The EAO and the Agency also entered into a consultation agreement with T8TA, which was finalized in February 2012. The agreement established a consultation framework setting out notifications, timelines and opportunities for the petitioners to present their views to the Crown.

Pre-Panel Stage

[29] As discussed above, during the Pre-Panel Stage, the federal and provincial government and B.C. Hydro developed the Joint Agreement and Terms of Reference, the EIS Guidelines and the EIS. To facilitate consultation, the EAO and

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the Agency established a Working Group comprised of Aboriginal groups including T8TA, and federal, provincial, territorial and local government agencies. The Working Group assisted in the development of the key documents in the Pre-Panel Stage. The Working Group was to provide advice, comments and proposed revisions for these documents. In addition to the Working Group, the EAO and the Agency also met individually with the petitioners.

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Joint Agreement

[30] In September 2011, the petitioners were invited to submit comments on the draft Joint Agreement and Terms of Reference, setting out the scope and procedure of the environmental assessment process. To facilitate this process, the Working Group met for the first time on October 5, 2011 to discuss the Project and the terms of the draft Joint Agreement. Throughout the fall of 2011, the parties also met on several occasions and exchanged correspondence on the scope of the environmental assessment process.

[31] During these exchanges, T8TA raised its concern that the environmental assessment process would not adequately assess certain issues, including: the rationale for the Project, particularly given the exemption of the Project from oversight by the BCUC; alternatives to the Project, both hydroelectric and otherwise; cumulative effects and prior development in the region; and the nature and quality of remaining treaty lands available following construction of the Project.

[32] T8TA expressed particular concern over the draft Terms of Reference that addressed Aboriginal and treaty rights. The draft Terms of Reference provided that, although the Panel would receive information on adversely affected treaty rights, the Panel could not make any conclusions or recommendations as to the nature and scope of Aboriginal rights, whether the Crown has met its duty and whether the Project infringes Treaty 8. T8TA's position was that in order for the Panel to make recommendations on mitigation of adverse effects, it must be permitted to assess the nature and scope of affected treaty rights and the severity of impacts on those rights.

[33] In response, the EAO's and the Agency's position was that the Terms of Reference would be expanded so that the Panel could receive information and make recommendations on avoiding or mitigating potential adverse effects on Aboriginal or treaty rights. However, the EAO and the Agency rejected the suggestion of permitting the Panel to make conclusions or recommendations as to the nature and scope of Aboriginal or treaty rights and whether the Project infringes Treaty 8. Their position was that the federal and provincial Ministers are responsible for the duty to consult and to assess the seriousness of adverse impacts, the adequacy of consultation and whether accommodation measures are appropriate.

[34] On February 13, 2012, Canada and British Columbia finalized and signed the Joint Agreement, including the Terms of Reference outlining the scope of the Panel's environmental assessment.

[35] Relevant Terms of Reference provisions included:

> 2.2 The Joint Review Panel must include in its assessment of the Project, consideration of the following factors:
>
> - the purpose of the Project;
> - the need for the Project;
> - alternatives to the Project;
> - alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
> - the environmental, economic, social, health and heritage effects of the Project, including the cumulative effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;
>
> …
>
> - any change that the Project may cause in the environment on the current use of lands and resources for traditional purposes by aboriginal persons;
>
> …
>
> - comments from the public and Aboriginal persons and groups that are received during the assessment; and
> - community knowledge and Aboriginal traditional knowledge.

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2.3 The Joint Review Panel will receive:

- information regarding the manner in which the Project may adversely affect asserted or established Aboriginal rights and treaty rights;
- information provided by Aboriginal persons or groups regarding the location, extent and exercise of asserted or established Aboriginal rights and treaty rights that may be affected by the Project; and
- Information regarding any measures to avoid or mitigate potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights.

2.4 The Joint Review Panel will use the information collected pursuant to section 2.3 of this Terms of Reference and its assessment made in accordance with 2.2 to:

(a) make recommendations which, if implemented, would avoid or minimize potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights; and

(b) inform its assessment of the potential environmental, economic, social, health or heritage effects of the Project.

2.5 The Joint Review Panel will not make any conclusions or recommendations as to:

a) the nature and scope of asserted Aboriginal rights or the strength of those asserted rights;

b) the scope of the Crown's duty to consult Aboriginal Groups;

c) whether the Crown has met its duty to consult Aboriginal Groups and, where appropriate, accommodate their interests in respect of the potential adverse effects of the Project on asserted or established Aboriginal rights or treaty rights;

d) whether the Project is an infringement of Treaty No. 8; and

e) any matter of treaty interpretation.

2.6 The Joint Review Panel will describe any asserted or established Aboriginal rights and Treaty rights that are raised during the Joint Review Panel Stage and any impacts on those rights as articulated by those Aboriginal Groups in the Joint Review Panel Report.

Preliminary Assessment of the Nature and Scope of Treaty 8 Rights

[36] During the Pre-Panel Stage, the parties also exchanged information concerning the nature of the petitioners' Treaty 8 rights and the potential impact of the Project on those rights. The EAO and the Agency requested this information to prepare preliminary assessments of the effect of the Project on the petitioners' treaty rights.

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[37] T8TA responded to the Crown request with a letter on November 4, 2011. T8TA presented its view that Treaty 8 protects the meaningful right to hunt, fish and trap, including the continuity of traditional harvesting practices, such as preferred species and preferred locations. T8TA also described its view of the limited nature of the taking-up clause in Treaty 8:

> However, the Crown's right to take up land under the Treaty is not absolute. Like the right to hunt, the scope of the Crown's right to take up land is interpreted in light of the mutual understanding of treaty signatories and the oral promises made by the Crown. It was understood by both the Crown and aboriginal signatories that *from time to time*, lands "would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not". However, neither party expected the taking up of so much land as to jeopardize the exercise of traditional practices…
>
> The parties did not expect that the amount of land to be taken up would affect hunting rights or the First Nation's traditional means of earning a livelihood….
>
> [Emphasis in original.]

[38] T8TA further stated that consultation by the Crown when taking up land must be aimed at ensuring the Project is consistent with the rights and obligations under Treaty 8. T8TA's position was that adequate consultation should include consideration of the other dams on the Peace River in assessing the impact of the Project on treaty rights.

[39] In March 2012, the EAO and the Agency sent the petitioners letters that outlined each organization's preliminary assessment of the scope of Treaty 8 rights, the potential impacts of the Project and the required depth of consultation for each group. The petitioners were invited to provide comments or additional information on their use of the lands affected by the Project.

[40] The EAO provided its preliminary understanding of Treaty 8, noting the Crown's right to take up land for settlement, mining, lumbering and other purposes and the right of First Nations signatories to hunt, fish and trap throughout the lands surrendered under the treaty. The EAO then provided a summary of the potential impacts on treaty rights and a summary of proposed consultation approaches for

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each stage of the assessment. The letter did not discuss at length the nature of the taking-up clause.

EIS Guidelines

[41] Following the signing of the Joint Agreement, the next step in the Pre-Panel Stage was the preparation of the EIS Guidelines. In January 2012, the draft EIS Guidelines were circulated for review.

[42] During meetings and in correspondence, T8TA requested the Guidelines include: a section on guiding principles, further discussion of the need for and alternatives to the Project and a requirement that cumulative effects be assessed in connection with the existing dams on the Peace River. T8TA also expressed concern that the EIS Guidelines did not frame an approach that would be effective in determining the adverse effects of the Project on treaty rights.

[43] The EAO and the Agency responded to T8TA in a series of letters, explaining how T8TA's comments had been considered and where they would be incorporated into the EIS Guidelines. The final version of the EIS Guidelines was approved by the EAO and the Agency in September 2012. The EIS Guidelines included the following guiding principles:

> 1.1 Guiding Principles
>
> …
>
> Aboriginal Consultation
>
> BCEAO and Canada are committed to working constructively with Aboriginal groups to ensure that the Crown fulfills its duties of consultation and accommodation. The proponent must ensure that it engages with Aboriginal groups that may be affected by the project, or that have asserted or established Aboriginal rights or treaty rights in the project area, as early as possible in the project planning process.
>
> An environmental assessment conducted in accordance with the agreement between the Ministers of Environment of BC and Canada with respect to the environmental assessment of the Project and with these EIS Guidelines, which have been developed under that Agreement, will meet the objectives of these principles.

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[44] The EIS Guidelines also required BC Hydro to assess the effects of the Project on lands and resources currently used by Aboriginal groups for traditional purposes (s. 15), and the potential adverse impacts of the Project on asserted or established Aboriginal and treaty rights (s. 20).

[45] On December 21, 2012, T8TA sent a letter summarizing its outstanding concerns with the Joint Agreement and EIS Guidelines. T8TA expressed its frustration that the EAO and the Agency had not provided further information to update the organizations' preliminary assessments of Treaty 8 rights. T8TA also questioned the short timelines and lack of resources for First Nations in reviewing the lengthy EIS and participating in the Panel hearing process. Further, T8TA questioned the lack of consultation prior to the enactment of the *CEA* and that statute's exclusion of feasible alternatives to the Project.

[46] On February 18, 2013, the EAO wrote to each of the T8TA First Nations providing additional information on the EAO's understanding of the scope and nature of Treaty 8 rights. The letter acknowledged that T8TA had provided significantly more detailed information about its understanding of Treaty 8 than in the EAO's preliminary assessment. The letter then provided an overview of the principles of treaty interpretation and noted the limitations on the right to hunt, fish and trap within treaty lands. The EAO did not provide an interpretation of the taking-up clause, nor respond to T8TA's interpretation of the clause. The EAO requested further information from T8TA on specific adverse impacts of the Project.

