Fasken Martineau DuMoulin LLP *
Barristers and Solicitors
Patent and Trade-mark Agents

2900 - 550 Burrard Street
Vancouver, British Columbia, Canada V6C 0A3

604 631 3131 Telephone
604 631 3232 Facsimile

www.fasken.com

C.B. Johnson, Q.C.
Direct 604 631 3130
Facsimile 604 632 3130
cjohnson@fasken.com

December 17, 2009
File No.: 241982.00437/14186

VIA E-MAIL

British Columbia Utilities Commission
6th floor, 900 Howe Street
Box 250
Vancouver, B.C. V6Z 2N3

Attention: Erica M. Hamilton
Commission Secretary

Dear Sirs/Mesdames:

Re: British Columbia Power and Hydro Authority
Application re Acquisition from Teck Metals Ltd. of an Undivided One-third Interest in its Waneta Dam and Associated Assets
Project No. 3698565

Enclosed is the electronic version of the Final Submission on behalf of Teck Metals Ltd. for filing in the above proceeding. Paper copies of the Final Submission will be provided to the Commission by courier.

We will provide copies of the authorities cited in the Submission.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Original signed by C.B. Johnson

C.B. Johnson, Q.C.

CBJ/vde

Encl.

cc: Registered Intervenors

DM_VAN/241982-00437/7489994.1

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE *UTILITIES COMMISSION ACT*
R.S.B.C. 1996, Chapter 473

and

IN THE MATTER OF A FILING
BY BRITISH COLUMBIA POWER AND HYDRO AUTHORITY

REGARDING THE ACQUISITION FROM TECK METALS LTD.
OF AN UNDIVIDED ONE-THIRD INTEREST IN THE
WANETA DAM AND ASSOCIATED ASSETS

SUBMISSIONS OF
TECK METALS LTD.

December 17, 2009

TABLE OF CONTENTS

SUBMISSIONS OF

TECK METALS LTD.

A. INTRODUCTION

1. On July 6, 2009, BC Hydro filed a Schedule of Expenditures (the "Filing") with the British Columbia Utilities Commission ("Commission" or "BCUC") in connection with expenditures it anticipates making to complete a transaction (the "Transaction") with Teck Metals Ltd. ("Teck") by which BC Hydro will acquire a undivided one-third interest in the Waneta Dam and related facilities ("Waneta Assets"), and which will also see a one-third reduction in BC Hydro's obligations under the Canal Plant Agreement ("CPA"). BC Hydro seeks the following Order 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 Act*[1] ("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; and

(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.

2. Teck submits that the Commission should grant the Order sought by BC Hydro.

3. The Submissions of Teck are limited to the following issues before the Commission:

(a) Does a duty to consult and, if necessary, accommodate aboriginals exist and, if so, has the duty has been met in respect of the Filing.

(b) Concerns raised by the City of Trail and the United Steelworkers, Local 480 ("USW 480").

(c) The form of Order sought by BC Hydro.

4. As discussed in the Filing, for many years Teck has sold into power markets the power available to it from Waneta in excess of the requirements of its industrial operations in the Trail area ("Industrial Operations").[2] From the perspective of Teck, the sale of a one-third interest in the Waneta Assets is monetization of the value of the excess power that Teck would otherwise

[1] R.S.B.C. 1996, c. 473

[2] Until 2005 the Sullivan Mine operations of Teck in Kimberley, B.C. were also supplied with power from Waneta

have sold as market power. In the Transaction Teck is **not** selling the power that is required for its Industrial Operations. BC Hydro's Filing provides a chronology of discussions between BC Hydro and Teck, saying that when discussions started "It was clear to BC Hydro that Teck needed to monetize the value of some of its assets and that the surplus energy that could be produced at Waneta was a candidate asset in that connection".[3] Teck's financial circumstances have improved, but Teck's debt levels must be reduced. As Don Lindsay, the Chief Executive Officer of Teck, is quoted as saying in a news report submitted by the City of Trail as part of its evidence:

> This transaction with BC Hydro is the latest step in Teck's plan to significantly reduce our debt and position the company for long-term success."[4]

The Transaction has Teck retaining a two-thirds undivided interest in the Waneta Assets, which will provide the Trail Industrial Operations with the power they require, while strengthening Teck financially; a financially strong Teck is important for the Trail Industrial Operations.

