COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Prophet River First Nation v. British Columbia (Environment),* 2017 BCCA 58

Date: 20170202
Docket: CA43187

Between:

Prophet River First Nation and West Moberly First Nations

Appellants (Petitioners)

And

Minister of the Environment, Minister of Forests, Lands and Natural Resource Operations, and British Columbia Hydro and Power Authority

Respondents (Respondents)

And

Te'mexw Treaty Association

Intervenor

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated September 18, 2015 (*Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682, Vancouver Docket No. S153242).

Counsel for the Appellants:	J. W. Gailus, E. Grier, A. T. Rana, and M. Nefstead
Counsel for the Respondent Ministers:	E. K. Christie and J. J. Oliphant
Counsel for the Respondent British Columbia Hydro and Power Authority:	M. D. Andrews, Q.C., C. F. Willms and E. A. B. Gilbride
Counsel for the Intervenor:	J. Langlois

Place and Date of Hearing: Vancouver, British Columbia
December 5, 6, 7 and 8, 2016

Place and Date of Judgment: Vancouver, British Columbia
February 2, 2017

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Savage

Summary:

Appeal from the dismissal of an application for judicial review of a decision made by Ministers of the provincial Crown to issue an Environmental Assessment Certificate for a hydroelectric project that will impact the treaty rights of First Nations. Two questions arise that bear upon the proper discharge of the duty owed by the Crown to First Nations. The first question is whether the Ministers were required to make a determination that the project will not unjustifiably infringe the subject treaty; the second, which requires a consideration of the standard of review, is whether there was adequate consultation with the two First Nations who made the application. Held: appeal dismissed. The first question is answered in the negative, the second in the affirmative.

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] The Site C Clean Energy Project now under construction in northeastern British Columbia has been the subject of wide-ranging controversy, in part because it is encompassed by land that is the subject of Aboriginal treaty. Two First Nations made application for judicial review of the decision of two Ministers of the provincial government who, following an extended public process of study and evaluation, issued an Environmental Assessment Certificate as required for the project to proceed. The application was dismissed; the First Nations now appeal. Two questions arise that bear upon the proper discharge of the duty of the Crown in seeking reconciliation with Aboriginal peoples: the first is whether, before issuing the certificate, the Ministers were required to determine the project would not constitute an unjustifiable infringement of constitutionally protected treaty rights; the second is whether there was adequate consultation with the First Nations and accommodation of their concerns.

Site C

[2] The project entails building a hydroelectric dam with a power-generating station and creating an upstream reservoir with a surface area of 93 square kilometres on the Peace River. It will be the third project of its kind on that river. The project is being undertaken by British Columbia Hydro and Power Authority, a Crown corporation. It is to be constructed over a period of eight years at a projected cost of about $9.0 billion.

[3] The traditional territories of the Prophet River First Nation and the West Moberly First Nations, together with those of two other First Nations, are said to amount to 121,818 square kilometres surrounding the project. They lie within the lands surrendered to the Crown at the turn of the last century under Treaty 8, the boundary of which encompasses northern Alberta, northwestern Saskatchewan, a southern part of the Northwest Territories, and northeastern British Columbia. Like Prophet River and West Moberly, many First Nations are either signatories or

adherents to the treaty. Under its terms, their "right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered", upon which the project will have a significant impact, are preserved, although subject to the land being "taken up from time to time for settlement, mining, lumbering, trading or other purposes".

[4] These two First Nations, like others, have been and remain unalterably opposed to the project. They are members of an association of First Nations, the Treaty 8 Tribal Association ("T8TA"), which coordinated consultation discussions on their behalf. In the main, they are opposed because they consider the environmental and ecological impact on what will be 83 kilometres of the Peace River Valley in creating the reservoir for the dam will infringe the exercise of their treaty rights to the point of essentially defeating them completely with sociological implications impairing the way of life for their people now and in the future. They maintain the infringement cannot be constitutionally justified under what is referred to as the *Sparrow* test (*R. v. Sparrow*, [1990] 1 S.C.R. 1075).

[5] The test is two-fold: to establish justification, the Crown must demonstrate that the infringement relates to a valid legislative or governmental objective, and that its actions are consistent with its fiduciary duty toward Aboriginal peoples. (See also *R. v. Gladstone*, [1996] 2 S.C.R. 723 at paras. 54–56.) For a legislative or governmental objective to be deemed "valid", it must be "compelling and substantial" (*Sparrow* at 1113). Once a valid objective has been established, the way in which that objective is to be attained must "uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Aboriginal peoples" (*Sparrow* at 1110).

[6] The project is subject to both federal and provincial environmental assessments and ministerial approval, the first under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, and the second under the *Environmental Assessment Act,* S.B.C. 2002, c. 43. The process to be followed was established by a joint cooperative assessment agreement announced in September

2011 between Canada and British Columbia which provided for the establishment of a three-person panel, the Joint Review Panel, and its Terms of Reference.

