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28 February 2010

Ms. Erica Hamilton
Commission Secretary
British Columbia Utilities Commission
900 Howe Street, Sixth Floor
Vancouver BC, V6Z 2N3

Dear Ms. Hamilton:

**Re: British Columbia Transmission Corporation (BCTC) Project No. 3698506
Interior to Lower Mainland (ILM) Transmission Project
Certificate of Public Convenience and Necessity (CPCN)
Court of Appeal Reconsideration
BCTC Submission**

BCTC files its Submission. The Book of Authorities will be filed separately on 1 March 2010.

Sincerely,

Original signed by:

Janet L. Fraser
Director, Regulatory Affairs

Copy: Registered Intervenors

BRITISH COLUMBIA UTILITIES COMMISSION

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

**RE: British Columbia Transmission Corporation Application for a Certificate of
Public Convenience and Necessity for the Interior to Lower Mainland
Transmission Project**

**FINAL SUBMISSION OF
BRITISH COLUMBIA TRANSMISSION CORPORATION**

March 1, 2010

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1. INTRODUCTION

1. On February 21, 2008, during the Interior to Lower Mainland (ILM) CPCN proceeding, the Commission decided that it did not need to conduct a separate inquiry into the adequacy of consultation and accommodation on the ILM Project as part of the CPCN proceeding (the Scoping Decision).¹ Following the conclusion of the CPCN proceeding, the Commission determined that the ILM Project was in the public convenience and necessity and granted a CPCN for the ILM Project on August 5, 2008.²

2. On February 18, 2009, the Court of Appeal held that the Commission had erred in its Scoping Decision and ordered that the Scoping Decision be remitted to the Commission for reconsideration in accordance with the Court's opinion. The Court further ordered that the effect of the ILM CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the Appellants had been met up to the point of the CPCN decision.³

3. BCTC submits that the Crown's duty to consult and accommodate the Appellants, and the other First Nation Intervenor who actively participated in this proceeding, had been met up to the point of the Commission's CPCN decision. These are BCTC's submissions in support of that position.

2. OVERVIEW

4. This Submission begins with BCTC's submissions on the law related to the duty to consult and on the role of the Commission in this proceeding.

5. Following BCTC's submissions on the law, BCTC provides a summary of its responses to the questions which the Commission asked at the close of the oral phase of the hearing. In some cases, more detailed responses to these questions are provided elsewhere.

¹ ILM CPCN Application, Exhibit A-8. The Commission issued Reasons for its Scoping Decision on March 5, 2008, Exhibit A-8A.

² Order No. C-4-8, Certificate of Public Convenience and Necessity for the ILM Project.

³ *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68. The Appellants were the Kwikwetlem First Nation, the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band. As discussed below, other First Nations and Tribal Councils have also intervened in and are the subject of this proceeding.

6. The Submission continues with a general review of the facts. This is primarily focused on the overall consultation efforts which took place with First Nations, BCTC and BC Hydro's approach to consultation, and the progress and focus of the ILM consultation process over time.

7. The general review of the facts is followed by individual sections on each First Nation Intervenor. These sections set out facts that are generally unique to each Intervenor and address each Intervenor's "complaints", as described by the Court of Appeal, about the adequacy of consultation up to the point of the CPCN decision with the exception of the issue of the impacts of Existing Assets.⁴ This issue was raised by a number of Intervenors and, as a result, is addressed separately following the sections on each First Nation Intervenor.

8. BCTC has not made submissions on the consultation which took place with individual non-Intervenor First Nations. These First Nations have not complained about the adequacy of consultation with them and BCTC submits that the Commission is not required to make any determinations with respect to these First Nations.

9. The Submission ends with a conclusion and a discussion of the Order sought.

3. LAW

3.1. Introduction

10. BCTC's submissions on the law address several aspects that BCTC submits are necessary for the Commission's review of the consultation that occurred with respect to the ILM Project. The submissions begin by setting out the underlying principles regarding the reconciliation of aboriginal rights with the Province's powers and responsibilities. The submissions then address a number of issues with respect to the duty to consult including the duty itself, the test for aboriginal rights and title, the scope of consultation, the process of consultation, First Nations' obligations, joint consultations, and staged-decision making. BCTC's legal submissions conclude with its submissions on the Commission's role in this proceeding. The law with respect to consultation on the impacts of Existing Assets is set out in a separate submission under the heading Consultation on Impacts of Existing Assets.

⁴ See paragraph 448 for the definition of the term "Existing Assets" in these submissions.

3.2. Reconciling Aboriginal Rights with the Province's Powers and Responsibilities

11. Section 35(1) of the *Constitution Act, 1982* reads as follows:⁵

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" include the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

12. The Supreme Court of Canada has held that section 35 does more than recognize and affirm aboriginal rights, the rights that are at issue in this proceeding.⁶ As set out below, it provides constitutional protection to these rights subject to the ability of the Crown to infringe the rights if the infringement can be justified. However, there are other provisions in the Constitution that give the Federal and provincial governments the power, and responsibility, to make laws with respect to various matters, to make decisions, and ultimately to govern. These include the power to restrict the way that certain activities are carried out and the power to authorize activities that may affect third parties, including First Nations.⁷

13. In order to give effect and meaning to the various provisions of the Constitution, the courts have had to reconcile these provisions. They have done this by holding that, notwithstanding that section 35 rights are constitutionally recognized, these rights are not absolute and may be infringed by the Federal and Provincial governments in the exercise of their powers. As stated by the Supreme Court of Canada in *Sparrow*, the first case in which the Court attempted to reconcile section 35 and the other provisions of the Constitution:⁸

⁵ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶ None of the First Nation Intervenor have entered into a treaty. Aboriginal title is a form of aboriginal right: See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 137.

⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 92 and 92A, reprinted in R.S.C. 1985, App II, No. 5.

⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1108-1109. Note, the reference at the end of the paragraph to the test for justifying an interference with a right recognized and affirmed under section 35 applies to proven aboriginal rights. As discussed below, the rights at issue in this proceeding are asserted (unproven) rights and, accordingly, the *Sparrow* justification analysis does not apply to them. Asserted rights are reconciled with other societal objectives under the duty to consult framework established in *Haida* and discussed below.

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

14. Ultimately, the courts have held that the reconciliation of the protection of aboriginal rights and other legitimate societal needs and objectives is a question of balance. As stated by the Supreme Court of Canada in *Nikal*:⁹

With respect to licensing, the appellant takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal rights since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p.524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

...Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

This conclusion is consistent with the approach to interpreting s.35 rights as set out in *Sparrow, supra*, at p. 1110:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative

⁹ *R. v. Nikal*, [1996] 1 S.C.R. 1013 at paras. 91-93.

power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. [Emphasis in original]

15. As further emphasized by the Court in *Gladstone*:¹⁰

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

16. BCTC has not provided the above references to attempt to minimize the aboriginal rights in question. It understands and respects the importance of these rights, and the protection given to them. Rather, it has highlighted the tension between section 35 and the Crown's other responsibilities to promote better understanding of the discussion of the duty to consult that follows. This discussion also captures just one of the issues faced by BCTC and BC Hydro on the ILM Project and now the subject of this proceeding; how to preserve the asserted aboriginal rights and title at issue and respond to the Intervenors' complaints while meeting the need for more electricity in the Lower Mainland and Vancouver Island.

3.3. The Duty to Consult

17. The Supreme Court of Canada has dealt with numerous issues arising from section 35. These include identifying various processes for the reconciliation of proven aboriginal rights,¹¹ treaty rights,¹² and Métis rights¹³ with other societal objectives – all of which are fundamentally directed at the broader reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. In 2004, in *Haida*, the Supreme Court of Canada addressed whether the Crown's obligations extended to claims to aboriginal rights, prior to those rights being proven or agreed to. The Court held that, while it was not appropriate to apply the reconciliation frameworks that the Court had developed for proven rights to asserted

¹⁰ *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73.

¹¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sparrow*.

¹² *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *R. v. Badger*, [1996] 1 S.C.R. 771.

¹³ *R. v. Powley*, 2003 SCC 43.

rights, these rights still needed to be addressed by a reconciliation framework. This framework is called the duty to consult. As stated in *Haida*:¹⁴

25. Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[...]

26. Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27. The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

18. The duty to consult is an interim measure intended to attempt to preserve the aboriginal interest pending claims resolution and to foster a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation.¹⁵

¹⁴ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 25-27.

¹⁵ *Haida* at para. 38.

3.3.1. Proof of Aboriginal Title

19. The Supreme Court of Canada set out the test for aboriginal title in *Delgamuukw*.¹⁶

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.

[...]

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....

185 I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation. [Emphasis in judgment.]

20. Exclusive use and occupation, that is to the exclusion of both non-aboriginals and aboriginals, is a condition precedent of aboriginal title. The Court expanded on this in *R. v. Marshall; R. v. Bernard*,¹⁷ where it found that occasional entry to an area is not sufficient to establish aboriginal title. In order to establish aboriginal title an aboriginal group must show "sufficiently regular and exclusive use", such as the construction of dwellings, the cultivation and

¹⁶ *Delgamuukw* at paras. 143, 155 and 185.

¹⁷ *R v. Marshall; R v. Bernard*, 2005 SCC 43 [*Marshall & Bernard*].

enclosure of fields, and the use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.¹⁸

21. Evidence of exclusive use and occupation to the exclusion of non-aboriginals and members of other aboriginal nations is therefore necessary to the preliminary assessment of the strength of claim to aboriginal title and scope of consultation owed, as discussed below.

3.3.2. *Proof of Aboriginal Rights*

22. 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*.¹⁹

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.

3.3.3. *Scope and Content*

23. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it.²⁰ Whether the duty to consult is triggered is not an issue in this proceeding. BCTC and BC Hydro have consistently acknowledged that the Crown's duty has been triggered and have taken steps to satisfy this duty. Notably, the duty to consult is triggered, not "pre-consultation". *Haida* does not recognize a pre-consultation stage.

24. Once the duty has been triggered, the scope and content of the duty is based on a preliminary assessment of the strength of the claimed right and the seriousness of the potential adverse effect.²¹

39. The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or

¹⁸ *Marshall & Bernard*, at paras. 56, 58 and 76.

¹⁹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46.

²⁰ *Haida* at para. 35.

²¹ *Haida* at paras. 39 and 43-45.

title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[...]

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.

45. Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

25. Overlapping claims are factors to consider in assessing the strength of claim for aboriginal title. The courts in *Tsilhqot’in* and *Nlaka’pamux*, respectively, found that where the claim for title is in relation to land that is distant from the location of the First Nation, the claim may be weak.²²

²² *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700 at para. 930; *Nlaka’pamux Nation Tribal Council v. Griffin*, 2009 BCSC 1275 at para. 79.

[930] As one might expect, the struggle, if any, between different Aboriginal groups came at the margins of their territories, those areas of overlap that existed in the absence of defined and accepted boundaries. For Tsilhqot'in people, the high mountains of the Cascade Range provided a natural barrier from any intrusive actions by others.

...

[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. [Emphasis added.]

3.3.4. *The Consultation Process and Accommodation*

26. The Court described the consultation process as follows:²³

42. At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

27. As indicated, the consultation process must be meaningful. The Court described the aspects of meaningful consultation as follows:²⁴

46. Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New

²³ *Haida* at para. 42.

²⁴ *Haida* at para. 46.

Zealand Ministry of Justice's *Guide for Consultation with Māori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed

. . . genuine consultation means a process that involves . . . :

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

28. In some circumstances, the process of consultation may lead to accommodation.²⁵

47. When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation ... [Emphasis added.]

29. In *Kwikwetlem*, the Court of Appeal paraphrased paragraphs 46 and 47 of *Haida* as follows:²⁶

[68] Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging

²⁵ *Haida* at para. 47.

²⁶ *Kwikwetlem* at para. 68.

information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida*, at paras. 46-47.

30. Similarly, in the companion decision in *Carrier Sekani*, Mr. Justice Donald said:²⁷

[65] Finally, the consultation duty is not a concept that lends itself to hard-edged tests. The trigger formula in *Haida* is to be applied within the proceeding, not on a threshold inquiry. The duty is to discuss, not necessarily to agree or to make compromises. It is to be open to accommodation, if necessary. The discussion itself has intrinsic value as a tool of reconciliation. It is not always possible to say in advance that consultation would be either productive or futile – the Crown may be influenced by the Aboriginal perspective in the way it carries out a project. At the very least, the First Nation will have had a chance to put its views forward. [Emphasis added.]