5. While an undivided one-third interest in the Waneta Assets will be acquired by BC Hydro, the operations of the Waneta Dam and the generation of power will not be affected by the Transaction. The Waneta Assets are currently managed by FortisBC, which management will continue. Under the Co-Ownership and Operating Agreement Teck will be the Operator of the Waneta Assets, which means that Teck will continue to have responsibility for the ongoing operations, as has been the case in the past. Teck's interest in the Waneta Dam will continue to be in the CPA, and BC Hydro's operating instructions in respect of its interest in the Waneta Assets are to be consistent with operating instructions pursuant to the CPA.[5] The Transaction will not affect what occurs at Waneta, the Transaction will only result in power that Teck would otherwise have sold as market power being available to BC Hydro.

B. DUTY TO CONSULT

FACTS re: DUTY TO CONSULT

6. In relation to the Filing, the evidence of BC Hydro's consultation efforts with the Sinixt First Nation ("Sinixt"), Okanagan Nation Alliance ("ONA"), Ktunaxa Nation Council ("KNC") and Shuswap Indian Band ("SIB") (the "First Nations") are set out in the Updated First Nations

[3] Filing, Exhibit B-1, page 6-14, lines 6 to 8

[4] June 18, 2009 BNN News Report in Exhibit C9-5

[5] Section 5.6 of the Co-Ownership and Operating Agreement

Consultation Report filed with the Commission on November 27, 2009.[6] Some of that evidence is highlighted below, but Teck relies on it in its entirety in this Submission.

7. With respect to the claims of aboriginal title or rights of each of the First Nations, BC Hydro reached the following conclusions relevant to the strength of claims of each First Nation:[7]

> In summary, BC Hydro has reached the following conclusions based in its consultation and the evidence filed in this proceeding:
>
> - There is conflicting evidence as to whether the lower Pend d'Oreille was extensively used by any Aboriginal people;
> - There is conflicting evidence as to whether historically the Sinixt or the Arrow Lake people whose composition may have included individuals that were Sinixt, Colville, Okanagan, Shuswap and Ktunaxa participated in such use. There is also conflicting evidence as to whether the Arrows Lake peoples were a distinct group from the Northern Okanagan;
> - The Arrow Lakes people (whether composed purely of Sinixt people or a combination of several First Nations) appear to have vacated the mouth of the Pend d'Oreille River by 1900 and the general area by 1910 at the latest and were not present in the area when the Waneta Dam was constructed and began operations; and
> - [Four] First Nation groups [Sinixt, the ONA, the SIB and the KNC] have claimed that the lands in the vicinity of the Waneta Dam are within their traditional territory.

and the following conclusions on the seriousness of potential impacts:[8]

> Similarly, BC Hydro ARN has sought to assess the significance of the impact, if any, of the Transaction on the interest asserted by the [Sinixt/ONA/KNC/SIB] Nation. The following evidence was considered most important in that regard:
>
> - The [Sinixt Nation accept that the] Transaction will not adversely affect (or indeed, affect at all) the flow regime on the Pend d'Oreille River or other physical characteristics of the Waneta Dam or it operations;
> - No non-physical adverse impacts of the Transaction on [the First Nations] interests have been identified either by the [First Nations] or in the public record;
> - BC Hydro will be acquiring a non-controlling interest in the facility and will not become the operator. However, BC Hydro will obtain a right to sit on the Operating Committee responsible for making operational decisions in connection with the Waneta Dam.

---

[6] Exhibit B-20

[7] *Supra,* pages 87, 90, 93 and 96

[8] *Supra,* pages 88, 91, 94 and 96

8. BC Hydro reached the following conclusions in respect of scope of the duty to consult, assuming such a duty existed, for each of the First Nations:

(a) [Sinixt] Given the low to moderate strength of claim and the very low potential for adverse effects set out above, BC Hydro ARN believes that the consultation obligation in respect of the Waneta Transaction is toward the lower end of the *Haida* spectrum.[9]

(b) [ONA] Based on the observations above and the information received by BC Hydro ARN, given the low to moderate strength of claim and the very low potential for adverse effects, BC Hydro ARN believes that the consultation obligation in respect of the Waneta Transaction is towards the lower end of the *Haida* spectrum.[10]

(c) [KNC] Based on the observation above and the information received by BC Hydro ARN to date, given the low to moderate strength of claim and the low potential for adverse effects, BC Hydro ARN believes that the consultation obligation in respect of the Waneta Transaction is towards the lower end of the *Haida* spectrum.[11]

(d) [SIB] Based on the observations above and the information received by BC Hydro ARN to date, given the low strength of claim and the very low potential for adverse effects, BC Hydro ARN believes that the consultation obligation in respect of the Waneta Transaction is at the lower end of the *Haida* spectrum.[12]

9. With respect to whether the duty to consult with the First Nations had been met, BC Hydro concluded:[13]

> BC Hydro ARN believes that the consultation undertaken with the First Nations on the Transaction has been adequate to allow the BCUC to find the expenditure in the public interest.

