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THE STORIES WE TELL: SITE-C, TREATY 8, AND THE DUTY TO CONSULT AND ACCOMMODATE

Rachel Gutman *

CITED: (2018) 23 *Appeal* 3

* Rachel Gutman recently completed her JD at the University of Victoria. She thanks Professor John Borrows (University of Victoria, Faculty of Law) for his advice and assistance with an initial draft of this paper—and the Editorial Board of *Appeal* for their revisions to that draft. The opinions expressed in this paper are those of the author alone.

"The truth about stories is that's all we are."

Thomas King, *The Truth About Stories*[1]

INTRODUCTION

The Dane-zaa have lived on their traditional territories, the Dane-zaa-nané ("the people's land"), since time immemorial.[2] The territory extends from the lands east of the Rocky Mountains in what is now Alberta to the Peace River Valley in what is now northeastern British Columbia and northwestern Alberta.[3] The Dane-zaa creation story describes the unfolding of time and space and begins with an enormous body of water covering the world. The creator, Sky Keeper, draws a cross on the water as a way of establishing the four directions, and then sends each of the animals beneath the water's surface to bring back earth. From the earth brought back under the nails of Muskrat, Sky Keeper tells the land to grow, until it eventually becomes so large that it can support both humans and animals.[4] The stories of archeologists and geologists also tell a parallel story of creation that place the Dane-zaa on the Dane-zaa-nané territory at a time beyond memory, when ice sheets covering most of what is now called Canada began to melt and recede into lakes and rivers, roughly 10,500 years ago.[5]

The connection of the Dane-zaa to the land extends beyond magnitude of time. The Dane-zaa creation story, and other stories passed down over history represent legal orders governing the relationship between the Dane-zaa and other living and non-living beings within their territory. While these legal traditions may have ancient roots, the laws of the Dane-zaa and other Indigenous peoples[6] are not relegated to the past.[7] Indigenous legal orders pre-exist and survive the arrival of Europeans and declarations of Crown sovereignty; and today, Canada is a legally pluralistic state, encompassing civil law, common law, and Indigenous legal traditions.[8] As such, the laws of Indigenous peoples remain relevant to all Canadians.[9]

Despite the pre-existence and continuation of Indigenous legal orders, the Crown in right of Canada and the Canadian common law courts tell a very different story of the relationship between the Dane-zaa and the Dane-zaa-nané territory than conveyed by the creation story described above. The predominance of the Crown's perspective in common law jurisprudence has brought drastic changes to the land and way of life of the Dane-zaa people.

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1 Thomas King, *The Truth About Stories: A Native Narrative,* 1st ed (Toronto: House of Anasi Press, 2003) at 1.

2 Robin Ridington & Jillian Ridington, *Where Happiness Dwells: A History of the Dane-Zaa First Nations* (Vancouver: University of British Columbia Press, 2013) at 3.

3 *Ibid*.

4 *Ibid* at 11.

5 *Ibid* at 68.

6 This paper will shift between "Aboriginal," "Indigenous," and "First Nation" depending on context. "Aboriginal peoples" is a colonial legal term referring to the "Indian, Inuit and Métis peoples of Canada," see section 35(2) of the *Constitution Act, 1982*, *infra* note 15. This paper will use the term "Aboriginal" when referring to constitutional rights or colonial laws or when quoting from jurisprudence. "Indigenous," on the other hand, is a term used by many communities to define themselves. "Indigenous law" refers to the legal orders and traditions of Indigenous peoples. This paper will use the term "Indigenous" where it is inappropriate to refer to Indigenous peoples or law through the lens of Canadian colonial law; see Gordon Christie, "'Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27 Can JL & Jur 259 at note 1. Finally, this paper will use the term "First Nation" when referring to the Treaty 8 Nations who refer themselves as First Nations.

7 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10.

8 *Mitchell v MNR,* 2001 SCC 33 at para 10.

9 Borrows, *supra* note 7 at 10.

In 1910 and 1914, Prophet River First Nation and Moberly Lake First Nations, descendants of the Dane-zaa, entered into Treaty 8, one of the eleven post-confederation numbered treaties signed between the Crown and Indigenous Nations between 1871 and 1923.[10] For the Federal Government, the purpose of Treaty 8 was "to secure the relinquishment of the Indian title," in order to facilitate the influx of settlement and mining in the western territories.[11] Like all numbered treaties, the written text of Treaty 8 contains an "extinguishment clause," that purports to "CEDE, RELEASE, SURRENDER AND YIELD UP" all "rights and titles and privileges" of First Nation signatories to the lands described in the treaty.[12] In exchange, the document writes:

> [T]he 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 […] 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.[13]

While this paper does not purport to present the content of the laws of the Dane-zaa, it is difficult to imagine that, with a stroke of a pen, a single document written in a foreign language, containing laws unknown to the Dane-zaa, could end a multi-millennia relationship between the Dane-zaa and the Dane-zaa-nané. Nonetheless, Canada's highest courts have relied on the written terms of Treaty 8 to interpret the following story of the treaty agreement: in exchange for surrender, First Nations signatories were given treaty rights to hunt, fish, and trap throughout the territory, which can be exercised until the Crown uses its treaty right to take up lands and put them to "an incompatible use" with the expression of treaty rights.[14] Although the Crown has a right to take up lands, the treaty rights of signatory nations are constitutionally enshrined in section 35(1) of the *Constitution Act, 1982*.[15] As such, they cannot be infringed without Crown justification.[16]

In the 2015 decision of *Prophet River v British Columbia* ("*Prophet River*"),[17] the British Columbia Supreme Court ("BCSC") expanded the Crown's story of Treaty 8, writing that: in taking up lands for the purpose of the construction of the Site-C Hydroelectric Dam ("Site-C"), the Crown is not obligated under section 35(1) of the *Constitution Act, 1982* to determine whether a taking will infringe treaty rights; though if it was, it was not obligated to justify its actions before proceeding with the proposed taking. Rather, the BCSC suggests that the written text of Treaty 8 provides the Crown with an unfettered right to take up lands, limited only by a process of consultation.[18] Any substantive limitation on the Crown's right to take up lands appears to lie with the affected nation in bringing an action for infringement.[19] The British Columbia Court of Appeal ("BCCA") affirmed this ruling in 2017.[20] This paper will focus its analysis on the reasoning of the earlier BCSC decision.

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10 *Prophet River First Nation v British Columbia* (*Environment*), 2015 BCSC 1682 at paras 7-10 [*Prophet River*].

11 René Fumoleau, *As Long As This Land Shall Last*, 2nd ed (Calgary: University of Calgary Press, 2004) at 64.

12 Treaty No 8 (21 June 1899), online; <www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853> archived at <https://perma.cc/38TS-NMZL> [emphasis in original].

13 *Ibid*.

14 *R v Badger*, [1996] 1 SCR 771 at para 56 [*Badger*].

15 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

16 *Badger, supra* note 14 at para 85.

17 *Prophet River, supra* note 10.

18 *Ibid* at paras 146-153.

19 *Ibid* at para 133.

20 *Prophet River* v *British Columbia (Minister of the Environment)*, 2017 BCCA 58.

The holding in *Prophet River* has allowed the province of British Columbia to commence with the construction of Site-C, which will flood thousands of hectares of the traditional territory of the Dane-zaa in the Peace River Valley. Significant construction is already underway. While preparing this paper for publication, Premier John Horgan announced his government's intention to continue with the construction of Site-C, citing the CAD3.9 billon dollars already committed to the project by the previous Liberal government.[21] The Crown has thus been permitted to cause irreversible impacts to the way of life of the Dana-zaa and, arguably, infringe Treaty 8 without justification, a result prohibited by section 35(1) of the *Constitution Act, 1982*.[22]

The decision in *Prophet River* relies on a story of Treaty 8 as extinguishing a 10,500-year legal relationship between the Dane-zaa and Dane-zaa-nané territory for "rights" devoid of their former connection to the land and other living beings. Although the written terms of the treaty are clear, they represent only one side of the story of Treaty 8. This paper will show that the Dane-zaa signatories who entered Treaty 8 did not view treaty rights as general guarantees of the ability to hunt, fish, and trap subject to abrogation at the whim of the Crown. Rather, Treaty 8 was entered in order to ensure the continuity and way of life of the Dane-zaa.

Treaties represent mutual promises and obligations and are to be interpreted with regard to the perspective of both parties.[23] An interpretation of Treaty 8 that considers the perspective of both parties suggests that the Crown does not have an unlimited right to take up lands under Treaty 8. The right to take up lands cannot be exercised when doing so will impact the continuity of Dane-zaa way of life and culture, as reflected in the treaty rights to hunt, fish, and trap. To give effect to this perspective, this paper will argue that in taking up lands that risk infringement of Treaty 8 First Nations' treaty rights, section 35(1) of the *Constitution Act, 1982* requires the Crown to determine whether the taking will result in an infringement of Treaty 8.[24] If infringement will occur, the Crown is then required to obtain the consent of the respective nation, and if absent, justify its action using a two-part test articulated by the Supreme Court of Canada ("SCC") in *R v Sparrow* ("*Sparrow*")[25] prior to the taking.[26] These obligations are best achieved by expanding the duty to consult to include a determination of infringement.