EIS

[47] Following the approval of the EIS Guidelines, BC Hydro prepared and submitted a draft EIS in January 2013. Copies of the EIS were distributed to the Working Group for review and comment.

[48] On April 13, 2013, T8TA provided comments on the draft EIS, which included concerns such as: the executive summary did not accurately summarize the document; the need for certain technical studies; an imbalance in the tone and content in describing adverse and beneficial effects; and concerns over the temporal

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and geographical scope of the cumulative effects assessment. T8TA also explained that BC Hydro had failed to integrate information and materials provided by T8TA into the EIS.

[49] On May 8, 2013, the EAO and the Agency circulated BC Hydro's responses to comments received from Aboriginal groups on the EIS, including new technical memoranda prepared by BC Hydro on Aboriginal and treaty rights and consultation.

[50] The Working Group also held meetings in early June 2013 to facilitate more detailed discussion on specific topics addressed in the EIS. T8TA met with the EAO and the Agency in June and July 2013 to discuss the EIS and review how comments received from the T8TA would be incorporated into the EIS. On August 1, 2013, the EAO and the Agency wrote to T8TA summarizing how its comments were considered and/or incorporated into the EIS. Specific areas that would be amended by BC Hydro included the need for the project, alternatives, current land use, cultural use of Site C land, specific wildlife issues, cumulative effects methodology and the impact on treaty rights.

Panel Stage

[51] Pursuant to the Joint Agreement, the role of the Panel was to review the EIS to determine whether it contained sufficient information to proceed to a public hearing, to oversee the public hearing process and to prepare a report containing the Panel's conclusions and recommendations.

[52] The Panel commenced its review of the EIS in August 2013. Following requests for additional information from BC Hydro, in November 2013, the Panel determined that the EIS contained sufficient information to proceed with the public hearings.

Panel Hearings

[53] The Panel conducted public hearings from December 2013 to January 2014. There were three hearing categories: general sessions, topic specific sessions and community hearings conducted in Aboriginal communities. A hearing was held in a

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community in West Moberly on December 16, 2013. The Panel also devoted a full day to receive evidence on Aboriginal and treaty rights on January 17, 2014. In advance of that hearing, the Panel wrote to Aboriginal groups, informing them that the Panel sought information on: Aboriginal and treaty rights that may be adversely affected by the Project; the manner that the Project might affect those rights; the location and extent of the exercise of those rights; and measures that might avoid or mitigate potential adverse effects.

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[54] T8TA filed numerous documents with the Panel, including letters, hearing exhibits, responses to undertakings, questions for BC Hydro, reports, written submissions, and final closing remarks. T8TA's evidence touched on treaty rights, current use of the area affected by the Project, cumulative effects and needs and alternatives for the project. T8TA repeatedly raised the issue of treaty rights infringement in its submissions to the Panel. T8TA explained that in its view, the Project would infringe Treaty 8, particularly in light of the cumulative effects of the Project and other development in the region.

Panel Report

[55] The Panel released its Report to the federal and provincial Ministers of Environment on May 1, 2014. The Panel Report was released to the public on May 8, 2014.

[56] In the Panel Report, the Panel provided the following overview of its findings on the costs and benefits of the Project:

> The benefits are clear. Despite high initial costs, and some uncertainty about when the power would be needed, the Project would provide a large and long-term increment of firm energy and capacity at a price that would benefit future generations. It would do this in a way that would produce a vastly smaller burden of greenhouse gases than any alternative save nuclear power, which B.C. has prohibited. The Project would improve the foundation for the integration of other renewable, low-carbon energy sources as the need arises. The Project would also entail a number of local and regional economic benefits, though many of these would be transfers from other parts of the province or country. Among them would be opportunities for jobs and small businesses of all kinds, including those accruing to Aboriginal people.

> There are other economic considerations. The scale of the Project means that, if built on BC Hydro's timetable, substantial financial losses would accrue for several years, accentuating the intergenerational pay-now, benefit-later effect. Energy conservation and end-user efficiencies have not been pressed as hard as possible in BC Hydro's analyses. There are alternative sources of power available at similar or somewhat higher costs, notably geothermal power. These sources, being individually smaller than Site C, would allow supply to better follow demand, obviating most of the early-year losses of Site C. Beyond that, the policy constraints that the B.C. government has imposed on BC Hydro have made some other alternatives unavailable.
>
> There are other costs, however, and questions of where they fall. Replacing a portion of the Peace River with an 83-kilometre reservoir would cause significant adverse effects on fish and fish habitat, and a number of birds and bats, smaller vertebrate and invertebrate species, rare plants, and sensitive ecosystems. The Project would significantly affect the current use of land and resources for traditional purposes by Aboriginal peoples, and the effect of that on Aboriginal rights and treaty rights generally will have to be weighed by governments. It would not, however, significantly affect the harvest of fish and wildlife by non-Aboriginal people. It would end agriculture on the Peace Valley bottom lands, and while that would not be significant in the context of B.C. or western Canadian agricultural production, it would highly impact the farmers who would bear the loss. The Project would inundate a number of valuable paleontological, archaeological, and historic sites. It would have modest effects on health, which could be mitigated, although the health effects of methylmercury on people who eat the reservoir fish require more analysis to be sure. For most users, outdoor recreation and tourism, transportation, and navigation would also experience effects but not significant effects. Because of the significant adverse effects identified on some renewable resource valued components in the long-term, there would be diminished biodiversity and reduced capacity of renewable resources, should the Project proceed. The Project would not have any measureable effect on the Peace-Athabasca Delta [at iv].

[57] The Panel concluded that the Project would cause significant adverse effects on fish and fish habitat. The Panel explained that there would be a net loss of habitat and a profound change in the type and character of the remaining habitat during the construction and operation of the Project. These effects would be "probable, negative, large, irreversible and permanent" so long as the dam remains, and could not be fully mitigated (Panel Report at 52 and 54-55).

[58] Specifically, the Project would result in the probable extirpation of three species of fish and would further unbalance species diversity in the Peace River through the ascendancy of kokanee, an introduced species. Although the Site C reservoir would lead to an increase in the total biomass of fish relative to what

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currently exists in the Peace River, there would also be a reduction in fish density which could make it more difficult to find and catch fish.

[59] The Panel also determined that the Project would cause a number of significant adverse effects on certain wildlife species. However, the Panel agreed with BC Hydro that the Project would not likely cause significant adverse effects on moose, elk, white-tailed deer, mule deer, or caribou despite the loss of habitat from the flooding of the valley. The Project also would not likely cause significant cumulative effects on ungulates.

[60] In section 7, the Panel evaluated the effects of the Project on the current use of lands and resources by Aboriginal groups in terms of fishing, hunting, trapping and other cultural and traditional uses of the land. The Panel concluded that the Project is likely to cause significant adverse effects on fishing opportunities for the First Nations represented by T8TA, and that these effects cannot be mitigated. The Panel explained that even if Aboriginal groups would still be able to fish in the reservoir, the knowledge of fishing sites, preferred species and cultural attachment to specific sites would be lost. The capacity of Aboriginal groups to transfer their knowledge and culture to future generations would also be impeded.

[61] The Panel also concluded that the Project is likely to cause significant adverse effects on hunting and non-tenured trapping opportunities and practices for the First Nations represented by T8TA, and that these effects cannot be mitigated. This conclusion took into account the effects on preferred harvested species, as well as the uniqueness and value of the area for affected First Nations.

[62] Further, the Panel concluded the Project would likely cause significant adverse effects on other traditional uses of land for the First Nations represented by T8TA, and that some of these effects cannot be mitigated. Such traditional uses of land include habitation sites, feather-gathering sites, harvesting of firewood, drinking water, trails and water routes, and berry and plant gathering. The Panel also concluded the project would likely cause significant adverse cumulative effects on current use of lands and resources for traditional purposes. Similarly, the Project

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would cause significant adverse effects on cultural heritage resources for Aboriginal people.

[63] Beyond specific Aboriginal concerns, the Panel also addressed the issue of costs, demand, alternatives and need for the Project. The Panel stated that it could not conclude as to the likely accuracy of Project cost estimates and recommended referring the issue of Project costs to the BCUC. Similarly, the Panel recommended that BC Hydro establish a research budget for alternative energy resources and submit a load forecast to the BCUC. On the overall need for the Project, the Panel concluded that, although British Columbia will need new energy and the Project would be the least expensive of the alternatives, BC Hydro had not fully demonstrated the need for the Project on the timetable set forth. The Panel again recommended the referral of the load forecast and demand a side management plan to the BCUC.

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Post-Panel Stage

[64] Following the release of the Panel Report in May 2014, the EAO and the Agency commenced consultation with Aboriginal groups on the content of the Panel Report, the draft Federal/Provincial Consultation and Accommodation Report to be sent to the Ministers (the “Consultation Report”) and the proposed conditions that would be included in the Certificate, if issued.

[65] On June 13, 2014, T8TA provided its initial comments on the Panel Report. T8TA explained its view that the Panel did not provide a basis for its conclusion that effects on ungulates would be minimal. T8TA also argued that there was no basis for the Panel’s conclusion that in the long term, Site C would produce less expensive power than any alternative, nor was there any evidentiary support for the Panel’s conclusion to the effect that, in the future, the current cost to construct Site C will “seem cheap” (Panel Report at 307).

[66] On July 22, 2014, T8TA again wrote to the EAO and the Agency providing comments on the Panel Report, Consultation Report and the proposed conditions to the Certificate. T8TA maintained that the Consultation Report should acknowledge

that the nature and scope of Treaty 8 rights and the taking-up clause remain uncertain. T8TA also asserted that the Crown must consider whether Site C was justified, considering the need for the Project and the available alternatives.