[7] There were three stages. Aboriginal groups participated in the process throughout. The first stage was the Pre-Panel Stage during which, through a working group, the federal Canadian Environmental Assessment Agency and the provincial Environmental Assessment Office oversaw the preparation of Environmental Impact Statement Guidelines, finalized in September 2012, that BC Hydro, as the proponent of the project, was to address in drawing what became the Environmental Impact Statement. The federal Agency and the provincial Office approved the statement in August 2013 as being ready for the Joint Review Panel's consideration.

[8] The second stage was the Joint Review Panel Stage during which the Joint Review Panel was mandated to inquire into the environmental, economic, social, health and heritage effects of the project, including the consideration of the mitigation of adverse effects with a view to assisting the ministers of the Crown in weighing the benefits of the project against the costs when deciding whether the project should proceed. In so doing, the Panel assessed BC Hydro's impact statement together with the extensive volume of information submitted. It requested and received further information, conducted public hearings over the course of 26 days concluding in January 2014, and ultimately delivered a report to the federal Agency and the provincial Office in May 2014.

[9] The third stage was the Post-Panel Stage during which referral packages were prepared by the federal Agency and the provincial Office for submission to the respective federal and provincial ministers. The process, which occupied three years, resulted in the preparation of extensive studies, assessments, reports, and correspondence running to many thousands of pages.

[10] In the main, the Joint Review Panel saw the benefits of the project to be clear: the provision of a large, long-term increase in energy at a price that would benefit future generations. It recognized the cost will be high and, while the power will in

time be needed, there is uncertainty about the timing of such need. The Panel considered the project would have vastly less greenhouse gas emissions than any comparable available alternatives. The Panel recognized, however, that the creation of the reservoir would mean significant adverse environmental and ecological consequences, particularly as would impact the treaty rights of Aboriginal peoples with respect to hunting, trapping and fishing, as well as the end of agriculture on the Peace River Valley bottom lands, and the inundating of valuable paleontological, archaeological, and historic sites.

[11] The discharge of the now well-established duty of the Crown to engage in consultation with First Nations for the purpose of addressing and accommodating their concerns in circumstances like these was undertaken jointly by the federal Agency and the provincial Office and, in particular, by BC Hydro as the agent of the Crown, in conjunction with the environmental assessment. The consultation involved 29 Aboriginal groups to differing degrees. It commenced well before the environmental assessment process and continued through to the conclusion of that process. Both the Prophet River First Nation and the West Moberly First Nations maintained a high level of engagement throughout. Their participation, through T8TA, was funded by BC Hydro to the extent of more than $5.8 million in addition to government funding. Some months before the ministerial decisions were made, they took the opportunity afforded them of writing separately to the federal and provincial ministers directly and, in so doing, stated clearly the basis for their opposition to the project.

[12] In September 2014, a Consultation and Accommodation Report, being an extensive assessment of the consultation process, was prepared jointly by the federal Agency and the provincial Office. Significantly, with respect to the infringement of treaty rights, it was said:

> 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.

[13] Hence, in keeping with the provisions of the agreement between Canada and British Columbia in establishing the Joint Review Panel, no conclusions were made as to whether the project would constitute an infringement of Treaty 8.

[14] With respect to the overall process of consultation, it was said:

> … as part of the [environmental assessment] for the proposed Project, the Agency and the [Office] conclude that consultation has been carried out in good faith and that the process was appropriate and reasonable in the circumstances.

[15] The report was included in the referral packages assembled for the Ministers' consideration.

[16] In October 2014, based on ministerial recommendation, a federal Order in Council was issued to the effect that the likely adverse environmental effects of the project are justified. On the same day, the provincial Minister of Environment and the Minister of Forests, Lands and Natural Resource Operations issued Environmental Assessment Certificate # E14-02 for the project, subject to 77 conditions aimed at addressing the concerns of First Nations and others with which BC Hydro must comply.

[17] Prophet River and West Moberly promptly made application in both the Federal Court of Canada and the Supreme Court of British Columbia for the judicial review of the decisions taken to issue the Order in Council and the certificate that facilitate the project proceeding. They named as respondents, in the Federal Court, the federal ministers involved and, in the Supreme Court, the provincial ministers involved, as well as BC Hydro in both proceedings. They advanced various grounds of review but, for present purposes, two are particularly germane. They contended the Ministers (the Governor in Council in the federal application) were bound to determine whether the project would constitute an unjustified infringement of their treaty rights which the Ministers had not done and that the Crown's duty of consultation and accommodation had not been properly discharged such that the Order in Council and the certificate were to be set aside. Their applications were dismissed: 2015 FC 1030 and 2015 BCSC 1682.