This paper will proceed in three parts. Part I will provide an introduction to the jurisprudence on section 35(1), the *Sparrow* test for infringement, and the duty to consult and accommodate. Next, Part II will describe how the court in *Prophet River* applied this case law to the context of the Site-C project. It will delve into the reasoning behind the decision and the court's interpretation of Treaty 8. Finally, Part III, will contrast the court's interpretation of Treaty 8 with the First Nation signatories' own understanding of the meaning and scope of the rights enshrined in the treaty. This paper will then argue that, in order to better reflect the perspective of signatory nations and protect treaty rights in the context of a taking up of land, the duty to consult ought to be expanded to include a determination of infringement.

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21 Office of the Premier, "Government will complete Site-C construction, will not burden taxpayers or BC Hydro customers with previous government's debt," (11 December 2017) online: <https://news.gov.bc.ca/releases/2017prem0135-002039> archived at <https://perma.cc/8L6A-EKUL>.

22 *Badger, supra* note 14 at para 56.

23 *R v Marshall*, [1999] 3 SCR 456 at para 14 [*Marshall*].

24 Although this paper discusses Aboriginal rights as limitations on Crown sovereignty, it acknowledges that this rests on a problematic assumption of the legitimacy of Crown sovereignty.

25 *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

26 *Ibid* at 1113-1114.

I. SECTION 35(1) INFRINGEMENT AND THE DUTY TO CONSULT

This paper will begin by first providing an introduction to the sources of Aboriginal and treaty rights and the common law jurisprudence dealing with section 35(1) infringement and the duty to consult.

A. Aboriginal and Treaty Rights and Establishing Proof

On April 17, 1982, Canada became the first country in the world to enshrine the rights of Indigenous peoples in its constitution.[27] Section 35(1) of the *Constitution Act, 1982* states:

> 35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.[28]

There are two rights protected by section 35(1): Aboriginal rights and treaty rights. The source of Aboriginal rights is the historic and continued Indigenous occupation of the lands that make up what is today called Canada.[29] In contrast, treaty rights derive from legally binding and solemn agreements entered into between the Crown and Indigenous Nations.[30] In order to benefit from a section 35(1) right, claimants must *prove* the existence of an Aboriginal or treaty right. As will be described in more detail below, whether a right is proven or asserted has significant effects on the Crown's ability to exercise its purported sovereignty.

Aboriginal and treaty rights are not general rights, but specific to the particular group claiming the right.[31] It is insufficient for a claimant Indigenous Nation to simply assert their existence; the Canadian common law requires that they be recognized either by court declaration or through the process of treaty negotiation. In a legal claim concerning the existence of an Aboriginal right, the burden falls on the claimant to demonstrate that the "activity" is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[32] As the courts have held that the Crown could extinguish Aboriginal rights prior to the constitutionalization of section 35(1) in 1982, the court must then determine whether the right in question has been extinguished.[33] The burden to prove extinguishment falls on the Crown.[34]

Treaties represent the exchange of mutual rights and obligations between Indigenous Nations and the Crown. Thus, the rights enshrined in treaties are contextual and specific to the terms of the respective treaty agreement. However, the courts have held that like Aboriginal rights, the Crown was capable of unilaterally abridging treaty rights prior to 1982.[35] Thus, proof of treaty rights entails the consideration of the existence and content of a treaty agreement and a determination of whether the rights have been extinguished.

The scope and content of the rights enshrined in treaties are delineated using special interpretive principles articulated by the courts. Although these principles of interpretation will be discussed in more detail in Part III, a few introductory points are necessary. In the

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27 Jack Woodward, *Native Law* (Toronto: Carswell, 1982) (loose-leaf), at 5-5.
28 *Constitution Act, 1982, supra* note 15.
29 *R v Van der Peet,* [1996] 2 SCR 507 at para 30 [*Van der Peet*].
30 *R v Sioui*, [1990] 1 SCR 1025.
31 *Van der Peet, supra* note 29 at para 69.
32 *Ibid* at para 46.
33 *Ibid* at para 2.
34 *Sparrow, supra* note 25 at 1099.
35 *Badger, supra* note 14 at para 41.

context of the historical treaties, such as the numbered treaties, written treaty documents do not necessarily represent the full content of the agreements. Treaty terms were often negotiated and agreed to orally, before Indigenous signatories assented to the written agreement.[36] The written agreements were drafted by officials in the Canadian government and were not translated into the languages of signatory nations.[37] Thus, the written text of Treaty 8, described in the Introduction, does not record the full extent of the treaty agreement and must be understood in relation to the oral promises made by the Crown and First Nations.

For the purposes of this paper, it is important to note that the treaty rights of the Prophet River First Nation and Moberly Lake First Nations under Treaty 8 are *proven* rights. In 1910 and 1914, both nations exchanged mutual and binding promises and obligations with Canada. The written treaty agreement and oral promises made by the parties are evidence of these promises. The Treaty 8 rights to hunt, fish, and trap have been affirmed by numerous courts and have been held to be unextinguished.[38] Although this paper will challenge the court's interpretation of the scope of those Treaty 8 rights, and in particular, the meaning of the "extinguishment clause," this does not suggest that the rights themselves are asserted or unproven.

B. *Sparrow* Justification Test and the Duty to Consult and Accommodate

In the seminal *Sparrow* decision, the SCC held that any action, which *prima facie* infringes an Aboriginal right needs to be justified by the Crown.[39] That is, Aboriginal rights serve as limitations on the sovereignty of the Crown. Before moving into the test for justification, the first question to be answered in an action claiming infringement is whether the proposal constitutes a *prima facie* infringement of an Aboriginal right. As will be discussed in more detail later, the court held that this necessarily involves an analysis of the characteristics of the rights at stake, with deference given to the Aboriginal perspective on their meaning.[40]

In determining whether the right has been interfered with to such an extent as to constitute a *prima facie* infringement, the court identified three questions to be asked: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?"[41]

If a *prima facie* infringement is found, the Crown is barred from proceeding with the proposed action unless it can meet the two-part justification test articulated in *Sparrow*. First, the infringement of the Aboriginal right must be in furtherance of a compelling and substantial legislative objective.[42] Second, the infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.[43] The government has a special relationship of trust and responsibility in respect to Aboriginal peoples. A proposed action must be in line with this responsibility.[44] Furthermore, at the second stage of the justification analysis, the court must ask itself additional questions, which depend on the circumstances of the inquiry, including:

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36 *Ibid* at para 52.

37 *Ibid*.

38 See *Badger, supra* note 14; *Prophet River, supra* note 10; *West Moberly First Nations v British Columbia (Chief Inspector of Mines),* 2011 BCCA 247 [*West Moberly*].

39 *Sparrow, supra* note 25 at 1078.

40 *Ibid*.

41 *Ibid* at 1112.

42 *Ibid* at 1113.

43 *Ibid* at 1113-1114.

44 *Ibid* at 1114.

> whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.[45]

In *R v Badger* ("*Badger*"),[46] a case involving three members of Treaty 8 First Nations charged with illegal hunting, the SCC held that infringements of rights guaranteed under Treaty 8 require justification by the two-part *Sparrow* test.[47] Thus, like Aboriginal rights, treaty rights also serve as a limitation on the sovereignty of the Crown. Although the court noted the different origins of Aboriginal and treaty rights, it held that their *sui generis* nature and explicit recognition in section 35(1) of the *Constitution Act, 1982* supported a common approach to infringement.[48]

Notably, the court held that, while Treaty 8 guaranteed the rights to trap, hunt, and fish, Treaty 8 also imposed two limitations on these rights. First, there was a geographic limitation expressed explicitly in the treaty terms: "saving and excepting such tracts as may be required or taken up from time to time."[49] The court wrote that signatories would have understood the expression of their rights as being limited to those geographic areas that had not been put to a visible and incompatible use with the ability to hunt, trap, or fish.[50] Second, the court noted that under the written text of the treaty, the rights to hunt, fish, and trap were subject to "such regulations as may from time to time be made by the Government of the country."[51] The court held that signatories would have understood the treaty as enabling the Crown to limit their treaty rights with regulations passed for the purpose of conserving game.[52]

While Treaty 8 enabled the Crown to pass regulations in respect to the conservation of game, the court in *Badger* held that the Alberta licensing scheme imposed on all First Nations hunters infringed Treaty 8 by going beyond the regulatory power contemplated by the parties at the time the Treaty was entered and thus required justification.[53] However, the court did not discuss whether geographic limitations on the exercise of treaty rights might under certain circumstances also constitute an infringement of treaty rights. That is, might a taking by the Crown that puts land to an incompatible use with the expression of a treaty right infringe section 35(1) of the *Constitution Act, 1982* and require justification under *Sparrow*?