[67] In June and July 2014, the EAO and the Agency had met with T8TA to discuss their concerns regarding the Panel Report's conclusions. On August 5, 2014, the EAO and the Agency wrote to each of the petitioners to provide a revised draft of the Consultation Report and to request additional comments on the revisions. The letter indicated how proposed revisions were incorporated.

[68] T8TA also provided its response to the potential conditions to be attached to the Certificate. However, T8TA declined to provide substantive comments on the proposed conditions, instead stating its position that under no conditions should the proposed Project receive a federal or provincial environmental assessment approval. T8TA also explained that its First Nations would not participate in environmental management and monitoring of a Project they did not support.

Referral Package

[69] Pursuant to the Joint Agreement and the *EAA*, in September 2014, the EAO prepared and submitted a referral package to the Ministers with the following documents:

1. Pre-Panel Stage Report;
2. EIS;
3. Panel Report;
4. EAO Information Note;
5. EAO Executive Director's Response to the Panel Report;
6. Consultation Report;
7. First Nations' submissions to the Ministers; and
8. Letters of proposed accommodation to First Nations.

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Consultation Report

[70] The Consultation Report contained a summary of the procedural and substantive aspects of Crown-Aboriginal consultation during the environmental assessment of the Project. It included a description of the views of Aboriginal groups on how the Project would impact their Aboriginal interests, as well as the measures proposed to mitigate or address potential impacts.

[71] The Consultation Report also provided an overview of the Crown's interpretation of Treaty 8 and the taking up clause: "the Crown does not view the [environmental assessment] as a process designed to determine specific rights recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*, but instead, to reasonably understand the nature and extent of treaty rights potentially being impacted by contemplated Crown actions in order to assess the severity of potential impacts to them" (Consultation Report at 27).

[72] The Consultation Report stated that if, as a result of a taking up, a Treaty 8 First Nation no longer has a meaningful right to hunt, trap, or fish in its traditional territory, then this would result in an infringement of Treaty 8. It also stated that when the Crown is exercising its taking up power, its obligations include: "being informed of the impact of the project on the exercise of the rights to hunt, trap and fish, communicate such findings to the First Nations, deal with First Nations in good faith and with the intention of substantially addressing their concerns" (at 29). Although the Consultation Report acknowledged that the Crown and First Nations differ on issues of treaty interpretation, it did not detail or attempt to address First Nations' submissions on the taking-up clause and treaty infringement.

[73] The EAO and the Agency stated that they approached consultation with the Treaty 8 First Nations in British Columbia at the deep end of the consultation spectrum, given the potential adverse impacts of the Project. After summarizing the various stages in the consultation process, the Agency and EAO concluded:

> Having regard to the overall process of consultation, as part of the EA for the proposed Project, the Agency and EAO conclude that consultation has been

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> carried out in good faith and that the process was appropriate and reasonable in the circumstances [Consultation Report at 87].

[74] Finally, the Consultation Report also included appendices summarizing each affected Aboriginal group, including their involvement in the process and an overview of their key interests and concerns.

Petitioners' Submissions to the Ministers

[75] Aboriginal groups were permitted to provide written submissions outlining their outstanding concerns, issues or views on the Project. These submissions were provided directly to the Ministers in the Referral Package.

[76] In its letter of August 19, 2014, Prophet River highlighted some conclusions of the Panel on the significant adverse effects of the Project on fishing, hunting, trapping and traditional uses of land. Prophet River explained its view that the Project will infringe Treaty 8:

> The loss of the Peace River Valley would be an *infringement* on the exercise of our Treaty rights, given the high value for the exercise of our Treaty rights and the sustenance of our mode and way of life, which was promised by the Crown to continue after the Treaty was signed as *if we never entered into it*. As noted by the Panel, an alternate comparable natural setting cannot be found nearby. Approval of Site C would demand justification under the *Sparrow* test. This also invokes the Crown's fiduciary duty.
>
> If the Crown action is in furtherance of a compelling and substantial objective (considered also from the Aboriginal perspective), the *Sparrow* test then requires the infringement to be justified through a proportionality assessment. The infringement must be necessary to achieve the Crown's goal and go no further than is necessary to achieve that goal. Also, the benefits that are expected to flow from that goal cannot be outweighed by the adverse effects on the Aboriginal interests. The Panel concluded that BC Hydro has not fully demonstrated the need for the Project on the timetable set forth, and that available electricity resources could provide adequate energy and capacity until at least 2028. The fact that time is available for the consideration of alternatives that would avoid the significant adverse environmental effects of Site C, can only lead to one conclusion: the significant adverse effects of Site C, as they relate to the Treaty 8 First Nations, cannot be justified. The Crown cannot justify approving a project that will have <u>certain</u> significant adverse effects that cannot be mitigated, while the need for the project in the foreseeable future remains <u>uncertain</u>.
>
> [Emphasis in original.]

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[77] Prophet River also addressed the issue of accommodation and compensation and concluded its letter by stating "it is simply not possible to adequately compensate our community for the permanent destruction of the Peace River Valley".

[78] In its letter of August 19, 2014, West Moberly repeated many of the concerns of Prophet River on adverse effects, infringement, alternatives to the project and accommodation. West Moberly similarly explained that the loss of the Peace River Valley would be an infringement requiring justification under the *Sparrow* test (*R. v. Sparrow,* [1990] 1 S.C.R. 1075) and that accommodation was not possible. West Moberly also noted that during the Panel Hearing, T8TA presented a number of alternatives to the Project, including wind, natural gas or smaller hydroelectric projects.

Proposed Accommodation Measures

[79] As indicated above, the Ministers issued the Certificate on October 14, 2014.

[80] The Certificate included a list of 77 conditions with which BC Hydro must comply for the Project to proceed. These conditions include a number of measures intended to avoid or reduce potentially significant adverse impacts of the Project on Aboriginal rights and interests, including:

(a) fisheries, aquatic habitat, and wetland monitoring and compensation programs;

(b) vegetation, invasive species, and rare plants assessment and compensation programs;

(c) wildlife management plans;

(d) establishment of alternate winter ranges for ungulates;

(e) identification of traditional plants used by Aboriginal groups and plant mitigation plans;

(f) compensation program for loss of use and access to structures used in Aboriginal traditional and current harvesting; and

(g) identification of Aboriginal burial sites.

[81] BC Hydro made a number of modifications to the Project during the environmental assessment process to accommodate Aboriginal interests and minimize adverse effects. The modifications were outlined in the Consultation Report and include:

(a) modifying the design for the Project, allowing access across the dam and, as a result, removing the need for a permanent bridge across the Peace River downstream of the dam site that would have enlarged the Project footprint and increased activity on the south bank of the river in the Area of Critical Community Interest and Peace Moberly Tract;

(b) using an existing transmission line right of way for the construction of new transmission lines to reduce the amount of land required;

(c) minimizing the loss of wildlife habitat on the big island downstream of the dam through design of the dam, generating station and spillway;

(d) relocating worker accommodation to reduce the Project footprint and disruption of wetland habitat;

(e) removing the requirement to establish a temporary work force camp on Crown land on the south side of the Peace River at the proposed dam site; and

(f) using existing corridors, including existing roads, for the realignment of Highway 29.

[82] BC Hydro has also offered to commence negotiations with the petitioners for Impact Benefits Agreements. The petitioners have not agreed to commence such negotiations.

[83] On July 22, 2014, BC Hydro sent letters to the petitioners to formally propose measures to be provided by BC Hydro and the Province to address residual effects of the Project. For West Moberly, BC Hydro and the Province proposed to enter into discussions for the potential transfer of the fee simple interest of up to 2500-3000

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acres of provincial Crown lands to West Moberly. BC Hydro also proposed to pay West Moberly $3.5, million in lump sum payments, in the following installments: $1.5 million upon receipt of all authorizations required for the Project and following any judicial review or appeal process; $1 million 45 days after commencement of construction; and $1 million on a date to be determined by BC Hydro and West Moberly. For 70 years, BC Hydro also offered to pay West Moberly $350,000 each year, adjusted annually for inflation.

[84] For Prophet River, BC Hydro and the Province proposed entering into discussions regarding the potential establishment of land protection measures for certain parcels of provincial Crown land. BC Hydro also proposed a financial contribution of $1 million, to be paid as an upfront lump sum.

[85] For both West Moberly and Prophet River, BC Hydro proposed to work with the Province to designate certain BC Hydro-owned lands as winter ungulate range, and to create a compensation fund of $10 million for initiatives to address impacts to lands and resources used for traditional purposes for the benefit of all Aboriginal groups affected by the Project. West Moberly and Prophet River would be eligible to apply to this fund.

[86] West Moberly and Prophet River have not accepted these offers.

[87] In addition to these offers, BC Hydro has also stated that it will provide economic benefits and capacity-building opportunities to Aboriginal people prior to and during the construction of the Project. This includes promoting partnerships between BC Hydro and Aboriginal businesses, and supporting programs and providing bursaries for trades and skills training for Aboriginal students.

IV: POSITION OF THE PARTIES

[88] The petitioners submit that the court should quash the Certificate on both constitutional and administrative law grounds.

