

First Nation Challenges to Hydroelectric Development – A Tale of Two Provinces

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Ontario and British Columbia have both invested heavily in infrastructure to generate inexpensive power. Each province considers hydroelectric development a central component of its long term energy policy. Both provinces have longstanding legacy issues arising from a failure to consult First Nations about large provincial hydroelectric developments in the 1960s.

The proposed Site C Clean Energy Project (Site C) in British Columbia offers an opportunity to consider how the two provinces differ in their modern approach to hydroelectric development. The environmental approvals of Site C have generated applications for judicial review filed at the provincial and federal courts. Among the parties challenging the hydro development are several First Nations communities, including Treaty 8 Tribal Association, the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation. The Peace Valley Landowners Association is also challenging Site C.

Several large hydro developments have taken place in Ontario and proceeded without the vigorous political and legal challenges advanced by First Nation communities. This article reflects on the historical, policy and legal reasons for the challenge to Site C in British Columbia and makes a comparison with hydro development in Ontario.

The Proposed Site C Project

BC Hydro's proposed Site C is a hydroelectric generating station providing 1,100 megawatts (MW) of capacity, producing approximately 5,100 GW/h of electricity per year. The project would be the third dam on the Peace River, constructed near Fort St John in British Columbia. The accompanying reservoir would flood approximately 13,000 acres of land.

An independent Joint Review Panel by agreement of the federal and provincial governments conducted an environmental assessment, releasing its Report on May 1, 2014. The Joint Review Panel found that Site C would provide benefits, including "a large and long-term increment of firm energy and capacity at a price that would benefit future generations". The Joint Review Panel commented on the significant adverse effects of Site C, including cumulative impacts to the environment, the exercise of Aboriginal rights and treaty rights, and to farmland. The Joint Review Panel also questioned whether BC Hydro had adequately assessed the cost associated with alternatives to Site C.

The Site C project received conditional environmental approvals from the federal and provincial governments. The project is currently undergoing an investment review. Minister Bill Bennett has indicated that a decision about whether to construct the dam will be made by December 2014.

Key Differences Between Ontario and British Columbia Hydropower

Hydroelectric development in Ontario has proceeded on a different basis from British Columbia for some years. Currently, several hydropower projects in Ontario are moving forward through the regulatory and construction processes. Recent Ontario projects have advanced with increased social licence. Ontario's hydro projects differ from Site C in their overall size, the regional cumulative impacts of development on treaty rights, the involvement of First Nations in the planning process, the perceived and actual benefits that flow to First Nations from the projects, and settlement of past grievances related to hydro development.

Individual Project Size

A simple but important factor distinguishing hydro development in Ontario from British Columbia is the project size. The scale of the largest hydroelectric development in British Columbia and in Ontario are of entirely different magnitudes – those in British Columbia are more than twice as large as those in Ontario. Ontario's largest hydroelectric project is the Lower Mattagami Complex, which is broken up over four existing power stations on the Mattagami River. The total capacity from all four power stations amounts to 500 MW – less than half the 1,100 MW capacity of British Columbia's proposed Site C project. The size of a project influences the level of regional impact at a basic level.

Cumulative Impacts on Treaty Rights

Hydroelectric development has the potential to adversely affect or infringe constitutionally-protected Aboriginal treaty rights. Where the Crown proposes activity that will infringe an Aboriginal treaty right, the Crown must justify infringement of the treaty right or obtain the consent of the First Nation. In Ontario, most hydroelectric development takes place in areas that are not as developed as Site C's proposed location in the Peace Valley.

BC Hydro will likely need to demonstrate that the Site C dam justifies infringing Aboriginal treaty rights. This may be more difficult in light of case law about cumulative impacts of development near the proposed Site C location.

In 2011, the British Columbia Court of Appeal's decision in *West Moberly First Nation v British Columbia*¹ discussed the cumulative impacts of development on the exercise of Aboriginal treaty rights in Treaty 8 territory. The First Nation asserted that allowing sampling – with a view to allowing coal mining – would affect treaty rights to hunt caribou in the First Nation's traditional territory. The Court found that further development in the area would likely lead to the extirpation of a herd of caribou to which the First Nation claimed a harvesting right under Treaty 8. The Court found that British Columbia and the proponent failed to properly address these concerns during consultation, and that extirpation of the herd would improperly result in the effective extinguishment of the right.

