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December 9, 2009

Ms. Erica Hamilton
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Dear Ms. Hamilton:

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**RE: Project No. 3698565
British Columbia Hydro & Power Authority (BC Hydro)
Acquisition from Teck Metals Ltd. (“Teck”) of an Undivided 1/3
Interest in its Waneta Dam and Associated Assets (the “Waneta
Transaction”)**

Vancouver
Calgary
Yellowknife

We attach the Final Argument of BC Hydro in connection with the above referenced proceeding.

Yours very truly,

LAWSON LUNDELL LLP



Chris W. Sanderson, Q.C.

CWS/tss
Enc.

CC: BCUC Project No. 3698565 Registered Intervenor Distribution

BC Hydro

The Waneta Transaction

FINAL ARGUMENT

December 9, 2009

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I. Introduction

On July 6, 2009, BC Hydro and Power Authority ("**BC Hydro**") filed a Schedule of Expenditures (the "**Filing**") with the British Columbia Utilities Commission ("**BCUC**") in connection with expenditures it anticipates making to complete a proposed transaction with Teck Metals Ltd. and its affiliates ("**Teck**") which would see BC Hydro acquiring an undivided one-third interest in the Waneta Assets and would also see a one-third reduction in the quantity of power that BC Hydro is required to supply to Teck as a result of the Canal Plant Agreement ("**CPA**") amongst BC Hydro, Teck, FortisBC Inc. ("**FortisBC**") and various subsidiaries of Columbia Power Corporation ("**CPC**"¹). BC Hydro seeks the following Order from the BCUC in connection with the Filing:

- (a) It is in the public interest for BC Hydro pursuant to Section 44.2(3)(a) of the Utilities Commission Act² ("**UCA**") to expend \$825 million to acquire a one-third interest in the Waneta Assets and to make expenditures in connection with reasonable transaction costs related thereto as identified in the Filing;
- (b) It is in the public interest to enter into the relationship governing future expenditures provided in the Operating Terms as defined in the Filing.

The Filing contained a Master Term Sheet executed on June 17, 2009 which contemplated definitive agreements being entered into between Teck and BC Hydro and subsequently filed with the BCUC. That occurred on September 23, 2009 when BC Hydro filed an executed Asset Purchase Agreement ("**APA**") which, although binding, is subject to various conditional precedents and would only become operational if those conditions are met and the parties execute final agreements substantially in the form of the following draft agreements filed with the APA:

- (a) CPA Amending Agreement;
- (b) Co-Ownership and Operating Agreement;
- (c) Reciprocal Security Agreement;
- (d) Mortgage;
- (e) Assignment Agreement;
- (f) Power Rights Agreement;
- (g) Transmission Right-of-Way Agreement; and
- (h) Road Right-of-Way Agreement.

¹ The subsidiaries are: Brilliant Power Corporation, Brilliant Expansion Power Corporation and Waneta Expansion Power Corporation.

² R.S.B.C. 1996, c. 473

Taken together, the package of documents filed on September 23, 2009 would implement the Transaction substantially in the form it was described in the Master Term Sheet filed with the BCUC on July 6, 2009.

II. Overview of the Benefits of the Transaction

The Transaction offers an extraordinary opportunity to obtain an alternative source of new generation for the BC Hydro system in a manner that is cost effective in the broadest sense of that term. Specifically, the Transaction provides BC Hydro with a resource that is:

- clean or renewable;
- within British Columbia;
- existing and therefore implies no new development or additional environmental or social impacts;
- already being scheduled by BC Hydro and thus can be used optimally within BC Hydro's system;
- attractively priced;
- a long term resource not limited by a contractual term;
- safe and reliable with a proven track record; and
- owned by a counterparty with a long history of successful operation in British Columbia and cooperative dealings with BC Hydro.

These benefits are set out in Table 6-6 of Exhibit B-1 which demonstrates that Waneta electricity compares favourably with other potential resources in these and all other relevant aspects.

III. The Acquisition of Low Cost Power

A. The July 2009 Perspective

The arrangements contemplated in the Term Sheet included in the Filing in July 2009 are complex. That complexity arises from the historical provenance of the Waneta Dam and of BC Hydro's involvement with a number of hydro electric generating facilities in the Columbia Valley. However, from a ratepayer perspective, the opportunity that the Transaction represents is straightforward.

The proposed Transaction would permit BC Hydro to acquire on a firm basis a significant block of existing domestic generation which is currently relied upon by no utility for planning

purposes³ and which has been typically exported from the Province on a short-term basis⁴. This power will assist in meeting BC Hydro's ongoing customer needs and is being acquired at a price which is well below the cost of obtaining firm power from any other source available to BC Hydro within the timeframe in which the power will be required.

Teck has owned and operated the Waneta Dam for more than 50 years and has benefited from its ability to market in the United States energy surplus to the needs of its smelter by virtue of its unique interconnection with the transmission system of the Bonneville Power Administration. The potential for BC Hydro acquiring Teck's power surplus has been raised in front of and by the BCUC.⁵ However, until late 2008, the issue was moot because the power was not for sale on a firm long-term basis.⁶ This situation changed as a result of the impact of the world economic recession on Teck's balance sheet. Teck was forced by its financial circumstances to seek ways to monetize the value of some of its assets⁷. Teck responded to this pressure by looking to dispose of non core assets that were not fully valued by the market and identified its surplus power from Waneta as being one such asset.⁸

Teck originally approached BC Hydro and other potential purchasers⁹ with a proposal to enter into a long-term energy purchase agreement ("**EPA**") pursuant to which the buyer would be entitled to a long-term source of energy for a fixed prepayment. This "prepaid EPA" approach was discussed between BC Hydro and Teck but rejected by BC Hydro because of concerns with respect to the enforcement of Teck's supply obligation in the event of its insolvency during the term of the agreement. Instead, BC Hydro proposed that it acquire a direct interest in the facility itself¹⁰ and the Master Term Sheet and subsequently the filed agreements were developed in consequence.

Thus, the economic conditions created an opportunity for BC Hydro and its ratepayers, first, to have access to a block of domestic power which had previously been unavailable to them on a firm basis and second, to acquire an asset, as opposed to power, so that the output of the facility would be available to BC Hydro and its ratepayers for generations to come. From the perspective of BC Hydro and its ratepayers, this opportunity serves BC Hydro's most fundamental objective of providing reliable power for generations.

³ See the responses to FortisBC Information Responses ("**IR**") 1.2.2 and 1.5.2.

⁴ See the response to BCUC IR 1.11.2.4 and FortisBC IR 1.2.2.

⁵ See BCUC January 29, 2008 Decision regarding the Electricity Purchase Agreement between BC Hydro and Alcan Inc. (the "**Alcan Decision**"), p. 78.

⁶ Ibid., also see response to FortisBC IR 1.4.2.2.

⁷ Filing, Exhibit B-1, Section 6.5.1, p. 6-14, Lines 6-8.

⁸ See the response to BCSEA IR 1.4.1.

⁹ See the responses to BCUC IRs 1.19.3 and 2.32.1.

¹⁰ Filing, Exhibit B-1, Section 6.5.1, p. 6-14 Line 12-17.

1 Securing long term sources of generation is important to BC Hydro and its ratepayers but a
 2 particular generation source will only be attractive to ratepayers at appropriate prices. The
 3 Waneta Transaction is unquestionably priced in a manner that should be attractive to
 4 ratepayers. When the Filing was made, the levelized unit energy cost was calculated to be
 5 \$63.1/MWh.¹¹ As set out in depth in the economic analysis contained in Section 6.2 of the
 6 Filing, the Effective Adjusted Price (“EAP”) of the electricity from Waneta was identified to be
 7 substantially less than any new alternative source of power that is available in the near to
 8 medium term and compares favourably to the recently approved¹² acquisition of power from
 9 Alcan. This very attractive pricing is confirmed when the Transaction is looked at as part of an
 10 optimum sequence portfolio analysis as elaborated in Section 6.2.2 and augmented in response
 11 to CECBC IR 1.3.9.2 (Exhibit B-13).

12 Thus, from the perspective of BC Hydro and its ratepayers in July of 2009, the Transaction was
 13 undoubtedly attractive based on its economic value to BC Hydro and its customers, as
 14 compared to any identified alternatives. There has been no evidence filed in this proceeding
 15 that takes issue with this proposition.

16 The Alcan Decision provided direction with respect to the consideration of opportunity cost in
 17 the context of contracts filed pursuant to Section 71 of Part V of the UCA. While the proposed
 18 Waneta Transaction contracts have been filed under Section 44.2 of Part III of the UCA, BC
 19 Hydro does not believe it is necessary to distinguish the considerations which apply to the public
 20 interest under Section 44.2 and those which were applied by the BCUC in the Alcan Decision
 21 under Section 71. This is not to say that there may not be differences in the public interest
 22 under those two sections in some circumstances. It is to say that, in this case, no such
 23 distinction needs to be made and BC Hydro believes that the evidence clearly demonstrates
 24 that the consideration of opportunity cost required by the BCUC at pages 18 to 21 of the Alcan
 25 Decision in respect of the public interest under Section 71 has been more than met in this case
 26 in the context of Section 44.2.

27 In particular, as elaborated in Section 6.5 of the Filing, BC Hydro’s whole approach to its
 28 negotiations with Teck was significantly influenced by its consideration of Teck’s alternatives.
 29 BC Hydro retained RBC Capital Markets to assist it in assessing Teck’s opportunity costs and
 30 BC Hydro is confident that the ultimate price struck in the APA reflects full consideration of the
 31 opportunity costs of Teck. There is no evidence that would provide any support for the
 32 suggestion that Teck would have been prepared to sell the interest acquired by BC Hydro for an
 33 amount less than \$825 million.

¹¹ Filing, p. 5-15, Line 7.

¹² See Alcan Decision.

B. The September 23, 2009 Perspective

1 Since July 2009, there have been two significant developments which are relevant to
 2 determining the attractiveness of the pricing of the Waneta Transaction and its value to BC
 3 Hydro and its customers. The first is the completion of the due diligence that BC Hydro
 4 undertook prior to signing the APA on September 23, 2009. The second was the release of the
 5 BCUC's decision of July 27, 2009 with respect to BC Hydro's Long Term Acquisition Plan (the
 6 "**2008 LTAP**") and the subsequent issuance of Direction No. 2¹³ (the "**Burrard Direction**") to the
 7 BCUC in connection with the Burrard Generating Station ("**Burrard**"). The next two sections
 8 discuss each of these developments.

(1) Due Diligence

9 BC Hydro undertook a significant due diligence process in connection with the acquisition of an
 10 interest in the Waneta facilities. The most significant products of that process are two
 11 independently prepared reports with respect to the engineering and environmental aspects of
 12 the facility.

(i) Environmental

13 One major external report with respect to due diligence concerned environmental issues and
 14 was undertaken by Golder Associates (the "**Golder Report**"). The result of their work is found
 15 in Exhibit B-11-5. The Golder Report concludes as follows:

16 "A review of environmental and public safety issues relating to the Waneta Dam
 17 and Generation Station and related assets demonstrate a generally well-run
 18 facility where basic issues are managed and response to incidents lead to
 19 ongoing improvements in management practices. The risks associated with the
 20 Waneta Dam assets are similar to those facing other utilities and dam owners in
 21 the Columbia basin, and have been addressed to a reasonable level to date."

22 The Golder Report goes on to identify a list of low to moderately high-risk consequence
 23 environment and public safety issues applying the criteria of the BC Hydro environmental risk
 24 matrix. These issues are typical of those associated with other generation facilities in the
 25 Columbia River. None were directly referenced in any Intervenor evidence. Some of these
 26 risks are relevant to concerns raised by First Nation Intervenor and will be considered below
 27 under the First Nation section of this Argument.

¹³ Direction No. 2 to the British Columbia Utilities Commission, O.I.C 565, October 28, 2009 (*Utilities Commission Act*).

