

Canada: Indigenous rights violated by the Site C dam



Joint Statement to the UN Committee on the Elimination of Racial Discrimination

93rd Session

31 July - 25 August 2017

On behalf of the following organizations:

Alliance4Democracy
Amnesty International Canada
Assembly of First Nations
Canadian Friends Service Committee
FightC
Force of Nature

KAIROS
Peace Valley Environment Association
Sierra Club British Columbia
Union of B.C. Indian Chiefs
Yellowstone to Yukon Conservation
Initiative

“The Committee is concerned about reports according to which **the right to consultation as provided in legislation and the right to prior, free and informed consent to projects and initiatives concerning Aboriginal peoples, are not fully applied by the State party**, and may be subject to limitations. It is also concerned that Aboriginal peoples are not always consulted for projects conducted on their lands or which affect their rights and that **treaties with Aboriginal peoples are not fully honoured or implemented**. The Committee is further concerned that **Aboriginal peoples incur heavy financial expenditures in litigation to resolve land disputes with the State party owing to rigidly adversarial positions taken by the State party in such disputes.**”-- UNCERD Concluding Observations Canada, Eightieth Session, 4 April 2012, CERD/C/CAN/CO 19-20

The Site C dam now under construction in northern British Columbia is one of the largest resource development projects underway anywhere in Canada. If completed, the dam will flood more than 100 kilometers of the Peace River Valley and its tributaries. These are lands vital to the cultures, traditions and heritage of the Dunne-Za and Cree peoples. The decision to inundate the Valley was made without their free, prior and informed consent.

Our organizations are deeply concerned by three aspects of this project that we believe clearly contravene Canada’s obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*: the megaproject’s impact on the ability of Indigenous peoples to exercise their rights within such a crucially important part of their traditional territories; the blatant disregard for the legal rights of Indigenous peoples demonstrated in the decision-making process; and the barriers to achieving legal remedy created by extreme and regressive positions taken by the federal government before the courts.

1. Impact on Indigenous rights to land, livelihood, culture, and spiritual practices (Art. 2)

The Peace River Valley is a unique landscape providing vital calving grounds for the moose that are central to the Dunne-Za and Cree cultures. The Valley also supports many plant and animal species rarely found in other parts of the region. Indigenous peoples have lived in and cared for this land since time immemorial. Documented cultural sites in the region date back more than 10,000 years. The Valley lies outside the boundaries of any designated First Nations reserves but it is part of the traditional territory covered by an historic Treaty – Treaty 8 – and is used extensively for ceremony, subsistence, and traditional livelihoods, as well as to provide young people the opportunity to learn their cultural traditions.

As a place to sustain and revitalize Indigenous cultures and traditions, the Peace River Valley is particularly important because it is close to a number of First Nations communities, and therefore more accessible to their elders and youth, as well as to the urban centre of Fort St. John where a great many community members now live. The Valley is also crucially important because so much of the

surrounding landscape has already been massively impacted by extensive oil and gas development, mining, and other extractive industries.¹

A joint federal-provincial environmental impact assessment concluded that flooding such a large stretch of the Peace River Valley would cause severe, permanent, and irreversible harm to Indigenous land use, make fish in the river unsafe for at least a generation because of the mercury that will be released, and wipe out hundreds of cultural and historic sites, including grave sites.² A group of Canadian academics who reviewed the assessment report concluded that the “number and scope” of harms identified by the joint review panel was “unprecedented in the history of environmental assessment in Canada.”³

Critically, however, environmental assessments conducted under federal legislation do not have the power to approve or reject projects. Nor are they allowed to make recommendations on whether such approval should be granted. The federal Cabinet decision to approve the Site C dam claimed that “the significant adverse environmental effects” of the Site C dam “are justified in the circumstances”⁴ but provided no explanation of how such a determination was made or what weight if any was given to the government’s obligations to uphold the rights of Indigenous peoples.

2. Failure to respect the rights of Indigenous peoples in the decision-making process (Art. 5)

The Site C dam was vigorously opposed throughout the review process by the Treaty 8 Tribal Association,⁵ an organization representing many of the First Nations in northeast BC that are signatories to Treaty 8, an historic agreement meant to protect Indigenous culture and livelihoods and allow the co-existence of Indigenous and non-Indigenous peoples in a shared territory. Two of those nations, Prophet River and West Moberly, have continued to fight the dam, including through legal challenges. They have been supported by numerous regional and national representative bodies including the Union of BC Indian Chiefs, the BC First Nations Summit, the Assembly of First Nations BC and the National Chief of the Assembly of First Nations.

Before and after the decision to approve the dam, the provincial utility company BC Hydro engaged with First Nations in efforts to negotiate mediation and compensation. However, it was clear from the outset that the federal and provincial governments were not willing to listen to the First Nations’ request for the project to be abandoned and Valley to be preserved as it was one of the only relatively ‘untouched’ areas left in their territory. Even recommendations by First Nations for project alternatives that would avoid the destruction of significant cultural sites were flatly rejected by the government.

¹ Peter G. Lee and Matt Hanneman, *Atlas of land cover, industrial land uses and industrial-caused land change in the Peace Region of British Columbia (Report #4)*, Global Forest Watch Canada, 2012; Eliana Macdonald, *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of the Blueberry River First Nations*, Ecotrust Canada and David Suzuki Foundation, 2016.