ISSUE re: DUTY TO CONSULT

10. The Issue to be determined by the Commission with regard to First Nations is: Does a duty to consult and, if necessary, accommodate the First Nations exist and, if so, has the duty has been met in respect of the Filing?

APPLICABLE LEGAL PRINCIPLES

11. The First Nations assert claims of aboriginal title and rights to the area surrounding the Waneta Dam. None of the First Nations asserts any treaty rights to the area surrounding the Waneta Dam. The Commission must apply the law on consultation to the evidence of aboriginal

[9] *Supra,* page 88
[10] *Supra,* page 91
[11] *Supra,* pages 94-95
[12] *Supra,* page 97
[13] *Supra,* page 97

rights and aboriginal title in order to determine the strength of the First Nation claims. Once the strength of claim is determined, it is necessary to consider the evidence of the impacts of the Filing on those asserted rights to determine the scope and content of the duty to consult.

12. The applicable legal principles in relation to:

(a) The duty to consult,

(b) Aboriginal title, and

(c) Aboriginal rights

are set out below in order to provide the legal framework for the Commission to consider the Issue.

Duty to Consult

13. The British Columbia Court of Appeal has concluded that when BC Hydro files an energy supply contract with the Commission under section 71, the Commission has the jurisdiction, and the legal obligation, to determine whether a duty to consult and, if necessary, accommodate aboriginals exists and, if so, whether the duty has been met in respect of the filing of the energy supply contract. The Court of Appeal said:

> [42] Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?
>
> …
>
> [62] I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. I refer to the assumed facts, namely, that there is an infringement without consultation and on the unquestioned fact that B.C. Hydro, a Crown agent, takes advantage of the power produced by the infringement by signing the EPA. In my opinion, this is enough to clear any reasonable hurdle. As stated in *Mikisew*, at para. 55:
>
> > The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. [Emphasis added in original.]
>
> Whether the EPA triggered a duty is for a hearing on the merits.
>
> …
>
> [63] Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The process deprived the appellant the opportunity to develop a case for the non-physical

> impacts listed in their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least participate in the infringement.
>
> [64] Again, these points may not carry the day for the appellant, but the appellant should have had the opportunity to develop them.
>
> [69] As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for consideration. The order I would make is in terms similar to those suggested by B.C. Hydro in the event the appeal is allowed:
>
> > THAT the proceeding identified as "Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electricity Purchase Agreement with RTA as an Energy Supply Contract Pursuant to section 71" be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.
> >
> > *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* 2009 BCCA 67 ("*CSTC*")

14. The Supreme Court of Canada has set out what has been called the *Haida* spectrum for determining the content of the duty to consult and whether the consultation was reasonable:

> 43 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. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government

may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 ("*Haida*")

15. The Court made this important determination in *Haida*:

> 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

16. The Court in *Haida* made it clear that so long as the reasonable attempts to consult were made, the duty to consult would be discharged so long as the existence and extent of the duty is correctly determined:

> 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748
>
> 62 The 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. As stated in *Nikal, supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> 63 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.

17. It is important to note that Teck has no duty to consult:

> 56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

Proof of Aboriginal Title

18. The Supreme Court of Canada set out the test for aboriginal title in *Delgamuukw*:

> 143 In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.
>
> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*")

19. The Supreme Court of Canada in *Delgamuukw* set out this important aspect of aboriginal title, which is relevant here:

> 155 Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

20. The date of sovereignty in British Columbia was determined to be 1846 in *Delgamuukw*.

Proof of Aboriginal Rights

21. Aboriginal rights are usually site specific and must be integral to the culture of the First Nation asserting the right. As the Supreme Court of Canada said in *Van der Peet*:

> 46. In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has

> established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> *R. v. Van der Peet*, [1996] 2 S.C.R. 507

ARGUMENT re: DUTY TO CONSULT

Is There a Duty in This Filing

22. BC Hydro's submission proceeds on the assumption that a duty to consult arises with respect to the Filing.[14] Without acknowledging that there is a duty to consult in respect of this Filing under section 44.2 of the UCA, these submissions of Teck also proceed on the assumption that a duty to consult arises with respect to the Filing.