(ii) *Engineering*

The other major external report concerned engineering issues. The Kohn Crippen Berger Report (“**KCB Report**”) filed at Exhibit B-11-4 is a comprehensive study by a leading engineering firm of the state of the Waneta facilities. The assessment performed by Kohn Crippen Berger included:

- an assessment of the condition of the major station components – dam, spillway, intake, powerhouse, switchyard, major electrical and mechanical equipment;
- an assessment of the condition of the Transmission Line 71;
- a review of the maintenance history, budgets and plans for major capital expenditures;
- review of the dam safety consequences category, significant issues (dam stability, seismic design aspects, capacity to pass extreme floods) and dam safety practices; and
- identification of potentially significant (cost being greater than \$1 million) funding gaps in risk issues.

Based on this extensive analysis, the KCB Report identified eight potential issues or risks that could cost in excess of \$1 million to address which had not previously been identified in the operating and maintenance budgets which had been presented to BC Hydro. These are set out at pages 3 to 5 of the KCB Report. BC Hydro employed this information to update its estimate of the future costs that would be associated with owning an undivided one-third interest in the Waneta facility under the proposed Terms of the Co-Ownership and Operating Agreement and employed that information to update the information contained in the Filing and in the IRs to BCUC IR Round 1 filed with the BCUC in August 2009. The following IR responses update future facility cost estimate based on the result of the KCB Report:

- the supplemental response to BCUC IR 1.13.3 (Exhibit B-2-3); and
- the response to BCUC IR 2.34.2.2.

(2) The Cost Implication of the Due Diligence Process

The due diligence process permitted BC Hydro to update its calculation of the unit energy cost of the Waneta electricity. Taking into account all information obtained from the due diligence process the levelized unit energy cost is now estimated to be \$64.08 MWh at an 8% discount rate.¹⁴ This cost remains attractive relative to BC Hydro’s alternatives.

¹⁴ See Exhibit B-13, Response to BCUC IR 2.34.2.2 at p. 4 of 4.

C. The 2008 LTAP Decision and the Burrard Direction

1 The Filing was prepared on the basis that the assumptions of BC Hydro's 2008 LTAP would be
 2 accepted by the BCUC for the purposes of future planning. This assumption was largely borne
 3 out in the BCUC's 2008 LTAP decision for the period most relevant to the Waneta Transaction
 4 with the notable exception of the appropriate level of reliance on the energy capability of Burrard
 5 for planning purposes. For the purposes of the Filing, BC Hydro assumed 3,000 GWh of energy
 6 would be available annually from Burrard. Since the BCUC's decision with respect to the 2008
 7 LTAP, the Provincial government has made clear that in fact no energy is to be assumed to be
 8 available from Burrard for BC Hydro's planning purposes.¹⁵

9 Thus, the effect of the Burrard Direction is that the load resource balances identified in Chapter
 10 4 of the Filing understate the need for all years in the planning horizon by 3,000 GWh per year.
 11 The effect of that change makes the need for new firm energy resources that much clearer and
 12 thus the attractiveness of Waneta to fill that gap that much greater. The firm energy shortfall
 13 which was identified in Chapter 4 (Table 4-2) as starting in F2014 would advance to the very
 14 beginning of the planning horizon in F2013 after incorporating the effect of the Burrard Direction.

15 In summary, the Waneta Transaction is a unique opportunity for BC Hydro which makes
 16 available a source of power that has been unavailable to it in the past and may never be
 17 available to it again on a firm and reliable basis. Teck had the opportunity to sell the interest in
 18 the Waneta Assets to other parties and, if the Transaction does not close, will have that
 19 opportunity again or can decide to retain the interest for itself. BC Hydro respectfully submits
 20 that these circumstances demand that BC Hydro take advantage of this opportunity as
 21 expeditiously as possible.

22 In the course of these proceedings, no party has identified any issue which casts doubt on this
 23 fundamental conclusion. That is, in the approximately 850 IRs addressed as part of the written
 24 process and in the thousands of pages of evidence filed by First Nation Intervenor, there has
 25 been no issue identified which would suggest that the interests of BC Hydro ratepayers do not
 26 demand that BC Hydro proceed with the Transaction. The result is that the Transaction as
 27 proposed appears to have attracted the support of all of BC Hydro's ratepayer groups.¹⁶ It is
 28 those groups that the UCA requires the BCUC to primarily consider in the context of the
 29 discretion that it is being asked to exercise in this case.¹⁷ In addition, BC Hydro's assertion in
 30 Chapter 6 of the Filing that the proposed Transaction serves significant other aspects of the
 31 public interest has not attracted contrary evidence or indeed extensive questioning from
 32 intervenors in this proceeding.

¹⁵ See the Burrard Direction.

¹⁶ See Exhibit C1-7, C13-5, and C16-3.

¹⁷ See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 at para. 7; and BCUC's decision on BC Hydro's 2006 LTEPA with Alcan, p. 24.

IV. Other Aspects of the Public Interest

A. Non-Monetary Issues Discussed in Chapter 6 of the Filing

BC Hydro has set out the reasons it believes that the Waneta Transaction serves the other aspects of the public interest that are traditionally considered by the BCUC in the context of public utility expenditures in Section 6.4 of the Filing. None of the IRs or filed evidence has shed any doubt on the conclusion that the Waneta Transaction is in the public interest from all of the perspectives listed in Section 6.4.

The proposed Transaction meets a variety of other government policy objectives as set out legislatively and in successive energy policies. The Filing discusses each of those objectives in turn and it is clear that the Transaction serves all of the objectives that are implicated by it. The bulk of Section 6.4 of the Filing will not be repeated here but BC Hydro wishes to draw attention to one of the issues covered there relating to the environment and First Nations.

Pursuant to Special Direction 10¹⁸, BC Hydro is required to attain self-sufficiency by 2016 and to have the ability to exceed its supply obligations by at least 3,000 GWh as soon as practicable but no later than 2026. This Transaction allows BC Hydro to take a significant step towards that objective without imposing any additional costs or impacts on the environment. Equally important, this step can be taken without derogating from any interests of First Nations. Meeting the Province's self-sufficiency objectives with new construction necessarily entails impacts on others. The opportunity to meet those objectives without those impacts demanded BC Hydro's attention and, in its respectful submission, demands similar attention from the BCUC.

B. Non-Monetary Issues raised by Intervenors Evidence or Information Requests

It is BC Hydro's respectful submission that the evidence and IRs raised only four potentially significant non-monetary issues. Two of these relate to specific aspects of the public interest, namely, the adequacy of consultation with First Nations in connection with the Transaction and the impact of the Transaction on other parties to the CPA. The third, involving impacts on the local community, would only be relevant to the BCUC's determination of the public interest if there is positive evidence that adverse impacts on these interests would result from the Transaction, which evidence is entirely lacking. The fourth issue relates to the form of Order that the BCUC should issue if it determines the Transaction is in the public interest. It is a question of form, not substance. Each of these outstanding issues will be addressed below:

¹⁸ Special Direction No. 10 to the British Columbia Utilities Commission, O.I.C. 508, June 25, 2007 (*Utilities Commission Act*).

V. First Nation Issues

A. Introduction

BC Hydro's approach to First Nation consultation in connection with the Transaction has been designed to conform to the requirements imposed by the decision of the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia Utilities Commission* (2009) BCCA 67 (the "**CSTC Decision**"). Leave to appeal that decision has been granted by the Supreme Court of Canada and accordingly, the ultimate status of those requirements will remain unknown for some time to come. Nevertheless, BC Hydro has developed an approach that it believes is fully compliant with the broadest reasonable interpretation of the Court of Appeal's decision. The result is that maintaining the honour of the Crown has been a significant consideration in all aspects of BC Hydro decision making with respect to the Transaction. BC Hydro has created a complete log of all of its dealings with First Nations in connection with the Transaction and a transparent record of its decision making processes.

The extensive record that has resulted from this approach is now before the BCUC.¹⁹ This record provides both First Nations and the BCUC with the ability to assess BC Hydro's conduct in connection with all aspects of its decision making process.

BC Hydro submits that the broadest possible interpretation of the CSTC Decision and the decision in the companion case of *Kwikwetlem First Nation vs British Columbia Transmission Company et. al.* (2009) BCCA 69 (the "**Kwikwetlem Decision**") would suggest that in this proceeding there are two decisions that require the BCUC to focus on the nature and extent of BC Hydro's consultation with First Nations. The first is BC Hydro's decision to sign the APA. Under this broad formulation, the BCUC's first duty would be to review BC Hydro's decision and determine whether BC Hydro's conclusion that signing the APA was consistent with maintaining the honour of the Crown was reasonable. The second decision would be the determination that the BCUC itself must make under Section 44.2 of the UCA. In contrast to the first decision, the BCUC's role *vis-à-vis* this decision would not one of reviewer, but instead one of decision-maker in that it would have to satisfy itself that adequate Crown consultation has taken place up to the point of the BCUC's decision. While BC Hydro is not aware of any decision, before or after the CSTC and Kwikwetlem Decisions, that has held that a commercial decision of the sort that BC Hydro took in signing the APA attracts the duty to consult, nevertheless, BC Hydro has assumed such a duty exists for the purposes of this argument and the balance of this argument proceeds on that assumption. As set out below, even with this expansive characterization of its obligations, BC Hydro has maintained the honour of the Crown at each step of the process in connection with the Transaction.

¹⁹ See Exhibit B-20, Updated First Nations Consultation Report dated November 26, 2009 ("**Updated ARN Report**").

1 With respect to the first decision, BC Hydro engaged in a reasonable consultation and, if
 2 appropriate, accommodation process in determining whether to enter the APA and therefore the
 3 decision resulting from that process was honourable. In respect of the second decision, the
 4 BCUC must review the Updated ARN Report and decide whether consultation to date has been
 5 adequate to allow the BCUC to accept the expenditures under Section 44.2 as being in the
 6 public interest and allow the Transaction to proceed. In doing so, BC Hydro submits the BCUC
 7 must consider not only the direct consultation process engaged by BC Hydro as evidenced in
 8 BC Hydro's Updated ARN Report, but also the BCUC's hearing process itself. BC Hydro
 9 submits that together these two complementary venues have provided First Nations with all the
 10 requirements of a reasonable and adequate consultation process and as such, approval of the
 11 expenditures under Section 44.2 of the UCA is in the public interest as defined in the CSTC
 12 Decision.

13 BC Hydro does not believe that in the circumstances of this case, consideration of grievances
 14 that any First Nation may have with the past conduct of the Crown is required. Where there is
 15 no nexus of any kind between the Crown decision being considered and the continuation of the
 16 conduct giving rise or contributing to their past grievances no consultation obligation can arise.
 17 Here, no such nexus has been established, despite ample opportunity and encouragement
 18 being offered to affected First Nations to do so.

19 BC Hydro is aware that some First Nations seek to read the CSTC Decision more broadly and
 20 suggest the fact that the Crown is contemplating a decision that would result in it receiving a
 21 benefit from activities allegedly authorized without adequate consultation always triggers an
 22 obligation to consult with respect to grievances arising from the initial activities. That reading is
 23 overbroad. Nevertheless, BC Hydro did permit all affected First Nations to bring forward their
 24 historical grievances to it during the consultation process as they have also done before the
 25 BCUC. Moreover, BC Hydro has agreed to accommodate affected First Nations with respect to
 26 the construction and operation of the Waneta Assets by offering to serve as a conduit for those
 27 concerns to the Operating Committee.

28 In summary, BC Hydro respectfully submits that it was under no obligation to consult or
 29 accommodate with respect to past grievances, but nevertheless did so, thereby going beyond
 30 what was necessary to preserve the honour of the Crown.

B. BC Hydro's Decision to Enter the APA

(1) The BCUC's Role *vis-à-vis* BC Hydro's Decision to Enter the APA

31 The first decision requiring the BCUC's consideration is whether BC Hydro's conclusion that its
 32 process in determining whether to sign the APA maintained the honour of the Crown as it
 33 relates to efforts to seek reconciliation with Aboriginal peoples was reasonable.