31. Significantly, in the context of the position taken by some of the First Nations in this proceeding, First Nations do not have a veto:²⁸

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.

3.3.5. Joint Consultation

32. Where many First Nations are potentially impacted by a Crown activity, the Court of Appeal has confirmed that joint consultation can be appropriate:²⁹

[40] In this case, DFO conducted extensive and detailed consultations with Fraser River First Nations as to its conservation objectives. Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO’s emphasis on joint consultations was reasonable and appropriate. DFO provided the necessary information and technical assistance. DFO provided opportunities for the First Nations to express their concerns and resources to facilitate the meetings. DFO adjusted the escapement target and exploitation rate in response to First Nations’ concerns. In this way, DFO complied with the standard set out in *Halfway River*, supra, and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 64. Because the Cheam refused to participate in the joint consultations, DFO attempted to consult them separately. The trial judge found, and the appeal judge agreed, that DFO’s

²⁷ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at para. 65.

²⁸ *Haida* at para. 48.

²⁹ *R v. Douglas*, 2007 BCCA 265 at para. 40. See also, *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212 at para. 51.

efforts to engage the Cheam in consultation were reasonable and in good faith.
[Emphasis added.]

3.3.6. *First Nations Obligations*

33. The Crown's obligations under the duty to consult are serious. However, as confirmed in a number of the references above, First Nations also have reciprocal obligations under the duty to consult.³⁰

[250] There is no duty to reach agreement, but there is a duty to focus on the relevant issues in the discussions.

[251] Consultation and accommodation with the goal of reconciliation is a two-way street; the HFN were required to conduct themselves reasonably in the process. If a First Nation is intransigent and unresponsive to government attempts to consult, those government efforts may be found reasonable even if they do not bear fruit: *R. v. Douglas*, 2007 BCCA 265, B.C.J. No. 891; *R. v. Tommy*, 2008 BCSC 1095, *R. v. Aleck*, 2008 BCSC 1096. ...[Emphasis added.]

34. The Court of Appeal in *R v. Douglas*, which was relied on in the decision above, held that where a First Nation frustrates the government's attempts to consult, it cannot then complain about a lack of consultation.³¹

[45] Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. The DFO's duty as described by the Supreme Court of Canada in *Sparrow* was to uphold the honour of the Crown and conform to the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, "the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed".

35. These obligations extend beyond the mutual obligations to participate reasonably and in good faith in the consultation process. Like the Crown, who has knowledge of and is

³⁰ *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at paras. 250-251. See also *Apsassin et al v. BC Oil and Gas et al*, 2004 BCSC 92 at para. 144.

³¹ at para. 45.

required to share information about its contemplated conduct, First Nations are required to provide information on those issues with which they are familiar. In particular, because the aboriginal groups know what their asserted rights are and how their asserted rights might be impacted, they have a duty to provide information about the existence of the right or the seriousness of the potential impact. As the Supreme Court of Canada said in *Haida*.³²

36. This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot “meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope”. However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. [Emphasis added.]

36. While First Nations asserting aboriginal rights and title do not need to provide evidence sufficient to establish the right claimed on final judicial determination or settlement, First Nations must provide enough information to allow the Crown to make a preliminary evidence-based assessment of the core of the right and its modern scope. As Madam Justice Huddart explained in *Halfway*.³³

[180] ...It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible.

[...]

[182] ... the first nation is required to co-operate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question.

37. As indicated above, 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.”³⁴ As stated by the Alberta Court of Appeal in *Dene Tha*.³⁵

³² at para. 36.

³³ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at paras. 180 and 182 per Huddart J.A.

³⁴ *R. v. Van der Peet* at para. 46.

[18] There had been discussions and provision of exact wellsite locations long before the submissions to the Board. There never has been any suggestion that anyone lived outside the reserve, or that any wells or roads were to be within the reserve. The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta. [Emphasis added.]

38. In addition to providing information on their asserted rights, First Nations have an obligation to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown:³⁶

[161] There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.C.A 91.

3.3.7. Staged Decision-Making

39. As emphasized by the Court of Appeal in *Kwikwetlem*, the Commission's CPCN decision is only the first step in a staged decision-making process on the ILM Project:

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[...]

[59] By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only

³⁵ *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para. 18.

³⁶ *Halfway* at para. 161 per Finch J.A.

the Commission can grant permission to enhance a power transmission line.
[Emphasis added.]

40. In *Taku River Tlingit v. British Columbia*, issued at the same time as *Haida*, the Supreme Court of Canada found that the Crown's consultation with the Taku River Tlingit First Nation (TRTFN) was adequate, despite the fact that the TRTFN argued that the Project Certificate should not have been issued until all of its concerns were addressed. The Court found that because the Project Certificate was only one stage of the process, it was appropriate that certain outstanding issues would be dealt with at a later stage, or even in separate more appropriate processes.³⁷

45. Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46. The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.
[Emphasis added.]

41. Like *Taku*, the Court of Appeal in *Kwikwetlem* anticipated that consultation would occur throughout the development, permitting and implementation stages of the ILM Project.

³⁷ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras. 45-46.

Significantly, the Court of Appeal also did not expect consultation and accommodation to be complete at the stage of the CPCN decision:³⁸

[62] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

[...]

[70] If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate. [Emphasis added.]

3.4. *The Role of the Commission*

42. The Commission's role in this proceeding has been defined by the Court of Appeal. The Court made the following Order on the appeal from the Scoping Decision.³⁹

THIS COURT ORDERS that the appeal is allowed and the Scoping Decision is remitted to the Commission for reconsideration in accordance with this Court's opinion.

AND THIS COURT FURTHER ORDERS THAT the effect of the certificate of public convenience and necessity issued by the Commission on August 5, 2008 (the "CPCN") is suspended for purposes of determining whether the Crown's duty to consult and accommodate the appellants had been met up to the point of the Commission's decision to grant the CPCN.

³⁸ *Kwikwetlem* at paras. 62 and 70.

³⁹ Order of the British Columbia Court of Appeal, *Kwikwetlem v. British Columbia (Utilities Commission)*, CA035864 and *Nlaka'pamux Tribal Council v. British Columbia (Utilities Commission)*, CA035928, entered March 19, 2009. While the Court of Appeal's Order is the operative part of their determination, the Order is repeated almost verbatim at paragraph 15 of the Court's Reasons:

[15] I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

43. The Court provided further direction on how the Commission must undertake the task of assessing whether the Crown's duty to consult and accommodate the Appellants had been met up to the point of the Commission's decision to grant the CPCN:⁴⁰

[13] The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

[14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

[...]

[61] This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

[62] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the

⁴⁰ *Kwikwetlem* at paras. 13-14, 61-62 and 65.

process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

[...]

[65] Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC. [Emphasis added.]

44. In short, in response to the Court of Appeal's decision, BCTC submits that the Commission is required to first reconsider its Scoping Decision in accordance with the Court's opinion.⁴¹ BCTC respectfully submits that a simple acknowledgement that the Commission understands that it erred in its Scoping Decision and that it is required to conduct its own assessment of whether the Crown's duty to consult and accommodate the Appellants was met up to August 5, 2008 is sufficient to satisfy this requirement.

45. Following this, the Commission is required to undertake an assessment of whether the Crown's duty to consult and accommodate the Appellants was met up to August 5, 2008 (i.e., to hear the Appellants' complaints as described by the Court of Appeal).⁴² To be clear, as BCTC indicated at the first Procedural Conference in this proceeding, while the Court of Appeal only formally directed the Commission to address the Appellants' complaints, BCTC believes that it is prudent to also address those of the active Intervenors who adduced evidence of their complaints in this proceeding. BCTC believes that the other non-Appellant Intervenors could likely have found some way of bringing their concerns before the Commission and these concerns should be addressed at the same time.

46. The Court identified a three-step process for undertaking this analysis: when the Crown's duty to consult with regard to the ILM Project arose; the scope of that duty; and whether it was fulfilled. BCTC does not understand any of the First Nations to have brought complaints on when the Crown's duty arose.

⁴¹ *Kwikwetlem* at para. 15.

⁴² *Kwikwetlem* at para. 15.

47. The factors to be considered on the scope of the duty and whether it was fulfilled are discussed in paragraphs 39 and 42 through 47 of *Haida* (reproduced above) and will be applied in BCTC's analysis below. The scope of the duty is most likely to be judged on a standard of reasonableness based on the extent of the role of the facts in making this assessment. Significantly, the consultation process itself, including accommodation, if any, is to be judged on the standard of reasonableness.⁴³

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. [Emphasis added.]

48. This was confirmed by the Court of Appeal in *Carrier Sekani*.⁴⁴

⁴³ *Haida* at paras. 61-63.

⁴⁴ at paras. 59-60.

[59] The appellant argues that the Commission has to be correct in disposing of constitutional issues such as those that arise here. The respondents submit the standard is reasonableness.

[60] I accept the respondents' position. The Commission's decision involves matters of fact, some assumed and others actually found, some questions of mixed fact and law and procedure. While I think the Commission took the wrong approach to the dispute, I cannot isolate a pure question of law for review on a correctness standard. Guidance on the standard is provided by *Haida*, at para. 61...

49. On a final matter, which has not been the subject of extensive discussion during this proceeding, the above assessments are to take place on the issues relevant to the CPCN proceeding.⁴⁵ These issues are addressed further below.

3.4.1. Findings of Fact

50. BCTC wishes to address one further matter in discussing the role of the Commission. Section 79 of the *Utilities Commission Act* makes the Commission's findings of fact within its jurisdiction binding and conclusive on all persons and all courts. The Commission has voluminous materials before it in this proceeding and has had the benefit of having these materials tested through an oral hearing phase. While BCTC and BC Hydro continue to work with First Nations on the ILM Project, and sincerely hope that the Commission's decision in this proceeding will assist in resolving a number of the issues which have been the subject of discussions, there is an obvious risk of further legal proceedings involving the Project. BCTC believes, given the Commission's unequalled exposure to the facts and the jurisdiction vested in the Commission regarding these facts, that it would be unreasonable to face the risk which sometimes arises in matters involving multiple proceedings that decisions can be issued on conflicting versions of the facts, or even that there should be argument about these facts in any other proceedings. Accordingly, for both the purposes of the present process and other potential processes involving the same facts, BCTC encourages the Commission to indicate when it is making findings of fact so that it is clear that these have been made.

4. THE COMMISSION'S QUESTIONS

4.1. Question 1 - What is the nature of the relief sought by each of the parties?

51. BCTC seeks an Order that the Crown's duty to consult and accommodate the Kwikwetlem, STC, SHAC, Coldwater et al, ONA/UNIB, NNTC and Hwlitsum was met up to the

⁴⁵ *Kwikwetlem* at para. 14.

date of the Commission's CPCN Decision. BCTC also seeks an Order rescinding the suspension of the CPCN.

52. In the alternative, if the Commission finds that the Crown's duty to consult and accommodate any of the above First Nations or Tribal Councils was not met, BCTC submits that further time should be given to discharge the duty as outlined in the Commission's Decision. Please see the Conclusions and Order Sought section for a further discussion of this topic.

4.2. Question 2(a) - With reference to paragraph 65 of the Kwikwetlem decision, did the scope and content of the duty to consult change as the ILM Project moved through different stages?

53. The assessed scope and content of the duty to consult changed for some First Nations but not for the majority of them. As indicated in *Haida*, consultation is a continuing process and the level of consultation may change as the process goes on and new information comes to light.⁴⁶

4.3. Question 2(b) - If so, how?

54. The assessment of the scope and content for Kwikwetlem was the primary assessment that changed. Once BCTC's assessment that HVDC was not an appropriate alternative was confirmed and that any changes to the Meridian Substation would occur within the existing substation property, the scope of consultation assessed for Kwikwetlem was changed from medium-high to the middle of the *Haida* spectrum.

4.4. Question 3(a) - Again with reference to paragraph 65 of the Kwikwetlem decision, if the Commission were to determine, for instance, that there had been inadequate consultation up to the point of the BCTC Board of Directors decision to pursue 5L83, does that mean that the duty cannot be fulfilled at later stages of the ILM project?

