

BREAKING CASE LAW

*Peace Valley
Landowner
Association v.
British Columbia
(Environment)*



This Issue

The Site C Dam
and the Peace Valley
Landowners Association

Peace Valley Landowner Association v. British Columbia (Environment)
2016 BCCA 377 (CanLII), <http://canlii.ca/t/qtq0t>

The Site C Dam Project will, if it proceeds, be a third dam and hydroelectric generating station on the Peace River in northeastern British Columbia, <https://www.sitecproject.com/about-site-c/project-overview>. The Project requires extensive flooding of occupied lands along the remaining British Columbia area of the Peace River valley, to a point just west of Fort St. John, British Columbia. The Peace Valley Landowners Association is made up of landowners who are impacted by the Project <http://www.peacevalleyland.com/about>. The Association initiated litigation challenging both Federal (*Peace Valley Landowner Association v. Canada (Attorney General)*, 2015 FC 1027 (CanLII) <http://canlii.ca/t/qldlj>) and Provincial (*Peace Valley Landowner Association v. British Columbia (Environment)*, 2015 BCSC 1129 (CanLII), <http://canlii.ca/t/gjw4w>) approvals of the Project. In a decision released on September 15, 2016, and cited as *Peace Valley Landowner Association v. British Columbia (Environment)*, 2016 BCCA 377 (CanLII), the British Columbia Court of Appeal dismissed an appeal from a decision of the British Columbia Supreme Court, dismissing the Association's challenge to the provincial approval.

The Joint Review Panel, which conducted the environmental assessment of the Project, <https://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=63919>, elected to include in its Final Report, <https://www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf>, recommendations subsequently referred to as 'Economic Recommendations'. The Economic Recommendations were recommendations 46 through 49 of the Joint Review Panel's report. These were:

46, referral of Project costs, including energy costs and revenue requirements, to the BC Utilities Commission for detailed examination;

47, that BC Hydro construct a reasonable long-term pricing scenario for electricity and its substitutes and update the associated load forecast, including Liquefied Natural Gas demand, and that this be exposed for public and Commission comment in a BC Utilities Commission hearing, before construction begins;

48, that BC Hydro establish a research and development budget for the resource and engineering characterization of geographically diverse renewable resources, and

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engineering characterization of geographically diverse renewable resources, conservation techniques, the optimal integration of intermittent and firm sources, and climate-induced changes to hydrology, and that an appropriate allowance in its revenue requirements be approved by the BC Utilities Commission; and

49, if Ministers are inclined to proceed, they may wish to consider referring the load forecast and demand side management plan details to the BC Utilities Commission.

It would appear -- from opinions subsequently published in the media by the Joint Review Panel Chairperson -- that the Economic Recommendations revealed concerns about the economic assumptions underlying the Project, (opinion: Site C: Truly awful economics <http://vancouver.sun.com/opinion/opinion-site-c-truly-awful-economics>).

The Executive Director of the provincial Environmental Assessment Office issued a Response to the Joint Review Panel Report (EAO Executive Director's Response to the Joint Review Panel Report for BC Hydro's Site C Clean Energy Project https://a100.gov.bc.ca/appsdata/epic/documents/p371/d38033/1413311107931_jCILJ9pTGxT2LKCwzQRsLGDW5PYyv8ZkhPLHYly2tpNcD2C3cpCQ!-351597226!1413310899891.pdf) expressing the view that the Economic Recommendations were outside of the Panel's mandate, and advising that the recommendations not form a part of the Environmental Assessment Certificate. The matter was then referred to Ministers, who approved the Project without giving reasons. The Economic Recommendations did not form part of the Environmental Assessment Certificate.

The Peace Valley Landowners Association initiated a judicial review, taking the position that there had been a failure by the Ministers to consider the Economic Recommendations, and that this contravened s. 17(3)(a) of the *Environmental Assessment Act*, SBC 2002, c 43, <http://canlii.ca/t/ktj1>. This statute stated that, when a matter is referred to Ministers, the Ministers "must consider the assessment report and any recommendations accompanying the assessment report."

The British Columbia Supreme Court decision selected reasonableness as the applicable standard of review, and assessed the Ministers' decision to issue the Certificate "in the context of the facts and the legal regime in which they were operating." The Court concluded the Director's had not "advised the Ministers that they could or should simply ignore any part of the Report, including the Economic Recommendations"; and that, "[t]here is no basis for concluding that the Ministers did not consider these sections of the Report."

The Peace Valley Landowner Association appealed to the British Columbia Court of Appeal. The Court of Appeal issued a unanimous Judgment on September 15, 2015. The Court began its analysis by affirming that environmental assessment legislation should not be interpreted narrowly: "there is a great deal at stake in environmental law. Environmental legislation is often broadly worded, but there is a real danger that bodies motivated by other agendas (including governments overwhelmed by short-term economic goals) will interpret it narrowly. The courts must not allow environmental legislation to be emasculated through unduly narrow interpretation."

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The Court of Appeal then proceeded to conclude that the Economic Recommendations, although not beyond the mandate of the Panel, were not 'recommendations' within the term as used in ss. 17(2)(b) and 17(3)(a) of the *Environmental Assessment Act*. This led the Court of Appeal to conclude that the Economic Recommendations did not need to be considered by the Ministers when they decided to issue an environmental assessment certificate. The Court of Appeal thereby found it unnecessary, or of no moment, to determine (1) whether the Ministers took the Economic Recommendations into account; or (2) whether the Minister's alleged failure to take into account a mandatory consideration could be characterized as reasonable.

The Peace River Valley Landowners Association may seek leave to appeal to the Supreme Court of Canada. That time is still running as of the date when this comment is written.

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