34 On September 21, 2009, BC Hydro determined that signing the APA was consistent with
 35 maintaining the honour of the Crown. In reaching this determination, BC Hydro reviewed and

relied upon the information and conclusions in a report produced by the Aboriginal Relations and Negotiations (“ARN”) group within BC Hydro (the “**Preliminary ARN Report**”).²⁰ The Preliminary ARN Report (1) identified all potentially affected First Nations, (2) assessed the strength of the claim and the seriousness of any potential impacts, (3) determined an appropriate level of consultation for each potentially affected First Nation and (4) reached conclusions on the adequacy of consultation up to that point. It is based on these determinations in the Preliminary ARN Report that BC Hydro’s Executive concluded that signing the APA would be consistent with maintaining the honour of the Crown.

For the purpose of this proceeding, BC Hydro accepts that by seeking the BCUC’s acceptance that the expenditures contemplated in the Waneta Transaction are in the public interest, the jurisdiction of the BCUC to consider the adequacy of consultation was invoked. As such, where a dispute arises as to the adequacy of the consultation undertaken such as in the present case, the BCUC has a duty to review BC Hydro’s decision and determine whether the honour of the Crown was been maintained in this regard:

The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation.

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)
(“Carrier Sekani”), 2009 BCCA 67 at para. 54; leave to appeal to the SCC
granted in [2009] S.C.C.A. No. 167.

BC Hydro submits that the BCUC’s role *vis-à-vis* this decision is one of reviewer. The BCUC is being called on by participants in the hearing process to review the decision taken by BC Hydro to determine if it was honourable. The Supreme Court of Canada has held that an honourable process does not have to be perfect, what is required is that the process be reasonable:

The [consultation] process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. [...]

***Haida Nation v. British Columbia (Minister of Forests)* (“Haida”),**
[2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33, para. 62.

Since the Supreme Court of Canada’s decision in *Dunsmuir v. New Brunswick* (“**Dunsmuir**”), [2008] 1 S.C.R. 190, 2008 SCC 9 at para. 62, the standard of review of reasonableness is now the most deferential standard at common law. The Supreme Court of Canada has defined reasonableness as:

²⁰ See Exhibit B-11-2, Appendix A.

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

***Dunsmuir supra*, at para. 47.**

While the above excerpts speak to the deference owed by a court to a tribunal's decision, BC Hydro submits that the same type of deference is owed by the BCUC to BC Hydro in respect of its decision to sign the APA. The decision is squarely within BC Hydro's authority and its enabling legislation²¹. The subject matter of the decision, whether consultation has been sufficient to permit proceeding with the Transaction in the manner contemplated in the APA, is a question that BC Hydro will be frequently called on to make and is fact dependent. These elements further support that deference is owed to BC Hydro in respect of its decision. In light of the deference owed, the BCUC's role is not to step into the shoes of BC Hydro and assess what it would have done had it been responsible for deciding whether to sign the APA. Instead, the BCUC must review the steps taken by BC Hydro to determine whether those steps together, on the whole, formed a process that was reasonable. If so, BC Hydro's conclusion that entering into the APA was honourable should not be disturbed.

BC Hydro recognizes that embedded in its decision that consultation was adequate are determinations in respect of the appropriate level of consultation required up to that point in the Transaction. Again, the Supreme Court has provided guidance on the appropriate level of review in respect of these determinations:

Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

***Haida, supra*, para. 63.**

Therefore, within its review of the process engaged by BC Hydro, the BCUC will also have to determine whether BC Hydro correctly assessed the level of consultation required in respect of

²¹ See *Hydro and Power Authority Act*, R.S.B.C. 1986, Chapter 212, section 12.

each First Nation. It is only once this determination is made that the BCUC will then be able to proceed to determine whether consultation undertaken by BC Hydro was adequate to meet the required level and adequately discharge the Crown's duty to consult.

(2) Consultation was Adequate to Enable BC Hydro to determine that Signing the APA was Honourable

(i) Structure of the Transaction Supports Crown Consultation

From the infancy of the Transaction, BC Hydro's approach has been to ensure that at each step of the Transaction, it has had and continues to have the necessary flexibility to withdraw from the Transaction if the honour of the Crown requires it to do so.²² To start, BC Hydro successfully negotiated with Teck to create a non-binding Term Sheet despite the high level of detail within it. This ensured that BC Hydro could provide First Nations with significant information concerning the Transaction early in the process before binding obligations on BC Hydro came into existence. It also ensured that an appropriate balance was struck between the need of the parties to the Transaction for commercial certainty and the need for appropriate consultation with affected First Nations. The structure BC Hydro identified for the Transaction ensured that five months (June 17 to November 18, 2009) was available to accommodate the consultation process.

BC Hydro was again mindful of its duty to First Nations when contemplating entering a phase of the Transaction that was legally binding. This is reflected in the following conditions precedent that must be satisfied before BC Hydro is required to complete the Transaction:

- The BCUC's acceptance of the expenditures in respect of the Transaction under Section 44.2 of the UCA; and
- No event or circumstance occurring that gives rise to reasonable grounds on which to determine that completion of the Transaction would be inconsistent with maintaining the honour of the Crown as it relates to efforts to seek reconciliation in connection with Aboriginal interests of which BC Hydro is aware at the time of closing.

The importance of these conditions as accommodation should not be overlooked. The inclusion of a condition requiring the BCUC's approval of the expenditures ensures that if the BCUC does not accept the Transaction is in the public interest because consultation has been inadequate, BC Hydro can refuse to complete the Transaction.

The second condition provides assurance that BC Hydro can withdraw from the Transaction if completing it would be inconsistent with the honour of the Crown. BC Hydro felt this condition was necessary because commercial realities require a period of time between the release of the

²² See Preliminary ARN Report, p. 1.

BCUC's decision and the completion date. Moreover, the BCUC's decision will be based on information available to it up to the close of arguments, which will be some two months before the anticipated closing. BC Hydro recognizes that new information regarding First Nations' concerns may come to light during this period. As the Crown, BC Hydro will have to make a final decision on the adequacy of consultation before deciding whether to complete the Transaction. In contemplation of this determination, BC Hydro has secured its ability to withdraw from the Transaction if it is of the opinion that completing the Transaction would not be honourable.

Any new information received by BC Hydro after its final submission to the BCUC but prior to completion will inform BC Hydro's decision on whether to complete the Transaction. Thus, while the BCUC's supervisory role ends with the release of its decision, BC Hydro's duty to act honourably nonetheless continues.

(ii) *Initial Identification of First Nations*

BC Hydro's consultation process started at the infancy of the Transaction. Prior to signing the non-binding Term Sheet on June 17, 2009, BC Hydro gathered all information at its disposal to broadly identify any First Nation that might have had an interest in the vicinity of the Waneta Dam and the immediate surrounding area.²³ The resources utilized by BC Hydro included publicly available information from government and First Nations' websites, information known to BC Hydro through previous projects in the area, and information obtained through consultations with Teck. Collectively, these resources provided BC Hydro with sufficient information to broadly identify any First Nation that had even a possibility of being affected by the Transaction.

BC Hydro was guided in its analysis by maps outlining the traditional territory of each First Nation. BC Hydro noted the location and proximity in kilometres of the Waneta Dam in relation to the asserted traditional territory of each First Nation. When a new map was discovered through another regulatory process, BC Hydro conducted a similar review of that map and adjusted its consultation process accordingly.²⁴ Further, BC Hydro also used the information obtained to canvass the nature of any rights asserted in the vicinity of the Waneta Dam.

In informing itself of the nature of the potential interest of each First Nation, BC Hydro was sensitive to the relationships asserted by particular First Nations. Where First Nations, such as the Okanagan Nation Alliance ("**ONA**"), represented themselves collectively instead of individually, BC Hydro respected this choice and conducted its own assessment accordingly. Moreover, when new information arose during the process to suggest that previous relationships between First Nations were no longer preferred, BC Hydro adjusted its assessment and approach to consultation.

²³ Ibid., pp. 2-12.

²⁴ Ibid., p. 10.

1 BC Hydro is confident that it capitalized on all the resources reasonably available to it to
 2 accurately identify in broad terms any First Nation with interests in the vicinity of the Waneta
 3 Dam that could be affected by the Transaction. This was both reasonable and appropriate
 4 conduct by BC Hydro.

(iii) *Initial Consultation Process*

5 Having identified a list of potentially affected First Nations, BC Hydro proceeded to make initial
 6 contact with the identified First Nations (the “**Schedule 7-2 First Nation groups**”) about the
 7 Transaction. On June 17th, 2009, the same day that BC Hydro signed the Term Sheet, an
 8 introductory letter on the Transaction was sent (via courier or express post) to the Schedule 7-2
 9 First Nation groups.²⁵ BC Hydro provided as much information as possible about the
 10 Transaction in its initial letter to Schedule 7-2 First Nation groups so as to ensure that
 11 information was available to those First Nations for the full extent of the consultation period.
 12 Specifically, the letter:

- 13 • provided a comprehensive summary of the agreement;
- 14 • promised to follow up with a copy of the Term Sheet for First Nations’ review;
- 15 • informed First Nations of the intended filing of a schedule of expenditures with the
 16 BCUC;
- 17 • provided an outline of the intended timeline of the Transaction; and
- 18 • invited First Nations to contact BC Hydro ARN directly to provide comments or express
 19 concerns pertaining to the Transaction.

20 On June 18th, 2009, one day later, BC Hydro fulfilled its promise to Schedule 7-2 First Nation
 21 groups and distributed to them signed copies of the Term Sheet.²⁶ Distribution on this date
 22 ensured that First Nations were given the maximum period of review possible. In fact, the Term
 23 Sheet was distributed to First Nations in advance of public release through the BCUC process.

24 In order to satisfy itself that Schedule 7-2 First Nation groups had indeed received the letters
 25 dated June 17th and 18th, BC Hydro made several attempts to confirm receipt.²⁷ BC Hydro:

- 26 • directly called each Schedule 7-2 First Nation group;

²⁵ Ibid., pp. 13-14.

²⁶ Ibid., p. 14.

²⁷ Ibid.

- left a message describing the purpose of the call and the name and contact information of a BC Hydro contact person in instances where persons were not reached; and
- made, at minimum, one subsequent follow-up phone call where a message had been previously left.

To further ensure that Schedule 7-2 First Nation groups had sufficient opportunities to learn about the Transaction and to exchange information with BC Hydro, BC Hydro invited all Schedule 7-2 First Nation groups to attend a Workshop on the Transaction.²⁸ Included in the invitation was a copy of the proposed regulatory schedule. BC Hydro also notified Schedule 7-2 First Nation groups of relevant deadlines. By letter dated September 2, 2009, BC Hydro reiterated to all Schedule 7-2 First Nation groups that it would be making its decision regarding the APA at the end of September and any further input or information that First Nations wanted BC Hydro to consider before making its decision should be provided to BC Hydro by September 15, 2009.²⁹

In sum, BC Hydro cast a wide net in identifying potentially affected First Nations, provided detailed information about the Transaction early in the process, ensured First Nations had received the information and understood that BC Hydro was seeking their input and provided notice of the deadline for submissions and engagement before signing the APA.

(iv) *Consultation with First Nations Expressing an Interest in the Transaction*

Of the Section 7-2 First Nation groups, the ONA, Upper Nicola Indian Band ("**UNIB**"), Ktunaxa Nation Council ("**KNC**"), Shuswap Indian Band ("**SIB**"), and Sinixt Nation Society ("**Sinixt Nation**") (collectively, the "**Interested First Nations**") communicated an interest in engaging in further consultation on the Transaction with BC Hydro. BC Hydro was receptive of these First Nations' requests for further information sharing about the Transaction. A complete summary of the direct consultation undertaken can be found at pages 15 to 30 of the Preliminary ARN Report.

In brief, BC Hydro engaged in an exchange of letters and/or phone calls with each Interested First Nation. Moreover, BC Hydro met individually with three of the Interested First Nations (namely ONA, KNC, and SIB) to discuss the Transaction and their individual interests and concerns. A meeting with the UNIB was arranged, but the representative from UNIB was unable to attend at the last minute. BC Hydro suggested the possibility of a meeting with the Sinixt Nation, but was unsuccessful at arranging one before the signing of the APA. Throughout communications with these First Nations, BC Hydro provided immediate responses to their

²⁸ Ibid.