In 2005, the SCC held in *Mikisew Cree First Nation v Canada* ("*Mikisew Cree*")[54] that a Crown taking of land under Treaty 8 does not constitute a *prima facie* infringement of treaty rights requiring justification.[55] Rather, the court held the Aboriginal rights of Treaty 8 First Nations were "surrendered and extinguished, and the Treaty 8 rights […] expressly limited to lands not 'required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.'"[56] Although not every taking will amount to an infringement of Treaty 8, the court in *Mikisew Cree* held that the Crown must

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45 *Ibid* at 1119.
46 *Badger, supra* note 14.
47 *Ibid* at para 73.
48 *Ibid* at para 79.
49 *Ibid* at para 40.
50 *Ibid* at para 58.
51 *Ibid* at para 70.
52 *Ibid*.
53 *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at para 43 [*Haida Nation*].
54 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 [*Mikisew Cree*].
55 *Ibid* at para 31.
56 *Ibid* [emphasis removed].

consult, and where necessary, accommodate an affected Treaty 8 First Nation prior to proceeding with the taking. That is, the court held that the duty to consult framework articulated in *Haida Nation v British Columbia* ("*Haida Nation*")[57] applied to a taking up of land under the treaty.

In the context of unproven but asserted Aboriginal rights, the SCC held in *Haida Nation* that the Crown has a duty to consult and, in some circumstances, accommodate Aboriginal peoples when "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[58] The duty to consult is grounded in the concept of the honour of the Crown. The honour of the Crown requires that, "in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[59] Central to the duty to consult is the goal of reconciliation between Canada and Indigenous Nations.[60]

In *Haida Nation*, the SCC found that the content of the duty to consult exists on a spectrum. That is, the precise requirements will vary depending on the strength of the case supporting the existence of an Aboriginal right and the seriousness of the potential adverse consequences to the right claimed. Where the claim to an Aboriginal right or title is weak and the potential for infringement unlikely, the Crown may only be required to give notice to the impacted group. When a strong *prima facie* claim to a right exists and the potential risk of infringement high, the Crown will be required to undergo "deep" consultation. This may include opportunities for the respective group to participate in the decision-making process.[61]

The court was clear in *Haida Nation*: although the Crown may have a duty to consult in the pre-proof context, "[t]he Crown is not rendered impotent."[62] That is, unlike proven Aboriginal rights, whose infringement must be justified, the duty to consult is a procedural safeguard that does not limit the sovereignty of the Crown. Even at the deep end of the spectrum, the duty to consult does not give an Aboriginal group a right to "a veto over what can be done with land pending final proof of the claim."[63] This is true irrespective of the harm to the asserted right or the strength of the rights claim. Where a strong *prima facie* case exists for a claim to an Aboriginal right and the potential to affect the right significant, the Crown may accommodate "Aboriginal concerns" by, "taking steps to avoid irreparable harm or to minimize the effects of infringement."[64] However, the court was clear that the term "accommodation" in the pre-proof context does not require a duty to agree but is "an attempt to harmonize conflicting interests."[65]

Citing the 1997 decision of the court in *Delgamuukw v British Columbia* ("*Delgamuukw*"),[66] the court acknowledged the only circumstance in which the Crown might be required to obtain consent in the consultation process was in the context of established rights, "and then by no means every case."[67] However, as will be discussed in greater in detail

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57 *Haida Nation, supra* note 53.
58 *Ibid* at para 35.
59 *Ibid* at para 17.
60 *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* 2017 SCC 40 at para 1.
61 *Haida Nation, supra* note 53 at para 44.
62 *Ibid* at para 27.
63 *Ibid* at para 48.
64 *Ibid* at para 47.
65 *Ibid* at para 49.
66 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 [*Delgamuukw*].
67 *Haida Nation*, *supra* note 53 at para 48.

in Part III, in the 2014 seminal *Tsilhqot'in v British Columbia* ("*Tsilhqot'in*")[68] decision, the SCC affirmed that the Crown is *always* required to obtain Indigenous consent prior to an incursion of Aboriginal title.

In *Mikisew Cree*, the SCC extended the *Haida Nation* consultation framework to the taking of lands under Treaty 8. The court held that Treaty 8 required a "process" by which lands could be taken up by the Crown and put to an "incompatible use" with the exercise of treaty rights.[69] The court held, as in *Haida Nation*, that the duty to consult exists on a spectrum. However, as the Crown always has knowledge of the existence of a treaty right, the content of the duty will depend on the adverse impact to the protected treaty rights.[70]

This is significant, as the decision effectively applied the pre-proof consultation framework to the context of Treaty 8 rights, which as described above, ought to be understood as proven or established rights. As in *Haida Nation*, the duty to consult and accommodate under the *Mikisew Cree* framework provides no guarantee that treaty rights will not be infringed. It is a procedural rather than substantive right, and offers First Nations no guarantee a particular outcome will be pursued, irrespective of the potential harm of the taking. The duty only requires the Crown to consider and weigh First Nations concerns in its decision-making, and when necessary, accommodate these concerns to the best extent possible.[71]

Although the court found that individual takings of land do not amount to a *prima facie* infringement of Treaty 8, the court did indicate that the *Sparrow* framework was still relevant to the context of a taking of land. However, the court was vague as to when the test would be triggered, writing:

> If the time comes that in the case of a particular Treaty 8 First Nation 'no meaningful right to hunt' remains over *its* traditional territories, the significance of the oral promise that 'the same means of earning a livelihood would continue after the treaty as existed before it' would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.[72]

Before *Prophet River*, the courts had never described how the *Sparrow* and *Haida Nation* frameworks relate to one another in the context of a taking of lands under a numbered treaty. That is, when consultation under the *Haida Nation* framework is underway or complete, and it is evident that a taking is so great as to risk infringement of treaty rights, does the Crown proceed to the *Sparrow* framework prior to commencing with the taking?

As will be described in Part II below, in discharging the duty to consult and accommodate in the context of Site-C, the Crown was faced with this problem. However, it appears to have decided that meeting its duties did not require a determination of infringement, and if triggered, justification under *Sparrow*.[73] The court in *Prophet River* upheld this decision.

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68 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [*Tsilhqot'in*].

69 *Mikisew Cree, supra* note 54 at para 33.

70 *Ibid* at para 55.

71 *Prophet River, supra* note 10 at para 162.

72 *Mikisew Cree, supra* note 54 at para 48 [emphasis in original].

73 Environmental Assessment Office and Canadian Environmental Assessment Agency, "Federal/Provincial Consultation and Accommodation Report Site-C Clean Energy Project" (2014), online: <https://sitecstatement.files.wordpress.com/2016/02/canadian-environmental-assessment-agency-e28093-british-columbia-environmental-assessment-office-september-7-2014-federalprovincial-consultation-and-accommodation-report-site-c-clean-en1.pdf> archived at <https://perma.cc/7SHC-V3QQ> ["Consultation Report"].

II. *PROPHET RIVER* AND ITS INTERPRETATION OF TREATY 8

In the summer of 2015, the British Columbia Hydro and Power Authority ("BC Hydro") commenced construction of the Site-C Hydroelectric Dam, the largest dam of its kind to be built in decades and the third on the Peace River.[74] The reservoir the dam creates will span 83 kilometers in length, flooding a total of 5,550 hectares of land.[75] The take up of lands by the Crown for the purposes of construction of Site-C is enormous, and the effect of the project on impacted Treaty 8 First Nations will be extraordinary. Both Prophet River First Nation and West Moberly First Nations contend that the project will infringe their treaty rights; yet to date, neither the Crown nor the courts have made a determination of infringement.[76] Rather, the Crown has only discharged the procedural duty to consult.

In this part, the paper will proceed by discussing how the Crown and court applied the jurisprudence described in Part I to the context of Site-C in *Prophet River*. It will contend that the court's decision to exclude a determination of infringement was based on an interpretation of the written text of Treaty 8 as extinguishing Aboriginal rights for lesser treaty rights devoid of their former connection to culture and land. This interpretation, and decision to exclude a determination of infringement from the consultation framework, has allowed the Crown to proceed with what may be an unjustified infringement of Treaty 8.