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[89] The constitutional grounds relied on by the petitioners are:

1. The Ministers were constitutionally obligated to determine whether the Project constituted an infringement of their treaty rights under Treaty 8, and, if so, whether the Project was justified in accordance with the test promulgated by the Supreme Court of Canada in *Sparrow* but failed to do so; and

2. The Ministers failed to satisfy themselves that the Crown had met its obligation to consult with and attempt to accommodate the interests of the petitioners recognized in s. 35 of the *Constitution Act*, *1982.*

[90] The administrative law grounds relied on by the petitioners are:

1. The Ministers' decision to issue the Certificate was unreasonable because the Ministers failed to consider relevant factors, and, in particular, the Panel's conclusions that the Project was unnecessary at the present time and that there were alternative sources of energy that could meet British Columbia's energy needs without causing the environmental harm of the Project; and

2. The Ministers' conduct gave rise to a reasonable apprehension of bias on their part in favour of the Project over other alternative sources of energy.

[91] The respondents' position is that the petition should be dismissed because the petitioners have failed to establish any constitutional or administrative grounds to set aside the Certificate.

[92] With respect to the constitutional grounds, the respondents submit that:

1. The Ministers had no jurisdiction to decide whether the Project constituted an infringement of the petitioners' treaty rights;

2. The issue of infringement cannot justly be determined on this judicial review application;

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3. The record before the Ministers did not disclose any reasonable basis for concluding that the Project was an infringement of the petitioners' treaty rights; and

4. The record shows that the government correctly identified the scope and nature of its obligations to consult with the petitioners with respect to the Project and that the government's consultation and accommodation activities were adequate and reasonable.

[93] With respect to the administrative grounds, the respondents submit that:

1. The Ministers' decision was reasonable when considered in light of the record that was before them; and

2. The petitioners have shown no basis on which a court could conclude that the Ministers' conduct gave rise to a reasonable apprehension of bias.

V: ISSUES

[94] The positions taken by the parties require consideration of the following constitutional issues:

1. Did the Ministers who issued the Certificate have the jurisdiction to decide whether the Project infringed the petitioners' treaty rights?

2. If the Ministers had such jurisdiction, were they required to exercise it in this case?

3. Should the court decide whether the Project was an infringement and therefore subject to the requirement of a *Sparrow* justification on this judicial review application?

4. Did the Ministers correctly understand the nature of the government's obligation to the petitioners with respect to the Project?

5. If the Ministers applied the correct legal standard to the government's obligation, did the government meet that standard?

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[95] The administrative law issues that require consideration are:

1. Was the decision to issue the Certificate reasonable in view of the contents of the Panel Report?

2. Are there grounds to conclude that there was a reasonable apprehension of bias on the part of the Ministers arising from the government's emphasis on "clean energy" in addressing British Columbia's energy requirements?

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VI: TREATY 8

[96] Before turning to the specific issues outlined above it is useful to review the provisions of Treaty 8 and the jurisprudence dealing with the relationship between the treaty right to hunt, trap and fish and the government's right to take up land.

[97] Treaty 8 has been considered in a number of Supreme Court of Canada decisions, including: *R. v. Badger,* [1996] 1 S.C.R. 771; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. In *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, the Court considered Treaty 3, which contains provisions similar to Treaty 8. In addition, the British Columbia Court of Appeal considered Treaty 8 in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.

[98] In *Badger,* the Court dealt with appeals from convictions of three members of Alberta Treaty 8 First Nations who had been convicted of hunting contrary to the Alberta *Wildlife Act.* The issue before the Court was whether the provisions of the *Wildlife Act* pursuant to which they had been convicted were inapplicable to them because they were exercising their treaty right to hunt. The Court upheld two of the convictions on the basis that the accused had been hunting on land that had been taken up for private settlement but remitted the third conviction to the lower courts to be dealt with in accordance with the decision.

[99] In Badger at para. 31, the Court referred to Treaty 8:

> 31 The relevant part of *Treaty No. 8*, made 21 June 1899, provides:
>
> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have 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.

[100] Cory J., on behalf of the majority, continued:

> 39 Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:
>
>> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. . . .
>>
>> We pointed out . . . that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. . . .
>>
>> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free

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> to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.]
>
> 40 Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.

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[101] Much of the decision in *Badger* dealt with the question of when privately owned land could be said to have been "taken up" and so no longer available to First Nations for hunting, trapping and fishing. However, the Court did make some general observations as to the relationship of the continuing right to hunt, trap and fish and the power of government to take up land that would be excluded from that right:

> 57 The oral history of the Treaty No. 8 Indians reveals a similar understanding of the treaty promises. Dan McLean, an elder from the Sturgeon Lake Indian Reserve, gave evidence in this trial. He indicated that the understanding of the treaty promise was that Indians were allowed to hunt anytime for food to feed their families. They could hunt on unoccupied Crown land and on abandoned land. If there was no fence on the land, they could hunt, but if there was a fence, they could not hunt there. This testimony is consistent with the oral histories presented by other Treaty No. 8 elders whose stories have been recorded by historians. The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. No doubt 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. See *The Spirit of the Alberta Indian Treaties, supra*, at pp. 92-100.
>
> 58 Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. …

[102] With respect to land that had not been taken up, the majority held that as the provisions of the *Wildlife Act* restricted the right to hunt guaranteed under Treaty 8,

such restriction had to be justified on the same test that the Court applied in *Sparrow*.

[103] *Sparrow* established that laws that interfere with an established aboriginal right can be valid only if they can be reasonably justified. In *Sparrow*, the Court gave some guidance with respect to interference:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," [1982] 5 Can. Legal Aid Bul. 99.) [at 1111-1112].

And as to justification:

> If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial [at 1113].

[104] A central issue in this petition is whether the environmental assessment of the Project requires a *Sparrow* analysis.

[105] It is important to note that *Badger* was decided some eight years before the seminal case of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. In addition, the majority decision in *Badger* does not address the duty of the

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Crown with respect to taking up land, because the lands on which the two accused who were convicted had been hunting had already been taken up by settlement.

[106] The duty of the Crown with respect to the taking up of lands pursuant to the treaty right to do so was addressed in *Mikisew*. In *Mikisew*, the federal government had approved the building of a winter road in Woods Buffalo National Park. Initially, the road was to pass through the Mikisew's reserve. When the Mikisew protested, the government realigned the road so that it passed around the reserve but did not consult them with respect to the new alignment. The Mikisew sought judicial review of the approval of the road.

[107] The Federal Court Trial Division set aside the approval on the grounds that the government action in developing the road was subject to a *Sparrow* analysis and the government had failed to justify its actions. In the Federal Court of Appeal, the decision was reversed, based on an argument raised by the Attorney General of Alberta, that the construction of the road should more properly be seen as a taking up of the land underlying the road than as an interference with an aboriginal interest and that the government therefore had no duty to consult. The Federal Court of Appeal decision predated the publication of the reasons in *Haida.*

[108] The Supreme Court disagreed with the Federal Court of Appeal. It held that the honour of the Crown required consultation with respect to the taking up of land pursuant to Treaty 8. In his judgment, Binnie J. recognized the tension between the treaty rights of the Mikisew to hunt, fish and trap and the power of the government to take up land:

> 24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

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> 25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:
>
> > The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.
> >
> > (C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61).

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[109] Binnie J. went on to reject the argument that any encroachment on the geographical limitation of the right to hunt, trap and fish required a *Sparrow* type justification:

> 31 I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up <u>from time to time</u> for settlement, mining, lumbering, trading or other purposes". (Emphasis added) [by Binnie J.] The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.
>
> 32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

[110] However, *Mikisew* also established that there was a duty to consult with any affected First Nation whose treaty right to hunt, trap and fish might be adversely affected by a proposed taking up of land formerly available for that purpose. The extent of the duty to consult in a particular case must be determined by the circumstances of that case:

> 63 The determination of the content of the duty to consult will, as *Haida Nation* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida Nation* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

[111] In *Grassy Narrows*, the Court was concerned with Treaty 3, which contains substantially the same right to hunt, trap and fish and taking up provisions as Treaty 8. The principal issue in *Grassy Narrows* was whether the power to take up land was vested in Ontario or Canada. The Court held that Ontario had the power to take up lands but that that power was subject to the honour of the Crown:

> [51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.
>
> [52] Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their

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> concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset. Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (*Mikisew*, at para. 48).

[112] In *Keewatin v. Ontario (Natural Resources),* 2013 ONCA 158, the Ontario Court of Appeal provides insight into governments' obligations with respect to taking up lands in reasons specifically approved at para. 51 of *Grassy Narrows*:

> [206] Turning to *Mikisew*, the trial judge's conclusion that Canada has a residual s. 91(24) supervisory authority over Ontario's use of the taking up clause is at odds with the principles set out by the Supreme Court of Canada in that case.
>
> [207] It is important to distinguish between a provincial taking up that would leave no meaningful harvesting right in a First Nation's traditional territories from a taking up that would have a lesser impact than that. The former would infringe the First Nations' treaty rights, whereas the latter would not. Where it is claimed that a taking up will infringe a treaty right, *Mikisew* makes it clear that the remedy is to bring an action for treaty infringement: see para. 48. An action for infringement does not engage Canada in a supervisory role.
>
> [208] *Mikisew* also explains the process that must be followed by a governmental entity seeking to take up surrendered lands, short of infringement.
>
> [209] To uphold the honour of the Crown, the governmental entity must first inform itself of the degree to which the contemplated conduct would adversely affect the Aboriginal peoples' right to hunt, fish and trap and whether that triggers the duty to consult. It must communicate its findings to the affected Aboriginal peoples. It must attempt to deal with First Nations in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold but adverse impact is a matter of degree, as is the extent of the content of the governmental entity's duty to consult and accommodate.
>
> [210] Ontario, as the emanation of the Crown holding the beneficial ownership of the public lands ceded by Treaty 3, is required to respect Treaty 3 harvesting rights. Its s. 109 powers are subject to Aboriginal harvesting rights.
>
> [211] Ontario must respect those rights and manage changes to them in accordance with the honour of the Crown and s. 35 of the *Constitution Act, 1982.* Ontario cannot take up lands so as to deprive the First Nation signatories of a meaningful right to harvest in their traditional territories. Further, honourable management requires that Ontario, as the government

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> with authority to take up in the Keewatin Lands, must consult with First Nations and accommodate their treaty rights whenever they are sufficiently impacted by the taking up. As noted above, Ontario accepts these constitutional obligations.