[18] Prophet River and West Moberly appealed to the Federal Court of Appeal as well as to this Court. In the Federal Court of Appeal, they appealed the dismissal of their application insofar as it relates to the Ministers having made no determination of whether the project would unjustifiably infringe their treaty rights. They did not appeal the determination the Federal Court had made that the Crown had not breached its duty of consultation and accommodation. In this Court, however, they appeal both with respect to the infringement of their treaty rights and the determination there has been no breach of the Crown's duty to consult and accommodate. Thus, because of our court system, which requires the two First Nations to proceed in two venues as they have, this Court is now in the unusual, if not awkward, position on this appeal of having to consider the discharge of the Crown's duty to consult and accommodate in the face of what is a final order of another Canadian court establishing there was no breach of that duty, with the order having been made when that court was considering the same issue on essentially the same evidence that bears on the joint involvement of the federal and provincial administrations and in particular BC Hydro.

[19] The appeal to the Federal Court of Appeal has just now been dismissed: 2017 FCA 15. The appellants' case with respect to their contention that the Ministers (the Governor in Council) were bound to make a determination of whether the project constitutes an unjustifiable infringement of their treaty rights appears to have been advanced on a somewhat different basis than the case argued on this appeal.

[20] Here, the appellants now seek declaratory relief and then to have the order dismissing their application set aside, the decision of the Ministers to issue the certificate quashed, and the matter remitted to the Ministers with directions.

[21] Against this outline I turn to address each of the two questions stated at the outset that are raised on this appeal.

Unjustifiable Infringement of Treaty Rights

[22] Before the Supreme Court of British Columbia, the appellants contended that, in exercising their statutory discretion to issue the certificate, the Ministers were constitutionally obliged to first determine whether the project constituted an infringement of the appellants' treaty rights that could not be justified on the analysis prescribed in *R. v. Sparrow*. On the argument advanced in this regard, the issues arising were seen to be three: first, whether the Ministers had jurisdiction to decide if the project would infringe treaty rights; second, if they had such jurisdiction, whether it had to be exercised; and third, whether the court should decide if the project would amount to an unjustified infringement. On the first issue, the judge concluded the Ministers were without jurisdiction to make the determination for which the appellants contend, in that it was not part of their statutory mandate, which he contrasted with that of a statutory commission as discussed in *Paul v. British Columbia (Forest Appeals Commission),* 2003 SCC 55. The second issue did not then need to be addressed. On the third issue, the judge found there was an insufficient evidentiary record to permit the proper determination of whether there would be an infringement that could not be justified if a *Sparrow* analysis were to be undertaken.

[23] The judge reasoned that, while the Ministers' decision to issue the certificate was political and polycentric in nature, the determination of the infringement of treaty rights and the justification for such was a rights-based decision ministers of the Crown acting under the *Environmental Assessment Act* could not be expected to make. He said:

> [130] The responsibility of the Ministers under the [*Environmental Assessment Act*] is to determine whether a project should be permitted to proceed in light of the considerations set out in s. 10. The [*Act*] 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 the [*Act*] 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* [*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69] and *Grassy Narrows* [*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48] 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 [*Act*]. 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.

…

[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 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.

…

[143] … 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*.

[24] The judge considered that, rather than remitting the application for judicial review to the trial list, the better course would be for the appellants to commence an action for the breach of the treaty seeking such remedy to which they considered themselves entitled. The Federal Court judge came to essentially the same conclusion in all respects on hearing the application made in that court, as has now the Federal Court of Appeal.

[25] The appellants contend the Supreme Court judge was wrong in concluding the Ministers were without jurisdiction such that no question of their constitutional obligation arose, but the appellants do not now make any concerted effort to advance a case of unjustified infringement on the record that was before the judge. Rather, they seek only a declaration that the Ministers were obliged to determine whether the project would constitute an unjustifiable infringement of treaty rights before deciding to issue the certificate.

[26] To this end, the appellants say administrative decisions authorized by statute must be constitutionally sound, citing *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038. Thus, they say, the Ministers were obliged to exercise their discretion in issuing the certificate within the bounds of the Constitution, in particular s. 35(1) of the *Constitution Act, 1982,* which preserves Aboriginal treaty rights: they could not issue the certificate without first determining that it was constitutionally compliant, citing *R. v. Conway*, 2010 SCC 22 at para. 42. They then say that to do so, in the circumstances, required the Ministers to determine whether the project was an infringement of the treaty to which *Sparrow* justification was applicable and, if so, whether the infringement was justified. The appellants contend that, because the Ministers issued the certificate without determining whether they were effectively authorizing an infringement of the appellants' treaty rights, the Ministers were "indifferent" to the possibility that the appellants' treaty rights might be unjustifiably infringed. This, they maintain, amounts to the kind of persistent indifference recognized in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 82, that is inconsistent with upholding the honour of the Crown.

[27] It is significant that, as the judge recognized, an environmental assessment certificate is not a licence to proceed with a project but rather is only one necessary, albeit important, step in the overall approval process for a project. The Ministers' decision to issue the certificate did not serve to adjudicate the rights of those having an interest in the project.