A. Site-C and the Scope of the Crown's Duty to Consult

In the case of Site-C, the duty to consult and accommodate was triggered and conducted pursuant to the environmental assessment ("EA") process, a necessary condition for the project to proceed to construction.[77] Due to the scale of the project, the EA was carried out by a combined federal and provincial review process, which included the formation of a Joint Review Panel ("JRP"). The JRP was responsible for reviewing the effects of the project, providing recommendations for mitigation strategies and providing a written report of their findings to federal and provincial Ministers of the Environment, who were to then decide whether to approve the project under the respective EA legislation.[78]

Due to the high probability that Site-C would impact the ability of "some First Nations to meaningfully exercise specific Treaty 8 rights in the area," the Crown concluded that consultation would proceed at the "deep level" of the spectrum discussed in *Mikisew Cree* and *Haida Nation*.[79] However, the Crown appears to have found that the terms of Treaty 8 did not necessitate a determination of infringement of treaty rights as part of the EA process. Rather, according to the Crown's Consultation Report ("Consultation Report"), which contains a summary of the consultation processes carried out by the Crown, the goal of consultation with British Columbia First Nations was:

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74 BC Hydro, "Information Sheet Site-C Reservoir," online: <https://www.sitecproject.com/sites/default/files/Site%20C%20Reservoir%20-%20January%202016.pdf> archived at < https://perma.cc/HL9D-J6E8>.

75 *Ibid*.

76 *Prophet River, supra* note 10 at paras 75-78.

77 Minister of the Environment (Canada) & Minister of the Environment (British Columbia), "Report of the Site-C Clean Energy Project BC Hydro Joint Review Panel Report" (2014) at 2, online: <https://www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf> archived at < https://perma.cc/W9Z7-QAW9 > ["JRP Report"].

78 Although both Ministers of the Environment provided approval to the project, this paper will focus on British Columbia's Minister of the Environment's decision to issue an Environmental Certificate to the Site-C project and subsequent judicial review in *Prophet River*.

79 "Consultation Report", *supra* note 73 at 23.

> to discuss the potential for adverse impacts on their treaty rights should the proposed Project proceed, and to develop measures to avoid, mitigate or otherwise accommodate for potential impacts to those rights.[80]

Indeed, in its Terms of Reference, the JRP was not permitted to make recommendations or findings on the nature and scope of Aboriginal or treaty rights or determine whether the project infringed Treaty 8.[81] Instead, the JRP received information from First Nations regarding the location, extent, and exercise of their rights. The panel also accepted information on the manner in which the project would impact these rights, and from this, set out avoidance and mitigation strategies.[82]

On May 1, 2014, the JRP released its near 500-page report to the public. As per its Terms of Reference, it did not make a determination on the issue of treaty infringement.[83] Nonetheless, the panel concluded that the project would "significantly affect the current use of land and resources for traditional purposes by Aboriginal peoples."[84] The JRP wrote that the effects to fish and fish habitat would be "probable, negative, large, irreversible and permanent" and include the probable extirpation of three species of fish and a reduction in fish density. [85] This was found to be likely to cause a significant adverse and irreversible effect on Aboriginal fishing opportunities and practices. Even if Aboriginal groups would still be able to fish in the reservoir, the JRP wrote that "knowledge of fishing sites, preferred species, and cultural attachment to specific sites would be lost."[86]

The JRP further concluded that the Project was likely to cause significant adverse effects on hunting and trapping practices, which could not be mitigated.[87] The panel also wrote that the project would likely cause significant adverse cumulative effects on current uses of lands and resources, such as habitation sites, feather-gathering sites, firewood harvesting sites, drinking water, trails and water routes, and berry and plant gathering sites.[88]

Turning to the costs, demand alternatives, and need for the project, the JRP concluded that while British Columbia will require more energy, BC Hydro had not fully demonstrated the need for the project on the timetable set forth.[89] As to an analysis of alternatives to the project, the Panel noted the availability of a number of supply alternatives immediately capable of adding a large load capacity at economical costs.[90]

In September 2014, the British Columbia Environmental Assessment Office ("EAO") submitted a referral package to the Minister of the Environment to use in making a final decision on whether to issue (or not issue) the Environmental Certificate.[91] Included in this package was the JRP report and the Consultation Report.[92] Additionally, the referral package also contained a letter from Prophet River First Nation outlining their outstanding concerns and issues with the project.[93] Prophet River First Nation pressed

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80 *Ibid* at 29.
81 *Prophet River, supra* note 10 at paras 32-33.
82 "JRP Report", *supra* note 77 at 123.
83 *Ibid* at 338.
84 *Ibid* at iv.
85 *Ibid* at 52.
86 *Ibid* at 102.
87 *Ibid* at 108-109.
88 *Prophet River, supra* note 10 at para 62.
89 "JRP Report", *supra* note 77 at 306.
90 *Ibid* at 298.
91 *Prophet River, supra* note 10 at para 69.
92 *Ibid* at para 70.
93 *Ibid* at para 76.

for a determination of infringement, and it rejected the adequacy of the accommodation and compensation measures put forward by the Crown and BC Hydro:

> The loss of the Peace River Valley would be an *infringement* on the exercise of our Treaty Rights […] It is simply not possible to adequately compensate our community for the permanent destruction of the Peace River Valley.[94]

Nonetheless, on October 14, 2014, the (British Columbia) Minister of the Environment issued the Environmental Certificate to BC Hydro to construct a dam, powerhouse, and related infrastructure on the Peace River for the purposes of the Site-C project.[95] No reasons for the decision were provided.[96]

In the fall of 2015, West Moberly First Nations and Prophet River First Nation brought a petition for judicial review of the Minister's decision to issue the Environmental Certificate. Specifically, the petitioners held that the Minister was constitutionally obligated under section 35(1) of the *Constitution Act, 1982* to determine whether their rights under Treaty 8 would be infringed by the project, and if so, whether the project was justified in accordance with the test set out in *Sparrow*.[97]

B. The *Prophet River* Ruling and Its Interpretation of Treaty 8

The court in *Prophet River* rejected all of the plaintiff's submissions, holding that the Minister of the Environment had no obligation to determine, in issuing the Environmental Certificate, whether the proposed project would infringe Treaty 8.[98] The court held the Minister of the Environment's decision to issue an Environmental Certificate under the *Environmental Assessment Act* ("*EAA*") was broad, discretionary, and based on policy rather than rights.[99] Moreover, the court further reasoned that the *EAA* did not provide the Minister the powers necessary to make a determination on the rights of the parties. That is, they did not have the power to compel testimony, hear legal submissions, or require production of documents.[100]

The only constitutional obligation required of the Minister of the Environment in making their decision appears to have been to ensure that the duty to consult and accommodate had been correctly discharged. Despite the exclusion of a determination of infringement, the court held that the duty to consult at the "deep level of consultation" had been made out.[101] As to whether the taking up of lands amounted to treaty infringement, the court held that the issue was best left to the courts in a separate action.[102] This suggests that the burden lies with the impacted Treaty Nation to ensure that the Crown does not infringe constitutionally enshrined rights.

Although the court cited ministerial discretion and lack of expertise as a basis for its findings, this reasoning is unsatisfactory. In the decision of the BCCA in *West Moberly First Nations v British Columbia* ("*West Moberly*"),[103] the court held that neither discretion nor capacity operate as means of escaping constitutional obligations.[104] Rather, constitutional

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94 *Ibid* at paras 76-77 [emphasis in original].
95 *Ibid* at para 1.
96 *Ibid* at para 118.
97 *Ibid* at para 94.
98 *Ibid* at para 134.
99 *Ibid* at paras 127, 132.
100 *Ibid* at para 130.
101 *Prophet River, supra* note 10 at paras 154-157.
102 *Ibid* at para 133.
103 *West Moberly, supra* note 38.
104 *Ibid* at paras 106-107.

duties lie upstream of administrative decisions, and therefore, when lacking the necessary powers and competencies to meet its obligations to First Nations, "[a] statutory decision maker may well require the assistance or advice of others with relevant expertise, whether from other government ministries or outside consultants."[105] In the case of Site-C, it is unclear why the Minister of the Environment could not have delegated the question of infringement to the JRP, EAO, or another expert body. This paper questions whether the reasoning of *Prophet River* is more likely grounded in the court's interpretation of Treaty 8, and the minimal constitutional limitations that treaty rights place on Crown sovereignty.

Before commencing its assessment of the issues at hand, the court in *Prophet River* provided excerpts from a number of cases dealing with the interpretation of numbered treaties and the Crown's right to take up land under Treaty 8. The court appears to principally have relied on the rulings in *Mikisew Cree*, *Grassy Narrows v Ontario* ("*Grassy Narrows*")[106] and *Keewatin v Ontario* ("*Keewatin*")[107] for its interpretation of Treaty 8 and the process required for the Crown to take up land. Later in his judgment, in discussing whether the Ministers correctly understood the government's duties with respect to treaty rights, the court wrote:

> 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*.
>
> 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.
>
> I am of the view that the government has correctly stated its obligation with respect to the exercise of power to take up land […][108]

Because the court accepted the Consultation Report as a correct interpretation of the Crown's obligations in taking up land under Treaty 8, the Consultation Report is an appropriate place to begin to understand why the court did not require the Crown to make a determination of infringement prior to issuing an Environmental Certificate for the Site-C project. Indeed, reading the Consultation Report along with the cases of *Mikisew Cree, Keewatin,* and *Grassy Narrows,* suggests that the court found that the treaty agreement limited the Crown's obligation with respect to taking up land to a procedural duty to consult and accommodate. This obligation appears to be derived from an understanding of the written text of Treaty 8 as surrendering Aboriginal rights and title for weaker treaty rights devoid of connection to place or culture. In turn, that imposes no substantive limitation on the exercise of Crown sovereignty prior to the taking of land.