[113] With these general principles in mind, I now turn to a consideration of the issues identified above at paras. 94 and 95.

VII: CONSTITUTION ISSUES

Did the Ministers have the Jurisdiction to Decide the Infringement Issue?

[114] The petitioners submit that the Ministers not only had the jurisdiction to decide infringement but also the obligation to do so, and, that the Ministers erred in law either by deciding that the Project did not infringe their rights pursuant to s. 35(1) of the *Constitution Act, 1982* or by not deciding that issue at all.

[115] This issue is framed in the petitioners' argument as follows:

> In this case, the Petitioners are adherents of Treaty No. 8 and have established Treaty rights that are explicitly protected by section 35 of the *Constitution Act, 1982.* The issues to be reviewed concern whether the infringement of those constitutionally-protected Treaty rights was adequately considered or determined and, in the alternative, the adequacy of the consultation process established by the Crown and the consultation which occurred thereunder.
>
> ….
>
> By issuing the Certificate, the Ministers either decided that the Project would not infringe the Petitioners' s. 35(1) rights or did not decide the issue at all. In either case, the decision to issue the Certificate is reviewable on a standard of correctness.
>
> In making a decision to issue the Certificate, the Ministers were required to "respect legal and constitutional limits", which are reviewable on a correctness standard. Further, on questions of law, a decision-maker must be correct. The determination of whether a treaty right has been infringed, particularly where the decision maker did not make the initial findings of fact, is both a constitutional issue and an issue of law. As a result, the proper approach is to determine whether or not that decision is correct.
>
> If the decision maker failed to make a determination on whether a treaty right has been infringed, or has failed to establish a process for this purpose, the question remains whether the decision maker has respected substantive constitutional limits owing to the petitioners under Treaty No. 8. Again, this is both a constitutional question and a question of law that must be reviewed on

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> a correctness standard. Even an executive decision can be nullified where the decision maker has "failed to observe a condition precedent to the exercise of that power" [Written Argument of the Petitioners at paras. 106-109].

[116] I agree with the petitioners that this is a question of law that must be reviewed on a correctness standard.

[117] I am satisfied that the Ministers did not decide whether the Project constituted an infringement of the petitioners' treaty rights. There is no indication in the record that they did so. The government's view with respect to the determination of treaty rights in the environmental assessment process is summarized at page 27 of the Consultation Report:

> **Nature and Scope of Treaty 8 Rights**
>
> Early in the EA process, Treaty 8 First Nations sought to engage the Crown in consultation regarding the nature and scope of rights protected under Treaty 8. Extensive efforts were made by both the First Nations and the Crown in examining this issue and communicating views in an open and transparent manner in order to focus consultations on the potential impacts of the proposed Project on the First Nations' treaty rights. The Crown does not view the EA as a process designed to determine specific rights recognized and affirmed under s. 35(1) of the *Constitution Act, 1982,* but instead, to reasonably understand the nature and extend of treaty rights potentially being impacted by contemplated Crown actions in order to assess the severity of potential impacts to them.

[118] Although the Ministers gave no reasons for issuing the Certificate, I infer from the fact that they issued it that they accepted the above views set out in the Consultation Report, and acted accordingly.

[119] In this case the petitioners argue that the magnitude of the Project added to previous development of the Peace River and Peace Valley threatens to eliminate any meaningful exercise of the right to hunt, trap and fish in the area. They submit that the Project does amount to an infringement because it would leave them with no meaningful right to hunt, trap and fish in a vital part of the area in which they carried on those activities prior to its surrender under Treaty 8, and that the Ministers could not have properly addressed the adverse effects of the Project without deciding whether it infringed their treaty rights.

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[120] The respondents submit that the environmental assessment process was not designed to resolve the complex questions of infringement and justification raised by the petitioners and that the Ministers lacked the jurisdiction to make binding findings on these issues.

[121] In *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, the Court considered the question of whether the Forest Appeals Commission (the “Commission”) had the jurisdiction to determine the aboriginal status of a person charged with an offence under the *Forest Practices Code of British Columbia Act,* R.S.B.C. 1996, c. 159.

[122] The Court began by observing that there was no constitutional prohibition against a provincially appointed tribunal determining that question. The Court held that the question to be determined was whether the legislature had expressly or impliedly empowered the Commission to decide questions of law.

[123] The Court reviewed the powers granted to the Commission and the nature of the proceedings before it and concluded that it had been granted the power to decide questions of law. At para. 41 of his reasons, Bastarache J. referred to a provision of the *Forest Practices Code* giving any party before the Commission the right to make submissions as to facts, law and jurisdiction and to a provision permitting appeals to the British Columbia Supreme Court on questions of law or jurisdiction. Based on these provisions and the adjudicative nature of the Commission’s hearings, Bastarache J. concluded that the Commission had the power to make determinations as to the aboriginal status of persons appearing before it. It should also be noted that the Court decided that an appeal from such a finding should be reviewed by this court on a standard of correctness.

[124] The functions of the Commission can usefully be contrasted to the functions of the Ministers under the *EAA.* The Ministers do not hear evidence or receive any oral submissions from persons who may be affected by their decision. They give no reasons for their decision.

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[125] The function of the Ministers in this case is found in ss. 10 and 17 of the *EAA*:

> **10** (1) The executive director by order
>
> …
>
> (c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that
>
> (i) an environmental assessment certificate is required for the project, and
>
> (ii) the proponent may not proceed with the project without an assessment.
>
> …
>
> **17** (1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied
>
> (a) under section 11 or 13 by the executive director,
>
> (b) under section 14 or 15 by the minister, or
>
> (c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person
>
> the executive director, commission, hearing panel or other person, as the case may be, must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).
>
> (2) A referral under subsection (1) must be accompanied by
>
> (a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,
>
> (b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and
>
> (c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.
>
> (3) On receipt of a referral under subsection (1), the ministers
>
> (a) must consider the assessment report and any recommendations accompanying the assessment report,
>
> (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
>
> (c) must
>
> (i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,
>
> (ii) refuse to issue the certificate to the proponent, or

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> (iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.
>
> (4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

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[126] The scope of the Ministers' review under the *EAA* was addressed by the Court of Appeal in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at para. 57:

> The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act.*

[127] In considering whether to issue a certificate, the Ministers were not making a rights-based decision but a political and policy one. The nature of their decision was described by Bauman J., as he then was, in *Do Rav Right Coalition v. Hagen*, 2005 BCSC 991:

> [31] I make several elementary observations concerning the statutory scheme.
>
> [32] First, it contemplates the assessment of works and activities which may have significant adverse environmental, economic, social, heritage or health effects.
>
> [33] Second, the process contemplates an *ad hoc* régime for public notice, access to information and consultation, tailored for each assessment by a person with broad discretionary authority which, in turn, is loosely guided by the *Regulation*.
>
> [34] Third, at the end of the process, a political, policy-driven decision is made by elected Ministers of the Crown; they are given a very broad discretion to consider the issue: they may consider "any other matters that they consider relevant to the public interest in making their decision on the application".

> [35] The environmental assessment process is not, in substance, one engaged in resolving a dispute between a project proponent and affected individuals. It is, on the contrary, one which assesses a project in the context of its broad impacts on society, weighs the efficacy of mitigative measures, and authorizes a project to proceed if it is in the public interest to do so.
>
> [36] In the language of the cases, the process is highly polycentric, not bipolar.

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[128] An environmental assessment certificate is not a licence to proceed with a project. It is a necessary but insufficient step in the overall approval process for a project. Unlike the Forest Appeals Commission, the Ministers' decision does not finally adjudicate on the rights of the parties interested in a project.

[129] The petitioners rely on *West Moberly* in support of their submission that the Ministers were required to consider infringement. However, I conclude that *West Moberly* is distinguishable from this case. The issue in *West Moberly* was over the extent of consultation and accommodation required with respect to the project under consideration in that case. Chief Justice Finch was of the view that, as part of the consultation process, the government was required to give serious consideration to the West Moberly First Nation's position that the mining project in question should not proceed at all. He found that the government did not give that position any consideration and therefore had failed to meet its obligation to consult and accommodate.

[130] The responsibility of the Ministers under the *EAA* is to determine whether a project should be permitted to proceed in light of the considerations set out in s. 10. The *EAA* does not provide the Ministers with the powers necessary to determine the rights of the parties interested in the project under consideration. The Ministers have no power to compel testimony, hear legal submissions from the parties or require production of documents. The procedures set out in in the *EAA* are simply inadequate to permit determination of the issues framed by the petitioners in this proceeding. In addition, it is obvious that the Ministers have no particular expertise with respect to those issues.

[131] The infringement issue as raised by the petitioners requires the resolution of the proper construction of Treaty 8, a determination of the nature and extent of each petitioner's traditional territory and a decision as to the effect of the jurisprudence to date on these issues. It is in every respect a rights-based issue and requires a rights-based resolution.

[132] Based on the nature of the decision being made by the Ministers, the way in which information was provided to them, the broad discretion they were granted to take any matter into account in reaching their decision, the lack of any effective fact-finding machinery and the Minister's lack of expertise with regard to matters of Aboriginal law, I conclude that the legislature did not intend to vest the Ministers with the jurisdiction to decide the complex question of whether the Project was an infringement of the petitioners' Treaty 8 rights.