Scope and Content of the Duty

23. In *Haida*, the Court described the low or lower end of the duty to consult as comprising those cases where: "the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor." It is important to note that if any one of these three conditions exists, the duty is at the lower end. Each of those three conditions is examined below.

Claim to Title is Weak

24. In *Delgamuukw* the Supreme Court of Canada emphasized that proof of aboriginal title requires proof of exclusive occupation at the date of assertion of sovereignty, being 1846 in B.C. In this proceeding, each of the Sinixt, ONA, KNC and SIB claim aboriginal title to the area surrounding the Waneta Dam. However, in law, the Sinixt, ONA, KNC and SIB cannot all have aboriginal title to the area surrounding the Waneta Dam. A similar situation was considered by the B.C. Supreme Court in *Heiltsuk* where two First Nations claimed aboriginal title to the same area of land. In respect of those overlapping claims, the Court concluded:

> [63] Based on the evidence before me of the overlapping claims, the only conclusion I have been able to reach is that both Heiltsuk and Nuxalk assert aboriginal title over the land, but I am unable to determine whether either has a good *prima facie* case of aboriginal title.
>
> *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422.

25. With respect to this Filing, when there are four overlapping claims to the area around Waneta Dam, it is impossible to say whether any of the Sinixt, ONA, KNC or SIB has a good

[14] Final Argument of BC Hydro, page 9.

prima facie case of aboriginal title to the area around the Waneta Dam. The result is that the claim of each of the four First Nations to aboriginal title is weak.

26. In addition, the fact that none of the First Nations reside anywhere close to the Waneta Dam[15] is a further ground for finding a weak claim to title for all:

> [79] Based on the limited material before me, my preliminary assessment is that the claim of the Nlaka'pamux Nation to aboriginal title to the land on which the Extension Project is proposed to be located is weak. I base this assessment on the fact that in the original land claim made by the Nlaka'pamux Nation stated that Ashcroft was the northern boundary of its territorial land claim. Further, on the evidence before me it appears that it is the Bonaparte Indian Band, a member of the Secwepemc Nation, which had had historical possession of the lands in question. In this regard, it is to be noted that the affidavit of Leslie Edmonds, an elder of the Village of Stassh, which is located on the Ashcroft Indian Reserve No. 2, does not specifically assert that the Extension Project is on land which has been exclusively occupied by the Nlaka'pamux Nation. As pointed out by counsel for the respondents, Mr. Edmonds is, of course, a member of the Cache Creek Band.
>
> *Nlaka'pamux Nation Tribal Council v. Griffin*, 2009 BCSC 1275

27. The Waneta Dam is at or near a boundary of the ONA and KNC claimed territories[16] and to the south of the originally asserted boundary of the SIB territory.[17] The evidence relating to the Sinixt supports a conclusion that between the mid 1800's and the early 1900's, the Sinixt may have used the area around the Waneta Dam but that they moved from Canada into the United States to the Colville reservation.[18] All of this evidence independently supports a conclusion of a weak claim for each of the four First Nations.

Aboriginal Right Limited

28. The only consistent claim to existing exercise of aboriginal rights is in relation to the sturgeon in the Columbia River below the dam. There is no evidence that any of the Sinixt, ONA, KNC or SIB regularly hunts, fish, trap or gather plants in the Waneta Dam area. The evidence filed in this hearing supports, at best, a limited claim to fish for sturgeon in the

[15] Final Argument of BC Hydro, pages 18 and 19
[16] Exhibit B-20, pages 10, 89 and 92.
[17] Exhibit B-20, pages 7, 11,12 and 48
[18] Exhibit B-20, pages 4-5 and 53-54.

Columbia River.[19] This means that the claim for aboriginal rights generally in the Waneta Dam area for each of the Sinixt, ONA, KNC and SIB is weak.

Potential for Infringement Minor

29. There will be no change in the operation of the Waneta Dam as a result of the proposed Transaction. No new facilities are being constructed, the flow regime will remain the same, all that will change is that BC Hydro will own a one-third undivided interest in the Waneta Assets, and power that would otherwise have been sold by Teck as market power will now be available to BC Hydro. The potential for infringement as a result of the proposed Transaction is minor or non-existent.