²⁹ Ibid., p. 15.

1 questions and concerns and when immediate responses were not possible, BC Hydro followed
2 up with a response in a timely manner.

3 In addition to addressing the concerns raised by the Interested First Nations, BC Hydro actively
4 solicited information from them to ensure it fully understood the impact of the Waneta
5 Transaction in the context of those impacts. BC Hydro remained open to considering the
6 information obtained from these direct consultations throughout the decision making process.

(3) Resources Used to Inform the Preliminary Strength of Claim and Seriousness of Potential Impacts Analysis

7 Although BC Hydro engaged in direct one on one consultation with the Interested First Nations
8 before signing the APA, these consultations failed to produce any information regarding their
9 specific asserted Aboriginal rights in the vicinity of the Waneta Dam or the potential impacts of
10 the Transaction on those rights. Thus, while BC Hydro had received information on the general
11 rights asserted by the Interested First Nations, it lacked information about specific interests in
12 the vicinity of the Waneta Dam that were potentially affected by the Transaction. In light of this,
13 BC Hydro decided to canvass other information sources to better inform its assessment.³⁰

14 BC Hydro utilized a number of reliable and relevant public reports and other information sources
15 to identify and assess the strength of any specific First Nations' interests in the vicinity of the
16 Waneta Dam and to identify and assess the seriousness of any potential impacts caused by the
17 Transaction. The reports and information used by BC Hydro were primarily related to the
18 Environmental Assessment Office's certification of the Waneta Expansion Project and the
19 Brilliant Expansion Project, two projects located in the precise area of the Waneta Dam. All the
20 documents were produced by qualified experts, or persons or bodies with a strong
21 understanding of and experience with the issues, some with the assistance of First Nations
22 themselves. The documents are current in that they were all produced in the last ten years and
23 in some cases as recently as 2007. Further, all the resources relied upon focused on First
24 Nations' traditional use of the area in the vicinity of the Waneta Dam. The information and the
25 conclusions drawn in these reports are based upon reliable archaeological, literary and
26 traditional use information. BC Hydro submits that the documents relied on were relevant,
27 reliable, on point and current; reliance on them by BC Hydro was both appropriate and
28 reasonable.

(4) Preliminary Assessment of the Strength of Claim and Seriousness of Potential Impacts

29 Having reviewed the reports and information discussed above, BC Hydro conducted a
30 preliminary assessment of the appropriate level of consultation for each Interested First Nation.

³⁰ Ibid., pp. 30-40.

1 BC Hydro's reliance on a wide range of information sources, not only relevant but precisely on
2 point, contributed to BC Hydro's confidence in the reasonableness of its assessment.

3 The fact that the Crown had very recently conducted an assessment of the adequacy of
4 consultation in connection with an expansion project relating to the Waneta facilities and that
5 their evidence on operational history of more than 50 years associated with the Waneta Dam
6 gave BC Hydro particular comfort in this regard.

7 BC Hydro did seek to obtain direct input from First Nations prior to signing the APA but was not
8 successful in that endeavour. Despite repeated requests, little information was obtained. BC
9 Hydro concluded it could sign the APA anyway because the agreement was far from an
10 unequivocal commitment to proceed with the Transaction. Indeed, the APA expressly
11 contemplates the BCUC's current review and a final review by BC Hydro prior to closing.
12 Accordingly, BC Hydro submits signing the APA based on the best available information but
13 actively continuing with the consultation process was entirely reasonable.

14 BC Hydro's approach to assessing the appropriate level of consultation for each of the
15 Interested First Nations in the Preliminary Report was guided by the two part test articulated by
16 the Supreme Court of Canada in *Haida*:

17 ...the duty arises when the Crown has knowledge, real or constructive, of the
18 potential existence of the Aboriginal right or title and contemplates conduct that
19 might adversely affect it....

Haida, supra, at para. 35.

20 As required, BC Hydro conducted an assessment of the strength of the claim and the
21 seriousness of the adverse effect for each Interested First Nation using all the information it had
22 received and collected. The information received and collected can be summarized as follows:

- 23 • With respect to the Sinixt Nation, the materials reviewed demonstrated that the federal
24 government considers the Sinixt to be extinct, while the provincial government has
25 stated that it is not clear at this time whether the Sinixt are "an Aboriginal people of
26 Canada" as referred to in Section 35 of the *Constitution Act, 1982*. There was some
27 information in the sources canvassed suggesting that the Sinixt may have at one time
28 been the Aboriginal group that was present in the area; however, they vacated the area
29 at the mouth of the Pend d'Oreille River by 1900, and the area in general by 1910 and
30 were not present in the area when construction and operation of the Waneta Dam
31 began.³¹

³¹ Ibid., p. 40-41.

- 1 • With respect to the ONA (including the UNIB), the materials reviewed indicate that the
2 closest ONA member community is approximately 150 km (in a straight line;
3 approximately 250 km by road) from the Waneta Dam. The material reviewed further
4 indicated that the Sinixt had a historic presence at the mouth of the Pend d'Oreille River
5 in the vicinity of the Waneta Dam and that the Sinixt were a distinct group from the
6 Northern Okanagan.³²
- 7 • With respect to the KNC and the Shuswap Indian Band, the materials reviewed support
8 the view that the closest KNC member community is approximately 85 km (in a straight
9 line; approximately 230 km by road) from the Waneta Dam. The materials reviewed
10 provided fairly limited factual evidence supporting that the KNC and the Shuswap
11 traditionally used the area around the Waneta Dam.³³
- 12 • None of the information reviewed or any information provided by Interested First Nations
13 would support the conclusion that the Transaction would adversely affect any right or
14 interest claimed by any of them.

15 In light of the information reviewed, BC Hydro made the following determinations:

- 16 • With respect to the Sinixt Nation, a successful claim by the Sinixt remains possible, but
17 the likelihood of success of such a claim is low to moderate, and the seriousness of any
18 potential impacts from proceeding with the Transaction was low.³⁴
- 19 • With respect to the ONA (including the UNIB), due to the distance of the Waneta Dam
20 from the ONA member communities and the lack of evidence of occupation (either
21 before or after the Sinixt departure), the overall strength of any claim was low and the
22 seriousness of any potential impacts of the Transaction was low.³⁵
- 23 • With respect to the KNC and the Shuswap Indian Band, due to the physical distance of
24 the Waneta Dam from the KNC member communities and/or the Shuswap Indian Band,
25 and the lack of evidence of traditional use of the area, the overall strength of any claim
26 was low and the seriousness of any potential impacts of the Transaction was also low.³⁶

27 BC Hydro submits that based on the information available at the time the APA was signed, the
28 only conclusions that could be reached were those made by BC Hydro. BC Hydro was
29 reasonable in its assessment.

³² Ibid., pp. 43-44.

³³ Ibid., pp. 46-47.

³⁴ Ibid., pp. 42-43.

³⁵ Ibid., pp. 46-47.

³⁶ Ibid., pp. 48-50.

(5) Preliminary Assessment of the Level of Consultation Required

Having made individual determinations on the strength of the claim and seriousness of the impact for each of the Interested First Nations, BC Hydro proceeded to assess the appropriate level of consultation. BC Hydro was guided by the words of the Supreme Court of Canada that the duty to consult “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed”.

Haida, supra, at para. 39.

Based upon the sliding scale articulated in *Haida*, BC Hydro made the following determinations in respect of the appropriate level of consultation for each Interested First Nation:

- The duty to consult with the Sinixt Nation was towards the lower end of the *Haida* spectrum.³⁷
- The duty to consult the ONA (including the UNIB) was at the low end of the *Haida* spectrum.³⁸
- The duty to consult the KNC and the SIB was at the low end of the *Haida* spectrum.³⁹

BC Hydro submits that based on the information provided in the materials canvassed, the above determinations were correct in the context of the decision to sign the APA. There was no basis in the materials reviewed to support a level of required consultation higher than the low end of the spectrum for the ONA, UNIB, KNC, and SIB, or in the case of the Sinixt at the lower end of the spectrum. Because BC Hydro’s determinations were correct, they do not warrant intervention by the BCUC.

³⁷ Ibid., pp. 42-43.

³⁸ Ibid., p. 49.

³⁹ Ibid., p. 50.

(6) **Conclusions on the Adequacy of Consultation Up to the Point of the APA Signing**

The ARN Report culminates in BC Hydro's conclusions on the adequacy of consultation to September 15, 2009 with each Interested First Nation. Satisfied that it had accurately determined the appropriate level of consultation for each Interested First Nation, BC Hydro proceeded to assess whether its consultation process up to that point had adequately fulfilled the determined levels of consultation. In making this assessment, BC Hydro was guided by the following words from the Supreme Court of Canada in *Haida*:

Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "Consultation" in its least technical definition is talking together for mutual understanding": T. Isaac and A. Know, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61. [Emphasis added.]

***Haida supra*, at para. 43.**

Although the Supreme Court goes on at paragraph 45 of its decision in *Haida* to hold that consultation is fact specific and must be approached on a situation by situation basis, it has clearly enumerated some of the duties required of the Crown to meet a low level of consultation such as the one at hand. These include notice of the proposed decision or course of action to First Nations, disclosure of sufficient information about the proposed decision or course of action, and an informative and useful exchange of information that fosters mutual understanding of the issues to better inform decision making.

Since the above articulation by the Supreme Court in *Haida*, subsequent court decisions have provided further guidance on the requirements articulated in *Haida* and some additional general requirements of consultation that apply to all points along the spectrum in order to make consultation reasonable. BC Hydro's analysis of whether its consultation process was honourable and adequate was further guided by the following general requirements:

- The consultation process must be engaged early in the decision-making process, before the process has moved too far along. (see ***Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 CarswellBC 2370, 2004 BCSC 1320 at para. 74**)

- 1 • The consultation process must include clear notification of the proposed course of action or
2 decision to First Nations, preferably directly and in written form. (see ***Dene Tha' First***
3 ***Nation v. Canada (Minister of Environment) ("Dene Tha")***, 2006 CarswellNat 3642,
4 **2006 FC 1354 at para. 116**)
 - 5 • The consultation process must involve information sharing wherein the Crown must share
6 with First Nations all information (about the proposed decision or course of action) that is
7 available and necessary to help the Aboriginal group understand the nature of the proposed
8 decision or activity and/or the possible impacts of the decision or activity on any proven or
9 asserted s. 35 rights. (see ***Mikisew Cree First Nation v. Canada (Minister of Canadian***
10 ***Heritage)***, 2005 CarswellNat 3756, 2005 SCC 69 (S.C.C.) at para. 64)
 - 11 • The consultation process must give First Nations a reasonable amount of time to consider
12 the proposed decision, gather any internal information, and seek any outside advice on
13 technical issues. (see ***Dene Tha***, at para. 116). However, "legitimate time constraints may
14 exist in some cases where the luxury of stately progress towards a business decision does
15 not exist [...]" (See ***Musqueam Indian Band v. British Columbia (Minister of Sustainable***
16 ***Resource Management)***, 2005 CarswellBC 958, 2005 BCCA 128 at para. 95).
- 17 BC Hydro submits that the consultation process undertaken satisfied all of the above
18 enumerated elements of reasonable consultation. The following factors contributed to the
19 reasonableness of the consultation process undertaken:
- 20 • BC Hydro engaged First Nations very early in the Transaction, on the same day BC Hydro
21 signed the Term Sheet, before any legally binding obligations were formed and before the
22 regulatory process had even been commenced.
 - 23 • BC Hydro's first initial contact with First Nations provided clear notice of the proposed
24 Transaction, the timeline for the Transaction, and the intended regulatory filing with the
25 BCUC and was in written form.
 - 26 • To ensure that First Nations were provided with all necessary and available information to
27 allow them to understand the nature of the Transaction and its possible effects on their
28 proven or asserted rights or title, BC Hydro successfully negotiated with Teck a non-binding
29 Term Sheet that was unusually detailed. A copy of the Term Sheet was provided to First
30 Nations within a day of its finalization, before its general release to the public.
 - 31 • BC Hydro followed-up to ensure that First Nations had received all the information and
32 informed First Nations that BC Hydro welcomed any information, questions or concerns
33 about the Transaction.