[28] It must be accepted that administrative statutory discretion is to be exercised in accordance with the jurisdiction the governing statute affords. It can be taken from what the Supreme Court of Canada has said in its recent consideration of administrative jurisdiction, with reference to both *Slaight Communications* and *Conway,* that an administrative decision can in some circumstances include determination of constitutional issues providing the decision maker is authorized to determine questions of law and the matter falls within the scope of the decision maker's jurisdiction: *Doré v. Barreau du Québec,* 2012 SCC 12. That cannot be said to have been the case here; the Ministers were not exercising a quasi-judicial statutory authority.

[29] While there can be little question that the exercise of ministerial discretion cannot stand if constitutionally impaired, to say the Crown, or ministers of the Crown, as opposed to the court, must make a binding determination – something that would itself amount to a reviewable decision – at first instance of whether the Crown is unjustifiably infringing Aboriginal treaty rights would appear to be a somewhat novel proposition. Issues of treaty infringement, like issues of Aboriginal territorial claims, are not determined by ministers of the Crown.

[30] That said, the appellants do not suggest the Ministers were required to publish any determination made in this regard. Rather, they maintain that, like the assessment of the consultation with Aboriginal peoples and the accommodation afforded them, made jointly by the federal Agency and the provincial Office and referred to the Ministers, it was necessary that there be a parallel assessment of the infringement of the treaty rights the project would constitute, and the extent to which such could be justified under the *Sparrow* test*,* for the Ministers to consider in

satisfying themselves and effectively determining that their issuing the certificate would not unjustifiably infringe the appellants' treaty rights.

[31] However, in the first place, the two are not parallel considerations – the first being the adequacy of a process, the second a determination of rights – and, in the second place, neither is in any event mandated by the governing authorities. It may be essential in any given case that ministers of the Crown, charged with making the kind of administrative decision made here, recognize Aboriginal claims and the necessity of deep consultation as well as measures of meaningful accommodation to which they give rise. But, while such will be among the considerations to be taken into account in the course of making their decision, they are not required to make a determination of the adequacy of the consultation undertaken and accommodation afforded before exercising their statutory discretion. What is important is that the consultation and accommodation be adequate, not that the Crown determine that to be the case. Whether it is in fact the case is a matter for the court, not the Crown, to decide. As was said in *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation*), 2013 ABCA 443, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 62, otherwise in dissent:

> [61] Although characterized as a judicial review, for the purposes of deciding this case, it might have been better to characterize it as a dispute over whether a legal duty had been discharged by the party which undeniably owed it. The legal duty, of course, was the duty to adequately consult. And the party owing it was the Crown.
>
> [62] As the majority quite properly points out, adequacy of consultation is ordinarily determined having regard to the importance of the First Nations' right or privilege potentially being impacted and to the magnitude of the potentially adverse impacts of what is being proposed on the First Nation right or privilege: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
>
> [63] And the body which makes that determination, when there is a dispute, is the Court, not the Crown which owes the duty. And because the Crown cannot be the judge of its own cause, as its ministers, agencies and quasi-judicial tribunals often are in administrative law cases, its view of the adequacy of its consultation is not what is being reviewed. What is being reviewed is the adequacy of its consultation and that review is conducted by the Court.

[32] If the Ministers, or others engaged in making comparable administrative decisions as agents of the Crown, could not exercise the discretion afforded them by statute without first making a determination that constitutional requirements had been fulfilled, their failure to make the determination would render the discretion exercised invalid even if the constitutional requirements had in fact been fulfilled. That cannot be right.

[33] It follows that, not only were the Ministers not required to make a determination of whether the consultation and accommodation were adequate, they were also not required to determine whether the project constituted an unjustifiable treaty infringement before issuing the certificate. It was not within their statutory mandate and, as the judge recognized, they did not have the means to make a proper determination.

[34] In *Mikisew Cree First Nation v. Canada*, 2005 SCC 69, the Court discussed the duty of the Crown when faced with exercising ministerial discretion with respect to a project where treaty rights would be affected. Consistent with the duty recognized in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, where not a treaty but a claim to Aboriginal title was concerned, the Court described the Crown's duty to be one of consultation and accommodation, the extent of which was to be driven by the context with regard for the measure of the impact the project would be expected to have on the apparent treaty rights involved. The governing question is always what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples affected. In all the Court said, there is no suggestion that, before exercising ministerial discretion in granting an approval for a project, a determination must be made as to whether the project will constitute an unjustifiable infringement of treaty rights, nor is such a suggestion to be found in any of the governing authorities.

[35] The appellants maintain that support for their contention is to be found in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, where it was said government administrators were, in the circumstances,

bound to take cognizance of the interpretation of Treaty 8, employing such assistance as necessary, in exercising their discretion with respect to permits affecting a mining proposal to which West Moberly was opposed on the basis it would infringe their treaty rights. But the issue there was whether the consultation was adequate when consideration had been given only to mitigating the impact of what was proposed and not to whether the proposal should be undertaken at all. In effect, a proper appreciation of treaty rights was seen to facilitate recognition of the scope of consultation, but nothing that was said suggests those exercising administrative discretion are bound to make a determination of a constitutional nature as to whether a project will infringe the treaty to an extent that cannot be justified.