Conclusion re Scope and Content

30. Applying the *Haida* test, the claim of each of the four First Nations is weak and therefore the duty to consult is at the low end of the *Haida* spectrum.

Reasonableness of Consultation

31. In *Haida*, the Supreme Court of Canada suggested that where the duty to consult was at the low or lower end of the spectrum "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice". It is clear from the material filed by BC Hydro that it has done far more than giving notice, disclosing information and discussing issues raised.[20] BC Hydro has engaged in much deeper consultation than *Haida* would require in respect of this Filing.

32. Teck submits that under the *Haida* test, the steps taken by BC Hydro in consulting with the First Nations were reasonable. The consultation process as a whole was reasonable. Teck submits that BC Hydro met the duty of consultation, assuming such a duty exists in relation to the Filing.

Historical Grievances

33. Teck agrees with the submissions of BC Hydro that the issue of historical grievances does not arise in the case. In particular, Teck submits that there has been no evidence adduced by the Sinixt, ONA, KNC or SIB that the concern expressed (in *CSTC* at paragraph 63)

[19] As noted in the quotation at the bottom of page 82 of the Updated First Nations Consultation Report (Exhibit B-20) harvesting of white sturgeon has been discontinued since the early 1970s due to collapse of both the Kootenay and Upper Columbia populations

[20] Updated First Nations Consultation Report, Exhibit B-20.

that the Filing "tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future" arises in this case.

Conclusion Respecting Duty to Consult

34. Teck submits that if a duty to consult the First Nations exists, which is not admitted, the duty has been met in respect of the Filing.

C. CONCERNS RAISED BY THE CITY OF TRAIL AND USW 480

35. The City of Trail and the USW 480 express concern that the Transaction may affect the viability of Teck's Industrial Operations. A similar concern is also expressed in some of the Letters of Comment filed by interested parties. The City of Trail says that in the past "Cominco [now Teck] made it known that access to low cost power was necessary to be competitive and maintain smelter operations in the community, both operationally as a factor of production".[21] Teck acknowledges that it has made such statements in the past; and access to low-cost power continues to be necessary for the Trail Industrial Operations to be economically viable. It is for this reason that the Transaction has been structured in a manner to provide the Industrial Operations with the low-cost power they require. As set out at page 3-6 of the Filing:

> Teck would use its two-thirds interest in the Waneta Assets to provide power for its Industrial Load at the Trail smelter. The parties recognize that Teck's Industrial Load may require less than two-thirds of the CPA entitlement associated with the Waneta Assets in some months and greater than two-thirds in other months. Accordingly, the Operating Terms would contemplate a series of entitlement adjustments until at least December 31, 2035 designed to ensure that Teck would have sufficient energy to serve the Industrial Load in all months.[22]

36. The BC Hydro response to BCUC information request 1.24.1 set out Teck's estimate of the maximum energy and capacity requirements of its Industrial Load. The monthly energy and capacity amounts set out in that response include a capacity buffer of 15 MW. The 15 MW buffer is shown in tables in the response to BCUC information request 1.41.2. For example, the load of the Industrial Operations (including reserves and the 15 MW buffer) is shown at lines 45 to 48 of the table at page 4 of 9 of that response. Corresponding monthly values for the Industrial Operations power load (with minor differences due to refinement of the values) are also shown in Table 3 (Section 14.5) of the Co-Ownership and Operating Agreement. It is the

[21] Exhibit C9-8, page 2 and Mr. Graham at transcript page 116, lines 17 to 22; with a similar statement referenced in footnote 4 on page 2 of Exhibit C9-3

[22] Filing, Exhibit B-1, page 3-6, lines 13 to 18

values in the tables in the Co-Ownership and Operating Agreement that provide for the division of power as between Teck and BC Hydro.

37. As discussed in the Filing, Teck and BC Hydro were aware that the Waneta Expansion Project ("WEP") may proceed, and if it does the energy and capacity to which Teck is entitled under the CPA would decrease. The earliest date at which the WEP is expected to be in service is April 1, 2014. To ensure that the availability of low-cost power for the Industrial Operations would not be adversely affected by the construction of the WEP, the Transaction provides for the power being made available to BC Hydro to decrease as of the assumed WEP in-service date of April 1, 2014. As set out at page 3-6 of the Filing:

> The Waneta Transaction was negotiated based on the assumption that the WEP would proceed with an in-service date of April 1, 2014. Because of WEP's priority rights to water above 25,000 cfs, the WEP would reduce the CPA energy entitlement by about 143 GWh/year. This reduction in energy and associated reduction in capacity has been reflected in the Operating Terms. To maintain Teck's ability to meet its Industrial Load, the Operating Terms contemplate that BC Hydro's Waneta Electricity would be reduced by the full amount of the anticipated reduction in energy and capacity associated with the WEP effective April 1, 2014 through December 31, 2035.