As with *Mikisew Cree* and *Grassy Narrows*, the Consultation Report writes that Treaty 8 had the effect of legally surrendering and extinguishing Aboriginal rights and title.[109] As to the impact of extinguishment, the Consultation Report writes that "Treaty 8 had the effect of exchanging all undefined Aboriginal rights in or to the lands described, both

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105 *Ibid*. The court in *Prophet River* distinguished *West Moberly* from the facts before it, finding that *West Moberly* concerned the extent of the duty to consult and accommodate required in respect to a mining project. However, the position of this paper is that the court in *Prophet River* was also concerned with the content of the duty to consult, albeit, whether or not it ought to have included a finding of infringement. Thus, the findings from *West Moberly* are relevant.

106 *Grassy Narrows First Nation v Ontario (Natural Resources),* 2014 SCC 48 [*Grassy Narrows*].

107 *Keewatin v Ontario (Natural Resources),* 2013 ONCA 158 [*Keewatin*].

108 *Prophet River, supra* note 10 at paras 149-151.

109 See *Mikisew Cree, supra* note 54 at para 31; *Grassy Narrows, supra* note 106 at para 2.

surface and subsurface, for the defined rights in the treaty."[110] That is, the Consultation Report suggests Aboriginal and treaty rights are distinct, and by entering Treaty 8, the rights of signatory First Nations changed in nature from their prior "Aboriginal" context.

The Consultation Report's discussion of oral representations made during treaty negotiation further suggests the Crown, and by extension, the court in *Prophet River*, interpreted treaty rights as being different from their former pre-treaty context. As described in Part I, oral representations made during treaty negotiations are critical to understanding the final terms of a treaty agreement. The Consultation Report cites the assurance made by the Superintendent General of Indian affairs in 1899 that the treaty would not lead to any "forced interference with mode of life" and that "the same means of earning a livelihood would continue after the treaty as existed before it."[111] However, the Consultation Report writes that it views these oral promises as consonant with the treaty terms insofar as "mode of life and livelihood" are "hunting, fishing and trapping activities protected by the treaty."[112] Additionally, the Consultation Report notes that, "harvesting activities undertaken for spiritual or cultural purposes" may be protected by Treaty 8.[113] That is, the Crown appears to interpret Treaty 8 as providing general rights to hunt, trap, and fish. Connection of the right to cultural or spiritual practices appears to be an incidental effect rather than defining element of the treaty right.

As described in Part I, Aboriginal rights are not abstract or general, but must necessarily be understood with regard to an Indigenous Nation's perspective on the meaning of the right at stake.[114] However, the Consultation Report suggests a very different interpretation of the meaning of treaty rights. By reason of the extinguishment clause, it appears to interpret treaty rights as being limited to discrete and defined activities, devoid of their prior "Aboriginal" context.

As the rights are no longer "Aboriginal," but limited to hunting, fishing, and trapping, the courts and the Consultation Report suggest that treaty rights import a much higher threshold of harm in order to trigger infringement than would Aboriginal rights. In *Sparrow*, the SCC held that the determination of whether a right has been infringed necessarily begins with an analysis of the characteristics or "incidents of the right at stake."[115] Due to the connection of the right to the culture of an Indigenous Nation, the SCC in *Sparrow* suggests that Aboriginal rights will be infringed at a relatively low level of harm to the right.[116] In contrast, the Consultation Report and cases cited by *Prophet River* write that a taking up of land will *prima facie* infringe a Treaty 8 First Nation's rights when the nation "no longer has a meaningful right to hunt, trap or fish in relation to the territory over which it traditionally hunted, trapped or fished."[117] That is, irrespective of the deleterious impact to the expression of a right in a particular location or cultural context, provided signatories are able to express their rights *somewhere* on their traditional territory, the promises of Treaty 8 remain intact.

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110 "Consultation Report", *supra* note 73 at 28.

111 *Ibid*.

112 *Ibid*.

113 *Ibid*.

114 *Van der Peet*, *supra* note 29 at para 49.

115 *Sparrow*, *supra* note 25 at 1078.

116 In *Sparrow*, the court wrote that the test for *prima facie* infringement involves, "asking whether either the purpose or the effect of the restriction […] unnecessarily infringes the interests protected by the fishing right" (*Ibid* at 1112).

117 *Grassy Narrows*, *supra* note 106 at para 52; "Consultation Report", *supra* note 73 at 29.

This is an enormous threshold of harm that arguably, if met, amounts to an extinguishment of treaty rights, a result prohibited by section 35(1) of the *Constitution Act, 1982*. If the take up of land eventually causes a particular nation to no longer have the ability to "meaningfully" express their treaty rights in their traditional territory, then what rights are they left with?

Prophet River suggests that this interpretation leaves Treaty 8 First Nations the "right" to fish, hunt, and trap on "surrendered" territory until the Crown so chooses to take up the land. Although *Mikisew Cree* held that the Crown must act honourably in the process of taking up land and must consult and accommodate affected First Nations, the ruling of *Prophet River* takes this one step further to find that acting honourably does not necessitate a finding of infringement. Rather, because infringement is triggered at such a high threshold of harm, the ruling arguably suggests that this necessarily circumscribes the scope of the Crown's duties to Treaty Nations. Indeed, before beginning its analysis of the issues at hand, *Prophet River* cites the following paragraph from the *Keewatin* decision as authority for the government's obligations in taking up land under numbered treaties:

> 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 Nation's treaty rights, whereas the latter would not.[118]

Thus, *Prophet River* appears to rely on the assumption that any taking less than what arguably is an extinguishment of the ability to hunt, trap and fish, is within the Crown's right to take up lands under treaty. Indeed, as to why the Minister did not have the jurisdiction to determine infringement the court wrote:

> [*Mikisew Cree*] and *Grassy Narrows* […] 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 […] infringement requires a consideration of the residual position of the aboriginal group as a result of the loss of all land taken up.[119]

The court appears to rely on the assumption that infringement will only occur as a result of cumulative effects resulting in "no meaningful" expression of treaty rights throughout the territory. Thus, the court suggests that any singular taking of land is *prima facie* within the Crown's treaty rights and therefore will not result in an infringement of the treaty.

As discussed in Part I, *Haida Nation* held that Aboriginal groups do not have the ability or right to "veto" a project in the consultation process.[120] In excluding a determination of infringement from the duty to consult, the court in *Prophet River* appears to suggest that like the non-proof context, Crown sovereignty will not be limited in a taking of land. That is, the process of consultation and accommodation appears to preclude substantive limits on Crown sovereignty that would be imported by a finding of infringement as per *Sparrow*. Rather, as it appears that treaty rights are presumed to remain intact provided they can be expressed somewhere on the traditional territory of a Treaty Nation, the relative harm to a treaty right will only impact the level of consultation in the decision-making process, but not force a particular outcome.

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118 *Prophet River, supra* note 10 at para 112.

119 *Ibid* at para 133.

120 *Ibid* at para 48.

C. Implications of the Ruling in *Prophet River*

The case of Site-C is a perfect demonstration of the shortcomings of the duty to consult and accommodate absent a determination of infringement. As the findings of the JRP report detail, Site-C will have substantial and irreversible consequences for West Moberly First Nations and Prophet River First Nation. There is no doubt that in discharging the duty to consult and accommodate, the Crown compiled considerable information on the impacts of the project on the rights of affected Treaty 8 First Nations and attempted to address these effects in the design of the project. However, due to the nature of the project, which involves flooding an entire river valley, the accommodation measures put forward simply cannot prevent the risk of infringement of treaty rights. Indeed, because the duty to consult requires no consensus or agreement of the parties, the Minister was able to approve the project, despite the very real possibility of infringement.

At no point prior to the issuance of the Environmental Certificate, or since commencing construction, has the Crown or a court determined whether the taking of land for the purpose of Site-C will result in an infringement of Treaty 8. The decision in *Prophet River* has thus allowed the Crown to proceed with what may be an unjustified infringement of Treaty 8, a result prohibited by section 35(1) of the *Constitution Act, 1982*. In contrast, had the Crown been required to determine infringement (and to justify the encroachment pursuant to the test in *Sparrow,* if it was determined there was an infringement), there exists a possibility that it would not have been able to do so, given the findings of the JRP on the costs, need, and availability of alternatives to Site-C.