[36] Consistent with what the Federal Court of Appeal has now held, I consider it was not incumbent on the Ministers to make a determination as to whether the project would constitute an unjustifiable infringement of the appellants' treaty rights before issuing the certificate. It was not a determination they had the means or the constitutional duty to make. Determining whether creating the reservoir for the dam will infringe the exercise of the appellants' treaty rights to the point of essentially defeating them completely would entail a decidedly different exercise than that contemplated by the environmental assessment process. However, far from there being indifference to the appellants' contention that the project would constitute an unjustifiable infringement, their contention informed the recognition of the need for consultation that drove the extent to which it was undertaken in discharging the duty owed by the Crown.

[37] I would add only that, while it is contended to the contrary, particularly by the intervenor, I consider the judge chose the proper course in declining to remit the application to the trial list in preference for the appellants commencing an action should they see fit to do so. His disposition in this regard is well supported by the authorities: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 11 as quoted by the judge at para. 142.

Adequacy of Consultation and Accommodation

[38] Consistent with the purpose stated in the assessment of the process in the Consultation and Accommodation Report prepared jointly by the federal Agency and the provincial Office, the consultation with Aboriginal peoples was undertaken to develop an understanding of the nature and the extent of their treaty rights that would potentially be impacted by the project so as to appreciate the severity of such and give meaningful consideration to measures of accommodation. The duty borne by the Crown drawn from the governing authorities, in particular *Mikisew* and more recently *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, with respect to projects that impact treaty rights is correctly stated in the Consultation and Accommodation Report, as quoted by the judge at para. 151:

> 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 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.

[39] Before the judge, the appellants maintained that both the extent of the consultation and the efforts to afford accommodation were inadequate to discharge the duty owed by the Crown in the circumstances. The judge reviewed the history of the consultation process in detail, identifying a large number of accommodative measures proposed, as well as changes to the project BC Hydro made in response to concerns raised and, after determining the duty to be discharged was properly understood as one of what the authorities recognize as “deep consultation”, he concluded that, considered on a reasonableness standard, the consultation with and the accommodation afforded the appellants was indeed adequate:

> [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 electricity needs of the province from alternative sources…

[40] The judge addressed directly the appellants' contention that the project should not proceed and that insufficient consideration had been given to alternatives. He said:

> [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 [*Clean Energy Act*, S.B.C. 2010, c. 22] 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 [Environmental Impact Statement]. 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.

[41] The judge who heard the application for judicial review in the Federal Court came to the same conclusion for much the same reasons. He attached particular importance to the fact that, although the appellants had expressed their strong opposition to the project, BC Hydro had, over the course of seven years, met with them 177 times and funded their full participation in the environmental assessment and consultation processes throughout in accordance with several agreements made with them over that time. The judge found the lengthy consultation process had been conducted in good faith and was extensive both qualitatively and quantitatively. He said it was apparent that, while efforts were made to engage with the appellants to address mitigation measures after the Joint Review Panel report was issued, they refused once they had decided the project being abandoned was the only viable solution for them.

[42] The appellants contend the Supreme Court judge was wrong in concluding that the consultation and the accommodation afforded them was adequate. They seek a declaration that the Ministers' decision to issue the certificate was in breach of the Crown's duty in that regard. The respondents maintain there is no basis on which this Court should interfere with what the judge decided and the parties are at odds over the applicable standard of review. The standard may best be addressed before the challenge to the judge's conclusion with respect to the process of consultation and accommodation is considered.

(i) The Standard of Review

[43] As seems increasingly to be the case, at least in matters of this kind, the applicable standard of review is not straightforward. The appellants contend it is one of reasonableness while the respondents maintain the judge's conclusion on the issue, being a question of fact or mixed fact and law, cannot be disturbed in the absence of his having made a palpable and overriding error. Their core contention is that where, as here, a judge's conclusion is fact-intensive, based on an extensive record comprising thousands of pages and seven days of submissions, the

principles to be applied are those established in *Housen v. Nikolaisen,* 2002 SCC 33: an appellate court may set aside the findings of a lower court if, on a question of law, the lower court was incorrect, or if, on a question of fact or mixed fact and law, the lower court made a palpable and overriding error.

[44] Questions of mixed fact and law involve applying a legal standard to a set of facts (*Housen* at para. 26). As stated in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35, "questions of mixed law and fact are questions about whether the facts satisfy the legal tests". The jurisprudence supports the respondents' contention that the adequacy of consultation and accommodation is a question of mixed fact and law: *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 at paras. 60 and 84; and *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189 at para. 82, leave to appeal to SCC refused, [2014] S.C.C.A. No. 466. What constitutes "adequate" consultation is determined through a combined legal and factual analysis of the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation* at paras. 43–45; and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras. 29–32.