If the in-service date of the WEP is delayed beyond April 1, 2014, power in excess of the estimated Industrial Operations requirement will be available to Teck, which would then be available to sell as market power (subject to the requirement to offer to BC Hydro under the Surplus Power Rights Agreement).

38. In summary, the Transaction has been designed to have the low-cost power that is required for the Industrial Operations available to Teck, and to have the power that is in excess of the requirements of the Industrial Operations (that would otherwise have been sold by Teck as market power) available to BC Hydro.

39. The City of Trail has said that the price paid to Teck under the Transaction "is more than Teck's opportunity cost", which "may be an incentive to Teck to sell additional portions of the Dam in the future".[23] Firstly, the only transaction the Commission is considering is that described in the Filing. Secondly, BC Hydro has considered Teck's opportunity cost, and concluded that the purchase price of $825 million is "directly comparable".[24] Information on Teck's export sales is provided in the response to BCUC information request 1.23.1, and was

[23] Exhibit C9-7, page 3

[24] Filing, Exhibit B-1, page 6-19, line 2, and Table 6-4. Teck's Opportunity Cost is addressed by BC Hydro in Section 6.5 of the Filing, commencing at page 6-13.

also provided by the City of Trail in Exhibit C9-7.[25] It is Teck's submission that this Transaction does not create an incentive for Teck to sell any further interest in the Waneta Dam.

40. The City of Trail has suggested that the parties to the Transaction are not concerned about the viability and sustainability of the Trail Industrial Operations. Teck submits that is not correct. As set out above, the Transaction has been designed so that the month-to-month power requirements of those Industrial Operations are met, including a 15 MW buffer. Any power savings achieved through the introduction of energy efficiencies in the Industrial Operations is available to Teck, and is not committed to BC Hydro as part of this Transaction. The City refers in Exhibit C9-7 to responses to information requests and sections of the Co-Ownership and Operating Agreement which set out that Teck is responsible for variations in entitlement for the period to 2036.[26] The USW 480 and Mr. Jones at the Community Input Session referred to Teck being responsible for outages at Waneta.[27] Teck is responsible for shortfalls in power during that period, but has the right to make market purchases to meet any shortfall. The existence of Line 71 with its connection to the U.S. border together with the ability to make market purchases of power mitigates any risk to Teck and the Industrial Operations.

41. Mayor Bogs and the City of Trail questioned why Teck would not sell its interest in Line 71.[28] Line 71 will be used to make available to BC Hydro its share of power from Waneta. In addition, Teck ownership of Line 71 will enable Teck to purchase power if it is required, and to sell power in circumstances such as a delay in the Waneta Expansion Project (which would cause incremental power to be available to Teck).

42. The City of Trail raises a concern respecting a possible effect on property taxes. Teck will continue to pay property taxes on its interest in the Waneta Assets. To the extent the taxes or grants in lieu that BC Hydro pays on its interest in the Waneta assets differ from what Teck would have paid, it is a matter for consideration by the Province, and not this Commission. In the Public Input Session Mr. Graham advised the Commission that the Association of Kootenay

[25] In 2000 and 2001 power prices were high, with metal production at the Trail Industrial Operations being curtailed to increase power sales, resulting in low metal profits and high power profits. In the years since 2001 metal production at the Trail Industrial Operations has been profitable, but cyclical.

[26] Exhibit C9-7, pages 4 and 5

[27] Exhibit C15-6 page 2, seventh paragraph, and Transcript page 95, line 1 to 7

[28] Exhibit C9-7 page 5 and Transcript page 105, lines 15 to 26

Boundary Local Governments had written to the Minister of Finance respecting property taxes.[29] [30]

43. The USW 480 has suggested that the water licences for Waneta are, or should be, limited with a condition that requires them to be tied to the Trail Industrial Operations. As acknowledged in Exhibit C15-4[31] and by Mr. Jones in his presentation at the Public Input Session[32], the USW 480 does not have any legal facts to back up this position. The Waneta water licences were filed by BC Hydro in response to ONA information request 1.2.2; the water licences do not contain such terms. Teck submits that there is no legal impediment to BC Hydro acquiring a one-third undivided interest in the Waneta Assets, including a one-third interest in the water licences. Further, as discussed above and as discussed by both the City of Trail and the USW 480, for years Teck has sold power in excess of the requirements of the Industrial Operations as market power. Instead of selling that power in the open market it will be committed to BC Hydro.