55. No. As a preliminary matter, BCTC does not believe that the issue in this proceeding is whether the Crown's duty to consult and accommodate had been met up to the point of the BCTC Board of Directors decision. The issue that the Court of Appeal directed the Commission to assess was whether the duty to consult and accommodate the First Nations (Appellants) had been met up to the point of the Commission's decision to grant the CPCN.⁴⁷

⁴⁶ *Haida* at para. 45.

⁴⁷ *Kwikwetlem* at para. 15.

56. In response to the Commission's question, BCTC submits that, even if the Commission were to conclude that the BCTC Board of Directors decision is an appropriate date for assessing whether the duty to consult and accommodate had been met - and the Commission determined that it had not been - any such duty can still be fulfilled at later stages.

57. On the existing record, the duty could still be met up to the Commission's CPCN decision point. However, even if it were not met by the Commission's CPCN decision, it can still be fulfilled at later stages.

58. In several cases where a court has found that the duty to consult has not been met, the courts have still upheld the decision at issue. The approach that the courts take in such cases is to uphold the decision, but issue a declaration that the duty has not been met so that the parties can continue consulting, remedy any deficiencies, and not cause irreparable harm to the project or transaction at issue.

59. For example, in *Ahousaht v. Canada (Attorney General)*,⁴⁸ in a trial to prove an aboriginal right to fish and sell fish, the Court would not consider whether the Crown had justified its infringement of the Ahousaht's rights until two years of consultation had taken place with respect to the fishing regulations at issue. Part of the Court's reason for doing so was that, prior to the decision, the Court found that it was not unreasonable for the Crown to proceed on the basis that the rights proven in the trial did not exist in law.

60. In *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*,⁴⁹ the Court concluded that the Crown had not discharged the duty to consult, but refused to quash the licence in question. Rather, it adjourned the application so that the Ministry could continue consultation.

61. In *Musqueam Indian Band v. Richmond*,⁵⁰ the Court found that the Crown had failed to consult on moving a casino to lands subject to a First Nation's claims. However, in fashioning its remedy, the Court decided not to set aside the decision which would have resulted in the casino closing and causing resulting damage. Instead, the Court issued a declaration that the Crown had a duty to consult and invited the First Nation to return to the Court if it was unsatisfied with any subsequent process.

⁴⁸ 2009 BCSC 1494, at para. 865.

⁴⁹ 2005 BCSC 283, at paras. 117-127.

⁵⁰ 2005 BCSC 1069.

62. Similarly, in *Hupacasath v. British Columbia*,⁵¹ having found that the Crown breached the duty to consult, the Court decided that the decision in issue should not be quashed, and that the appropriate remedy was a declaration that the duty had not yet been met, so that the parties could pursue further consultation.

63. BCTC submits that such a duty can effectively be fulfilled at later stages of the ILM Project. BCTC wishes to be clear that it is not suggesting that the Commission consider another decision-maker's findings at a later stage (such as under the British Columbia Environmental Assessment Office (BCEAO) process). Rather, BCTC is suggesting that, should the need arise, the Commission can satisfy itself that the duty has been met by assessing further consultation that occurs after August 5, 2008, rather than re-opening the CPCN proceeding.

4.5. Question 3(b) - Does the answer to question 3(a) depend on where the Commission finds that the duty lies on the Haida spectrum?

64. No. Regardless of where the duty lies on the *Haida* spectrum, First Nations do not have a veto under the duty to consult.⁵² In the absence of a veto, BCTC submits that a finding that there has been inadequate consultation can be rectified (see response to question 3(a)).

4.6. Question 4(a) - Is there a duty upon the Crown to share with First Nations its strength of claim and impact assessments?

65. BCTC submits that there is no duty upon the Crown to share its strength of claim and impact assessments with First Nations in all cases. BCTC submits that any obligation to share strength of claim and impact assessments is governed by the requirements in *Haida* to act reasonably and in good faith.

4.7. Question 4(b) - If so, when does that duty arise?

66. As indicated, BCTC submits that if there is a duty upon the Crown to share strength of claim and impact assessments, this duty would only arise from the Crown's obligation to consult reasonably and in good faith. As such, a determination of whether such a duty exists would depend on the circumstances of each case. In the context of the ILM

⁵¹ 2005 BCSC 1712.

⁵² *Haida* at para. 48.

proceeding, no First Nation ever requested BC Hydro's strength of claim and impact assessments and BC Hydro's assessments were provided when they were requested.

4.8. Question 5(a) - Does the Commission have the jurisdiction to address historical ongoing infringements and the consultation on such infringements in reaching its determination as to the adequacy of consultation to the point of its CPCN decision?

67. Yes, the Court of Appeal confirmed that the Commission has the jurisdiction to hear the complaints of the First Nations about the adequacy of consultation to the point of the Commission's CPCN decision. The Court of Appeal did not limit this jurisdiction in any way.

68. Please see Consultation on Impacts of Existing Assets for BCTC's submissions on consultation on "historical ongoing infringements".

4.9. Question 5(b) - Does the answer to question 5(a) depend on whether the proposed infringement is incremental to the original infringement?

69. No. The jurisdiction of the Commission does not depend on whether the proposed infringement is incremental. Again, please see Consultation on Impacts of Existing Assets for BCTC's submission on consultation on "historical ongoing infringements".

4.10. Question 5(c) - If the answer to question 5(b) is 'Yes', is the Commission's jurisdiction limited to the assessment of adequacy with respect to the incremental infringement?

70. Please see BCTC's answer to 5(a) and (b).

4.11. Question (6) - What effect does BC Hydro and BCTC's offer to address historical ongoing infringements at a separate table have upon the adequacy of their consultation obligation for the ILM Project?

71. If there is a duty to consult with respect to the full extent of "historical ongoing infringements" as these appear were expressed during the consultation process, BCTC submits that BCTC's offer to address historical ongoing infringements at a separate table was sufficient to discharge this duty. Please see Consultation on Impacts of Existing Assets for BCTC's submission on consultation on "historical ongoing infringements".

4.12. Question 7(a) - What is the impact on the CPCN that the Commission issued, if the Commission Panel were to determine that, for instance, one of the First Nation intervenors had not been adequately consulted?

72. *Haida* requires that overall consultation be reasonable. If the Commission were to determine that one of the First Nation Intervenor had not been adequately consulted but that the overall consultation was reasonable, then the Commission should find that BCTC had discharged its obligations.

4.13. Question 7(b) - Under this scenario, what options are available to the Commission in respect of CPCN decision?

73. If the Commission were to determine that one of the First Nation Intervenor had not been adequately consulted and that joint consultation did not discharge BCTC's duty then the Commission should request further submissions in respect of the First Nation that was not adequately consulted.

5. GENERAL FACTS AND OVERALL CONSULTATION EFFORTS

5.1. Background

74. In March 2006, BC Hydro filed an Integrated Energy Plan (IEP) and Long Term Acquisition Plan (LTAP) with the Commission. The IEP described how BC Hydro could address its customers' electricity needs over a 20-year planning horizon and the LTAP identified the actions that BC Hydro proposed to take over a ten-year period to meet those needs. BCTC's analysis of the transmission implications of the supply portfolios developed by BC Hydro for the 2006 IEP/LTAP confirmed that increased Interior to Lower Mainland transmission was required by F2014 in virtually every portfolio. The portfolio that contemplated a delay of further transmission requirements beyond F2014 required substantial additional thermal dispatchable generation in the Lower Mainland region, which BC Hydro stated was "unlikely to be implementable".⁵³

75. In recognition of the unique status of First Nations, BC Hydro developed a distinct First Nations engagement stream for its IEP and all First Nations with reserves and traditional territories in BC were invited to participate in the IEP process.⁵⁴

⁵³ ILM CPCN Application, Exhibit B-1, Application, p. 77-78; BC Hydro 2006 Integrated Electricity Plan, 8-34 (Exhibit B-1A of 2006 IEP/LTAP Proceeding).

⁵⁴ Exhibit A-2-7, 2006 IEP/LTAP Application, App. G, pp. 36-61.

76. In the 2006 IEP/LTAP, based on the availability of resources identified in BC Hydro's IEP/LTAP including "non-wires" alternatives, the Commission concluded:

.. the Commission Panel accepts the evidence in Exhibit B-146A that the ILM reinforcement is required sometime in the 7 to 15 year timeframe regardless of decisions on the repowering of Burrard. Therefore, in light of the loss savings, potential trade benefits, and possibility for implementation delays associated with the ILM, the Commission Panel expects that BCTC will be proceeding with its current schedule to bring forward a CPCN application for the ILM. The Commission Panel expects the ILM CPCN Application will contain a comprehensive comparison of route options and a comprehensive evaluation of trade benefits.⁵⁵

5.2. The Commencement of the ILM Project

77. Following the transmission studies that BCTC undertook for BC Hydro as part of its IEP/LTAP, BCTC established a project team in May 2006 to pursue the apparent need to reinforce the transmission system between the Interior and the Lower Mainland. Ms. Holland was given the role as the Project Manager of the "ILM Project" which, at that time, was a project intended to determine how to potentially meet the need for increased transfer capability of the Interior to Lower Mainland (ILM) portion of the transmission grid.⁵⁶

78. Over the initial period of time, BCTC considered several alternatives to meet the apparent need to reinforce the ILM grid including, on the specific direction of Ms. Holland, attempting to identify any transmission options that would avoid the need for a new line from the Interior to the Lower Mainland:

MS. HOLLAND: A: ... At the time that I was given a project in March of 2006, we had recently been through the VITR decision, and in that decision the Commission was very clear with BCTC that we needed to analyze alternatives.

When I was given the project, I asked our system planning group, "Is a new line the only way to resolve this problem?" And our system planning group said, "Well, there's a package of upgrades that may or may not be able to work," and I directed our system planning group to do more work on that alternative, because if there was an alternative that didn't have either the same costs or the same potential effects of building a whole new transmission line, then it would be prudent to spend a great deal more time looking at that alternative.⁵⁷

⁵⁵ British Columbia Hydro and Power Authority 2006 IEP and LTAP Decision, May 11, 2007, p. 173.

⁵⁶ Cross-examination of Ms. Holland, January 14, 2010, Vol. 7, p. 799, l. 14 - p. 800, l. 4.

⁵⁷ Cross-examination of Ms. Holland, January 14, 2010, Vol. 7, p. 799, l. 14 - p. 800, l. 4.

79. The potential alternatives that were identified included:⁵⁸
- (a) Coastal generation and demand side management (i.e., a “non-wires” option);
 - (b) Upgrade Existing Circuits (UEC) (a package of upgrades to the existing ILM lines and stations);
 - (c) A new Alternating Current (AC) transmission line between the Nicola Substation near Merritt and the Meridian Substation in Coquitlam (designated 5L83);
 - (d) A HVDC (High Voltage Direct Current) transmission line from Nicola to Meridian;
 - (e) A new AC transmission line from Nicola to Ingledow Substation in Surrey (which was eventually determined would pass through Meridian on its route to Ingledow); and
 - (f) A new AC transmission line from Kelly Lake Substation near Lillooet to Cheekye Substation near Squamish (designated 5L46).

80. These alternatives were screened through the alternatives analysis methodology that was approved by the Commission in the VITR proceeding. As a result of this analysis, the UEC and the new AC line between Nicola and Meridian (5L83) were identified as the only two feasible transmission-related alternatives to meet the identified need and were subjected to further analysis and study.⁵⁹ These are described below as the UEC Alternative and the New Line Alternative.

5.3. Planning for Consultation on the ILM Project

81. Pursuant to an Asset Management and Maintenance Agreement between BCTC and BC Hydro, BC Hydro remains responsible for the relationship between BC Hydro and First Nations with respect to the transmission system, including consultation with First Nations with respect to the planning of extensions or expansions to the system.⁶⁰

82. BC Hydro’s Aboriginal Relations and Negotiations (ARN) Department was tasked with carrying out the consultation with First Nations for the ILM Project, in close coordination

⁵⁸ ILM CPCN Application, Exhibit B-1, pp. 79, l. 4 - p. 80, l. 16.

⁵⁹ ILM CPCN Application, Exhibit B-10, BCTC Response to BCUC IR 2.147.1.1. Note, this is based on BCTC’s determination that HVDC was not an appropriate alternative. HVDC continued to be identified as a potential option during the period that BCTC’s determination was being confirmed.