[45] It does not, however, follow that the standard of review on what is an appeal of a disposition of an application for judicial review is one of palpable and overriding error. In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, the Court drew a distinction between the appellate review standards of correctness and palpable and overriding error, and the administrative law standards of correctness and reasonableness:

> [45] The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper

> approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:
>
> > Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
>
> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).
>
> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

[46] Thus, on what was said in *Agraira,* an appeal from the disposition of an application for judicial review engages a two-step analysis: first, whether the reviewing judge employed the right standard – be it correctness or reasonableness – and second, whether it was properly applied, with the appellate court making an independent assessment in that regard focusing on the administrative decision that was the subject of the review.

[47] That said, it must be recognized that, consistent with the discussion above, the review of a decision to issue an environmental assessment certificate where the adequacy of consultation and accommodation is challenged will, as in this case, require focusing on whether the Crown's constitutional duty in that regard has been properly discharged. As stated in *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 (cited with approval in *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para. 68):

> [94] … The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional

> duty has been fulfilled (*Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 at para. 65, 2002 BCSC 1701).

[48] While the notion of an appellate court stepping into the shoes of the reviewing judge has been applied to the extent of suggesting that, in considering the Crown's duty to consult and accommodate, it is necessary to "re-do" the judge's reasonableness analysis to see if the same conclusion is reached (*Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 93), it appears to have been qualified with respect to what are clear findings of fact in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada),* 2015 FCA 4. There, on an appeal concerning the fulfillment of the Crown's duty of consultation and accommodation the following was stated:

> [75] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36 at paragraph 46 stands for the proposition that we are to stand in the shoes and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.
>
> [76] In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings.

[49] Further, the authorities are not free of confusion as to whether the adequacy of consultation and accommodation is a matter of reasonableness. *Haida Nation* (para. 62) appears to have established the consultation process itself is to be examined on a standard of reasonableness, but in *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para. 48, it was said the standard is correctness. In *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 at paras. 60 and 84, this Court definitively applied a standard of reasonableness as stated in *Haida* over that stated in *Beckman*. (See also *Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations),* 2015 BCCA 352 at para. 79, and *Nunatsiavut v. Canada (Attorney General),* 2015 FC 492 at paras. 114–115.)

[50] Reasonableness is a deferential standard of review concerned with both "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. Reviewing courts must avoid merely paying "lip service to the concept of reasonableness review while in fact imposing their own view": *Dunsmuir* at para. 48. There may be more than one reasonable outcome and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59.

[51] What amounts to adequate consultation is perhaps most recently addressed in *Gitxaala Nation v. Canada,* 2016 FCA 187, leave to appeal to the Supreme Court of Canada sought:

> [182] Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.
>
> [183] In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, at paragraph 54; …

[52] Here, the judge employed the right standard of review in concluding the consultation with and the accommodation afforded the appellants was reasonable and therefore adequate. He did assume that the Ministers had determined that to be the case by virtue of their apparent acceptance of what was said in the joint Consultation and Accommodation Report of the federal Agency and the provincial Office, quoted above, but his having done so did not impair the analysis of the process he undertook. Absent any discrete question of law, it is now for this Court to determine whether the standard of reasonableness was properly applied. This is to be done by assessing whether the process followed in the course of consulting with

and accommodating the appellants was, in the circumstances, reasonable having regard for the nature of that standard recognized in law. The question, one of mixed fact and law, is to be considered as if being addressed initially by the judge save that no clear findings of fact made by him are to be altered in the absence of palpable and overriding error.

(ii) The Process

[53] The consultation with the appellants was by any account deep and extensive. It could not be characterized as anything less. It was directed at gaining an understanding of the impact the project would have on the Aboriginal peoples affected in the context of their treaty rights with a view to the consideration of measures that could be taken to accommodate them. Given the substantial funding they were given to engage assistance and undertake their own assessments, the studies and reports to which they were given access, and the interaction they were afforded through meetings, public hearings and correspondence, they clearly had the benefit of a full involvement in the process throughout. Their involvement led to a substantial number of modifications to the project and other accommodative measures that were proposed and to a large extent implemented that the judge considered (paras. 80–87) which need not be specifically addressed here. It suffices to say that, on its face, the record reflects the extent of consultation and accommodation that appears reasonable in the circumstances.