44. Mr. Graham and the City of Trail said that the Transaction was taking advantage of water rental rates designed to benefit industrial development in the province.[33] The *Water Regulation* under the *Water Act*, R.S.B.C. Ch. 483, provides for a "commercial" power use category for the calculation of water fees for water diverted for the generation of power. The "commercial" power use category is only available if the power is "used for the extraction or processing of natural resources, or the manufacturing of products, in a primary industrial facility in which the licensee has an interest of more than 50%".[34] Power that is used in Teck's Industrial Operations qualifies for the "commercial" category; power that is sold by Teck in the market, and power that is made available to BC Hydro as a result of the Transaction, does not qualify, and has never qualified, for the "commercial" category. The Transaction does not take advantage of water fees designed to benefit industrial development.

D. THE FORM OF ORDER SOUGHT BY BC HYDRO

45. At page 39 of its Final Argument BC Hydro addresses an issue of whether BC Hydro requires a certificate of public convenience and necessity ("CPCN") in connection with its

[29] Transcript, Volume 2, pages 119 and 120
[30] A copy of the letter from the Association to the Minister of Finance was filed as Exhibit E-1
[31] Exhibit C15-4 page 1
[32] Transcript, Volume 2, page 93, lines 18 to 22
[33] Exhibit C9-8, page 8, item (h) and Transcript page 118, lines 1 to 22
[34] Water Regulation, B.C. Reg. 204/88, as amended, section 15

undivided one-third interest in the Waneta Assets. Section 45 of the UCA is the applicable legislation.

46. Teck submits that there is no requirement for BC Hydro to obtain a CPCN for the undivided interest in the Waneta Assets it proposed to acquire. The construction of the Waneta Dam was completed in 1953; BC Hydro will not be beginning its construction. Nor will BC Hydro be beginning the operation of the Waneta Dam, which operations also began in 1953. Further, the Transaction contemplates that FortisBC will continue to be the manager of the Waneta Assets and Teck will be the Operator; BC Hydro will not be operating the Waneta Dam and related facilities.

47. Teck will continue to own Line 71, which runs between Waneta and the Nelway Substation operated by BCTC, and Lines 14 through 17 that run from Waneta to the Trail Industrial Operations. Teck will make BC Hydro's share of generation from Waneta available to BC Hydro in most circumstances at the Nelway Substation (an interconnection point within the Kootenay Interconnection described in the CPA) just as Coordination Transfers (imbalances between generation and load) have been made available to, or by, BC Hydro at the Kootenay Interconnection under the CPA. Teck submits that there is no extension of the BC Hydro system as a result of the Transaction.

48. BC Hydro, at page 40 of its Final Argument, addresses BC Hydro's commitment to future expenditures on the Waneta Assets. BC Hydro, as an owner of a one-third undivided interest in the Waneta Assets, will be obliged to fund one-third of ongoing operating expenses, and one-third of the ongoing sustaining and non-sustaining capital expenditures of the Waneta Assets. In practical terms this is no different than BC Hydro's obligations in respect of generating facilities it owns outright. Teck has never had an interest in making imprudent expenditures on the Waneta Dam and related facilities, and a one-third ownership interest by BC Hydro will not cause Teck to alter its intention to undertake fiscally appropriate expenditures in respect of the Waneta Assets.

E. CONCLUSION

49. Teck submits that the Commission should find that the expenditures BC Hydro intends to make in respect of the Transaction are in the public interest and that it is in the public interest for BC Hydro to enter into the contractual arrangements with Teck contemplated as part of the Transaction.

50. Teck further submits that the Commission should find that to the extent a duty to consult First Nations exists in relation to the Filing; BC Hydro has met that duty.

All of which is respectfully submitted.

Original signed by Charles F. Willms

C. F. Willms

Original signed by C.B. Johnson

C.B. Johnson, Q.C.

Counsel for Teck Metals Ltd.

December 17, 2009