Although West Moberly First Nations, Prophet River First Nation, and other Treaty Nations can attempt to uphold their rights by bringing an action for infringement, this is an enormous and challenging burden for litigants to overcome. No court has ruled on a case where a treaty beneficiary alleges the taking up of land has infringed or is about to infringe a treaty right.[121] Moreover, given the lengthy nature of a court action, it is possible that the project will be even farther into construction by the time a court makes a determination of infringement, causing irrevocable damage to the exercise of treaty rights. While West Moberly First Nations and Prophet River First Nation could apply for interim injunctive relief pending the outcome of their claim, the legal test for such a remedy is considerably weighted against them, and often tips in favour of protecting jobs and government interests.[122]

III. EXPANDING THE DUTY TO CONSULT AND ACCOMMODATE: MOVING FROM A *HAIDA* TO *SPARROW* CONSULTATION FRAMEWORK

The critical problem with the ruling in *Prophet River* is that Treaty 8 did not provide the Crown an unlimited right to take up lands. The story of Treaty 8 relied on by the court rests on a literal interpretation of the text of Treaty 8 that fails to consider the perspective of signatory nations. As such, the interpretation offered by the court in *Prophet River* arguably violates the canons of treaty interpretation and the promises of Treaty 8.

Previous jurisprudence and historical and modern testimony from Treaty 8 signatories indicate that irrespective of the language of the extinguishment clause, Treaty 8 signatories did not view their rights as general guarantees of their ability to hunt, fish, and trap subject to abrogation at the whim of the Crown. Rather, Treaty 8 was entered into to ensure the continuity and way of life of signatory nations in exchange for granting the Crown rights

121 Woodward, *supra* note 27.

122 *Haida Nation, supra* note 53 at para 14.

to use their traditional territories. Accordingly, the Crown cannot take up lands in such a way as would unduly impact the exercise of the treaty rights to hunt, fish, and trap as they exist in relation to the perspective and culture of the respective Treaty 8 First Nation.

To give life to this perspective, this section will demonstrate that when a land taking presents significant risk to Treaty 8 rights, section 35(1) of the *Constitution Act, 1982* requires the Crown to determine whether in fact the taking will result in an infringement of Treaty 8. If infringement will occur, the Crown is then required to obtain consent, and if absent, justify its action using the two-part *Sparrow* test prior to the taking. The logical place for a determination of infringement to occur is during the consultation process.

A. "As Long as the Sun Shall Rise and the River Shall Flow": Treaty Promises and Searching for Common Intent

Mikisew Cree and the Consultation Report, unequivocally state that the written text of Treaty 8 had the effect of surrendering all Aboriginal rights and title. As described earlier, this assumption of surrender appears to ground the court's understanding of treaty rights, and in turn, their role in limiting Crown sovereignty in *Prophet River*.

However, the SCC has rejected a literal interpretation of the texts of historical treaties in determining the meaning of treaty terms.[123] Instead, courts are to choose an interpretation that represents the common intention of both parties, and in doing so, be sensitive to the unique cultural and linguistic differences of the parties. Any ambiguities are to be resolved in favor of Indigenous Nations.[124] Applying the principles of treaty interpretation to the terms of Treaty 8, there is considerable doubt that the extinguishment clause had the legal effect of surrendering rights and title.

Many Treaty 8 First Nations reject the argument that entering Treaty 8 surrendered their Aboriginal rights and title. They argue that their ancestors would not have understood Western notions of land ownership, and even if they did, their own laws would not have permitted the alienation of their traditional land.[125] In *Paulette, Re* ("*Paulette*"),[126] after canvassing the oral promises made by the Crown and Indigenous signatories as well as affidavits from elders who remembered the treaty negotiations, Justice Morrow affirmed this challenge to the legal effect of the surrender clause:

> Treaty 8 and Treaty 11 could not legally terminate Indian land rights. The Indian people did not understand or agree to the terms appearing in the written version of the treaties; only mutually understood promises relating to wild life, annuities, relief and friendship became legally effective commitments.[127]

This discussion of the Aboriginal perspective on the meaning of the extinguishment clause is absent in *Mikisew Cree*, *Keewatin, Grassy Narrows*, the Consultation Report, and in turn, the *Prophet River* judgment. However, as demonstrated by the ruling in *Paulette*, there is doubt that there ever existed a common intention to cede rights and title.

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123 *Marshall, supra* note 23 at paras 11-14.

124 *Ibid* at para 78.

125 Ridington & Ridington, *supra* note 2 at 226-229.

126 *Re Paulette et al and Registrar of Titles (No 2),* 1973 CanLII 1298 (NWTSC) at 30 [*Paulette*]. Justice Morrow's judgment was reversed by the Court of Appeal for the Northwest Territories ("NWTCA") in *Paulette (Re),* 1975 CanLII 945 (NWTCA). The NWTCA did not address Justice Morrow's reasons respecting the legal validity of the extinguishment clause in Treaty 8 and Treaty 11.

127 *Paulette, supra* note 126 at 30.

Rather, *Paulette* suggests that it is possible that the effect of Treaty 8 was to, "confirm [the Crown's] paramount title and, by assuring the Indians that 'their liberty to hunt, trap and fish' was not to be taken away or curtailed, was in effect a form of declaration by the Government of continuing aboriginal rights in the Indians."[128] Thus, Treaty 8 may have simply affirmed the continuation of the existing Aboriginal rights of First Nations signatories in light of assertions of Crown sovereignty. If this is true, then the ruling of *Prophet River*, which rests on assumptions of extinguishment for grounding the scope of the Crowns right to take up lands, sits on shaky ground.

If Aboriginal rights and title continue in the same manner after signing the treaty as before, then the rights of Treaty 8 First Nations and what amounts to infringement of these rights, must necessarily be understood in respect to the perspective of First Nations rights holders. That is, rather than general rights only infringed when they can longer be expressed over a territory, any taking of land that has the impact of unduly limiting the exercise of the rights to hunt, fish, and trap, as understood in regards to the perspective of the First Nation, constitutes a *prima facie* infringement requiring justification.

Even if Treaty 8 did have the legal effect of ceding Aboriginal rights and title, the court in *Prophet River* is still incorrect to suggest that the Crown has an unlimited right to take up lands so long as the treaty rights can be expressed somewhere on the nation's territory. Although the rights to hunt, fish, and trap are explicit terms of Treaty 8, this does not mean that they can be interpreted in a vacuum that ignores the history and culture of a First Nation. As held by the SCC in *R v Marshall* ("*Marshall*"),[129] "even in the context of a treaty document that purports to contain all of the terms […] extrinsic evidence of the historical and cultural context of a treaty may be received […]."[130] Indigenous Nations relied on the authority of their own legal orders to enter treaty agreements. As such, the respective laws and culture of signatory nations are relevant to understand the meaning of treaty terms.[131]

The legal relationship between Dane-zaa hunters and animals makes it difficult to imagine that the rights guaranteed in Treaty 8 were abstract rights to hunt, fish, and trap devoid of connection to culture. In the Dane-zaa creation story (described in brief in the Introduction), Sky Keeper does not give humans dominion over animals; instead, humans and animals exist in mutually beneficial relationships, governed by reciprocal promises and obligations.[132] Before a hunt, a hunter dreams to make contact with the spirit of the animal whose life he wishes to take, by visualizing the point where their trails connect.[133] The meeting of the trails represents an image of creation and the cross, made at the beginning of time by Sky Keeper. When the trail connects, the hunter shares an image of creation with the animal, and the animal and hunter enter into a mutual agreement. The hunter promises to respect the animal's body and share the meat generously. If the animal fulfills its promise and shows up at the place their trails converge in the dream, its spirit will ascend to heaven and return in another body.[134]

Oral accounts of witnesses and participants of Treaty 8 negotiations also suggest that the rights enshrined in Treaty 8 were more than just abstract rights, but a promise of the continuation of the signatory's way of life and culture. In discussing the content of the

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128 *Ibid*.
129 *Marshall, supra* note 23.
130 *Ibid* at para 11.
131 Borrows, *supra* note 7 at 133-134.
132 Ridington & Ridington, *supra* note 2 at 10.
133 *Ibid* at 45-46.
134 *Ibid*.

promises made in treaty negotiation, the court in *Badger* cited the following note made by the Commissioner of Treaty 8:

> the same means of earning a livelihood would continue after the treaty as existed before it […] 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 furbearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.[135]

Indeed, in *West Moberly*, the BCCA rejected British Columbia's argument that Treaty 8 provided a general right to "hunt for food"—and therefore could not be understood in relation to the specific cultural practice of hunting caribou.[136] The court wrote that "while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a 'continuity in traditional patterns of economic activity' and respect for 'traditional patterns of activity and occupation.'"[137]

Moreover, as to the scope of the Crown's right to take up lands, the court in *West Moberly* challenges the notion that the language of the Treaty 8 contemplates the take up of land for a broad litany of uses:

> Just as the right to hunt must be understood as the treaty makers would have understood it, so too must 'taking up' and 'mining' […] 'some white prospectors [who] might stake claims', to the understanding of those making the Treaty, would have been prospectors using pack animals […] That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures.[138]

Indeed, this observation applies equally to the case of Site-C. It is dubious that First Nation signatories in 1914 contemplated the possibility of a hydroelectric project capable of flooding over 5,000 hectares of their traditional territory.