- 1 • In August 2009, BC Hydro provided an offer of capacity funding to those Interested First
2 Nations that expressed a need for capacity funding to engage in consultations and to be
3 able to provide information to BC Hydro to inform BC Hydro's September 21, 2009 decision
4 to sign the APA.
- 5 • BC Hydro met with those First Nations that requested a meeting and engaged in an
6 information exchange that fostered mutual understanding of the First Nations issues in
7 relation to the Transaction.
- 8 • BC Hydro ensured that before the decision to enter the APA was made, it had already
9 engaged First Nations in the consultation process for over 3 months. This was more than
10 sufficient time for those First Nations who wished to advise BC Hydro of their concerns
11 regarding BC Hydro entering into the APA. This period allowed BC Hydro to balance the
12 requirement for a reasonable period for consultation with the need to recognize the
13 commercial realities associated with this opportunity to acquire power to further other
14 elements of the public interest.

15 The consultation process engaged in prior to BC Hydro entering the APA met, and in fact
16 exceeded, the required levels of consultation.

**(7) Accommodation of First Nations Interests Up to the Point
of the APA Signing**

17 It is trite law that accommodation is not required in every case where First Nations have been
18 consulted. "Where a strong *prima facie* case exists for the claim and the consequences of the
19 government's proposed decision may adversely affect it in a significant way, addressing the
20 Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the
21 effects of infringement, pending final resolution of the underlying claim."

Haida, supra, at para .47.

23 Based on its assessment of the appropriate level of consultation, BC Hydro determined that
24 accommodation of specific First Nations' interests was not required in this case. No adverse
25 effect on any First Nation's interest was identified through the consultation process, much less
26 irreparably harmed.

27 Despite the lack of requirement for accommodation, BC Hydro nevertheless included
28 accommodation of First Nations' interests into the proposed Transaction. During consultations
29 First Nations repeatedly expressed their wish to have enhanced input into the operating
30 considerations on the Pend d'Oreille River. To accommodate this concern, BC Hydro has
31 assured First Nations that through its acquisition of one-third of the votes on the Operating
32 Committee of the Waneta Dam, it will advise Teck, the party directly responsible for operation of
33 the facility, of First Nations' concerns in respect of the operation of the Waneta Dam. BC Hydro
34 submits that this consultation provides First Nations with a new venue to express their concerns

1 with respect to the ongoing operation of the Waneta Assets. Provision of this venue represents
 2 a significant accommodation of their concerns that exceeds the requirements imposed on the
 3 Crown by law.

C. The Decision to Approve the Expenditures under s. 44.2

(1) The BCUC's Role *vis-à-vis* the Determination under Section 44.2

4 The second decision requiring the BCUC's consideration is the determination that the BCUC
 5 must make under Section 44.2 of the UCA as to whether the schedule of expenditures for the
 6 Waneta Transaction is in the public interest. Unlike the BCUC's reviewing role in respect of the
 7 BC Hydro's decision to sign the APA, the BCUC's role in respect of the Section 44.2 of the UCA
 8 is to make a decision at first instance. Imbedded in this second decision is a duty on the BCUC
 9 to determine whether consultation for the Waneta Transaction up to the point of the BCUC's
 10 decision has been adequate to maintain the honour of the Crown.

11 **Carrier Sekani, *supra* at para. 54.**

12 BC Hydro submits that in determining how to approach the decision, the BCUC will have to
 13 engage a process not unlike that which BC Hydro engaged in rendering its decision to enter the
 14 APA. That is, just as BC Hydro executive had to review the Preliminary ARN Report to
 15 determine that signing the APA was honourable, the BCUC will have to review consultation to
 16 date, as evidenced in the Updated ARN Report and other evidence filed through the BCUC
 17 process, to determine whether Crown consultation with First Nations has been adequate and
 18 that therefore approving the expenditures under Section 44.2 is consistent with the public
 19 interest.

20 Three important differences exist between the role the BCUC must play in making its decision in
 21 this proceeding and the decision BC Hydro made when signing the APA. First, the BCUC's
 22 assessment of the appropriate level of consultation and the adequacy of consultation will
 23 include information both pre and post signing of the APA in light of the fact that the BCUC is
 24 adjudicating the adequacy of consultation up to the point of its decision. Second, as an
 25 independent quasi-judicial tribunal, the BCUC does not have a duty or indeed the capacity to
 26 gather its own information about the adequacy of consultation. Therefore, in making its
 27 assessment and determinations, the BCUC is required to rely on the information put before it
 28 through the hearing process.

29 Third, the decision to be made by the BCUC is the last opportunity it will have to review the
 30 adequacy of consultation. Thus, it must be satisfied that the consultation that has occurred is
 31 sufficient to allow it to conclude that completion of the Transaction by BC Hydro would be
 32 honourable. Despite these differences, BC Hydro believes that the BCUC can nonetheless be
 33 guided by and can rely on the process undertaken and conclusions drawn by BC Hydro as
 34 evidenced in the Updated ARN Report. In reviewing the consultation process to date, the BCUC

1 will have to consider not only BC Hydro's direct consultation with First Nations, but also the
 2 opportunities provided within the BCUC's hearing process.

(2) Consultation with First Nations has been Adequate to enable the BCUC to conclude that the Transaction is Honourable

(i) Process engaged to inform the Updated ARN Report

3 From the start, BC Hydro has made it clear to First Nations and the BCUC that the Preliminary
 4 ARN Report was only preliminary in nature and was created solely for the purpose of
 5 determining whether the consultation undertaken up to that point in time was adequate to permit
 6 BC Hydro to honourably enter the APA. BC Hydro never intended the conclusions drawn in the
 7 preliminary report to serve as its final determinations on the required level of consultation. It
 8 was always intended and made clear that BC Hydro would be filing an Updated ARN Report to
 9 satisfy the BCUC that sufficient consultation had occurred to allow it to find the expenditures to
 10 be in the public interest.⁴⁰

11 BC Hydro was clear in its correspondence to First Nations that any information received after
 12 the September 15, 2009 deadline for the Preliminary ARN Report would be considered by BC
 13 Hydro in its submissions to the BCUC whether the consultation was sufficient to allow the BCUC
 14 to determine the expenditures were in the public interest. After submitting the Preliminary ARN
 15 Report to the BCUC and circulating it to the Interested First Nations, BC Hydro continued, as it
 16 had done prior to conclusion of the Preliminary ARN Report, to invite First Nations to provide
 17 information and evidence regarding whether the proposed Waneta Transaction would affect
 18 their interest. It specifically asked First Nations to identify any concerns they might have with
 19 any aspect of the Preliminary ARN Report.

20 During meetings and correspondences with the Interested First Nations, several concerns were
 21 raised as to the accuracy of the conclusions made in the Preliminary Report. In response, BC
 22 Hydro again advised that it welcomed new information from each First Nation regarding whether
 23 the proposed Waneta Transaction would affect their interest as this would inform BC Hydro's
 24 updated assessment. BC Hydro ARN reviewed all the documentation and evidence provided
 25 up to November 18, 2009 including the evidence filed with the BCUC (see pages 52 to 85 of the
 26 Updated ARN Report), incorporated it into the Updated ARN Report, and reassessed the
 27 conclusions rendered in the Preliminary ARN Report in light of the new information received. BC
 28 Hydro submits that the iterative process undertaken was both entirely appropriate and, indeed,
 29 greatly facilitated First Nation engagement in the decision making process. The approach
 30 employed supports the conclusion reached in the Updated ARN Report that consultation has
 31 been adequate and therefore supports BC Hydro's submission that the BCUC may determine
 32 that the expenditures are in the public interest.

⁴⁰ Ibid., p. 2 and Updated ARN Report, pp. 19-20, 26, 28, 30, 39-42 and 48.

In their written evidence, the KNC challenge BC Hydro ARN's reliance on public documents and reports related to the Waneta Expansion Project in drafting the Preliminary ARN Report. BC Hydro's response to these submissions is threefold. Firstly, the KNC was provided the opportunity to submit its own evidence for consideration in that report, and the evidence they chose to submit provided little information in respect of the KNC's specific interest in the Waneta area. In light of this it was only reasonable for BC Hydro to consult reliable public sources to supplement the information provided. Secondly, while the KNC take issue with BC Hydro ARN's reliance on reports related to the Waneta Expansion Project, they themselves have submitted to BC Hydro, and filed with the BCUC similar documents. And finally, the KNC's concerns are now moot given that they have provided BC Hydro with their own information and this has been included and considered by BC Hydro ARN in drafting the Updated ARN Report.

(ii) *Updated Assessment of the Strength of Claim and Seriousness of Potential Impacts*

As in the preliminary report, BC Hydro's approach to assessing the appropriate level of consultation for each Interested First Nation was guided by the two part test articulated by the Supreme Court of Canada in *Haida*. In light of the new information and evidence received from the Interested First Nations, BC Hydro reconsidered its previous assessment and altered it to reflect the entirety of the information available. In doing so, BC Hydro was sensitive to submissions by both the KNC and the SIB that the previous association between the entities no longer existed and SIB was to be consulted and assessed independently of KNC.

The information received and collected up to November 18, 2009 can be summarized as follows:

Sinixt⁴¹

- The materials continued to support that neither the federal nor provincial government recognized the Sinixt First Nation's interest in the vicinity of the Waneta Dam. Nothing in the new evidence reviewed rebutted that the federal government considers the Sinixt to be extinct, or that the provincial government has stated that it is not clear at this time whether the Sinixt are "an Aboriginal people of Canada" as referred to in section 45 of the *Constitution Act, 1982*. However, the Sinixt did provide expert opinions supporting that they are an Aboriginal people of Canada. The Sinixt provided additional information about their claims against the federal government. They rely, in particular, on evidence that the Sinixt migrated south out of necessity and not out of choice.
- The previously assessed information suggesting that the Sinixt may have at one time been the Aboriginal group with a historical presence in the area was contested by evidence provided by the ONA and KNC described below. If accepted, this evidence would cast

⁴¹ Ibid., p. 85-86.

doubt on the Sinixt assertion that they were a distinct nation unassociated with either the Okanagan or Ktunaxa Nation.

- The Sinixt evidence as to potential impacts was limited to historical impacts arising from the construction of the Waneta Dam; no information on potential impacts arising from the Transaction was provided.

ONA (including the UNIB)⁴²

- The materials continue to support that the closest ONA member community is approximately 150 km (in a straight line; approximately 250 km by road) from the Waneta Dam. The material provided by the ONA contests the previous determination that there was little evidence of traditional use by the ONA to the area in the vicinity of the Waneta Dam. The evidence submitted by the ONA challenges the previously assessed reports suggesting that the Sinixt were the Aboriginal group with a historical presence in the area. In particular, evidence provided by the ONA suggested that Bouchard and Kennedy had wrongly equated the Sinixt with the Arrow Lakes people when in fact the Sinixt were only one of several First Nations with representation in the composition of the Arrow Lakes people. The ONA further provided evidence supporting the proposition that the Arrow Lakes people were not a distinct group from the Northern Okanagan, but yet shared common communicative norms based on the Okanagan language and were in fact part of the Okanagan Nation.
- The ONA's evidence regarding impacts was limited to historical impacts arising from the construction of the Waneta Dam; no information on potential impacts arising from the Transaction was provided.

KNC⁴³

- The materials reviewed continue to support that the closest KNC member community is approximately 86 km (in a straight line; approximately 230 km by road) from the Waneta Dam. The KNC provided further information on the recognized strength of their claim to the western portion of their asserted traditional territory, namely that the provincial government has offered them lands around Castlegar as part of the treaty process. The KNC challenged the suggestion that there was little evidence of traditional use by the Ktunaxa in the vicinity of the Waneta Dam, especially due to the difficulties of travel in the area. In particular, the Ktunaxa provided evidence supporting their historic involvement in the area through fishing and other traditional uses such hunting and plant gathering. The majority of this information suggests that the Ktunaxa's use of the area was migratory and seasonal in nature.