[133] My conclusion in this regard is reinforced by the comments in *Mikisew* and *Grassy Narrows* that suggest questions of infringement should be determined in an action. At a minimum, these cases make it clear that deciding whether an infringement has occurred requires a consideration of matters beyond the impact of the Project as set out in s. 10 of the *EAA.* Section 10 is clearly focused on the impact of the project under consideration. However, infringement requires a consideration of the residual position of the aboriginal group as a result of the loss of all land taken up. It seems to me that the legislature could not have intended to give the Ministers the jurisdiction to decide that question as part of an environmental assessment of a specific project.

[134] In summary, I find that the Ministers made no error in issuing the Certificate without deciding whether the Project was an infringement of the petitioners' Treaty 8 rights.

[135] This conclusion makes it unnecessary to consider the second issue set out at para. 94 (2).

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Should the Court Decide Whether the Project Infringes the Petitioners' Treaty Rights in this Proceeding?

[136] The question of whether this Court should consider and decide questions of infringement is distinct from the question of whether the Ministers were required or had the jurisdiction to do so.

[137] The petitioners take the position that the question of infringement can be decided on this petition and that it was necessary to do so to determine whether the petitioners' constitutional rights were violated by the issuance of the Certificate.

[138] The respondents submit that the proper function of judicial review is to determine whether the decision itself was reasonable and whether the decision makers had the jurisdiction to make the decision. They argue that a judicial review is not the appropriate forum to decide the issue of infringement for essentially the same procedural reasons that it was not appropriate for the Ministers to decide that issue.

[139] I have concluded that the infringement issue as framed by the petitioners cannot be determined in this proceeding. The petitioners' claim of infringement relies on matters that extend beyond the Project and the decision to issue the Certificate. The petitioners argue that the intensity of development in the Peace River Valley and adjacent areas has resulted in a drastic reduction of areas in which they and other Treaty 8 First Nations in the area are able to exercise the rights guaranteed to them in Treaty 8. For example, the petitioners point to the extent to which oil and gas exploitation has diminished the areas in which First Nations can hunt.

[140] In my view, an action commenced by notice of civil claim and conducted in accordance with the *Supreme Court Civil Rules* is the proper forum for determination of the infringement issue. It is apparent that there is a considerable degree of conflict in the evidence which can only be resolved at trial. The *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 contemplates a summary hearing to review an administrative decision. The hearing of this petition occupied seven days. Even in that time there was not an adequate opportunity to fully consider the issues of

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infringement. In addition, the record before me was inadequate to permit me to make the necessary findings of fact to determine whether there has been an infringement, and, if so, whether it can be justified.

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[141] The factual complexity of those questions is apparent from the petitioners' letters to the Ministers on August 19, 2014, quoted at para. 76 of these reasons.

[142] The question of the proper forum for determining disputed aboriginal and treaty claims was considered by the Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 11:

> [11] The courts (including this Court) have long urged the negotiation of Aboriginal and treaty claims. If litigation becomes necessary, however, we have also said that such complex issues would be better sorted out in civil actions for declaratory relief rather than within the confines of regulatory proceedings. In a fisheries prosecution, for example, there are no pleadings, no pre-trial discovery, and few of the procedural advantages afforded by the civil rules of practice to facilitate a full hearing of all relevant issues. …

[143] In my view these comments apply equally to a judicial review pursuant to the *Judicial Review Procedure Act.* The petitioners' claims of infringement would involve the petitioners establishing the boundaries of their traditional territory, the extent to which specific species were exploited within their traditional territory and the relative impact of the Project on the traditional rights of the petitioners. These matters would have to be proven by admissible evidence accepted by the court. They cannot appropriately be resolved on a summary hearing pursuant to the *Judicial Review Procedure Act*.

[144] I did give consideration to referring the infringement issue to the trial list. However, in my view, that would be inappropriate in this case. I can see no procedural advantage to the parties in that process over leaving it open to the petitioners to pursue an action for infringement if they wish to do so.

[145] For the above reasons I will not attempt to resolve the infringement issue on this petition.

Did the Ministers Correctly Understand the Government's Duty with Respect to the Petitioners' Aboriginal Rights?

[146] There can be no doubt that the Project involves the taking up of considerable amounts of land and water resources that were formerly available to the petitioners for hunting, fishing and trapping. The first question therefore is whether government correctly understood its obligations with respect to that taking up.

[147] There is no direct evidence of the extent to which the Ministers understood the government's obligation to First Nations with respect to the Project because the Ministers gave no reasons for their decision. For the purposes of this judicial review, I must therefore proceed on the assumption that the Ministers were satisfied, based primarily on the Consultation Report, that the government had adequately discharged its constitutional duty to consult and attempt to accommodate First Nations' interests.

[148] The Consultation Report must therefore be the starting point for assessing this issue.

[149] I have already addressed the question of infringement and the applicability of the *Sparrow* analysis to the question of taking up and need not revisit that question in this part of my reasons. I have however compared the approach of government to the taking up power as described in the Consultation Report with the approach mandated in *Mikisew* and *Grassy Narrows.*

[150] I conclude that the Ministers accepted the position of the EAO and the agency with respect to taking up as set out in the Consultation Report in preference to that expressed in the petitioners' letters to them.

[151] I am of the view that the government has correctly stated its obligation with respect to the exercise of its power to take up land at page 29 of the Consultation Report:

> When intending to take up lands, the Crown must exercise its powers in accordance with the Crown obligations owed to the Treaty 8 First Nations, which includes being informed of the impact of the project on the exercise of

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> the rights to hunt, trap and fish, communicate such findings to the First Nations, deal with the First Nations in good faith, and with the intention of substantially addressing their concerns. The extent or scope of the duty to consult and accommodate required with a Treaty 8 First Nation depends on the seriousness of potential impacts to that First Nation, as discussed in the following sections of this report.

[152] In particular, I am satisfied that the government recognized that it had the obligation to conduct itself as set out in para. 209 of *Keewatin* and para. 63 of *Mikisew*. The government was required to inform itself of the degree to which the taking up would adversely affect the petitioners' treaty right to hunt, trap and fish, communicate its findings to the petitioners and attempt to deal with the petitioners in good faith with the intention of substantially addressing their concerns. I am satisfied that this is the approach that the Consultation Report stated should be followed. I am also satisfied that the government correctly concluded that deep consultation was required with respect to this question.

[153] I conclude that the government correctly understood its obligations with respect to the taking up power as set out in the opinions of the Supreme Court in *Mikisew* and *Grassy Narrows*. In particular, I find that the petitioners have not shown that the Ministers erred in law by failing to find that the Project required justification pursuant to a *Sparrow* analysis.

Was there Adequate Consultation?

[154] In this case, I am in substantial agreement with the aforementioned views expressed in the Consultation Report at page 27 with respect to the nature of the government's obligations in the environmental assessment of the Project.

[155] However, even if the government correctly recognized the extent of its obligation to consult and accommodate the petitioners, it is still necessary to consider whether the consultation and offers of accommodation were adequate. The government's consultation and accommodation efforts are reviewable on a reasonableness standard; *Haida* at paras. 61-62.

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[156] The honour of the Crown requires government to inform itself about the degree to which the Project would adversely affect the petitioners' right to hunt, trap and fish in their traditional territories and decide whether the effects trigger a duty to consult. It must communicate its findings to the petitioners and attempt to deal with them in good faith with the intention of substantially addressing their concerns. However, it is not required to reach agreement with the petitioners (*Keewatin* at para. 209; *Haida* at para. 42).

[157] Based on the record reviewed in these reasons, I conclude that the government made reasonable and good faith efforts to consult and accommodate the petitioners with respect to the Project.

[158] I have set out the history of the consultation process in perhaps excessive detail earlier in these reasons. I did so in part to make clear the factual foundation for my conclusion that there was adequate consultation and efforts to accommodate in this case. I am satisfied that the government made reasonable efforts and acted in good faith with respect to consultation with the petitioners.

[159] In the end the parties were unable to reconcile their differences over the Project. However, I conclude that they failed to achieve reconciliation because of an honest but fundamental disagreement over whether the Project should be permitted to proceed at all. I am satisfied that the government made a good faith effort to understand the petitioners' position on this issue and made reasonable efforts to understand and address the petitioners' concerns.

[160] The object of consultation and accommodation is reconciliation between governments and First Nations. In this case, that reconciliation was not achieved because the government has concluded that it is in the best interests of the province for the Project to proceed and the petitioners have concluded that there is no adequate accommodation for the effects of the Project.

[161] The petitioners' position is that the only government action that would adequately accommodate their right would be for the government to meet the

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electricity needs of the province from alternative sources. As stated in the previously mentioned Prophet River letter to the Ministers of August 19, 2014:

> Finally, we note that despite the Panel's conclusions that the adverse effects on our rights and land use cannot be mitigated, BC Hydro provided us with a written "accommodation" offer on July 22, 2014. While we continue to make ourselves available to meet with BC Hydro to discuss "avoidance" of adverse effects through the consideration of alternative sources of electricity generation, we maintain our view that it is simply not possible to adequately compensate our community for the permanent destruction of the Peace River Valley. …

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[162] In both *Haida* and *West Moberly,* the courts stated that the consultation process does not require acceptance of the First Nation's position. What the jurisprudence establishes is that meaningful consultation requires a respectful consideration of the position put forward by an affected First Nation, even if the position is that the government action should not proceed under any terms.