⁶⁰ ILM CPCN Application, Exhibit B-1, p. 127, ll. 18 – 29.

with the BCTC ILM Project Team.⁶¹ Given the large number of aboriginal groups potentially interested in the ILM Project, BC Hydro established a team of field coordinators. The role of the field coordinators was to consult and build relationships with aboriginal groups on behalf of BCTC and BC Hydro. This would include, for example, liaising with aboriginal groups, sharing Project information, documenting and responding to concerns expressed by aboriginal groups, and relaying relevant information concerning aboriginal issues to other BCTC and BC Hydro team members. The field coordinators were each assigned a number of aboriginal groups for whom he or she would have primary contact and responsibility. The field coordinators then established personal contact with each of his or her assigned aboriginal groups.⁶²

5.4. Objectives of the ILM Consultation Process

83. The primary objectives of BCTC and BC Hydro's consultation efforts were as follows:⁶³

As set out in Section 8.2.4 of the Application, the primary objectives of BCTC and BC Hydro's consultation efforts were to attempt to ensure that the relevant Aboriginal groups were and are provided with appropriate information to understand the nature of the ILM Project and to receive input from those Aboriginal groups on the ILM Project. It is also important to ensure that the potential adverse and beneficial effects on Aboriginal interests are clearly understood by the Project team and the relevant Aboriginal groups. A key objective is to carry on discussions aimed at, where possible, avoiding or mitigating significant effects on Aboriginal rights and interests.

Much of the early focus of the ILM consultation efforts were to attempt to ensure that the relevant First Nations were provided with appropriate information to understand the nature of the alternatives (particularly the UEC and 5L83 Alternatives), to seek input from those First Nations on the selection of the preferred alternative, and to respond, if necessary, to this input regarding BCTC's choice between alternatives. As consultation progressed, the efforts have shifted to attempting to identify potential effects of the 5L83 Alternative on First Nations rights and interests and to avoid or mitigate, if possible, significant effects on these interests. Where effects cannot be fully avoided or mitigated, BCTC and BC Hydro have sought to accommodate First Nations interests through Impact Benefit Agreements and other potential opportunities associated with the ILM Project.

⁶¹ ILM CPCN Application, Exhibit B-1, p. 128, ll. 5 – 10.

⁶² ILM CPCN Application, Exhibit B-1, s. 8.2.4, p. 129, ll. 5 - 27.

⁶³ Exhibit B-3-1, Supplemental Evidence, p. 6, ll. 8 – 26.

5.5. First Nations Identification and Initial Contact

84. The identification of First Nations to be consulted was an evolving process. Since BCTC had not selected a preferred alternative when initial contact was made with First Nations in August 2006, BC Hydro engaged First Nations that they considered could be affected by either the UEC or New Line Alternatives (or both).⁶⁴

85. Initial contact with the identified First Nations was often a telephone call, or in some cases an email, that was intended to initiate discussions on the ILM Project and the alternatives that were under consideration. Approximately fifty-four First Nations and Tribal Councils/Societies were initially contacted - most of them in August of 2006.⁶⁵

86. Following the initial contact, BC Hydro attempted to have an introductory meeting with the identified First Nations to introduce the ILM Project. These meetings typically took place between August and October of 2006. BC Hydro and BCTC discussed various topics at these meetings, including the ILM alternatives, the BCEAO process if the New Line Alternative was chosen as the preferred alternative, the criteria for the choice of the preferred alternative, the Project schedule, how First Nations would like to be consulted, and capacity funding. During most of these meetings, BCTC or BC Hydro made a presentation entitled "Interior – Lower Mainland Project First Nations Briefing October 2006" and provided a document entitled "Electricity Supply Challenges Interior to Lower Mainland". Some First Nations were also provided with a copy of a BC Hydro/BCTC document entitled "Challenges and Choices: Planning for a Secure Energy Future".⁶⁶

87. Ms. Holland described how BCTC and BC Hydro approached these initial meetings in terms of asking how First Nations wanted to be consulted and having a flexible approach based on the understanding that the pace and timing of consultation with First Nations would vary.⁶⁷

⁶⁴ Exhibit B-3-1, Supplemental Evidence, s. 1.2, p. 7, l. 9 - p. 8, l. 18.

⁶⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.1, p. 22, l. 14 - p. 24, l. 10.

⁶⁶ Exhibit B-3-1, Supplemental Evidence, ss. 2.2.1, 2.2.2, p. 24, l. 13 - p. 28, l. 3, Apps. D, E, F. The topics covered in the October 2006 presentation are as follows: role of BC Hydro and BCTC; project need; alternatives; the existing transmission corridor; key dates and activities; First Nations' involvement; how First Nations can be involved.

⁶⁷ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 280, l. 24 - p. 281, l. 18; see also Exhibit B-3-1, Supplemental Evidence, pp. 35, 36, 40, 41, Apps. M, O, Q.

MS. HOLLAND: A: ... But as my colleagues, Mr. Anderson and Mr. Littledale have indicated, what actually happens in the field, you can't flow-chart. And so you go to meetings, you provide the information, and you ask the questions and you hope, perhaps, at those meetings to receive information, you ask the question of First Nations "How would you like to be consulted with?" And if you're invited back to future meetings, or you're able to secure future meetings, great. If you're able to secure some information at that very first meeting that helps you, that's good too.

And it doesn't work the same way with every First Nation, and on this project we have 67, and as we've indicated in our evidence, the pace and timing of those things is not something that I don't think you can flow-chart. And the coordinators work with the First Nations again at very different paces. But right from the beginning, we went out with information on the project, on the alternatives, and were asking questions, sharing information, and asking how First Nations would like to be consulted with.

88. As described in BCTC's Supplemental Evidence and by Ms. Holland during the hearing, one of the primary focuses of the consultation with First Nations from the outset was on providing them with information and getting their feedback on the alternatives under consideration. Initially, BCTC and BC Hydro tended to describe four alternatives for the ILM Project: Do Nothing, Non-wires Options (coastal generation and/or DSM), UEC and the New Line Alternative.⁶⁸

89. The "Do Nothing" alternative was a "benchmark" for discussion purposes.⁶⁹

MS. HOLLAND: A: Well, the do-nothing option exists because that's your benchmark. So people always ask us, "What happens if you don't do anything?" So it's kind of your base case, and if you don't have it there, people ask you. What happens if you don't do anything? So it's there. We knew from a system planning perspective, by 2014 we needed to be doing something. And so does the do-nothing option, does that satisfy having to have something in place by 2014? No. It stays on the slides and in the documents because it's a question and it's your baseline, if you will.

90. Ms. Holland also explained the inclusion of the "non-wire" alternatives, coastal generation and DSM.⁷⁰

MS. HOLLAND: A: ... The other primary reason those topics [non-wire options] appear is that it's very hard as a transmission company to go out and say, we've got two transmission alternatives we're looking at, and somebody says to you, well what about generation, what about demand-side management, what about these other things. So we end up in those discussions anyway. And so, yes, we

⁶⁸ See for example B-3-1, App. D, October 2006 Presentation.

⁶⁹ Cross-examination of Ms. Holland, January 14, 2010, Vol. 7, p. 803, l. 26 - p. 804, l. 11

can say something like, we're not here to talk about that, you've got to deal with that in the IEP, and that's not a particularly responsive way or conducive to having a discussion.

So they're on there in the context of, you know, there is an IEP proceeding but generally when asked -- and these are very basic questions that we're asked and very basic discussions that we're having; what about solar panels, what about people saving energy in the Lower Mainland, does that offset the need for this project, what if Burrard, what if another generating unit in the Lower Mainland. Those are the discussions that we were having and engaged in while we're talking about two main transmission alternatives that we see as the transmission company needing to be in place by 2014.

91. As identifying above, during this time BC Hydro was going through its IEP/LTAP proceedings before the Commission concerning these potential "non-wires" alternatives.

92. Another primary focus of BCTC and BC Hydro during this time (and throughout the consultation process) was First Nations' capacity to participate in the consultation process. BCTC and BC Hydro initially looked to the First Nations to tell them what their capacity needs might be.⁷¹

MS. HOLLAND: A: I believe the expectation in a meeting, certainly in the meetings I was at, in the preliminary meetings, was we ask a First Nations, "What do you foresee needing in capacity?" So we didn't go out with the presumption at that point of what the First Nation would need. Rather we asked the First Nations what they needed.

And I wouldn't expect a First Nation to complete in that one meeting an identification and a budget and a listing of what they would need, hand it to us, we would sign off on it and hand it back. That typically doesn't happen in one meeting. What I would expect to hear is the First Nation to say, "Well, these are the kinds of things that we might need capacity for." If a First Nation had a number in place, then the coordinator would certainly bring that back to the team and say, "I was out at this meeting, this is what was asked for." And we would have a discussion about that.

So the coordinators were fully able and ready to engage in that discussion on capacity and what capacity might be required.

93. Internally, BC Hydro ARN would hold regular project meetings to review the consultation that had taken place over the previous period, upcoming events, and consider how

⁷⁰ Cross-examination of Ms. Holland, January 20, 2010, Vol. 11, p. 1566, l. 22 - p. 1567, l. 18.

⁷¹ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 293, ll. 2 - 24.

to respond to issues that had been raised. BC Hydro ARN and BCTC also had regular project meetings to review how the consultation was going.⁷²

5.6. Initial Contact to May 2007 Choice of Preferred Alternative

94. After the initial meetings, BC Hydro attempted to have further meetings with the identified First Nations. These meetings generally occurred from November 2006 through February 2007. The topics reviewed in presentations and discussed at these meetings continued to include the Project alternatives, capacity funding arrangements, procurement opportunities related to the transmission-related alternatives, and the regulatory processes. Either BC Hydro or BCTC made a presentation entitled "Interior to Lower Mainland Transmission Reinforcement Project November 2006" at most of these meetings.⁷³

95. In late November 2006, BC Hydro sent a letter to each of the then identified First Nations offering initial capacity funding of \$10,000 to help participate in the consultation process.⁷⁴ Prior to that time, BC Hydro had asked First Nations what kind of capacity funding they would need, but had generally not had any responses. Accordingly, the \$10,000 was offered as a start to ensure that the First Nations would have at least some capacity at the beginning. BC Hydro went on to indicate that, while it was committed to this initial capacity funding, it believed that there was value in entering into a more formal consultation and capacity funding agreement (CFA) and attached a draft CFA entitled "Options Definition Phase-Capacity Funding Agreement", for First Nations' consideration and further discussion.⁷⁵

96. Mr. Anderson described the initial capacity funding offer in November 2006 as follows:⁷⁶

MR. ANDERSON: A: Yeah, and I think it's maybe a little bit of context needed there. Again the November offer of capacity funding wasn't -- that initial \$10,000 wasn't linked to any capacity funding agreement. It was an offer of \$10,000, provide your invoices and those dollars will be paid. And in that letter it again

⁷² Cross-examination of Mr. Anderson, January 11, 2010, Vol. 4, p. 275 ll. 7-13 and p. 314, ll. 17-26.

⁷³ Exhibit B-3-1, Supplemental Evidence, s. 2.3.5, 2.3.6, p. 34, l. 4 - p. 39, l. 13, App. M. In the November 2006 presentation (App. M), the topics discussed were ILM alternatives (pp. 3-6), the British Columbia Environmental Assessment Office process (p. 12), criteria for the choice of the preferred alternative (p. 15), the Project schedule (p. 16), how First Nations would like to be consulted and capacity funding (pp. 17-18).

⁷⁴ Exhibit B-3-1, Supplemental Evidence, s. 2.3.1, p. 28, l. 12 - p. 29, l. 9.

⁷⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.3.1, 2.3.2, 2.3.3, p. 28, l. 12 - p. 31, l. 14, Apps. H, I and J.

⁷⁶ Cross-examination of Mr. Anderson, January 11, 2010, Vol. 4, p. 342, l. 16 - p. 343, l. 4.

outlines that it's funding to be used for certainly participation in environmental assessment, terms and reference (sic) process, as well as the review studies and providing input on the ILM upgrade option.

So I think it's, in terms of suggesting that there needed to be a capacity funding agreement, or they needed to sign on to the capacity funding agreement, I don't think that's quite true. They just needed to respond.