⁴² Ibid., pp. 89-90.

⁴³ Ibid., pp. 92-93.

- The KNC also disputed the Sinixt claim to a historic presence in the area surrounding the Waneta Dam. Like the ONA, the KNC provided evidence suggesting that it was in fact the Arrow Lakes people that had this historic presence and that this group was composed, in part, of Ktunaxa; however, unlike the ONA, the KNC did not provide evidence purporting to claim the Arrow Lakes people as part of the Ktunaxa.
- The KNC's evidence as to the potential impacts arising from the Transaction was limited to historical impacts arising from the construction of the Waneta Dam and from the current operation of the Waneta Dam. The KNC provided a significant amount of information and evidence concerning the current operation of the Waneta Dam and its effect on fish populations, particularly white sturgeon. However, none of that information suggested that the Transaction would cause any adverse effects in connection with the operation of the Waneta Dam.

SIB⁴⁴

- The materials previously reviewed provided fairly limited factual evidence that the Shuswap traditionally used the area around the Waneta Dam. The SIB did not provide BC Hydro with any further evidence of their historic use of this area. The SIB did provide BC Hydro with a new map placing the Waneta Dam within their traditional territory. The SIB did not provide any evidence relating to the impacts of the Transaction.

In light of the information reviewed, BC Hydro ARN made the following determinations:

- With respect to the Sinixt Nation, the materials reviewed continued to support the conclusion that an ultimately successful claim by the Sinixt remained possible, but new evidence provided by other First Nations (namely the ONA) suggested that the Sinixt would face significant challenges to this claim, and therefore the likelihood of the success of the claim remains low to moderate. Notwithstanding, the ample opportunity that the Sinixt Nation was given to provide evidence of adverse effects from the Transaction, none was forthcoming and the assessment of the seriousness of any potential impacts remains low.⁴⁵
- With respect to the ONA (including the UNIB), the materials reviewed continued to support the conclusion that the ONA member communities are a significant distance from the Waneta Dam. However, new evidence provided by the ONA suggests that the Arrow Lakes people had a historic presence in the area and they were composed in part, of members of the ONA. Further, the new evidence further suggests that the Arrow Lakes people may have been linguistically linked to the Okanagan Nation such that they were not a distinct group from the Northern Okanagan, but were in fact part of the Okanagan Nation. In light of

⁴⁴ Ibid., p. 95.

⁴⁵ Ibid., pp. 87-88.

1 this new evidence, BC Hydro ARN's previous assessment of the ONA strength of claim was
 2 elevated from low to low to moderate. Notwithstanding, the ample opportunity that the ONA
 3 was given to provide evidence of adverse effects from the Transaction, none was
 4 forthcoming and the assessment of the seriousness of any potential impacts remains low.⁴⁶

- 5 • With respect to the KNC, the materials reviewed continued to support the conclusion that
 6 the KNC member communities are a significant distance from the Waneta Dam. The new
 7 evidence provided some, albeit limited, support for the recognition of the KNC's claim in the
 8 western region of their traditional territory. The evidence also suggested that the Ktunaxa
 9 engaged in traditional uses in the area of the Waneta Dam and navigated the waterways;
 10 however, the information supported that the traditional use was primarily migratory and
 11 seasonal in nature. In light of this new evidence, BC Hydro ARN's previous assessment of
 12 the KNC strength of claim was elevated from low to low to moderate. Notwithstanding, the
 13 ample opportunity that the KNC was given to provide evidence of adverse effects from the
 14 Transaction, none was forthcoming and the assessment of the seriousness of any potential
 15 impacts remains low.⁴⁷
- 16 • With respect to the SIB, the information provided did not challenge BC Hydro's previous
 17 findings and as such, BC Hydro stands by its previous assessment. The strength of the
 18 SIB's claim remains low. Notwithstanding, the ample opportunity that the SIB was given to
 19 provide evidence of adverse effects from the Transaction, none was forthcoming and the
 20 assessment of the seriousness of any potential impacts remains low.⁴⁸

(iii) *Updated Assessment of the Level of Consultation Required*

21 As in the Preliminary ARN Report, BC Hydro's assessment of the level of consultation required
 22 was guided by the words of the Supreme Court of Canada that the duty to consult "is
 23 proportionate to a preliminary assessment of the strength of the case supporting the existence
 24 of the right or title, and to the seriousness of the potentially adverse effect upon the right or title
 25 claimed."

Haida, supra, at para. 39.

27 Based upon the revisited strength of claim and seriousness of potential impacts assessments,
 28 BC Hydro ARN made the following determinations in respect of the appropriate level of
 29 consultation for each Interested First Nation:

- 30 • The duty to consult the Sinixt Nation remains towards the lower end of the *Haida* spectrum.

⁴⁶ Ibid., pp. 90-91.

⁴⁷ Ibid., pp. 93-95.

⁴⁸ Ibid., pp. 95-97.

- 1 • The duty to consult the ONA (including the UNIB) has been elevated from the low end of the
2 spectrum to the lower end of the *Haida* spectrum.
- 3 • The duty to consult the KNC has been elevated from the low end of the spectrum to the
4 lower end of the *Haida* spectrum.
- 5 • The duty to consult the SIB remains at the low end of the *Haida* spectrum.

(iv) *Conclusions on the Adequacy of Consultation to Date*

6 In rendering its conclusions on the adequacy of consultation to date, BC Hydro was again
7 guided by the words of the Supreme Court of Canada in *Haida* and the principles articulated in
8 subsequent case law as to what is required of a reasonable consultation process (these were
9 previously discussed in Part IV, Section B(6) wherein BC Hydro discussed its conclusions on
10 the adequacy of consultation up to the point of the decision to enter the APA). BC Hydro
11 believes the following factors contributed to the reasonableness of the consultation process
12 undertaken:

- 13 • BC Hydro approached its negotiations with Teck in a manner that was mindful of its
14 obligations to First Nations. In particular, it insisted that the key elements of the Transaction
15 were identified early in a non-binding Term Sheet to permit adequate consultation to occur
16 before final decisions on the Transaction would take place; that BC Hydro's legal obligations
17 under the APA were conditional on maintaining the honour of the Crown as understood by
18 the BCUC, and a condition in respect of the closing of the Transaction that ensured BC
19 Hydro would not have to take further steps or complete the Transaction if the honour of the
20 Crown required it not to do so.
- 21 • BC Hydro engaged First Nations very early in the Transaction, on the same day BC Hydro
22 signed the non-binding Term Sheet and more than three months before any legally binding
23 obligations were formed and before the regulatory process had even been commenced.
- 24 • BC Hydro's first initial contact with First Nations provided clear notice of the proposed
25 Transaction, the timeline for the Transaction, and the intended regulatory filing with the
26 Commission and was in written form.
- 27 • BC Hydro provided First Nations with the Term Sheet within a day of having signed it and
28 prior to release to the public.
- 29 • BC Hydro followed-up with First Nations to ensure receipt of all information and to
30 communicate that BC Hydro would welcome any information, questions or concerns about
31 the Transaction and how it affected First Nations' interests. BC Hydro advised that it wanted
32 to obtain this information before September 15, 2009 in order to use it to inform its decision
33 on whether or not to enter the APA, but advised that any information received thereafter
34 would be used to inform BC Hydro's decision whether or not to complete the Transaction.

- 1 • Prior to BC Hydro's decision to sign the APA, BC Hydro met with all of the Interested First
2 Nations, with the exception of the Sinixt, and engaged with all First Nations in information
3 sharing that fostered mutual understanding of First Nations issues in respect of the
4 proposed Transaction. After the decision to sign the APA was made, BC Hydro held at least
5 one further meeting with each of the Interested First Nations, and a first meeting with the
6 Sinixt. BC Hydro used all information provided to it from First Nations prior to September 15,
7 2009 to inform its Preliminary ARN Report. BC Hydro used all information provided to it
8 prior to November 18, 2009 and the information filed in the BCUC process to inform its
9 Updated ARN Report.
 - 10 • BC Hydro was receptive to requests for capacity funding to enable First Nations to clearly
11 identify their interests in the area and how they could be potentially impacted by the
12 proposed Transaction. All Interested First Nations that sought funding were given sufficient
13 funding to participate in consultation up to November 18, 2009.
 - 14 • Prior to making the decision that entering the APA was honourable, BC Hydro had already
15 engaged First Nations in the consultation process for over 3 months. Prior to making its
16 submissions that approving the expenditures is in the public interest, BC Hydro will have
17 already engaged First Nations in the consultation process for over 5 months.
 - 18 • Although not necessary, BC Hydro took measures to accommodate First Nations' interests.
19 In particular, BC Hydro committed to use its limited presence on the Waneta Dam Operating
20 Committee as a venue through which BC Hydro would bring First Nations concerns about
21 the current operation of the Waneta Dam to Teck's attention.
- 22 Taken together the steps taken by BC Hydro yielded a consultation process that was
23 reasonable and more than adequate to permit the BCUC to conclude that consultation in
24 respect of the Transaction has been adequate and therefore the expenditures are in the public
25 interest.

(3) The BCUC's Hearing Process

26 Although ultimately the Crown is responsible for adequately discharging the duty to consult, BC
27 Hydro submits the regulatory process provides a complimentary avenue through which certain
28 procedural aspects of the Crown's duty to consult are fulfilled. To be clear, BC Hydro is not
29 suggesting the Crown has delegated part of the responsibility of consultation to the BCUC.
30 However, BC Hydro is submitting that through the BCUC's hearing process, certain procedural
31 requirements of consultation, some of which were not available through direct consultation with
32 BC Hydro, were fulfilled. Through participation in the BCUC's regulatory process, First Nations
33 were provided with:

- 34 ○ Adequate notice of an intended decision;
- 35 ○ All necessary information about the decision in a timely way;

- An opportunity to express their interests and concerns directly to the decision maker (in this case the BCUC);
- An opportunity to engage in the discovery process through the filing of IRs;
- An opportunity to receive PACA funding; and
- Assurance that their representations are seriously considered and, whenever possible, demonstrably integrated into the proposed plan of action.

While BC Hydro has fulfilled some of the above listed procedural requirements through its direct consultation process, some, particularly the opportunity for First Nations to express their interest and concerns directly to the decision maker, are only available through the BCUC's process. The BCUC process provides procedural elements of consultation to First Nations that are unavailable through BC Hydro's direct consultation process.

The BCUC itself has in its previous decisions recognized the contribution that its own regulatory process makes towards discharging the Crown's duty to consult:

The Minister has delegated the responsibility for current consultation to BC Hydro, and has requested BC Hydro to undertake further consultation if it is required for the purpose of a decision by the Minister regarding the Commissions' determinations. However, in the Inquiry Panel's view, the regulatory process that the Inquiry Panel is responsible for will fulfill certain procedural aspects of the consultation duty owed by the Crown.

**British Columbia Utilities Commission, Section 5 Transmission Inquiry,
Appendix A to Order G-108-09 at 13.**

BC Hydro submits that the BCUC's process, coupled with the BC Hydro's direct consultation process has more than discharged the Crown's duty to consult the Sinixt, ONA, UNIB, SIB and KNC. The consultation process with each group has been equivalent and the consideration given to each of their concerns has been transparent and complete. All decisions have been made with a full understanding of each group's perspective and steps have been taken to ensure that their ongoing concerns will be considered in the context of future operation decisions. In consequence, the honour of the Crown in respect of the Waneta Transaction has been maintained and the BCUC should conclude that the expenditures are in the public interest.

