SITE C | CLEAN ENERGY PROJECT

RESPONSE TO WORKING GROUP AND PUBLIC COMMENTS ON THE SITE C CLEAN ENERGY PROJECT ENVIRONMENTAL IMPACT STATEMENT

Technical Memo

ORAL PROMISES UNDER TREATY 8

MAY 8, 2013

Subject: Oral Promises Under Treaty 8

Purpose

As required by by the federal Minister of Environment and the Executive Director of the BCEAO in section 20 of the EIS Guidelines, BC Hydro has provided its understanding of the Treaty rights held by the Aboriginal groups potentially affected by the Project at Volume 5 Section 34.3.2.1.

BC Hydro understands that oral promises recorded in the reports of the Treaty Commissioners who negotiated Treaty 8 are significant in the interpretation of the Treaty and has taken the oral promises into account in its assessment of the potential impacts to the exercise of Treaty rights by Treaty 8 First Nations. BC Hydro referred to implications of the oral promises at Volume 5 Section 34.3.2.1 page 34-6, lines 3-8. BC Hydro's understanding of their significance is also reflected in a draft memorandum that BC Hydro shared with some of the Treaty 8 First Nations prior to submitting the EIS[1] entitled "Draft Discussion Paper re: Treaty 8 Rights", which included excerpts from the Treaty Commissioners report dated September 22, 1899.

The purpose of the technical memo is to expand on the reference to the oral promises that were considered in the EIS.

Oral Promises Under Treaty 8

In *R. v. Badger*,[2] the Supreme Court of Canada said "the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation."[3]

To assist in interpreting Treaty 8, the courts have, on multiple occasions, cited the report of the Treaty Commissioners who negotiated the treaty, dated September 22, 1899. The report provides, in part::

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the treaty would lead to taxation and enforced military service. …
>
> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. …
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> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to

[1] BC Hydro provided the "Draft Discussion Paper re: Treaty 8 Rights" with the following groups prior to the submission of the EIS: T8TA (Doig River First Nation, Halfway River First Nation, Prophet River First Nation, West Moberly First Nations) - November 8, 2012; Saulteau First Nation - December, 2012; Athabasca Chipewyan First Nation, Dene Tha' First Nation, Mikisew Cree First Nation - December 13, 2012; North Peace Tribal Council (Dene Tha' First Nation, Little Red River Cree First Nation, Tallcree First Nation, Beaver First Nation) - Deccember 17, 2012; McLeod Lake Indian Band - January 3, 2013.
[2] *R. v. Badger*, [1996] 1 SCR 771
[3] *Badger*, at para. 55

> be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
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> We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. …
>
> …It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.

In *Badger*, the Supreme Court of Canada relied on the Commissioners' report, among other sources, to conclude the First Nation signatories understood that land would be taken up and it would preclude their ability to hunt on lands taken up:

> 56 … Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices.
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> …
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> 57 The oral history of the Treaty No. 8 Indians reveals a similar understanding of the treaty promises. Dan McLean, an elder from the Sturgeon Lake Indian Reserve, gave evidence in this trial. He indicated that the understanding of the treaty promise was that Indians were allowed to hunt anytime for food to feed their families. They could hunt on unoccupied Crown land and on abandoned land. If there was no fence on the land, they could hunt, but if there was a fence, they could not hunt there. This testimony is consistent with the oral histories presented by other Treaty No. 8 elders whose stories have been recorded by historians. The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping. See *The Spirit of the Alberta Indian Treaties, supra*, at pp. 92-100.
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> 58 Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting.

In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*,[4] the Supreme Court of Canada relied on the Treaty Commissioners' Report and *Badger*, as follows:[5]

[4] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69

> 25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:
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> > The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.
> >
> > (C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)
>
> As Cory J. explained in *Badger*, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".
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> 26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:
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> > We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]
>
> 27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble" (Mair, at p. 61).

In *Mikisew*, the Court also commented on infringement of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it":[6]

> 48 … 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.

[5] *Mikisew* at paras. 25-27
[6] *Mikisew* at para. 48

Related Comments / Information Requests:

This technical memo provides information related to the following Information Requests:

ab_0001-707	ab_0001-708	ab_0001-711	ab_0004-089	ab_0006-032
ab_0006-033	ab_0006-034	ab_0006-035	ab_0006-037	ab_0006-038
ab_0006-041	ab_0012-036	ab_0004-092		