97. On December 4, 2006, due to the long lead time associated with permitting and constructing a new transmission line if the New Line Alternative were chosen as the preferred alternative, BCTC commenced the pre-application phase of the environmental assessment process by filing a Project Description for the New Line Alternative with the BCEAO.⁷⁷ The Project Description identified that an HVDC solution had not been ruled out at that point in time but such a solution was considered "unlikely".⁷⁸

98. The Project Description also indicated that:

BCTC will complete its analysis of the transmission options by May 2007 and make a decision on the preferred option at that time. It is expected that the BCUC will have rendered its decision on BC Hydro's IEP/LTAP Application before then.

In the interim, due to the long-lead time associated with permitting and constructing new transmission lines, BCTC is entering into the Environmental Assessment process for a new transmission line option. If the new transmission line option is not selected as the preferred alternative, BCTC will withdraw this option from the Environmental Assessment process.⁷⁹

99. A link to the Project Description was sent by the BCEAO to the identified First Nations. The Project Description was also provided to First Nations in the binder of materials provided at the February 21, 2007, BCEAO Working Group meeting (discussed below).⁸⁰

100. On December 18, 2006, the BCEAO issued a Section 10 Order under the BC *Environmental Assessment Act* (BCEAA) setting out that, if the New Line Alternative were chosen as the preferred alternative, it was a "reviewable project" under BCEAA (i.e., it would be subject to a full environmental and socio-economic review).⁸¹

⁷⁷ Exhibit B-3-1, Supplemental Evidence, s. 1.2, p. 7, fn. 1.

⁷⁸ Exhibit B-26, EAC Project Description, p. vii.

⁷⁹ Exhibit B-26, EAC Project Description, pp. vi-vii.

⁸⁰ Cross-examination of Ms. Holland, January 14, 2010, Vol. 7, p. 813, l. 24 - p. 814, l. 7.

⁸¹ ILM CPCN Application, Exhibit B-1, App. O.

101. BC Hydro engaged in further meetings with the identified First Nations from January through April 2007 leading up to the May 2007 decision on the preferred alternative. At these meetings, BC Hydro continued to provide information and attempt to receive input on the UEC and New Line Alternatives, discuss capacity funding, obtain input on the BCEAO draft Section 11 Order and draft Terms of Reference (TOR), and discuss how First Nations could participate in studies related to the ILM Project and regulatory processes. Powerpoint presentations entitled “Interior to Lower Mainland Transmission Reinforcement Project January 2007” and “Interior to Lower Mainland Transmission Reinforcement Project February 2007” were presented at these meetings.⁸²

102. The “Interior to Lower Mainland Transmission Reinforcement Project January 2007” presentation described the criteria that BCTC was planning on using to choose the preferred alternative:⁸³

- (a) Line capacity;
- (b) Cost;
- (c) Transmission losses;
- (d) Reliability;
- (e) The outcome of BC Hydro’s IEP;
- (f) First Nations’ input;
- (g) Public input;

⁸² Exhibit B-3-1, Supplemental Evidence, s. 2.4.1, 2.4.2, p. 39, l. 17 - p. 42, l. 17, Apps. O, Q. The topics discussed in the January Presentation (App. O) included Reinforcement Options (pp. 3-6) Proposed Routing for New Line Option (p. 7); Transmission Corridor (p. 8); Preliminary Structure Design (p. 9); Transmission Corridor – Parks (p. 10); Regulatory Process (pp. 11-14); Decision Criteria (p. 15); Schedule (p. 16); Preferred Consultation (p. 17); Capacity Funding (p. 18). Similar topics were discussed in the February 2007 Presentation including Reinforcement Options (pp. 3-7) Proposed Routing for New Line Option (p. 8-11); Regulatory Process (pp. 12-14); Project Description (p. 15); Decision Criteria (p. 17); Schedule (p. 18); Preferred Consultation (p. 19); and Capacity Funding (p. 20).

⁸³ Exhibit B-3-1, Supplemental Evidence, App. O, p. 15.

- (h) Social and environmental effects; and
- (i) Transmission customer benefits.

103. In order to provide further input on the choice of the preferred alternative, BCTC retained Golder Associates, an environmental consulting firm, to undertake an Archaeological Overview Assessment (AOA) of the New Line Alternative. Subsequently, at the request of the Stó:lō Research and Resource Management Centre (SRRMC), which provides technical support to the Stó:lō Tribal Council and Stó:lō Nation Society (SNS),⁸⁴ BCTC and BC Hydro agreed to expand the scope of the AOA to include a Traditional Use component and to also include a portion of the UEC Alternative in Stó:lō traditional territory.⁸⁵ As a result, the Archaeological Overview Assessment became a broader Heritage Overview Assessment (HOA).⁸⁶

MS. HOLLAND: A: What I want to try and clarify is that originally we had contracted with Golder to undertake an archaeological overview assessment. That was deemed to be too narrow by a number of First Nations. We agreed to expand the scope of that to include a traditional use component, and it became a Heritage overview assessment.

104. An HOA is a planning and evaluation process for predicting the significance of potential effects of proposed projects on generally known heritage resources, and to assist in the early identification of measures to avoid, reduce or otherwise mitigate potential project effects. Based on the agreement with the SRRMC to undertake an HOA, BCTC and BC Hydro encouraged other First Nations to participate in the broader HOA work in addition to the Archaeological Overview component and a number of First Nations participated in this work. While the primary focus was on known heritage resources, some First Nations provided new information.⁸⁷

105. The draft HOA was completed in April 2007 by Golder in partnership with SRRMC and T'mixw Research of the Nicola Tribal Association. Unfortunately, shortly before

⁸⁴ The Stó:lō Tribal Council is a Tribal Council made up Shw'ow'hamel, Cheam, Chawathil, Kwantlen, Kwaw-kwaw-a-pilt, Scowlitz, Soowahlie and Seabird Island First Nations. Stó:lō Nation Society is an organization of Stó:lō bands.

⁸⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.6, p. 47, l. 4 - p. 48, l. 19; Exhibit B-10, BCTC Response to Coldwater IR 1.8.

⁸⁶ Cross-examination of Ms. Holland, January 12, 2010, Vol. 5, p. 537, ll. 18 - 24.

⁸⁷ Exhibit B-3-1, Supplemental Evidence, s. 2.6, p. 47, l. 4 - p. 48, l. 19; Exhibit B-11, BCTC Response to Coldwater IR 1.8.

the choice of the preferred alternative, T'mixw indicated that it would not be able to provide Golder with the archaeological modelling methodology and location of significant traditional use study (TUS) sites that it had committed to. The final HOA was completed in February 2008.⁸⁸

106. In February 2007, based on feedback from a number of First Nations, BC Hydro sent several First Nations a revised and more detailed draft CFA for their review.⁸⁹

107. In early February 2007, BC Hydro also sent a letter to each of the identified First Nations encouraging their attendance at the first BCEAO Working Group meeting and advising them that BC Hydro was prepared to provide funding to prepare for and attend the meeting. By this point in time, the BCEAO had identified a number of other First Nations that it considered might be potentially affected by the New Line Alternative and these additional First Nations were included in the First Nations who were contacted.⁹⁰

108. On February 21, 2007, the first BCEAO Working Group meeting took place.⁹¹ The BCEAO Working Group is a formal group made up of various levels of government and all potentially affected First Nations.⁹²

109. At the February 2007 Working Group meeting, BCTC made a presentation entitled "Interior to Lower Mainland Transmission Reinforcement Project – Nicola to Meridian Transmission Line Alternative".⁹³ Among other things, the presentation identified the two main alternatives and indicated that, regardless of which alternative was chosen, BCTC expected to submit a CPCN Application with the Commission in the fall of 2007.⁹⁴ BCTC indicated that it would decide on the preferred alternative in May of 2007 and that, if the UEC Alternative were chosen as the preferred alternative, BCTC would withdraw its filing for the New Line Alternative from the BCEAO process.⁹⁵ Various questions were asked on the alternatives.⁹⁶ The BCEAO made a presentation on the provincial environmental assessment process and the Canadian Environmental Assessment Agency made a presentation on the federal environmental process,

⁸⁸ Exhibit B-12, BCTC Response to BCUC IR 1.1.1 (Nicola Tribal Association), p. 175.

⁸⁹ Exhibit B-3-1, Supplemental Evidence, s. 2.3.3, p. 30, ll. 14 – 18, App. J.

⁹⁰ Exhibit B-3-1, Supplemental Evidence, p. 42, ll. 19 - 23, App. S.

⁹¹ Exhibit B-3-1, Supplemental Evidence, p. 42, ll. 19 - 23.

⁹² Cross-examination of Ms. Holland, January 14, 2010, Vol. 7, p. 860, l. 19 - 21.

⁹³ Exhibit B-3-1, Supplemental Evidence, App. T.

⁹⁴ Cross-examination of Ms. Holland, January 19, 2010, Vol. 10, p. 1402, ll. 3 – 19.

⁹⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.5, p. 42, l. 19 - p. 47, l. 2, App. U.

⁹⁶ Exhibit B-3-1, Supplemental Evidence, App. U, p. 6.

if this would apply. BC Hydro explained that it conducts consultation on behalf of BCTC. It presented a plan for consulting with First Nations and expressed a willingness to consult with all potentially affected First Nations, whether they wished to be consulted as part of a larger group or on their own.⁹⁷

110. In the BCEAO process, the TOR outline the scope of the technical studies and consultation activities to be undertaken for the Environmental Assessment Certificate (EAC) Application.⁹⁸ During the February 21, 2007, BCEAO Working Group meeting, the draft BCEAO TOR for the New Line Alternative were presented and discussed with the meeting participants. First Nations were encouraged to submit their comments on the draft TOR when ready, with a view to receipt of comments on the draft TOR prior to the next Working Group meeting (September 2007).⁹⁹

111. An information binder was distributed at the meeting including the Project Description, the draft TOR, and a hard copy of the presentation entitled "Interior to Lower Mainland Transmission Reinforcement Project – Nicola to Meridian Transmission Line Alternative".¹⁰⁰

112. Following the Working Group meeting, BC Hydro sent a copy of the information binder to those First Nations and Tribal Councils who were unable to attend the Working Group meeting and offered to provide capacity funding to review these materials.¹⁰¹

113. In addition to the meetings that BC Hydro attended or attempted to arrange with individual First Nations, BCTC and BC Hydro also invited First Nations to a number of Open Houses on the ILM Project, including Open Houses held in February 2007. First Nations were also offered separate Open Houses or presentations. Representatives from some First Nations attended the February Open Houses. Apart from Seabird Island, no First Nations requested separate Open Houses or presentations.¹⁰²

⁹⁷ Exhibit B-3-1, Supplemental Evidence, s. 2.5, p. 42, l. 19 - p. 47, l. 2, Apps. S, T and U.

⁹⁸ ILM CPCN Application, Exhibit B-1, s. 7.1.1.1, p. 96, l. 2 - p. 97, l. 14.

⁹⁹ Exhibit B-3-1, Supplemental Evidence, s. 2.5, p. 42, l. 19 - p. 47, l. 2 and s. 2.19, p. 62, l. 24 - p. 63, l. 4.

¹⁰⁰ Exhibit B-3-1, Supplemental Evidence, s. 2.5, p. 44, ll. 14-18.

¹⁰¹ Exhibit B-3-1, Supplemental Evidence, p. 44; Exhibit B-20, Rebuttal Evidence, A-14; Exhibit C3-16, Atts. 7, 9, 11, 13, 15.

¹⁰² Exhibit B-3-1, Supplemental Evidence, s. 2.8, p. 50, l. 18 - p. 51, l. 10.

114. Due to a lack of response to BC Hydro's initial capacity funding offers, in early March 2007 BC Hydro sent a one-page capacity funding letter agreement to several First Nations offering \$10,000 in capacity funding to participate in various activities related to the ILM Project.¹⁰³ BC Hydro's letter indicated that BCTC was in the process of deciding whether to pursue the New Line Alternative or the UEC Alternative and that, if the New Line Alternative was chosen, BCTC would be proceeding through the BCEAO process. The letter went on to indicate that BC Hydro was willing to provide capacity funding of \$10,000 to assist First Nations to:¹⁰⁴

- (a) Provide BC Hydro with input either written or verbal on the transmission reinforcement alternatives;
- (b) Provide initial overview comments on the draft BCEAO TOR;
- (c) Review the draft Section 11 Order;
- (d) Review Golder's Archaeological Overview Assessment Report; and
- (e) Meet with BC Hydro to discuss opportunities and issues as requested by either party.