The Joint Review Panel found that cumulative impacts from surrounding projects will compound the adverse effects from Site C. The Peace Valley region's existing development includes both hydro development as well as mining and petroleum/natural gas projects. Site C would be constructed downstream of the existing WAC Bennett dam and the Peace Canyon dam. Constructed in the 1960s, the two dams are fed by the large Williston Reservoir, which, when it was constructed, flooded 350,000 acres of land.

The applications for judicial review question the federal government's approval of Site C on the grounds that the Joint Review Panel found significant adverse impacts from Site C, while the "unambiguous need for the power" has not been demonstrated. The test to justify infringement

involves demonstrating a “compelling and substantial public interest”, as articulated in the recent Supreme Court of Canada decision in *Tsilhqot’in Nation v British Columbia*.ⁱⁱ If the federal and provincial governments cannot justify the impacts to treaty rights that would be caused by Site C, the Court may quash the environmental approval.

Co-Planning

Both Ontario and British Columbia embarked on extensive hydroelectric development in the 1960s. The unmitigated impacts of this development caused considerable anger among First Nations and is a residual issue that both provinces have faced in opposition to hydro projects. Both provinces have paid out substantial settlements to address past grievances associated with the 1960s development. However, a key difference between the two provinces was how hydro development planning took place after the past grievance resolution process commenced.

When Ontario committed itself to negotiations to resolve past grievances, it also committed itself to co-planning with First Nations about future hydroelectric developments that would affect First Nations. The co-planning initiative arose as part Ontario’s 25 Year Demand/Supply Plan initiative. This policy shift recognized the need for First Nations’ support for development.

While BC Hydro has engaged with First Nations on the Site C project, consultation and engagement have taken place as part of the Joint Review Panel process instead of on a co-planning level. Minister Bill Bennett is hopeful that, while First Nations may not support the project, they will recognize the potential for economic opportunities that could arise from its construction and operation.

Partnerships with First Nations

Since the development of co-planning in the 1990s, most hydroelectric development in Ontario has either provided direct benefits to, or been constructed and operated in partnership with, First Nations.

Examples of two recent large developments include the Lower Mattagami Complex and the Umbata Falls Generating Project. The Lower Mattagami Complex is a 500 MW project that offers First Nation community investment. It has provided significant opportunities for Aboriginal business development, including \$250 million in contracts. Ontario Power Generation has also committed to and implemented a training program for First Nations, creating a database of trained candidates for employment. Human Resources and Skills Development Canada, Ontario Power Generation, the Ministry of Skills Development and Training and the project contractors together provided \$8 million for training. Ontario Power Generation says the training program trained 350 persons with a 96% successful completion rate. The Umbata Falls Generating Project is another example of successful First Nations partnerships. The project is a run-of-river 23 MW project that is majority-owned by Ojibways of Pic River through the Begetekong Power Corporation. Smaller projects are also being developed by or in partnership with First Nations. Dokis First Nation in partnership with Hydromega Services is building a 10 MW run-of-river hydroelectric project on the French River. Coral Rapids Power, a wholly-owned business of Taykwa Tagamou Nation, is developing a 25 MW project on New Post Creek in partnership with Ontario Power Generation.

BC Hydro is moving to a similar model of negotiating impact benefit agreements with First Nations on capital projects, where appropriate. British Columbia is in negotiations with local First Nations communities about mitigating impacts to those communities. In addition, the conditions attached to the provincial environmental approval include exploring economic opportunities for First Nations. To our knowledge, there have been no impact benefit agreements nor partnerships

created in relation to Site C. The Joint Review Panel noted BC Hydro identified training and business opportunities for First Nations as planned project benefits. Some commentators, such as Clean Energy BC, have suggested that smaller run-of-river projects would offer greater opportunities for economic development to First Nations than Site C.

Conclusion

Site C demonstrates the powerful need for a social licence for projects. Ontario's modern hydro development has benefitted from a planning approach that provides for early consultation and often includes First Nations as partners. This approach, as well as the comparative size and location of Ontario's projects, has helped to partially insulate Ontario's hydro providers from legal challenges based on impacts to treaty rights. However, individual projects may still be vulnerable to challenges on the basis of treaty right infringement. Ontario and hydropower producers within the province should remain committed to early engagement with First Nations during the planning process to ensure minimal risk to hydro projects and positive relationships with local communities.

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ⁱ *West Moberly First Nation v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.

ⁱⁱ 2014 SCC 44.