² Canadian Environmental Assessment Agency, *Report of the Joint Review Panel: Site C Clean Energy Project: BC Hydro*, 1 May 2014, available at www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf

³ Programme of Water Governance, *Statement of Concerned Scholars on the Site C Dam project*, University of British Columbia, 24 May 2016.

⁴ The Honourable Leona Aglukkaq, Minister of the Environment, *Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012*, 14 October 2014.

⁵ Treaty 8 Tribal Association, treaty8.bc.ca

The independent provincial utilities commission has previously rejected the Site C dam as unneeded. Before bringing forward the proposal for the second time, the province changed its legislation to exempt the Site C dam from such oversight.⁶ A thorough review by the utilities commission would have considered whether consultation with Indigenous peoples was adequate to meet the government's legal obligations and would have focused on important issues that the environmental assessment process could not fully address, such as the need for and cost of the project. Not only was there no review of this matter by the utilities commission, the terms of reference for the environmental assessment (the only public review that was held) explicitly excluded findings related to the adequacy of consultation and whether proceeding with construction would be consistent with Canada's legal obligations under Treaty 8.⁷ The federal government has stated in court that the legal implications of Treaty 8 were not considered in the decision-making process.⁸

3. Barriers to legal remedy (Art. 6)

The West Moberly and Prophet River First Nations sought to protect their rights through a judicial review of federal approval of Site C, seeking the decision to be overturned because of the acknowledged failure of the government to consider whether flooding the Valley would infringe rights protected under Treaty 8.⁹ Unfortunately, both the Federal Court and the Federal Court of Appeal accepted the federal arguments that it was entitled to ignore its Treaty obligations.¹⁰ In June 2017 the Supreme Court of Canada declined to consider a further appeal.¹¹

The federal government argued in court that it did not have an obligation to consider whether the Site C dam would violate Treaty rights before issuing the approval that allowed construction to proceed. The federal government claimed that Indigenous peoples have the onus of conclusively proving that their Treaty rights are infringed through a civil action, which is a lengthy and costly process. The federal government argued that its own environmental assessment of the Site C dam, and its findings of severe, permanent and irreversible harm, was not sufficient to come to any conclusion about possible violation of Treaty rights. The federal government argued instead that the standard of proof necessary to establish violation of Treaty rights would require a full trial in which the federal government and other

⁶ At the time of this submission, a new provincial government is expected to take office shortly and has promised that the dam will be subject to some form of review by this commission, although the scope of such a review is likely to again exclude matters of the legal rights of Indigenous peoples.

⁷ Canadian Environmental Assessment Agency, *AGREEMENT To Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project Between The Minister of the Environment, Canada and The Minister of Environment, British Columbia*, 11 March 2004, p. 15, available at www.ceaa.gc.ca/050/documents/54272/54272E.pdf

⁸ *Prophet River First Nation And West Moberly First Nations v. Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and British Columbia Hydro and Power Authority*, 2016 FCA 15. (Factum of the Respondent)(Attorney General of Canada).

⁹ *Prophet River First Nation And West Moberly First Nations v. Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and British Columbia Hydro and Power Authority*, 2016 FCA 15.

¹⁰ *Prophet River First Nation And West Moberly First Nations v. Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and British Columbia Hydro and Power Authority*, 2016 FCA 15.

¹¹ As is the usual practice, no reasons were provided for the Supreme Court's decision not to hear an appeal.

parties would be able to contest Indigenous peoples' assertions about use they use the land and how their use of the land would be impacted.¹²

Given the protracted nature of Indigenous rights suits before Canadian courts, a matter on which this Committee and other human rights bodies have previously commented¹³, a full trial could take a decade or longer to resolve. Because the affected First Nations have already been denied an injunction against the construction of Site C dam – an all too common outcome in Canadian courts when Indigenous rights are pitted against asserted economic benefits – requiring that First Nations conclusively prove their rights through a full trial effectively denies any reasonable access to remedy.

Questions to the Government of Canada

Does either the federal government or the province of BC know whether the Indigenous peoples of northeast BC will still be able to meaningfully exercise their Treaty protected rights if the Peace River Valley is flooded by the Site C dam?

If the displacement of Treaty 8 people from the Peace River Valley means that they cannot exercise their rights or continue these practices for future generations because of the construction of the Site C dam, will the government of Canada withdraw its approval for the dam?

Recommendations

Call for construction of the Site C dam to be immediately suspended and not resumed unless and until a full review is conducted, in collaboration with Indigenous peoples, of whether flooding the Peace River Valley is compatible with Canada's obligation to respect the rights of Indigenous peoples, including the right to free, prior and informed consent and the right to have their Treaties upheld.

Call on the federal government to acknowledge its obligation to exercise due diligence to ensure that any planned actions do not unjustifiably infringe on the Treaty rights of Indigenous peoples and further urge that the government refrain from taking positions before court that are contrary to this principle.

Urge Canada to ensure that the right of free, prior and informed consent is upheld in all decisions pertaining to resource development and to reform pertinent legislation accordingly.

¹² *Prophet River First Nation And West Moberly First Nations v. Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and British Columbia Hydro and Power Authority*, 2016 FCA 15. (Factum of the Respondent at para 83) (Attorney General of Canada).

¹³ Inter-American Commission on Human Rights (IACHR). *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. October 30, 2009. Para. 39.