115. Mr. Anderson and Ms. Holland responded to questions on the March capacity funding offer as follows:¹⁰⁵

MR. McDADE: Q: So, but my question goes to you've listed five tasks, each of which are quite significant in and of themselves. Was the offer of the \$10,000 intended to require them to agree to do all five, or could they have assigned the money to any one of those tasks as they chose? It appears to have required them to do all five.

MR. ANDERSON: A: I don't believe that's the case. Again, the context of how those points arose were primarily in response to the feedback we were getting from First Nations at the time. I again – the thought was that this is initial funding. Comprehensive or additional capacity funding is something that was ongoing with the Kwikwetlem in terms of discussions, and certainly expected that there would be more funding needed.

¹⁰³ For First Nations who were far removed from the ILM Project, BC Hydro would not send out capacity funding agreements. For these First Nations who were less likely to be impacted, BC Hydro relied on them to contact BC Hydro if they needed funding: cross-examination of Keith Anderson, January 19, 2010, Vol. 10, p. 1410, l. 16 – p. 1411, l. 4.

¹⁰⁴ Exhibit B-3-1, Supplemental Evidence, s. 2.3.4, p. 31, l. 16 - p. 34, l. 2, App. K.

¹⁰⁵ Cross-examination of Mr. Anderson and Ms. Holland, January 12, 2010, Vol. 5, p. 524, l. 25 - p. 527, l. 1.

...

MR. McDADE: Q: So it would have been reasonable for a First Nation to have read this as meaning they could one or two or three of these things, and didn't have to do all five. Is that what you're saying?

MS. HOLLAND: A: In fact, a number of First Nations took the capacity funding and did not complete all five, and were provided the funding.

MR. McDADE: Q: But in your view, they acted reasonably in doing so?

MS. HOLLAND: A: We can provide the opportunities that we can provide. We cannot force somebody to do something. We can request it. We can ask for it. We can provide funding to do so. But I'm unable to compel somebody else to do something that they don't want to do.

116. BC Hydro's March letter contemplated further meetings to discuss and enter into further CFAs once a preferred alternative had been chosen. A number of First Nations entered into these capacity funding letter agreements, including a number of the Intervenors.¹⁰⁶

117. In early March 2007, the BCEAO circulated a draft Section 11 Procedural Order for the environmental assessment process for the New Line Alternative for comment to the 60 First Nations and 7 Tribal Councils that were ultimately listed in the Section 11 Order issued by the BCEAO.¹⁰⁷

118. In March and April of 2007, the BCEAO and BC Hydro also sent draft discipline specific Work Plans to the First Nations who could be affected by the New Line Alternative for their review and input.¹⁰⁸ The discipline-specific work plans support the TOR by providing details on methods for how the studies identified in the TOR will be undertaken and completed.¹⁰⁹

119. One of the communications tools which is being used on the ILM Project is the use of Project Updates. These are brief documents which provide information on the current and upcoming activities related to the Project. ILM Project Update No. 1 was sent to all First Nations during the week of April 9, 2007. Project Update No. 1 indicated that BCTC was studying alternatives to reinforce the capacity of the transmission system between the Interior and the Lower Mainland and that this reinforcement was necessary in order to meet growing

¹⁰⁶ Exhibit B-3-1, Supplemental Evidence, s. 2.3.4, p. 31, l. 16 - p. 34, l. 2, App. K.

¹⁰⁷ Exhibit B-3-1, Supplemental Evidence, s. 2.10, p. 52, ll. 4 - 10.

¹⁰⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.10, p. 52, ll. 11 - 18.

¹⁰⁹ ILM CPCN Application, Exhibit B-1, s. 7.1.1.1, p. 96, l. 2 - p. 97, l. 14;

electricity needs. The Project Update also provided a brief description of the alternatives and when the choice of the preferred alternative would be made.¹¹⁰

120. Up to the time of the choice of the preferred alternative, no First Nation identified any issues that would prevent the New Line Alternative from being pursued.¹¹¹

Now, we had been in many meetings with First Nations. We had undertaken a detailed -- well it's an overview, sorry, an archaeological overview assessment. We had offered for organizations to provide traditional use information. If there had been some huge showstopper, like, you can't go through this whole area because of -- it's a massive village site and it spans this distance to this distance and there's no way to route around it, I would have had anticipated that somebody would have said to me, between the fall of 2006 and May of 2007, are you aware of this big showstopper? Nobody said that.

121. In early May 2007, Ms. Holland, on behalf of the ILM Project team and BCTC's Vice-President of Major Projects, made a recommendation on the preferred alternative to BCTC's Executive. Ms. Holland's recommendation was to proceed with the full scope of Definition Phase activities for the New Line Alternative (5L83) and to file an application for a CPCN for the 5L83 Alternative with the Commission.¹¹²

122. The system planning and cost comparison analysis of the 5L83 Alternative and the UEC Alternative was as follows:¹¹³

Table 1: System Planning and Cost Comparison of Upgrade and New Line alternatives for the ILM System

	Existing	Upgrade	New Line (5L83)
Total Capital Cost	NA	\$270 million	\$559 million
1-Hr Overload Capacity MW	6300	8,400	8,400
Continuous Thermal Capacity MW	5800	6500	6750
Voltage Stability Limit	5800	6355	7120

¹¹⁰ Exhibit B-3-1, Supplemental Evidence, s. 2.11, p. 52, l. 20 - p. 53, l. 11, App. V.

¹¹¹ Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, pp. 1185, l. 16 - 1186, l. 1; Cross-examination of Mr. Anderson, January 20, 2010, Vol. 11, p. 1544, l. 11 - p. 1545, l. 2; Exhibit B-10, BCTC Response to Coldwater IR 1.1.

¹¹² Exhibit B-10, BCTC Response to Coldwater IR 1.1.

¹¹³ Exhibit B-10-5, Briefing Paper – BCTC Executive Meeting May 4, 2007, p. 6.

MW			
Incremental Value of Losses @ \$74 /MWHr	NA	0	(\$379 million)
NPV \$M Comparison	NA	\$286	\$170.6 million

123. Based on this analysis, the 5L83 Alternative provided greater electrical capacity at a net cost of over \$100 million less than the UEC.

124. With respect to First Nations input, BCTC's conclusion was that it was clear that neither the UEC or 5L83 Alternatives would have broad First Nations support generally (although 5L83 could be designed to avoid crossing Indian Reserves). When evaluating the project alternatives, BCTC did consider whether potential impacts could be avoided, mitigated or otherwise accommodated. BCTC's conclusion was that both alternatives would cause impacts but, for both alternatives, avoidance, mitigation or other accommodation was feasible. BCTC identified that in moving forward with one alternative (regardless of which one) further consultation would be required to more fully understand the potential impacts and options for avoidance, mitigation or other accommodation.¹¹⁴

125. The draft HOA which was prepared for the choice of the preferred alternative did not identify any known archaeological, traditional use, historic and palaeontological issues that could not be avoided or otherwise mitigated through the implementation of Best Management Practices and other appropriate actions.¹¹⁵ Ms. Holland described the results of the HOA and how they factored into the choice of the preferred alternative as follows:¹¹⁶

MS. HOLLAND: A: And we spent the next year trying to complete the overview, but in May, 2007 I made a recommendation on a preferred alternative. I decided to make that recommendation based on the information that I had in front of me, and Golder had not at that point in time identified any archaeological, traditional-use, historical or paleontological issues that cannot be avoided or otherwise mitigated through the implementation of best management practices and other appropriate management activities.

¹¹⁴ See Exhibit B-11, BCTC Response to Coldwater IR 1.8 for potential accommodation measures that had been identified at the time of the choice of the preferred alternative.

¹¹⁵ Exhibit B-10, BCTC Response to Coldwater IR 1.1.

¹¹⁶ Cross-examination of Ms. Holland, January 18, 2010, Vol. 9, pp. 1185, l. 6 - 1186, l. 25.

Now, we had been in many meetings with First Nations. We had undertaken a detailed -- well it's an overview, sorry, an archaeological overview assessment. We had offered for organizations to provide traditional use information. If there had been some huge showstopper, like, you can't go through this whole area because of -- it's a massive village site and it spans this distance to this distance and there's no way to route around it, I would have had anticipated that somebody would have said to me, between the fall of 2006 and May of 2007, are you aware of this big showstopper? Nobody said that.

They were all small areas. It's a transmission line, you can reroute it, you can move it if you need to. For the most part we want to use existing right-of-way, next to a line that's already built. Similarly on the upgrade, we're going to be doing work on what's already built, an on asset that already exists. Some First Nations said to us, what is that going to look like if it's on our reserve, are you going to be coming on, what does that work entail, are you aware that when you did the work in the 70s there were these concerns and these issues, we don't like having a transmission line on our reserve, we don't like having it in our traditional territory. We heard all those different things from different First Nations but no First Nation said to me or to my team, there's a big showstopper right here, you can't do this alternative because of this showstopper.

And so, yes, it's an overview and I used it to make a decision and for the next year I tried to get T'mixw to provide their input to complete the overview. In the meantime I undertook the further analysis that Golder suggested that we undertake, and that was to contract for traditional use and to begin an archaeological impact assessment.

126. None of the First Nations had raised any concerns with respect to the decision to choose the preferred alternative.¹¹⁷

MR. ANDERSON: A: At that point in time we didn't hear back from any First Nation that there was concern about the options decision, that they were looking for us to wait at all. As we've looked through our literature over the last little while, we asked for feedback I believe early April and the decision wasn't happening until May and nowhere in that time frame did we hear back from anybody, that, "Look, we're really concerned, we want you to postpone this." So, that, we didn't provide any feedback to BCTC that would -- to delay, because of what we were hearing from First Nations.

127. Had BCTC or BC Hydro understood that there were concerns regarding the choice of the preferred alternatives, it would not have proceeded with the decision:¹¹⁸

COMMISSIONER VIVIAN: The central question before the Commission Panel in this proceeding is the adequacy of consultation. So do I take it your position was that prior to making the recommendation to the Board -- or to the executive, on

¹¹⁷ Commission questions of Mr. Anderson, January 20, 2010, Vol. 11, p. 1544, l. 17 - p. 1545, l.2.

¹¹⁸ Commission questions of Ms. Holland, January 20, 2010, Vol. 11, p. 1546, ll. 4 - 17.

May 4th, you had satisfied yourself that in respect of the options there had been sufficient consultation with First Nations?

MS. HOLLAND: A: I'm wondering whether you would like BCTC and B.C. Hydro to both respond to that? Perhaps I can respond on behalf of the project. Yes. Otherwise I wouldn't have made the decision. And after we made the decision, made the announcement, we didn't hear anything. And to me, that confirms that it had been adequate.

128. On May 4, 2007, the BCTC Executive approved Ms. Holland's recommendation¹¹⁹ and, on May 23, 2007, BCTC's Board of Directors approved additional Definition Phase funding and proceeding with a CPCN Application for the 5L83 Alternative.¹²⁰

5.7. *May 2007 Choice of Preferred Alternative to Filing of CPCN Application in November 2007*

129. Following the May 2007 decision, BCTC and BC Hydro continued to have face-to-face meetings with First Nations regarding the ILM Project. These meetings are described in BCTC's Supplemental Evidence, BCTC's response to BCUC Information Request 1.1.1, BCTC's Rebuttal Evidence, and are summarized with reference to specific First Nations in further detail below.¹²¹ In addition to the many face-to-face meetings with First Nations following the May 2007 decision, BCTC also carried out numerous technical studies and activities related to the Project and First Nations consultation. For example,¹²² BCTC and BC Hydro continued to attempt to negotiate CFAs with First Nations, began efforts to engage First Nations in Traditional Use Studies, held Open Houses, consulted on route alignment options, and sent First Nations the draft discipline specific technical reports for the EAC process for their review and comment.¹²³

130. Ms. Holland described the focus of the consultation process moving forward from the choice of the preferred alternative as follows:¹²⁴

MS. HOLLAND: A: Yes, and we believed that based on the issues and concerns that had been raised, that we would be able to avoid, mitigate or accommodate those issues and concerns that had been raised to that point in time. And the next step after the May decision was to go and continue consulting with First

¹¹⁹ Exhibit B-10, BCTC Response to Coldwater IR 1.1.