Given these accounts, it is also difficult to imagine that the ancestors of West Moberly First Nations, Prophet River First Nation and other Treaty 8 First Nations perceived their entering the treaty as providing the Crown with an unfettered right to take up their lands, provided they could still hunt, fish, and trap somewhere on their territory. Instead, in entering Treaty 8, First Nations signatories gave the Crown rights to use their traditional territories. This appears to have been agreed to explicitly upon the condition that the lives of the signatory nations would be unchanged after entering the treaty. As such, Treaty 8 does not provide the Crown an unlimited right to take up lands for any purpose it chooses. Rather, the exercise of its rights is necessarily constrained by the promise of continuity of the way of life of Treaty 8 First Nations. Therefore, the Crown cannot take up lands in such a way as would unduly impact the exercise of the treaty rights to hunt, fish, and trap as they exist in relation to the perspective and culture of the respective Treaty 8 Nation.

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135 *Badger, supra* note 14 at para 39 [emphasis removed].

136 *West Moberly, supra* note 38 at para 130.

137 *Ibid* at para 137.

138 *Ibid* at paras 134-135.

While it is possible that the nature of the rights held by signatory First Nations may have changed after the signing of Treaty 8, the treaty rights of both the Crown and First Nations under Treaty 8 are relational and limited by each party's obligations and responsibilities to the other. Indeed, as articulated by the Treaty 8 Tribal Association:

> The Crown's right to take up land 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' […] However, neither party expected the taking up of so much land as to jeopardize the exercise of traditional practices.[139]

The promises of continuity of culture and way of life are legally binding and enshrined in section 35(1) of the *Constitution Act, 1982*. As such, the obligations of the Crown to Treaty 8 First Nations are not analogous to the non-proof context; rather, as will be described below, the rights of Treaty 8 First Nations serve as limitations on Crown sovereignty (as would proven Aboriginal rights). In turn, this imparts a duty on the Crown to determine whether the taking will result in a *prima facie* infringement of Treaty 8.

B. Understanding Treaty Rights as Limitations on Crown Sovereignty

As described above, contrary to the ruling of *Prophet River*, Treaty 8 does not provide the Crown an unfettered right to take up lands. The Crown's treaty right to take up land is constrained by treaty promises to First Nations signatories guaranteeing the continuity of their culture and way of life. The Crown cannot take up lands if doing so will undermine the ability of a Treaty Nation to hunt, fish, and trap, as understood in respect to the significance of those activities to the particular culture of the Treaty 8 Nation.

As the rights of Treaty 8 First Nations are proven rights, enshrined in section 35(1) of the *Constitution Act, 1982,* like Aboriginal rights and title, they represent a limitation on the sovereignty of the Crown. The 2014 decision of the SCC in *Tsilhqot'in* suggests that this limitation imports a requirement of prior consent and, if absent, justification according to the *Sparrow* test. This appears to be the case irrespective of whether the right is Aboriginal or treaty. Although not every taking of land will amount to a *prima facie* infringement of Treaty 8, the requirements articulated in *Tsilhqot'in* constitutionally oblige the Crown to determine whether a taking of land will result in an infringement prior to its approval.

While the justification test articulated in *Sparrow* often becomes relevant in legal proceedings when an Indigenous Nation challenges a Crown action, the courts have also held that section 35(1) rights import constitutional limitations upstream of the exercise of Crown sovereignty. That is, section 35(1) also represents substantive and procedural obligations on the part of the Crown *prior* to an action that may infringe an Aboriginal right.

As described in Part I, in *Haida Nation,* citing the *Delgamuukw* decision, the SCC noted that in the context of established title claims, the Crown may be required to obtain the consent of an Indigenous Nation in discharging the duty to consult on "very serious issues."[140] In this context, the duty to consult appears to import a substantive limitation on Crown sovereignty. That is, the Crown may be required to obtain First Nations consent prior to the incursion of the right.

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139 *Prophet River, supra* note 10 at para 37 [emphasis in original].

140 *Haida Nation*, *supra* note 53 at para 24.

In the watershed *Tsilhqot'in* decision, the court applied this finding further, writing that in the case of an established title claim, consent is *always* required prior to incursion of title.[141] When title is established and consent is absent:

> the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of [section] 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.[142]

While *Tsilhqot'in* was decided in the context of an Aboriginal title claim, there exists a strong logical basis to assume that the substantive requirements it spoke of apply equally to treaty rights. Indeed, in the passage cited above, the court's reasoning is grounded in the distinction between the requirements flowing from Aboriginal title from those required "[where] Aboriginal title is unproven."[143] That is, the procedural and substantive obligations required prior to Crown action appear to derive from the nature of the right as being established, and therefore constitutionalized under section 35(1) of the *Constitution Act, 1982,* rather than as a requirement specific to title rights.

In *Badger*, the court held that by nature of their constitutionalization, treaty and Aboriginal rights import the same limitation on Crown sovereignty. Furthermore, the court wrote that "it is equally if not more important to justify *prima facie* infringements of treaty rights."[144] If consent is understood to flow from a constitutional limitation on Crown sovereignty, as articulated in *Badger*, then it is difficult to imagine why section 35(1) would not import the same requirement on the Crown in the context of treaty rights, including in the take up of land.

In *West Moberly*, a case concerning whether the Crown adequately discharged its duty to consult prior to a taking of land under Treaty 8, the BCCA wrote that "[i]t is a well-established principle that statutory decision makers are required to respect legal and constitutional limits."[145] Although the Crown may have the right to take up land, this right is not unlimited. If a taking of land will *prima facie* infringe Treaty 8, it is reasonable to conclude that, like *Tsilhqot'in*, section 35(1) requires the Crown to obtain First Nations consent prior to the taking. If consent is not obtained, then the Crown is required to meet both the procedural duty to consult and accommodate and the substantive obligation to justify the encroachment according to the *Sparrow* framework. If these requirements are not met, the Crown is then constitutionally barred from continuing with the taking.[146]

All the steps articulated by the court in *Tsilhqot'in* are required to be carried out prior to the proposed Crown action.[147] In order to fulfill the above requirements, the Crown must also be constitutionally obliged to determine whether a taking will result in an infringement of section 35(1). It is an absurd result, incongruent with the ruling in *Tsilhqot'in,* if the Crown could, as suggested by the court in *Prophet River*, escape the requirements of consent and justification imposed by section 35(1) by evading a determination of whether its action will result in a *prima facie* infringement of proven Aboriginal and treaty rights. Indeed, excluding a determination of infringement prior to the taking of land prevents

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141 *Tsilhqot'in*, *supra* note 68 at para 76.
142 *Ibid* at para 103.
143 *Ibid* at para 80.
144 *Badger, supra* note 14 at paras 79-82.
145 *West Moberly*, *supra* note 38 at para 106.
146 *Tsilhqot'in*, *supra* note 68 at para 90.
147 *Ibid*.

Aboriginal groups from benefiting from the higher protections that flow from their proven rights (prior consent, and if absent, justification per the *Sparrow* framework) until their rights may already have been infringed. The case of Site-C is a perfect demonstration of this risk. In excluding a determination of infringement prior to the taking of land, the Crown has proceeded with construction of a project that very well may culminate in the extinguishment of treaty rights in the Peace River Valley without justification.

C. From *Haida* to *Sparrow*: Expanding the Duty to Consult and Accommodate

In *Tsilhqot'in* we are told of the requirements placed on the Crown prior to pursuing an infringement of title. However, we do not know the *process* by which the Crown evaluates whether a proposed project necessitates discharging the requirements of consent and justification. Indeed, this is likely because the court indicates that infringement is triggered at the low threshold of any non-title holder use of the land, and thus, the Crown will always have notice of infringement.[148] However, in the case of a treaty, where mutual rights and obligations have been exchanged, *prima facie* infringement is arguably less obvious. Meeting the procedural and substantive obligations articulated in *Tsilhqot'in* requires the Crown to first engage in an evaluation of the impact of a proposed action and determine whether it triggers the requirement of consent, and if absent, justification. The logical locus for this to occur is during the consultation process.

Although the duty to consult, as articulated in *Haida Nation,* and the justification framework in *Sparrow*, are often treated as separate legal concepts, they do not need to exist in watertight compartments. Indeed, in *Haida Nation*, the court wrote that the duty to consult is best understood as a spectrum, with each case being approached individually:

> Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation […][149]

When it becomes apparent to the Crown that infringement is likely to occur in gathering information during the consultation process, the framework ought to shift from mere mitigation of potential impacts of the action to obtaining the consent of the affected nation. When consent is withheld, the *Sparrow* justification test then would become the operative framework.