D. The Remaining Issue of Past Grievances

(1) Introduction

Through the direct consultation process with BC Hydro and their intervention in the BCUC process, it has become clear that at the heart of the Interested First Nations' allegation of inadequate consultation is the issue of past grievances. The Interested First Nations argue that BC Hydro is perpetuating a past infringement by purchasing an undivided one third interest in the Waneta Facilities and that the benefit that BC Hydro acquires from the purchase of an

1 interest in facilities that when initially built over five decades ago allegedly did not involve Crown
 2 consultation triggers a requirement that the First Nations be accommodated for all the impacts
 3 arising from the initial construction of the Waneta Facilities. It is the First Nations' position that
 4 failure to do so makes the proposed Transaction dishonourable.

5 BC Hydro does not accept this position. The Courts have found past grievances relevant to
 6 consultations on current decision making only where the decision being contemplated brings to
 7 life past infringements in a manner that further impacts First Nations' interests. Simply put,
 8 unless the Transaction creates a new additional impact on First Nations' interests caused by
 9 past infringements or makes continuation of a past infringement more likely, consultation with
 10 respect to past grievances is not a required element of honourable conduct. A brief review of
 11 the leading decisions in connection with this issue is necessary to elaborate this point.

(2) Case Law on Past Grievances

12 BC Hydro submits that there is no case law supporting a free-standing duty to consult on past
 13 grievances. The common denominator to past judicial considerations involving past grievances
 14 is the existence of a new adverse impact arising from the contemplated decision that has the
 15 effect of prolonging or exacerbating the existing past infringement. It is in some of these
 16 situations and these situations alone, that the courts have found the issue of past grievances to
 17 be relevant to consultation in respect of the contemplated decision.

18 For instance, in *Gitxsan and Other First Nations v. British Columbia (Minister of Forests)* Mr.
 19 Justice Tysoe had to consider whether the Minister of Forests' approval of a change of control
 20 of the holder of tree farms and forest licences triggered the duty to consult. The fact that no
 21 Crown consultation had occurred in respect of the initial issuance was accepted, but the
 22 Minister argued that the decision to approve the change of control had no impact on the First
 23 Nations' interest because the *status quo* was maintained. In response, the First Nations argued
 24 that the effect of the decision was to perpetuate the existing historical grievances. In finding for
 25 the First Nations, Mr. Justice Tysoe made the pivotal finding that "the change of control was not
 26 neutral from a practical point of view."

***Gitxsan and Other First Nations v. British Columbia (Minister of Forests)* (Gitxsan), 2002 BCSC 1701, at para. 82.**

29 Mr. Justice Tysoe went on to identify the following potential practical impacts as being adverse
 30 to the First Nations' interests:

31 First, it changed the identity of the controlling mind of Skeena, and the
 32 philosophy of the persons making the decisions associated with the licences may
 33 have changed correspondingly. Second, Skeena was on the brink of bankruptcy
 34 and it may have gone into bankruptcy if the Minister had not given his consent by
 35 April 30. If Skeena had gone into bankruptcy, it would no longer have been able
 36 to utilize the licences. It is possible that the trustee in bankruptcy or Skeena's
 37 secured creditors would have been able to sell the licences but any sale would

1 have required the Minister's consent and there can be no doubt that he would
 2 have been required to consult the Petitioners before giving his consent to any
 3 sale of the licenses. There was also a possibility that the tree farm licence would
 4 not be sold, in which case the Petitioners would have had the opportunity of
 5 pursuing their own ventures for logging some or all of the lands covered by the
 6 licence.

7 It was based on the identification of these potential practical adverse effects which worsened
 8 existing past grievances that the Court found that the Minister's decision triggered the duty to
 9 consult. Had Mr. Justice Tysoe found the change of control to be neutral, in that past
 10 infringements were unaffected and the *status quo* was maintained, the issue of past
 11 infringements would not have affected the duty to consult analysis.

12 ***Gitxsan, supra at para. 82.***

13 The CSTC Decision, with which the BCUC is very familiar, is the most recent decision in this
 14 area. Unlike *Gitxsan*, the CSTC Decision made no definitive finding on whether past grievances
 15 factored into the duty to consult analysis in that case. To the contrary, the Court expressly
 16 stated that it was not prepared to decide whether the BCUC was required to consider past
 17 grievances in assessing the duty to consult. The Court found that the BCUC had a duty to
 18 consider for itself whether past grievances were relevant:

19 The process deprived the appellants the opportunity to develop a case for the
 20 non-physical impacts listed in their written application for reconsideration and
 21 reproduced earlier at para. 22 of these reasons. For instance, the decision in
 22 question does not deal in any substantive way with the appellant's allegations
 23 that the EPA tends to perpetuate an historical infringement and to make less
 24 likely a satisfactory resolution of the appellant's claimed right to manage the
 25 water resource in the future. They say the power sale has cemented the current
 26 regime for many years in the future. Arguably, the surface facts would seem to
 27 indicate that B.C. Hydro will at least participate in the infringement.

28 Again, **these points may not carry the day for the appellant**, but the appellant
 29 should have had the opportunity to develop them. [Bolding added.]

30 ***Carrier Sekani, supra at paras. 63-64.***

31 The burden of the CSTC Decision was that the BCUC erred by determining that past grievances
 32 were not relevant without fully hearing the evidence of the CSTC. The CSTC Decision did not
 33 expand on the principles governing the nature of consultation with First Nations required to
 34 maintain the honour of the Crown.

35 In summary, BC Hydro's understanding of the law on past grievances, including the CSTC
 36 decision, is that the relevance of past grievances to current decision making is dependent on
 37 the identification of a new practical reality arising directly from the contemplated decision that
 38 has the effect of worsening the *status quo* by perpetuating the past grievance. The focus of the
 39 inquiry should be on the effect on the First Nations' interests, not the benefit received by the

1 Crown. The Interested First Nations have failed to identify any impact arising from the
 2 Transaction that further perpetuates or worsens the historical impacts arising from the
 3 construction and operation of the Waneta Dam. Without this nexus, there is no requirement to
 4 consult on past grievances.

(3) A broader interpretation of the CSTC Decision

5 BC Hydro acknowledges that some First Nations have read the CSTC Decision as having
 6 broader implications. In particular, some First Nations interpret the CSTC Decision as holding
 7 that the Crown's contemplation of a decision that would result in it benefiting from activities
 8 authorized without adequate consultation is in and of itself sufficient to always trigger a duty on
 9 the Crown to consult in respect of those past grievances. In the context of the Waneta
 10 Transaction, the Interested First Nations may translate this to mean that the benefit that BC
 11 Hydro gains through its purchase of a facility that was constructed over 50 years ago by a
 12 private party allegedly without adequate consultation with First Nations is sufficient to require
 13 BC Hydro to consult and accommodate on past grievances.

14 While BC Hydro disagrees with this overbroad reading of the CSTC Decision, the new Crown
 15 obligation in respect of past grievances that the First Nations seek to impose through the CSTC
 16 Decision has been met in the context of the Waneta Transaction. During its direct consultation
 17 process and through the BCUC process, BC Hydro accepted and considered information
 18 concerning past grievances in respect of the construction and operation of the Waneta Dam.
 19 Upon review of the information, BC Hydro considered whether, within the context of the
 20 Transaction, there was an opportunity for BC Hydro to meaningfully address any of the
 21 concerns raised with respect to past grievances arising from the construction and operation of
 22 the Waneta Dam.

23 BC Hydro identified such an opportunity through its participation on the Operating Committee.
 24 Although BC Hydro's participation on the Operating Committee is as a minority voter with no
 25 ultimate decision making authority, nonetheless it provides an opportunity to identify and
 26 communicate First Nations' concerns to Teck in a way that is not currently institutionalized. If
 27 information concerning past infringements can better inform the operation of the Waneta Assets,
 28 BC Hydro's commitment to communicate this information to Teck through the Operating
 29 Committee represents significant accommodation of First Nations' interests and furthers the
 30 goal of reconciliation.

31 In this regard, it is important to note that if the *status quo* of Teck as the sole owner persisted or
 32 if a private third party purchased an interest in the Waneta Dam, there would be no formalized
 33 avenue for First Nations' input into the operation of the Waneta Dam. This opportunity is unique
 34 to BC Hydro's involvement in the Transaction as an agent of the Crown burdened with the
 35 responsibility of maintaining the honour of the Crown.

1 In summary, despite being provided ample opportunity to do so, the Interested First Nations
 2 have failed to identify any nexus between the contemplated decision and the perpetuation or
 3 exacerbation of past grievances. The case law surrounding past grievances requires such a
 4 nexus to exist in order to find that the Crown must consult in respect of past grievances. In the
 5 alternative, even if, based on a broader interpretation of the CSTC decision, the BCUC
 6 concludes that the mere benefit to BC Hydro arising from the purchase of an interest in the
 7 Waneta Assets is in and of itself sufficient to require consultation on past grievances, BC
 8 Hydro's consultation and accommodation efforts have been sufficient in the circumstances. By
 9 any measure, BC Hydro has gone above and beyond what is required of it to maintain the
 10 honour of the Crown in respect of the Transaction.

E. Conclusion with respect to First Nation Consultation

11 It is respectfully submitted that on the record of this proceeding there can be no question that
 12 BC Hydro has adequately consulted with First Nations in the area of the Waneta facilities to
 13 meet its obligation to act honourably. Before leaving the question of First Nations' consultation
 14 and the effects of the Transaction on First Nations' interests, BC Hydro would also like to
 15 comment on the overall perspective of First Nations' interests in British Columbia in this context.

16 Just as the public interest generally is well served by BC Hydro acquiring wherever possible
 17 existing resources to meet future power needs, so too are the traditional interests of First
 18 Nations in British Columbia. If BC Hydro is to meet its mandate to serve British Columbia
 19 residents with British Columbia resources, it must employ every effort to make optimal use of
 20 existing resources in the Province for that purpose. The Waneta facilities have existed for over
 21 50 years. It would be ironic indeed if attempts by First Nations to raise concerns about events
 22 that have long since occurred, led to a result that required BC Hydro to undertake alternative
 23 activities which had new and significantly greater effects on First Nations' interests. In BC
 24 Hydro's respectful submission, such an outcome would be entirely inconsistent with the Crown
 25 taking effective steps to affect reconciliation between the Crown and First Nations.

26 BC Hydro also observes that, while it takes its obligation to consult with First Nations very
 27 seriously, it must put its consultation efforts in connection with any particular action in the
 28 context of its operation and development of its system as a whole. Here, BC Hydro is acquiring
 29 a largely passive interest in a facility that has been operated in the Province for a very long time.
 30 Its decision to do so will not affect any opportunity for First Nations to rectify any historical
 31 Crown failure to consider their interests when permitting the Waneta Assets to be developed.
 32 BC Hydro has nevertheless made a significant effort to engage First Nations in respect of this
 33 Transaction. A determination that even this effort is inadequate would impair BC Hydro's ability
 34 to apply its resources on consultation to projects that will have a real and material impact on
 35 First Nations' interests.

VI. The Impact of the Transaction on Other Parties to the Canal Plant Agreement

1 The CPA is made amongst BC Hydro, Teck, FortisBC and two subsidiaries of Columbia Power
2 Corp. (“**CPC**”). The CPA Amending Agreement attached to the APA contemplates certain
3 changes to the CPA. The CPA as amended by the parties is exempt from BCUC regulation by
4 BCUC Order No. G-41-06.

5 The CPA Amending Agreement made bilaterally by Teck and BC Hydro will come into effect
6 only if the Transaction closes. BC Hydro and Teck have made a good faith commitment to work
7 with FortisBC and CPC to provide for the Transaction through amendments to the CPA that
8 minimize the potential impact on FortisBC or CPC. Both those companies have accepted those
9 commitments and discussions are continuing in that regard. The final form of revisions to the
10 CPA will be determined by the time the Transaction closes with the default arrangement being
11 that the amendments set out in the filed CPA Amending Agreement will take effect.

12 The parties to the CPA accept these arrangements and have filed no evidence in these
13 proceedings. The BCUC has determined in granting Exemption Order No. G-41-06 that the
14 parties are best able to protect their interests through commercial arrangements. In these
15 circumstances, no further regard need be had to the concerns of the parties to the CPA in
16 assessing the public interest in this case.