[54] The appellants take no exception with the judge's factual account of the course the environmental assessment and concurrent consultation took that underlay his conclusion. Their contention is that, despite the extent of their involvement, the consultation was not adequate primarily because alternatives to the project were not considered. During the process, they advocated consideration be given to deriving electrical power from alternative sources, which included wind, natural gas, geothermal resources, and smaller hydroelectric projects at other sites, but they say there was never any real consideration by the Crown as to whether an alternative source of power or location for the dam ought to be explored. This they attribute first to the enactment of the *Clean Energy Act* and then to BC Hydro having

advanced the case for the project before the Joint Review Panel on the basis that it would maximize the hydroelectric potential of the Peace River. The *Clean Energy Act* provides for the objective of 93% of electricity in the province being generated from clean or renewable sources and exempts the project from utilities commission approval, which the appellants say rendered the project a "foregone conclusion". The Joint Review Panel discounted the maximization of the Peace River as tilting the scales unduly in favour of the project over alternatives, which the appellants maintain is what happened. The appellants say that, as the authorities establish, consultation that from the outset excludes meaningful accommodation is meaningless.

[55] The appellants also contend that outstanding issues identified by the Joint Review Panel were not properly addressed in the Post-Panel Stage, but they focus in the main on what they say is the absence of the Crown's consideration of alternatives. The appellants attach importance to the Joint Review Panel finding that BC Hydro had not fully demonstrated the need for the hydroelectric power to be produced by the project on the timetable proposed and the Panel's recognition that the project would have a number of impacts on their treaty rights, including their current use of land and resources for hunting, trapping and fishing, which in large measure cannot be mitigated. They say that despite the impact the project will have, there was no consideration of the only accommodation warranted that would be satisfactory to them, namely the project being abandoned or at least deferred indefinitely to permit a proper consideration of the alternatives that might be undertaken.

[56] Support for the appellants' contention is said to be found in principle in *Haida Nation* (specifically para. 47) where the duty of the Crown to avoid irreparable harm or minimize its effects is discussed and, by analogy, in *Gitxaala Nation* (see in particular para. 325). Broadly, the appellants say consultation and accommodation must be meaningful in both procedure and substance. They say that upholding the honour of the Crown in discharging the duty owed to Aboriginal peoples must demonstrably promote reconciliation, citing *Chartrand* at paras. 68–69. The

appellants maintain the process of consultation wholly failed in this regard, having been heavy on quantity but lacking in quality. They say the principle that actions that adversely affect the rights of First Nations people should be taken in a manner that minimally infringes their constitutional rights – the "golden thread" of proportionality that runs through the authorities – was forsaken in the consultation process.

[57] For their part, the respondents maintain that the record reflects considerable consultation with Aboriginal peoples, including the appellants, concerning alternatives to the project, emphasizing in particular an assessment prepared by BC Hydro during the Post-Panel Stage headed "Consideration of Site C Alternatives– Related Consultation with First Nations". A draft was included in the referral packages for the Ministers. It identifies three channels through which consultation was carried out with First Nations regarding alternatives: BC Hydro's own consultation process; the consideration of alternatives during the course of the joint federal and provincial environmental assessment process; and the development of BC Hydro's Integrated Resource Plan (pursuant to s. 3 of the *Clean Energy Act*), a long-term plan for meeting the province's future electricity needs.

[58] The extent to which the proper discharge of the duty of the Crown requires the consideration of alternatives to any given project appears to be largely an open question. The authorities reflect the need for caution in imposing a duty to exhaustively consult on and consider matters going beyond the scope of a project. As the Supreme Court of Canada stated in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 53, the duty to consult concerns "the specific Crown proposal at issue". The duty to consult on proposed project alternatives may therefore be tempered to the extent that such alternatives go beyond the specific project being considered. (See also *Adams Lake Indian Band v. Lieutenant Governor in Council*, 2012 BCCA 333, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 425; and *Halalt First Nation v. British Columbia (Minister of Environment)*, 2012 BCCA 472, leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 22.) That said, it does not appear necessary to explore the question further in

this instance because it is clear on the record that, contrary to what the appellants contend, alternatives to the project were properly considered.

[59] It is of significance that in contending, as they do, there was never any real consideration of alternatives by the Crown, the appellants do not now advance any case with respect to any specific alternatives they maintain should have been but were not considered in the course of the consultation process. They do not identify any specific sources of electricity that might be sufficiently viable in terms of comparable cost, power production, and availability that ought to have been, but were not, considered as alternatives. Rather, they argue only in terms of broad generalizations to the effect that the process "fell short" of what was required because alternatives were not considered.

[60] Certainly, as the judge found, a consideration of alternatives to the project was undertaken by the Joint Review Panel. Its analysis led to the conclusion that the project was the least expensive and that its cost advantages would increase in the future. The consideration of alternatives was mandated by the Panel's Terms of Reference. The terms were expanded to address the appellants' concerns with respect to the consideration of alternatives which then formed part of the Environmental Impact Statement Guidelines, the Environmental Impact Statement, and ultimately the Joint Review Panel Report. BC Hydro devoted an entire section of its Environmental Impact Statement and a technical appendix to the need for and alternatives to the project. Three of the 26 days of the Joint Review Panel hearings were devoted to that subject. Further, the Consultation and Accommodation Report prepared in the Post-Panel Stage specifically addressed the alternatives proposed by First Nations and set out the responses of BC Hydro and the Joint Review Panel to those alternatives.