¹²⁰ Exhibit B-10, BCTC Response to Coldwater IR 1.1.

¹²¹ Exhibits B-3-1, B-11, B-12, B-13, and B-20.

¹²² This is not an exhaustive list.

¹²³ Exhibit B-3-1, Supplemental Evidence, ss. 2.15, 2.16, 2.17, 2.22, and 2.23.

¹²⁴ Cross-examination of Ms. Holland, January 13, 2010, Vol. 6, p. 579, ll. 4 - 18

Nations and work towards benefits agreements and to, through the environmental assessment process, identify ways to avoid and mitigate those issues and concerns that had been identified and new ones that would be identified through the environmental assessment process and through more detailed project design. At the time of making the May decision, we believed that we could address those issues and concerns that had been raised and that were likely to be raised.

131. Notwithstanding that BCTC had chosen to pursue the 5L83 Alternative, this did not foreclose the UEC Alternative from being considered further. As Ms. Holland testified:¹²⁵

MR. KIRCHNER: Q: Okay. And after May, '07, you -- BCTC, that is, and B.C. Hydro -- stopped consulting with First Nations on the UEC alternative altogether, correct?

MS. HOLLAND: A: I don't think that's entirely correct. We continued to keep the UEC First Nations updated and informed of the project. And I believe we notified them when we filed the CPCN application. And I'm getting nods from my team here, so apparently we -- I'm correct in saying that we did. And that was towards the end of keeping them informed, should there be a change along the way.

MR. KIRCHNER: Q: But you didn't consult with the 5L83 affected options -- excuse me, the 5L83 affected First Nations about doing the UEC alternative, still. That was gone after the May decision.

MS. HOLLAND: A: We were willing to receive input from First Nations post the May decision, and are still willing to receive information from First Nations, if there is something that could be identified that said, "This project can't be built." So I'm not sure I understand your question.

MR. KIRCHNER: Q: Well, I don't see anything in the record where you're talking to Coldwater, for example, about the UEC alternative after May of '07. The consultation at that point is focused on 5L83.

MS. HOLLAND: A: Any meetings post May often included a description of how we had made the decision, and so that included often information on the upgraded existing circuits and that included, I believe, in Lytton in September 2007, the meeting you reviewed with us earlier, we talked about the decision we had made and we talked about the upgraded existing circuits. And at no time after the May decision did we hear from any First Nation, "You made the wrong decision."

132. On May 31, 2007, the BCEAO issued the Section 11 Procedural Order for the ILM Project. The Section 11 Order identified 60 First Nations and 7 Tribal Councils/Societies that the BCEAO considered could be potentially affected by the 5L83 Alternative.¹²⁶

¹²⁵ Cross-examination of Ms. Holland, January 18, 2010, Vol. 9, p. 1222, l. 1 - p. 1223, l. 11.

¹²⁶ Exhibit B-3-1, Supplemental Evidence, s. 2.13, p. 55, ll. 8 - 14.

133. On June 1, 2007, BCTC submitted a revised TOR and discipline specific Work Plans to the BCEAO to address comments it had received from various government agencies and First Nations. The revised TOR was then posted on the BCEAO's website and made available for review and input. Relatively few additional comments were provided by First Nations on the draft TOR and, as a result, the BCEAO extended the comment period for First Nations to August 31, 2007.¹²⁷

134. On June 6, 2007, BC Hydro advised identified First Nations that BCTC had selected the 5L83 Alternative as the preferred alternative. BC Hydro explained that, as a result of the selection of the 5L83 Alternative, BCTC would be proceeding to seek the necessary approvals to construct a new 500 kV transmission line. BC Hydro went on to indicate that First Nations consultation was an important component of the Project and that BC Hydro would be contacting First Nations to provide further information and discuss next steps. BC Hydro's letter attached a further letter from BCTC confirming that BCTC had selected the 5L83 Alternative as the preferred alternative and that BCTC would be seeking the necessary approvals for this alternative. The BCTC letter also confirmed that the 5L83 Alternative would require the approval of both the Commission and the BCEAO and set out information on upcoming events, the approvals required, and the anticipated Project schedule.¹²⁸

135. Project Update No. 2 was distributed to First Nations during the week of June 4, 2007. It was also sent to the First Nations who had been identified as potentially affected by the UEC Alternative. Project Update No. 2 highlighted BCTC's choice of the preferred alternative, the public comment period for the BCEAO draft TOR, and further Open Houses scheduled for June 2007.¹²⁹

136. In early July 2007, BC Hydro sent a letter to First Nations advising that BCTC had initiated summer data collection as part of the work to establish an environmental baseline for the environmental and socio-economic assessment of the ILM Project. BC Hydro advised that it would be in contact to share information about the nature of opportunities for local

¹²⁷ ILM CPCN Application, Exhibit B-1, s. 7.1.1.1, p. 96, l. 2 - p. 97, l. 14.

¹²⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.12, p. 53, l. 13 - p. 55, l. 6.

¹²⁹ Exhibit B-3-1, Supplemental Evidence, s. 2.14, p. 55, ll. 20 - 26.

assistants, and that further opportunities to provide input on the environmental and socio-economic assessment would occur as the Project progressed.¹³⁰

137. Throughout the spring and summer of 2007, BC Hydro also continued to try to enter into CFAs with various First Nations and Tribal Councils. On July 25, 2007, as part of these efforts, BC Hydro sent a further draft Comprehensive Capacity Funding Agreement (CCFA) to several First Nations.¹³¹

138. BC Hydro and BCTC also began efforts to engage First Nations in more detailed Traditional Use Studies. On August 10, 2007, BC Hydro wrote to a number of First Nations advising that it would like to work with communities in proximity of the project corridor to collect and document traditional land use for affected areas to identify potential areas of concern and to develop proposed mitigative measures to avoid or minimize potential impacts. BC Hydro advised that it planned to start meeting with First Nation communities in August 2007 and that a member of the BC Hydro team would be in contact in the near future to set up a meeting date.¹³²

139. Ms. Holland described the overall purpose of the proposed Traditional Use Studies as follows:¹³³

And what generally I needed as a project manager that the traditional use studies help inform is, are there things that I need to do to change this project? So, into the route options decision that came in early 2008, how do we best make that decision, balancing the interests of First Nations, the technical challenges and the geotechnical issues? Again, are there things that we need to do to change the project design, to change the location of it, or to change the operation and management practices? And that's -- that was what I was hoping to hear for -- hear from, and did hear from a number of First Nations in their traditional use studies.

140. In response to this initiative, a number of First Nations agreed to undertake Traditional Use Studies. The majority of these studies were commenced in 2007/2008. Most studies were funded through broader CFAs; although, in some cases, the work was funded

¹³⁰ Exhibit B-20, Rebuttal Evidence, D-12; Exhibits B-11 and B-12, BCTC Response to BCUC IR 1.1.1, pp. 34, 89, 104, 124, 138, 158, 198.

¹³¹ Exhibit B-3-1, Supplemental Evidence, s. 2.16, p. 56, ll. 12 - 17.

¹³² Exhibit B-3-1, Supplemental Evidence, s. 2.17, p. 60, l. 3 - p. 62, l. 11 and s. 2.26, p. 70, l. 4 - p. 75, l. 2, App. AA.

¹³³ Cross-examination of Ms. Holland, January 12, 2010, Vol. 5, p. 460, l. 15 - p. 461, l. 1, January 20, 2010, Vol. 11 p. 1594 l. 24- p. 1597 l. 16.

through a separate contractual arrangement. As of August 5, 2008, 33 First Nations had a TUS either in progress or completed.¹³⁴

141. Project Update No. 3 was sent during the week of August 20, 2007. Project Update No. 3 provided a summary of issues that were raised during the June Open Houses and the status of the environmental assessment process. Project Update No. 3 also highlighted that BCTC would be filing a CPCN Application with the Commission and provided a link to the Commission's website for information on how to participate in the CPCN process.¹³⁵

142. On September 20, 2007, a second BCEAO Working Group meeting took place. All 60 First Nations and 7 Tribal Councils were invited to the Working Group meeting. The discussion at the Working Group meeting included the current status of the BCEAO process, Project route and right-of-way requirements, right-of-way clearing and considerations, field study updates, and further discussion of the BCEAO draft TOR. During the meeting, in response to a request from First Nations, the BCEAO agreed to further extend the time for First Nations to submit their final comments on the draft TOR to November 2, 2007.¹³⁶

143. On November 5, 2007, BCTC filed its CPCN Application for the 5L83 Alternative. The Application sought approval for a new 500 kV AC transmission line (5L83) between Nicola Substation near Merritt and Meridian Substation in Coquitlam, a new series capacitor station located at approximately the midpoint of the line, and the necessary telecommunications, protection, and control equipment.¹³⁷ To reflect the staged decision-making approach to the Project, the Application did not seek approval of a specific route alignment. Rather, it identified a reference alignment for the purpose of cost estimating that was chosen based on avoiding First Nations reserves, using existing right of way, and taking into account preliminary environmental assessment information.¹³⁸

144. A CPCN was sought at that time because it provided greater certainty around the Project, which BCTC believed was important for an EAC Application. Further, if BCTC applied for an EAC for the Project and the Commission subsequently did not approve the Project, then

¹³⁴ Exhibit B-3-1, Supplemental Evidence, s. 2.17, p. 60, l. 3 - p. 62, l. 11 and s. 2.26, p. 70, l. 4 - p. 75, l. 2, App. AA.

¹³⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.18, p. 62, ll. 13 - 22, App. CC.

¹³⁶ Exhibit B-3-1, Supplemental Evidence, ss. 2.19, p. 62, l. 24 - p. 63, l. 4 and s. 2.20, p. 63, l. 6 - p. 64, l. 1, App. DD.

¹³⁷ ILM CPCN Application, Exhibit B-1, Application, p. 6, App. A.

¹³⁸ Exhibit B-5, BCTC Responses to BCUC IRs 1.3.1 and 1.3.2.

BCTC would have spent significant time and money on a Project that ultimately would not go ahead as planned. This also provided for more time for consultation with First Nations.¹³⁹

145. Prior to the CPCN Application, BCTC identified and incorporated into the Application a number of means to avoid and mitigate potential impacts of the Project on First Nations to that point in time including:

- (a) Identifying a reference route that avoided crossing any Indian Reserves;¹⁴⁰
- (b) Choosing a reference route, to the greatest extent possible, parallel to existing transmission lines and utilizing existing right of way. Utilizing this reference route mitigated/minimized the potential impact (as compared to the establishment of a new linear right of way with associated access);¹⁴¹
- (c) Identifying a potential tower design for use in forested and urban areas, a delta tower configuration, which would reduce right of way and clearing requirements from those that would be required using a traditional flat tower design which is in place in the rest of the 500 kV transmission system;¹⁴² and
- (d) Confirming that the work required at the Nicola Substation and Meridian Substation could be undertaken within the existing fence line, – in contrast to an HVDC line, which would have required a major expansion to the Nicola and Meridian Substations.¹⁴³

146. At no time prior to the filing of the CPCN, or any time after up to the August 5, 2008 CPCN decision, did any First Nation identify an issue that would preclude the construction of the 5L83 Alternative or would affect the choice of the 5L83 Alternative as the preferred alternative:¹⁴⁴

MS. HOLLAND: A: ... After we made the May decision and we advised the First Nations that we had made the decision on a preferred alternative, we did not

¹³⁹ ILM CPCN Application, Exhibit B-5, BCTC Response to BCUC IR 1.5.2.

¹⁴⁰ ILM CPCN Application, Exhibit B-5, BCTC Response to BCUC IR 1.3.1.

¹⁴¹ ILM CPCN Application, Exhibit B-5, BCTC Response to BCUC IR 1.3.1.

¹⁴² ILM CPCN Application, B-1, Application, s. 5.1.3.1, p. 48, l.3 – p. 49, l. 11.

¹⁴³ Exhibit B-11, BCTC Response to Coldwater IR 1.8 and Exhibit B-10, BCTC Response to Kwikwetlem IR 1.1.