[163] The petitioners submit that the Ministers never gave meaningful consideration to rejecting the Project in favour of alternative sources of energy. They place considerable reliance on *West Moberly* in support of their submission that meaningful consultation requires government to give serious consideration to rejecting a project that is opposed by an affected First Nation:

> [146] In my respectful view, the Considerations document and the Rationale do not meet this test. MEMPR effectively accepted First Coal's CMMP as a satisfactory response to the petitioners' position. However, the CMMP does not explain why the petitioners' position that the Exploration Permits should be cancelled, First Coal's activities relocated, and the Burnt Pine caribou herd restored, was rejected. It does not address why the petitioners' position was unnecessary, impractical, or otherwise unreasonable. Rather, the CMMP proceeds on the footing that the Bulk Sampling and Advanced Exploration Programs should proceed, and then proposes measures to minimize or mitigate whatever adverse effects those programs will have. It contains proposals to monitor the impact of the projects on the Burnt Pine caribou herd and to "discuss" ways in which First Coal can assist in recovery of the caribou population.
>
> [147] The decision reached by MEMPR based on the CMMP and the position put forward by the petitioners are as two ships passing in the night. There was no real engagement of the petitioners' position. It was not a position that could be dismissed out of hand, supported as it was by the expert opinions of the government's own biologists, Dr. Seip and Pierre Johnstone.

> [148] If the petitioners' position were to be addressed head on, and a careful consideration given to whether the exploration programs should be cancelled, First Coal's activities relocated, and the Burnt Pine caribou herd restored, it may be that MEMPR could give a persuasive explanation as to why such steps were unnecessary, impractical, or otherwise unreasonable. The consultation process does not mandate success for the First Nations interest. It should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted.

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[164] At para. 149 of *West Moberly*, Chief Justice Finch expressed the view that if government does not accept the position put forward by a First Nation that a project should not proceed at all, it should provide a satisfactory, reasoned explanation as to why the position was not accepted:

> The consultation in this case does not do that. I think the reason is apparent. MEMPR never considered the possibility that the petitioners' position might have to be preferred. It based its concept of consultation on the premise that the exploration projects should proceed and that some sort of mitigation plan would suffice. However, to commence consultation on that basis does not recognize the full range of possible outcomes, and amounts to nothing more than an opportunity for the First Nations "to blow off steam".

[165] In this case I am satisfied that such an explanation can be found in the referral package put before the Ministers. The referral package included the Panel Report and the Amended E.I.S., as well as the final submission of the petitioners. I think it can be reasonably concluded that the Ministers were of the view that the benefits of the Project to the province as a whole were sufficiently great to permit the Project to proceed, notwithstanding the petitioners' position that it should not proceed at all.

[166] I am of the view that *West Moberly* is distinguishable from the facts of this case. In *West Moberly* no comprehensive review of the project had been undertaken. The only analysis of the project had been carried out by the proponent's consultant, who had made no effort to explore or consider alternatives to the Project.

[167] In this case the Panel was specifically tasked with considering alternatives to the Project. While the Panel did conclude that BC Hydro had not fully demonstrated a need for the power from the Project on the timetable proposed by BC Hydro, it also concluded that British Columbia would need new energy and capacity in the future.

The Panel determined that Site C was the least expensive of the alternative sources of energy and that its cost advantages would increase in the future. The Panel also acknowledged that the objectives of the *CEA* were a legitimate objective of BC Hydro.

[168] I am satisfied that the petitioners were provided a meaningful opportunity to participate in the environmental assessment process. They were on the Working Group that reviewed the Terms of Reference and the EIS. They participated in the Panel review process. Government and BC Hydro provided the petitioners with funding to assist them in participating in the assessment process. Finally, their position was clearly and succinctly put before the Ministers in their final letters.

[169] I am also satisfied that the environmental assessment process as a whole did provide the petitioners with a reasoned explanation as to why their position, that the Project should not proceed at all, was not accepted. Because the Ministers were not required to give reasons for issuing the Certificate, that explanation must be reasonably ascertainable from the assessment process. I am satisfied that, in this case, the petitioners understood the reasons why the government decided to move forward with the Project.

[170] In addition, I am of the opinion that that conclusion must be reviewed on a reasonableness standard. I find that the Ministers' decision that there had been adequate consultation to permit the Project to proceed cannot be said to be unreasonable in light of the record before them.

VIII: ADMINISTRATIVE ISSUES

[171] The petitioners also challenge the decision to issue the Certificate on two administrative law grounds. First, they submit that the decision was unreasonable because the Ministers failed to consider relevant factors. Second, the petitioners submit that there was a reasonable apprehension of bias on the part of the Ministers because they had pre-determined the outcome of the environmental assessment process.

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Failure to Consider Relevant Factors

[172] The petitioners submit the Ministers failed to consider relevant factors when deciding to issue the Certificate. In support of this argument, the petitioners rely, in particular, on the need for further study, as noted in several sections of the Panel Report. The Panel observed, for example, that there is a need for further study of the cumulative effects of various types of development in the Peace Valley region. The Panel similarly concluded that issues of project costs and the need for the project should be referred to the BC Utilities Commission for detailed examination. The Panel also recommended that BC Hydro should establish a research budget for studying alternative energy sources.

[173] The petitioners submit that despite the Panel Report and accompanying recommendations, the Ministers did not undertake further study before deciding to issue the Certificate. In addition, they submit that the Ministers did not explain their decision to proceed with the Project, despite the potential concerns about lack of information. On the contrary, the only comment on the content of the Panel Report is from the Executive Director, explaining that these recommendations are outside the scope of the Panel's mandate and should not be made conditions to the Certificate.

[174] The petitioners submit that, without further study, the Ministers made their decision without adequate information on costs, need, available alternatives, and cumulative effects of development in the Peace Valley region.

[175] Although they acknowledge that the decision to issue the Certificate is discretionary, the petitioners say that these issues are so central to the application for a Certificate that it was unreasonable for the Ministers to issue the Certificate without properly assessing them. They submit that the Panel Report did not contain sufficient information to reasonably justify the approval of the Project. They say this is particularly a concern given that the Terms of Reference required the Panel to consider costs, need, alternatives, and cumulative effects, and the Ministers appear to have ignored the Panel's recommendations on these issues.

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[176] The above grounds are similar to those advanced by the petitioner in *Peace Valley Landowner Association*. For essentially the same reasons as I gave in those reasons, I must reject this submission.

[177] There are two difficulties in the petitioners' argument on this ground. The first is that it is based on selected and incomplete references to the record that was before the Ministers. The second is that the argument in substance calls for the court to reweigh the information that was before the Ministers, which is not the proper function of a court conducting a judicial review.

[178] At paragraph 127 of their written submissions, the petitioners set out a number of the Panel's conclusions, recommendations and observations with respect to the Project and the quality of information available with respect to the Peace River Valley.

[179] The petitioners rely on the Panel's concerns about the lack of a comprehensive cumulative effects study with respect to the Project. However, the recommendation of the Panel with respect to this concern was not specific to the Project being assessed:

> Recommendation 43:
>
> Given the rapid developments foreseen for northeast B.C., Ministers may wish to consider commissioning a regional baseline study and environmental assessment as a public good and a basis for planning and regulating all activities requiring review. Such a study would greatly assist future proponents in all sectors, notably oil and gas, forestry, mining and energy production [Panel Report at 298].

[180] This recommendation falls into the category recognized by the Panel as being directed to government. I do not see how the Ministers can be said to have acted unreasonably in not acting on this recommendation.

[181] The petitioners also rely on the concerns of the Panel with respect to BC Hydro's estimates of the cost of the Project and the effect of that cost on energy pricing. The Panel recommended that these matters be referred to the Utilities Commission.

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[182] In my reasons in *Peace Valley Landowner Association*, I also made reference to a number of recommendations of the Panel to refer certain aspects of the Project to the Utilities Commission, including the one referred to in the preceding paragraph. I need not repeat in detail what I said in those reasons. However I remain of the view that the Ministers could not be said to be acting unreasonably in declining to refer matters relating to the Project to the Utilities Commission in view of the provisions of the *CEA* that expressly exempt the Project from the jurisdiction of the Utilities Commission.

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[183] In addition, the petitioners' submission in this regard do not take into account the Panel's comments that it found the cost estimating process engaged in by BC Hydro encouraging. In addition, the Panel Report contains no specific disagreement with the Project estimates provided by BC Hydro:

> The Panel is unable to say whether these estimates are likely to be accurate. It notes, however, that BC Hydro has been working on this Project off and on for 35 years, that the technology is mature, that the work has been done to the standards of a Class 3 (-15 percent to +30 percent) estimate of the Association for the Advancement of Cost Engineering, and that the work has been reviewed independently by KPMG, a consulting firm. The cost estimate was completed in 2011, and allowances have been made for inflation until the in-service date.
>
> Because BC Hydro has not built a project of this size for many years, the Panel feels that there is little corporate experience to draw on. When asked for its recent experience with smaller capital projects, BC Hydro noted that its average cost overrun on recent projects of more than $50 million was 3.3 percent, and for generation projects, was -0.3 percent. The Panel is encouraged by these results [at 280].

[184] The petitioners also rely on a number of comments in the Panel Report to the effect that some of the assumptions and valuations made by BC Hydro in the EIS and elsewhere may have been inaccurate or failed to take relevant considerations into account. However, it must be remembered that the Ministers were not required to agree with the views of the Panel and were free to form their own conclusions with respect to the accuracy and reliability of BC Hydro's forecasts.

[185] For example, the petitioners point out that the Panel disagreed with BC Hydro's estimate regarding the amount of electrical power that the liquefied natural

gas industry will be likely to require in the future. However, the Panel's comments on this issue, found at pages 285-286 of the Panel Report, are clearly only the Panel's opinion. The Ministers were, therefore, in the position of having two different but credible opinions on the electricity requirements of the province over the ensuing decades. In the absence of some demonstrated error in BC Hydro's forecasts, I cannot conclude that the Ministers can be said to have reached an unreasonable decision by failing to give effect to the Panel's views on these issues.