VII. Concerns of the City of Trail and United Steelworkers Local 480 (“USW 480”)

17 The City of Trail and USW 480 that represents workers at Teck’s Trail Smelter have raised
18 concerns with respect to the impact of the Transaction on jobs at the smelter and the Trail
19 community in general. While BC Hydro respects these concerns, it respectfully submits that on
20 the evidence there is no basis for the BCUC permitting them to affect its assessment of the
21 public interest in this case.

22 BC Hydro does not say that local concerns may not be relevant to the public interest in certain
23 circumstances. However, as the BCUC made clear in the Alcan Decision, local effects must be
24 proven before they will influence the BCUC’s assessment of the public interest.⁴⁹ Here, there is
25 no basis in the evidence upon which the BCUC can conclude that the proposed Transaction will
26 in fact have a negative impact on employment in Trail or a negative impact on Trail or the region
27 at all.

28 The evidence of the City of Trail and the submissions to date of USW 480 are entirely
29 speculative in nature. This speculation is most fully developed in Exhibits C9-7 and C9-8 which
30 are the speaking notes of Mayor Dieter Bogs and Councillor Al Graham. In that evidence, both

⁴⁹ See the Alcan Decision, p. 24.

1 assert that the Waneta Transaction will have a negative impact on the future of Teck's Trail
 2 operations. They reached this conclusion based on speculation concerning Teck's behaviour
 3 after the Transaction is complete.

4 It is equally possible to speculate that far from jeopardizing the future operation of the Trail
 5 Smelter, the Transaction played a significant part in providing a future for that operation. At the
 6 time that Teck came to BC Hydro to sell surplus power, it had a real and urgent need to
 7 monetize the value of some of its assets in order to remain financially solvent.⁵⁰ Had it been
 8 unable to do that, its corporate survival was in issue. Although the ongoing operation of the
 9 Waneta Assets was never in doubt during this period, the future of the Trail Smelter if Teck had
 10 not been able to escape its financial difficulties was highly uncertain.

11 Based on the evidence in this proceeding, while the structure of the Transaction cannot
 12 guarantee the future of the Trail Smelter, it certainly supports it. From BC Hydro's perspective,
 13 acquiring one-third of the output from Waneta as it is available would be straightforward and
 14 satisfactory. Instead the Transaction contemplated complex adjustments to Teck's entitlement
 15 designed to ensure it always has enough power to operate the Smelter at its current capacity.
 16 Far from threatening the ongoing operation of the Smelter, the parties went to considerable
 17 effort to ensure it will have sufficient power to be able to continue operations at its current
 18 capacity.

19 In summary, we may never know what would have happened to Teck and Trail had this
 20 Transaction not been available to Teck and played its part in the successful financial recovery
 21 plan that Teck undertook, but on the evidence, it is fair to conclude the Transaction has
 22 improved the future prospects of the Smelter.

23 Furthermore, BC Hydro need not prove that this Transaction is beneficial to the Trail Smelter.
 24 The future of that important industrial undertaking is unknown to all of us. It is simply not
 25 possible to say that the Waneta Transaction is at the expense of the Trail Smelter any more that
 26 it is to say that the Waneta Transaction will guarantee the future of the smelter. In these
 27 circumstances, it is respectfully submitted that the future of the Trail Smelter is not a central
 28 issue in assessing the Waneta Transaction. In the absence of any evidence demonstrating that
 29 there are probable economic effects of the Transaction on the area, speculation about such
 30 effects should not influence the BCUC's assessment of the public interest in this case. In this
 31 respect, BC Hydro respectfully submits that the circumstances are wholly analogous to those
 32 described at page 24 of the Alcan Decision with respect to the Alcan EPA.

33 BC Hydro does acknowledge the City of Trail's concerns about tax revenue. There is a
 34 possibility that the change of ownership will lead to a reduction in local taxes. Again, over time
 35 the net effect of the change in ownership is speculative. It is not sufficient in any case to

⁵⁰ Filing, Exhibit B-1, Section 6.5.1, pp. 6-14, lns. 3-6.

1 outweigh the significant benefits of the Transaction catalogued above when determining the
2 public interest.

VIII. The Form of Order sought by BC Hydro

3 The IR process has raised at least two issues with respect to the form of order sought by BC
4 Hydro. The first relates to whether BC Hydro requires a CPCN in connection with its undivided
5 one-third interest in the Waneta Assets. The second relates to whether BC Hydro's request that
6 the BCUC accept that it is in the public interest to enter into the future spending obligations
7 identified in the Co-ownership and Operating Agreement.

A. Requirement for CPCN

8 BC Hydro respectfully submits that no CPCN is required with respect to its interest in the
9 Waneta Assets and it will not be deemed to have such a certificate after it has acquired its
10 interest.

11 No certificate application is required pursuant to Section 45(1) of the UCA because the
12 Transaction does not contemplate a person undertaking any activity contemplated by that
13 section. In particular, BC Hydro does not pursuant to the Transaction propose to "begin the
14 construction of" the Waneta Dam given that it was constructed more than 50 years ago.
15 Similarly, BC Hydro does not propose to begin the operation of the Waneta Dam since it has
16 also been in operation for more than 50 years.

17 The only other way that Section 45(1) could be implicated by the Transaction is if it constituted
18 "an extension of BC Hydro existing public utility plant or system". Thus, the only relevant legal
19 issue is whether or not the ownership of a minority interest in the Waneta Dam can be said to be
20 an extension of BC Hydro's public utility plant or system. In BC Hydro's submission it is clear
21 that it cannot.

22 BC Hydro observes first that the Waneta Assets will not be interconnected with its plant or
23 system. The Waneta Assets are not interconnected to BC Hydro's system. Teck's core
24 obligation is to deliver the output from the Waneta facilities at the Kootenay Interconnection
25 which is physically removed from the Waneta Assets and accessible only through Line 71. Line
26 71 will continue to be owned by Teck. Thus, BC Hydro's system does not now and will not after
27 the Transaction "extend" to include the Waneta Assets.⁵¹

28 Second, the interest in the facility is not being acquired to serve new BC Hydro's load or to
29 permit BC Hydro to expand its service area. The Transaction does not create and is not
30 premised on any obligation to serve new customers and there is no effect of this Transaction on
31 the nature of BC Hydro's ongoing public utility operations. To the contrary, the Waneta

⁵¹ See the Response to BCUC IR 2.12.1.

Transaction will have the effect of reducing the load that BC Hydro must serve. Currently, BC Hydro receives the output from the Waneta Assets and then provides an entitlement to Teck based on an adjusted forecast of that output. After the Transaction, the entitlement of Teck will be reduced. The issue therefore is whether in these circumstances the reduction in the obligation to provide power to Teck based on the purchase of an interest in the Waneta Assets can be said to be an extension of BC Hydro's plant or system.

While there are various dictionary definitions that describe an "extension", two are apt in the circumstances: one definition emphasizes physical continuity while the other reflects a purpose of serving new territory.

Webster's Third New International Dictionary defines an extension as "a part that is extended from or attached to a main body or section as an addition, supplement, or enlargement – a segment that forms an additional length."⁵² *Ballantine's Law Dictionary* defines "extension", in part, as "An addition to the system of lines of a public utility for the purpose of serving new territory."⁵³

Based on these definitions, BC Hydro does not believe that the acquisition of the Waneta Assets represents an extension of BC Hydro's plant or system because it is not attached or interconnected with BC Hydro existing equipment or facilities nor is it being added to BC Hydro's system for the purposes of serving new territory or new customers.

It is for these reasons that BC Hydro believes that no CPCN should be issued to it with respect to this Transaction. In reaching this conclusion, BC Hydro acknowledges the absence of BCUC or other regulatory authority on the point given the unusual structure of the Transaction. However, the clear words of the statute appear to permit no other conclusion.

B. BC Hydro's Commitment to Future Expenditures

A second point of form, as opposed to substance, can be inferred from IRs that focused on the second part of the order requested by BC Hydro. Pursuant to the proposed Co-ownership and Operating Agreement, BC Hydro will be committed to making a one-third pro rata contribution to the operation, maintenance and capital expenditures associated with the Waneta Dam. So long as Teck is generally in compliance with its obligations as operator, BC Hydro is obliged to make these contributions to most expenses approved by the Operating Committee (where BC Hydro has one-third of the votes). For some major sustaining capital expenditures or operating and maintenance expenses identified in budgets that would represent a major change in past expenditure levels, BC Hydro will be able to refer the matter to an independent third party referee. That referee will then apply standards described in the agreement to determine whether

⁵² 3rd ed., s.v. "extension". See, also, *supra* note 8, s.v. "extension", where "extension" is defined to mean "a part added to a structure or building to enlarge it."

⁵³ 3rd ed., s.v. "extension".

1 BC Hydro should be required to make its contribution. Finally, BC Hydro may veto significant
 2 non-sustaining capital expenditures. These would be expenditures that expand output or
 3 otherwise are not required to maintain the level of production currently associated with the
 4 facility.⁵⁴

5 The result of these arrangements is that where the Operating Committee chooses to expend
 6 funds on operations, maintenance or sustaining capital, BC Hydro may be committed to make a
 7 one-third contribution to those expenditures, whether it believes those expenditures are prudent
 8 or not. BC Hydro has negotiated extensive provisions in the Co-ownership and Operating
 9 Agreement to make it likely that the expenditures will be prudent and the operator's own
 10 financial interest should align in all foreseeable circumstances with BC Hydro's.⁵⁵ BC Hydro
 11 can think of no reason why Teck or any subsequent owner of a majority interest in the facility
 12 would wish to expend funds on the Waneta Dam imprudently. However, the fact remains that
 13 BC Hydro is a minority owner and is not the operator. Accordingly, like any minority owner, it is
 14 making an investment in the business acumen and operating skill of the majority
 15 owner/operator. BC Hydro is entirely comfortable making this commitment in this case given
 16 the long and successful operating history Teck has with the Waneta facility.⁵⁶ The form of order
 17 sought from the BCUC in connection with this Filing seeks the BCUC's concurrence with this
 18 assessment.

IX. Conclusion and Summary

19 BC Hydro appreciates the manner in which BCUC has balanced commercial realities with
 20 legitimate stakeholder interests and First Nations consultation needs in defining the process for
 21 considering the Filing. In BC Hydro's respectful submission, the BCUC has conducted a
 22 process that has allowed all viewpoints to be fully considered while recognizing that undue
 23 delay would jeopardize a transaction that is very attractive for BC Hydro and its ratepayers.

24 BC Hydro asks that the BCUC take the same balanced approach in determining whether BC
 25 Hydro has adequately demonstrated that the Transaction serves the public interest. No
 26 evidence before the BCUC in this proceeding casts any doubt on BC Hydro's assertion that the
 27 Transaction will serve the public interest. In these circumstances, the BCUC should refrain from
 28 entertaining arguments about what might have been in the context of the Transaction. BC
 29 Hydro has brought forward a schedule of expenditures that is manifestly in the public interest.
 30 Accordingly, BC Hydro respectfully submits that the BCUC should accept it.

31 If BC Hydro is unable to complete the Transaction because of concerns raised by Intervenor
 32 with their own private agendas to pursue or because of jurisdictional reach by the BCUC, not

⁵⁴ Exhibit b-11-1, Co-Ownership and Operating Agreement, Section 6.5-6.6, pp. 124-129 of 293.

⁵⁵ See the responses to BCUC IRs 2.4.1 and 2.4.8.

⁵⁶ See the response to BCUC IR 2.11.1.


1 only will the public interest benefits of the Transaction be lost, but so too will the potential
2 benefits from other transactions involving non-regulated third parties. Ratepayers depend upon
3 BC Hydro to make full use of the private sector's ability to deliver cost effective power to the BC
4 Hydro system. If private sector players conclude that the regulatory burden associated with
5 contracting with BC Hydro is too onerous, they will take their capital and power elsewhere. BC
6 Hydro respectfully submits the BCUC should ensure its decision in this case does not foster that
7 outcome.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 9TH DAY OF DECEMBER, 2009:**

Per:


Chris W. Sanderson, Q.C.

Per:


Michelle S. Jones