[61] Beyond that, during the course of the process, there was direct consultation between the appellants and BC Hydro that included the subject of alternatives to the project. T8TA provided BC Hydro with comments on the Environmental Impact Statement on a range of topics, including the need for the project, project

alternatives, and cumulative effects. There were 730 comments in total, occupying 470 pages. BC Hydro responded to each comment received and submitted 29 technical memorandums on common themes that arose including treaty rights, consultation, the need for the project, alternatives, and cumulative effects. The Joint Review Panel hearings were followed by BC Hydro's further communications with T8TA, explanations of how T8TA's comments were considered, and consideration of reports written by T8TA.

[62] The consideration given to specific alternatives at one point in the process is found in BC Hydro's assessment of three alternate locations for a hydroelectric dam, including the First Nations' requested consideration of Site 7b (a proposed alternative for a dam at another site on the Peace River). BC Hydro produced a table containing its responses to comments on the Environmental Impact Statement submitted by First Nations. It prepared a report headed "Review of Alternate Sites on the Peace River". With respect to Site 7b in particular, it was considered that it would not meet the need described in the Environmental Impact Statement, as it would produce only about one-fourth of the energy that could be produced by the project. In short, BC Hydro concluded that situating the project at Site 7b would be uneconomical. Following the issuance of this report, BC Hydro met with T8TA to review it and seek the First Nations' input. BC Hydro also provided funding to T8TA to engage consultants with engineering expertise to support a review of the report. It is evident that a meaningful dialogue took place with respect to this report and with respect to alternative sites.

[63] Ultimately, following the Joint Review Panel report, T8TA advised BC Hydro that it was only interested in discussing alternatives to the project. BC Hydro agreed to discuss alternatives and to arrange for its experts on this issue to participate. Between September and December 2014, BC Hydro and T8TA engaged in further consultation on the need for and alternatives to the project. BC Hydro provided T8TA with $58,250 to participate in this consultation alone. It appears evident BC Hydro did identify and consult on at least seven potentially viable alternatives referred to as: demand-side management, run-of-river hydro, wind, biomass,

geothermal resources, natural gas, and pumped-storage hydroelectricity. In the end, BC Hydro determined that the project offered the best combination of attributes and was the preferred option.

[64] *Gitxaala Nation*, upon which the appellants rely, is to be distinguished. There the consultation process was found wanting because key issues were left "undisclosed, undiscussed and unconsidered" (para. 325). Here the same deficiencies are not apparent. BC Hydro did consult meaningfully on the issues identified by the appellants; in particular, First Nations were provided a meaningful opportunity to make submissions, have those submissions considered, and engage in discussions concerning alternatives. On the record, it simply cannot be said the Crown failed to discharge the duty of consultation and accommodation it owed.

[65] With respect to the appellants' claims regarding the duty to accommodate, it must be remembered that the Crown's consultation and accommodation efforts should not be deemed unreasonable merely because immitigable impacts are identified. As articulated in *Haida Nation*, the identification of such impacts is a factor indicating the requirement of deep consultation and accommodation, but this does not necessarily require that a different substantive outcome be reached: "the focus … is not on the outcome, but on the process of consultation and accommodation" (para. 63). The duty to consult and accommodate does not afford First Nations a "veto" over the proposed activity: *Mikisew* at para. 66. Here, the appellants have not been open to any accommodation short of selecting an alternative to the project; such a position amounts to seeking a "veto". They rightly contend that a meaningful process of consultation requires working collaboratively to find a compromise that balances the conflicting interests at issue, in a manner that minimally impairs the exercise of treaty rights. But that becomes unworkable when, as here, the only compromise acceptable to them is to abandon the entire project.

[66] In *West Moberly First Nations* (para. 148), it was said that if the position put forward by a First Nation that a project should not proceed at all is not acceptable, a "satisfactory, reasoned explanation" must be given to them. It appears clear, as the

judge found, that such an explanation was provided in the referral package put before the Ministers, as well as other information that was made available to the appellants in the course of the process.

[67] Viewed from the perspective of a reviewing judge at first instance, there is no sound basis on which to conclude the process of consultation in which the appellants were engaged was other than adequate in the sense of being reasonable in all the circumstances. Reconciliation, as indeed the judge concluded, was not achieved because of an honest disagreement over whether the project should proceed, but that does not mean the process was flawed. The fact that the appellants' position was not accepted does not mean the process of consultation in which they were fully engaged was inadequate. Although the appellants maintain the record is one only of quantity, it is apparent it is very much one of quality as well. It demonstrates the thorough consultation and efforts to accommodate apart from abandoning the project that were made before, during, and after the environmental assessment, including meaningful consideration of, and consultation on, alternatives.

Disposition

[68] I would dismiss the appeal.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Savage"