[186] The petitioners also submit that the Ministers failed to appreciate the conclusions of the Panel that BC Hydro used a corporate, rather than a societal, cost benefit analysis to value alternatives to Site C with the result that the Panel could not be confident in the valuation of those alternatives in the public interest. However, the petitioners appear to have overlooked the Panel's final conclusion that a number of alternatives are competitive with Site C on a standard financial analysis but that Site C would produce less expensive power in the long term than any alternative. I also note that the Panel had only limited information as to the financial and societal costs of the alternatives. This again demonstrates that there were a number of reasonable conclusions open to the Ministers on the record before them.

[187] It bears repeating that the decision of the Ministers was a polycentric one in which the Ministers were exercising a very wide discretion. Such a decision is entitled to a high degree of deference from the court. In my view, the issues raised by the petitioners in this portion of their argument go no further than suggesting that it would have been open to the Ministers to reach a different conclusion than the one they did. It may be that such a decision may have been more in keeping with some of the views expressed by the Panel. However, that is not the test for setting aside the decision of the Ministers. A conclusion with respect to factual matters and future events can be found to be unreasonable only if there is no reasonable foundation for it. In this case the petitioners have failed to demonstrate that the Ministers proceeded without a reasonable basis for their conclusions.

[188] Therefore, this ground for setting aside the certificate must fail.

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Reasonable Apprehension of Bias

[189] The petitioners base their allegation of a reasonable apprehension of bias on two grounds:

1. Existing legislative policy, requiring that the development of hydroelectric power generation be restricted to the Peace and Columbia Rivers, resulted in the Ministers failing to consider alternatives to the Project; and

2. The Ministers approached the decision to issue the Certificate with a closed mind.

[190] They petitioners say the history leading up to the approval of the project demonstrates that the Ministers were "set on a path" leading to the approval of the Project (Written Argument of the petitioners at para. 134).

[191] The petitioners rely in particular on the lengthy history of the Project, going back to the 1950s, and the Two Rivers Policy, which was developed in the 1960s and included a flood reserve established for Site C in the Peace River Valley. The Project was rejected by the Utilities Commission in 1980.

[192] The petitioners note that the *CEA* exempts the Project from oversight of the Utilities Commission, prohibits BC Hydro from undertaking any major hydroelectric developments other than the Project, and imposes a 93% clean energy requirement on BC Hydro. The petitioners say that these measures show that the government treated Site C as a "foregone conclusion" and, in effect, stacked the regulatory deck to give the Project a winning hand (Written Argument of the petitioners at para. 139).

[193] The petitioners also submit that BC Hydro, by framing one of the purposes of the project as the maximization of the hydroelectric potential of the Peace River, did not properly assess alternatives to the Project. Such alternatives included smaller projects on the Peace River, the development of geothermal resources, and the utilization of the Canadian entitlement to energy under the Columbia River Treaty.

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[194] Finally, the petitioners say that because the Ministers proceeded to issue the Certificate without properly informing themselves of the issues discussed above, they closed their minds to the alternatives. The petitioners submit that the Ministers did not have sufficient information to make a decision on the merits, and instead the decision was made on the basis of a predetermined policy position.

[195] I would not give effect to this argument. In my view it amounts to a collateral attack on the *CEA,* which gives statutory effect to the Two Rivers Policy. The validity of the *CEA* was not challenged directly by the petitioners. They cited no authority for the proposition that the Ministers were biased in following the requirements of that legislation.

[196] The second ground fails in my view for lack of any evidentiary foundation to establish bias. From the content of the petitioners' argument, I infer that they are alleging bias in the sense considered by the Supreme Court in the companion cases of *Old St. Boniface Residents Assn Inc. v. Winnipeg(City)*, [1990] 3 S.C.R. 1170 and *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213.

[197] To establish bias as defined by the Court in those cases, the petitioners must prove that the Ministers entered into the assessment of the Project with a closed mind. The facts put forward by the petitioners go no further than establishing that the policy of the government of British Columbia was to promote energy generation projects that minimized the production of greenhouse gases and restrict major hydroelectric projects to two rivers that already were heavily dammed by the 1960's. In my view, to find bias there must be bias on the part of the actual decision maker, in this case the Ministers. A governmental policy favouring one approach to addressing an issue does not equate to a Minister having a closed mind in exercising a statutory discretion.

[198] There is simply no evidence that the Ministers had closed minds before they entered into consideration of whether to issue the Certificate. The Ministers had a statutory duty to carry out the responsibility of deciding whether to issue the Certificate in accordance with the relevant statutory authority and the principles of

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administrative law. The presumption of regularity requires this court to presume that the Ministers carried out that duty until the contrary is established by credible evidence. In terms of the complaint of bias, I must presume that the Ministers had not closed their minds to the possibility of refusing the Certificate or requiring further information as contemplated by s. 17 of the *EAA* unless there is evidence to the contrary. In this case, there is no such evidence.

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[199] In this regard, I respectfully adopt the comments of McIntosh J. in *West Moberly First Nations v. British Columbia (Energy and Mines)*, 2014 BCSC 924 at para.110:

> In summary, regarding this allegation [of bias], the common law presumption of regularity in the acts of public officers, including the statutory decision makers in this case, has not been rebutted. Two decisions, which I will cite but not summarize, provide the relevant legal analysis for denying the bias allegation the West Moberly have raised. See, *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at para. 10; and *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General)*, 2009 SKQB 20 at paras. 41, 46-47.

[200] I therefore reject this ground for setting aside the certificate.

IX: DISPOSITION

[201] For the foregoing reasons, I conclude that the petition must be dismissed.

[202] The parties will bear their own costs of these proceedings.

"The Honourable Mr. Justice Sewell"

APPENDIX A

2004-2007	BC Hydro conducts a review of the feasibility of the 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 EAO and the Agency.
November 2007	BC Hydro commences consultation with affected Aboriginal groups, including the petitioners.
December 1, 2008	BC Hydro and T8TA enter into a formal consultation agreement.
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 the Province release the draft Joint Agreement and Terms of Reference. The petitioners are invited to submit comments.
October 5, 2011	The Working Group meets for the first time to discuss the terms of the Joint Agreement. Consultation on the Joint Agreement continues to December 2011.
November 4, 2011	T8TA sends a letter to the EAO and the Agency summarizing its understanding of Treaty 8 and the potential impact of the Project on the petitioners' treaty rights. This letter was supplemented by an additional letter sent on February 24, 2012.
December 2, 2011	T8TA provides its formal response to the Joint Agreement. It expresses concern that the Terms of Reference prevent the Panel from making any conclusions or recommendations as to

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	the nature and scope of Aboriginal rights, whether the Crown has met its duty to consult and whether the Project infringes Treaty 8.
January 2012	BC Hydro submits the initial draft of the EIS Guidelines. Consultation on the EIS Guidelines occurs from January to March 2013, prior to the public comment period.
February 2012	Canada and the Province finalize the Joint Agreement and Terms of Reference.
February 2012	The EAO and the Agency respond to T8TA's letter of December 2, 2011 on the Joint Agreement. They explain that the Ministers, and not the Panel, will assess whether the duty to consult and accommodate was met in this case.
February 2012	The EAO and the Agency finalize a consultation agreement with T8TA.
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. Aboriginal groups are asked to provide comments and additional information on affected Aboriginal and treaty rights.
March 2012	Following meetings with the petitioners, the EAO and 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 petitioners' comments on the EIS Guidelines.
September 2012	The EAO and the Agency finalize the EIS Guidelines.
December 21, 2012	T8TA sends a letter to the EAO and the Agency summarizing its outstanding concerns with the consultation process.
January 2013	BC Hydro submits the EIS to the EAO and the Agency. The EIS

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	is circulated to the Working Group for review and comment.
February 18, 2013	EAO sends letters to the petitioners with updated information on the nature and scope of Treaty 8 rights.
February 19, 2013	The Working Group holds a meeting on the EIS.
April 13, 2013	T8TA provides comments on the draft EIS. T8TA expresses concern on the accuracy of the summary, the imbalance in the tone and content, and the scope of the assessment. T8TA is also concerned that BC Hydro has failed to integrate T8TA documents into the EIS.
May 8, 2013	The EAO and the Agency circulated BC Hydro's responses to comments received from Aboriginal groups on the EIS, including new technical memoranda.
June 2013	The Working Group holds a series of sub-committee meetings to discuss aspects of the EIS
June-July 2013	T8TA meets with the EAO and the Agency to discuss the EIS.
August 2013	The EAO and the Agency respond to T8TA's 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 to January 2014	The Panel conducts public hearings.

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February 3, 2014	T8TA provides its closing submissions to the Panel. T8TA says the Project will infringe Treaty 8. T8TA urges the Panel to conclude the Project is not justifiable and not in the public interest.
May 1, 2014	The Panel submits its Report on the Project to the EAO and the Agency.
June-July 2014	T8TA meets with the EAO and the Agency to discuss the Panel Report and the Consultation Report. T8TA also sends several letters outlining its continued opposition to the Project.
July 2014	BC Hydro sends letters to the petitioners outlining proposed accommodation offers.
August 2014	The EAO and the Agency provide the petitioners with a revised Consultation Report and draft conditions to attach to the Certificate.
September 2014	Executive Director submits a referral package to the Ministers pursuant to s. 17 of the *EAA*.
October 2014	The Ministers issue the Certificate.

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