Not every taking up of land will push the duty into the realm of consultation requiring consent. In entering Treaty 8, First Nations provided the Crown the right to use their traditional lands under certain circumstances. It follows however, that in taking land under treaty, the Crown needs to include as part of the consultation process a determination of whether a proposed taking is in line with the promises of Treaty 8, that is, whether the taking is likely to result in a *prima facie* infringement.

A determination of *prima facie* infringement is not, as suggested in *Prophet River*, impossible in the context of Treaty 8. As discussed in Part II, the Crown's right to take up land is not unlimited. A singular taking of land will be beyond the Crown's right when doing so impacts the continuity of the life and culture of the Treaty 8 Nation, as reflected by the rights to hunt, fish, and trap.

148 *Ibid* at para 103.

149 *Haida Nation, supra* note 53 at para 45.

Even if the thesis of this paper is incorrect, and treaty rights exist as general rights, only infringed once they can no longer be "meaningfully expressed" over a territory, this does not preclude a determination of infringement in discharging the Crown's duty to consult and accommodate. Rather, as demonstrated by the findings of the JRP report, the impact of the Site-C project is so large that it is possible that the taking will result in Prophet River and Moberly Lake First Nations not being able to "meaningfully" exercise their treaty rights. As such, the effects of the project on Treaty Nations is sufficiently well established to allow the Crown, in discharging its duty to consult and accommodate, to reach a determination as to whether the project will result in a *prima facie* infringement of Treaty 8.

A reasonable concern with the thesis of this paper is the result of having Crown actors perform infringement analyses. That is, can Treaty First Nations rely on the Crown to impartially adjudicate their rights? Indeed, in *Tsilhqot'in*, quoting from *Delgamuukw*, Chief Justice McLachlin noted a broad array of legislative objectives capable of meeting the first step of the Sparrow test for infringement:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.[150]

In the case of Site-C, had the JRP or another Crown body determined infringement, the Minister of Environment arguably could have simply justified the taking as being in the public interest.

Firstly, this paper does not contend that the determination of the rights at stake ought to be conducted unilaterally by the Crown. Treaties represent the exchange of mutual rights. Giving effect to these rights necessarily involves the participation of both the Crown and signatory nations. Even the duty to consult as it stands today involves the participation of affected First Nations in understanding the impact of the rights at stake. This paper sees no reason why the Crown would necessarily determine infringement one-sidedly as part of an expanded consultation framework.

As to the troubling breadth of legislative objectives capable of justifying infringement of section 35(1) rights, it is important to highlight that it is insufficient for the Crown to simply assert a project is in the public interest. The Crown must also meet the second stage of the *Sparrow* analysis and demonstrate that the infringement is consistent with the fiduciary duty owed to First Nations.

That being said, it would be naïve and misleading for this paper to suggest that an expansion of the duty to consult to include a determination of infringement (and where necessary, prior consent) will perfectly protect Treaty 8 rights. The *Sparrow* justification test necessarily provides a framework for the Crown to unilaterally abridge the rights enshrined in section 35(1). This test rests on a problematic assumption of the sovereignty of the Crown and many Indigenous communities may reject the suggestion that the Crown has the inherent power to infringe their rights.

This paper does not wish to dismiss these objections or ignore the problematic assumptions and defects imbued in the common law doctrine of Aboriginal rights. However, in the context of Treaty 8, the consultation framework as it stands today provides little, if any,

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150 *Tsilhqot'in*, *supra* note 68 at para 83 [emphasis removed].

assurance to Treaty 8 Nations that their rights will be protected from Crown infringement. As described in Part II, this weak framework has allowed the Crown to pursue Site-C, which may very well infringe Treaty 8.

Introducing the requirement of a determination of infringement to the duty to consult, and when triggered, consent, provides at least some substantive protection to the rights enshrined in Treaty 8. Moreover, an expanded duty to consult better reflects the promises and nature of Treaty 8 as a binding and solemn agreement between nations.

CONCLUSION

This paper discussed two creation stories. Both depict how people came to inhabit the lands over which they live. Both contain legal obligations and responsibilities governing the way in which people live on the land. Both bring two nations into existence. In the first, Sky Walker creates the land from the earth under the nails of Muskrat from which the Dane-zaa come into being. Amongst other sources of Dane-zaa law, the story contains rules and norms that give guidance to the Dane-zaa on how to live within the world and interact with both living and non-living beings. In the second story, Canada and its citizens come to have rights to live within the Dane-za-nané as a result of the consent given by the Dane-zaa in entering Treaty 8. Like the creation story of the Dane-zaa, the Treaty agreement is a source of law, prescribing legally binding obligations and responsibilities governing the relationship between the Crown and First Nations signatories.[151]

The ruling in *Prophet River* and other Canadian jurisprudence discussed in this paper suggests that these two stories are mutually exclusive, and that the existence of the second story makes the first story irrelevant to the present. That is, in entering of Treaty 8, First Nations signatories ceded all their former rights and title in exchange for limited and defined treaty rights to hunt, fish, and trap. As these rights are general and defined without regard to the respective nation's relationship with the land or culture, in exercising its treaty rights to take up land, the Crown need only discharge a procedural duty to consult and accommodate the affected Treaty 8 Nation, irrespective of the potential harm to the right.

As the current construction of the Site-C project exemplifies, the dichotomous treatment of the two creation stories enables the Crown to use and occupy the Dane-za-nané in an unencumbered manner. As one story is true and the other is fiction, there exists no need to embrace oppositions, complexities or other worldviews in understanding the relationship between the Crown and Treaty 8 First Nations. Indeed, the goal of "reconciliation," underpinning section 35(1) is easily achieved when the Crown's sovereignty is perceived as unlimited and treaty rights are defined and understood in the context of one normative system.[152] Within this framework, "the [duty] to consult and accommodate [does] not operate to merge or reconcile Aboriginal visions of land use (rooted in Aboriginal self-understandings) with Crown visions of land use. Rather, the Crown is imagined as working within and through nothing but its own vision […]."[153]

However, in the words of author Thomas King, "[do] the stories we tell reflect the world as it truly is, or did we simply start off with the wrong story?"[154] Does the creation story of the Crown in the Peace River Valley end the 10,500-year relationship between the

151 Borrows, *supra* note 7 at 24-29.

152 *Mikisew Cree, supra* note 54 at para 1: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."

153 Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39:1 UBC L Rev 139 at 181.

154 King, *supra* note 1 at 26.

Dane-zaa and Dane-za-nané? In Part III, this paper answered this question in the negative. Irrespective of whether or not Treaty 8 had the effect of ceding Aboriginal rights and title, the legal relationship between the Dane-zaa and their territory, depicted by their creation story did not end upon entering Treaty 8. The legal relationship between the Dane-zaa and Dane-zaa-nané is not independent of Treaty 8, but is foundational to both its existence and the meaning of its terms.

Treaty 8 represents inter-societal law. It is an agreement between nations containing mutual obligations and promises made pursuant to distinct legal orders and norms.[155] As such, the meaning of its terms must necessarily be understood in respect to the perspective and laws of its parties. In entering Treaty 8, the Dane-zaa relied on their laws to *consent* to and provide the Crown the right of use of the Dane-za-nané, including what is now referred to as the Peace River Valley of British Columbia. Previous jurisprudence and historical and modern testimony from First Nation signatories and their descendants demonstrate that in exchange for these rights, the Crown guaranteed the Dane-zaa continuity of their way of life and culture, rather than general rights to hunt, fish, and trap, capable of abrogation at the whim of the Crown.

Given these promises, the ruling of *Prophet River* sits on shaky ground. The Crown does not have an unfettered right to take up land circumscribed only by a procedural duty to consult and accommodate. Rather, the Crown can only take up lands when doing so does not infringe the promises made to First Nations signatories, that is, the rights to hunt, fish, and trap, as understood in respect to the significance of those activities to the particular culture and perspective of the Treaty 8 First Nation.

While this paper does not deny that the Crown may have the right to take up lands under Treaty 8, the nature of the promises enshrined in the treaty agreement and the constitutionalization of treaty rights necessitates substantive limitations and obligations on the part of the Crown in taking up land. This paper is to be published in 2018, over 100 years since Prophet River First Nation and Moberly Lake First Nations entered into Treaty 8, 36 years since treaty rights were given constitutional protection, and three years since the Truth and Reconciliation Commission called on the federal and provincial governments to respect and honour treaty promises and "commit to the informed consent of Indigenous peoples before proceeding with economic development projects."[156] Just as consent of the Dane-zaa and other First Nations signatories created Treaty 8 and gave the Crown and Canadians rights to the use of their territory, the infringement of treaty terms for the construction of the Site-C hydroelectric project requires a framework grounded in consent.

155 Borrows, *supra* note 7 at 28-29.

156 Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada Calls to Action" (2015) at 10, online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> archived at < https://perma.cc/3ECN-CACM>.