¹⁴⁴ Cross-examination of Ms. Holland, January 12, 2010, Vol. 5, p. 427, ll. 16 - 26.

hear from First Nations that there was a large significant looming issue that would preclude us from being able to construct the line in roughly the area between the substation in Meridian that we were proposing. And at no point along the way has something like that been identified that we haven't been able to, so far, avoid or mitigate or otherwise accommodate.

147. Project Update No. 4 was sent to First Nations during the week of November 30, 2007. It provided a description of the ILM Project regulatory review process and included the Notice of Application and Procedural Conference issued by the Commission which outlined the public participation process for the CPCN Application.¹⁴⁵

5.8. Filing of CPCN in November 2007 to August 5, 2008

148. Following the filing of the CPCN Application, BCTC and BC Hydro remained committed to ongoing consultation with First Nations to seek to identify specific aboriginal interests which may be potentially affected by the Project and measures to avoid or mitigate the potential adverse effects, and/or to otherwise address or accommodate First Nations' interests.

149. In February 2008, Golder sent copies of the HOA report to all Section 11 Order First Nations.¹⁴⁶

150. Project Update No. 5 was sent to First Nations during the week of February 25, 2008. It provided a further update on the CPCN process and information on Community Input Sessions scheduled by the Commission. It also included a copy of the Community Input Session advertisement which had been published in local newspapers.¹⁴⁷

151. The Archaeological Impact Assessment (AIA) field work for the ILM Project was commenced in March 2008 under a permit issued by the Provincial Archaeology Branch,¹⁴⁸ Chehalis Indian Band Cultural Investigations Heritage Permit 2008-004, Kwantlen Heritage Investigation Permit 3-43, Squamish Nation Archaeological Investigation Permit 08-0108, Stó:lō Heritage Investigation Permit 2008-03, and BC Ministry of Environment Park Use Permit

¹⁴⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.21, p. 64, ll. 3 - 8, App. EE.

¹⁴⁶ Exhibits B-11, B-12 and B-13, BCTC Response to BCUC IR 1.1.1. (Kwikwetlem p. 22; Coldwater p. 41; Cook's Ferry p. 64; Siska p. 81; Ashcroft p. 92; UNIB p. 112; Hwlitsum p. 126; NNTC p. 147; ONA p. 162; NTA p. 181; Nicomen p. 201; Nooatch p. 222; STC p. 244; and SHAC p. 268.)

¹⁴⁷ Exhibit B-3-1, Supplemental Evidence, s. 2.21, p. 64, ll. 9 - 15, App. FF.

¹⁴⁸ The Archaeology Branch circulated Golder's HCA Permit Application (submitted in September 2007) for review and comment to several First Nations (as determined by the Archaeology Branch). Comments were received from two First Nations and forwarded to Golder, who responded in writing. The permit was issued on February 5, 2008. See Exhibit B-3-1, Supplemental Evidence, App. JJ, p. 13.

LM08116336.¹⁴⁹ Golder was aware of the Upper Nicola Band permit system but was unable to secure an application from the UNIB.¹⁵⁰

152. The objectives of the AIA were to provide the data necessary to locate, document and evaluate archaeological sites within the ILM Project area. Other objectives included the assessment of post-1846 AD historic sites and paleontological remains, so that impacts to these sites could be managed. Further specific objectives are set out at p. ii of the Executive Summary of the AIA.¹⁵¹

153. The AIA was carried out through a partnership between Golder and SRRMC.¹⁵² To facilitate First Nations participation in the field program for the AIA, Golder entered into a number of sub-consulting agreements with First Nations groups and organizations. These included Esh-Kn-Am Joint Ventures (representing Coldwater, Cook's Ferry, Siska and Boston Bar), Brown and Oakes Archaeology (representing Kwikweltem), and the Lower Nicola Indian Band. Golder also retained a First Nations representative from the Shackan First Nation as an hourly Golder employee to facilitate their involvement in the field program. Other organizations provided fieldworkers or their own archaeologists through a subcontracting arrangement with BC Hydro ARN. These groups included SRRMC, Katzie First Nation, Tsleil-Waututh First Nation, Cheam Indian Band, Chehalis Indian Band, Kwantlen First Nation, Seabird Island Indian Band, and the Yale Indian Band.¹⁵³

154. The AIA field work for the majority of the preferred alignment and the Ruby Creek capacitor station location was completed in August of 2008.¹⁵⁴

155. On March 4, 2008, BC Hydro sent a letter to all 60 First Nations and 7 Tribal Councils indicating that BCTC would be focussing on determining a preferred route alignment for the ILM Project and that it was seeking First Nations' input into the decision on the preferred alignment so that BCTC could propose a preferred route alignment as part of its EAC Application in the fall. BC Hydro's letter set out the upcoming route alignment options activities.

¹⁴⁹ Exhibit B-3-1, Supplemental Evidence, s. 2.24, p. 68, l. 7 – p. 69, l. 15, App. JJ, Executive Summary.

¹⁵⁰ Exhibit B-3-1, Supplemental Evidence, s. 2.24, p. 69, ll. 5. - 9.

¹⁵¹ Exhibit B-3-1, Supplemental Evidence, App. JJ, Executive Summary.

¹⁵² Exhibit B-3-1, Supplemental Evidence, App. JJ, Executive Summary.

¹⁵³ Exhibit B-3-1, Supplemental Evidence, App. JJ, pp. 14-15.

¹⁵⁴ Exhibit B-3-1, Supplemental Evidence, s. 2.24, p. 69, l. 10 - 15, App. JJ.

The letter also attached maps illustrating the three areas along the project right-of-way where the primary route alignment options were being considered.¹⁵⁵

156. Consistent with other efforts, in order to provide a range of opportunities to receive further information about, and provide input into, the route alignment options, BCTC identified a number of ways for First Nations to participate in these discussions. These included First Nation only Open Houses near the areas of the primary route alignment options, and also the opportunity for individual meetings and, if requested, presentations on the route alignment and options.¹⁵⁶

157. On or about March 19, 2008, BC Hydro invited each of the 60 First Nations and 7 Tribal Councils to attend two First Nation only route alignment Open Houses. The first was to be held in Merritt on March 25, 2008, and the second in Chilliwack on March 26, 2008. The invitation noted that there were three primary areas along the ILM Project corridor between Nicola and Meridian where there were route alignment options and stated that, based on environmental assessment studies and the work of BCTC's engineering team, BCTC had identified these route alignment options as the ones with the least potential of affecting the environment. The invitation also noted that BC Hydro and BCTC were seeking First Nations' comments and input on these route alignment options and encouraged the attendance of First Nations at the Open Houses.¹⁵⁷

158. In addition to the Open Houses, a series of meetings were scheduled with First Nations on the route alignment options as follows:¹⁵⁸

- (a) April 21, 2008 – Union Bar First Nation;
- (b) April 21, 2008 – Yale First Nation;
- (c) April 23, 2008 – Stó:lō (collective);
- (d) April 24, 2008 – Boston Bar First Nation;

¹⁵⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 65, ll. 1 - 8, App. GG.

¹⁵⁶ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 64, l. 17 - p. 67, l. 2.

¹⁵⁷ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 65, ll. 11-13, App. HH.

¹⁵⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 65, l. 16 - p. 66, l. 6.

- (e) April 28, 2008 – Coldwater First Nation;
- (f) April 28, 2008 – Lower Nicola First Nation;
- (g) May 28, 2008 – Chehalis First Nation;
- (h) June 5, 2008 – Spuzzum First Nation; and
- (i) July 3, 2008 – Stó:lō Nation Society representing Aitchelitz First Nation, Leq'a:mel First Nation, Skawahlook First Nation, Skowkale First Nation, Tzeachten First Nation, and Yakwekwioose First Nation.

159. Ms. Holland described the route alignment discussions as follows:

MS. HOLLAND: A: I do recall that. But if I may also say, it was Chief Aljam who said, "In terms of the route alignment decision, you actually need to be talking to our sister band, Boston Bar." So from a route alignment perspective, Chief Aljam basically said, you know, not so much for us to comment on the Anderson, that's really for Boston Bar. On the TU, broader, we need -- and we haven't had time to do the traditional work. And my response to Chief Aljam and to Mary Sandy was, and I described this a little bit earlier, when you have detailed TU and it can start to inform where can you put towers, do you need to move the line and make adjustments slightly, I said, we still have time to do that. We haven't done detailed design on the project yet. We haven't established how tower locations. So we still want to work with you on traditional use information, we still need it, it's still important for the overall design of the project. But in terms of the route alignment selection, Chief Aljam said to me, Boston Bar's information will outweigh ours in making that decision. It's -- it will be of more import to them, they are closer to that area.¹⁵⁹

...

The route options meetings start to form and shape the project, we're seeking First Nations input. That's iterative. You start to see some First Nations taking a stronger interest. Some First Nations saying, "This is less our decision and more somebody else's."

When I spoke about the Coldwater and Boston Bar examples of the route decision in the Anderson, that was an example. We didn't know how we were going to deal with the Coquihalla crossing until the overhead design engineers turned their minds to that section. We realized the existing right-of-way --

¹⁵⁹ Cross-examination of Ms. Holland, January 18, 2010, Vol. 9, p. 1229, ll. 4 – 26.

unfortunately, the part that was available to us is actually on a side slope where we can't build a transmission line.

If the prior planners had moved the other two lines slightly to the left, we probably would have space. That necessitated a discussion with Coldwater Band around, "Okay, we have a couple of options here, so let's talk about what that might look like."

That starts to iterate in terms of potential impacts, understanding further potential impacts with Coldwater. We couldn't have done that earlier, because we didn't have that information.

With Yale, we had community issues that we were trying to address as well as First Nations issues. We had geotechnical issues as well. So the routing through and around the Yale area was particularly challenging. We heard from the community, "We don't want you to build just up the slope of the existing lines. We've had a lot of rock falls from when the original lines went in." Our geotech lead agreed that if we did build up there, it wasn't a good place to go. That started to push it up the hill.

Yale First Nation talked to us about, "Well, if it goes up the hill, then there's areas up there that we use, so what does that mean?" Yale also had concern around access roads and if there was going to be more access.

So there were a host of discussions that you then have. I remember driving in a winter storm up to Yale, Yale First Nation saying, "Don't come, the roads are bad," and I said, "Well, I've got my geotechnical lead from Gabriola Island in the car with me, we've got a good car, we'd really like to come and sit down and talk to you about this." And we had a very good meeting, where we actually sorted out where the preliminary layout was going to be for Yale. We couldn't have done that any earlier in the process, because we just didn't have the information.

Yale then was able to incorporate their understanding of the potential effects into their negotiations with B.C. Hydro for the benefits agreement that was signed.¹⁶⁰

160. On May 23, 2008, the BCEAO approved the TOR for the BCEAA review of the Project.

161. Following consultation with First Nations regarding the route alignment options, BCTC selected the preferred route for two of the three areas (the two areas in the upper and lower Fraser Canyon). On June 6, 2008, BCTC wrote to First Nations summarizing the process that had been followed to determine a preferred route alignment. The letter went on to indicate that the route alignment could be modified should new information emerge during the review of the EAC Application, prior to final detailed design. The letter also indicated that, if necessary, modifications to the alignment could still be made during the construction phase. The preferred

¹⁶⁰ Cross-examination of Ms. Holland, January 20, 2010, Vol. 11, p. 1595, l. 13 - p. 1597, l. 16.

alignment in the third area, within the Cascade Creek drainage, was identified in August 2008 following completion of further engineering work and geotechnical assessment.¹⁶¹

162. On June 19, 2008, hard copies of the drafts of 17 of 18 discipline-specific technical reports that were prepared for the EAC Application were sent to each of the Section 11 Order First Nations. The draft reports were intended to:

- (a) Provide First Nations with an early opportunity to review and comment on ILM Project assessment information, reducing the time pressure during the EAC Application review stage; and
- (b) To seek early feedback and comments from First Nations to prepare an application that was as comprehensive and complete as possible.

The cover letter to the draft discipline-specific reports noted that the reports reflected preliminary results of effects assessments and other data collected in 2007 and 2008 and that each discipline specific report had been organized and presented to include a description of baseline conditions along the Project corridor; a discussion and evaluation of potential environmental effects of the construction and operation of the Project; mitigation measures, Best Management Practices, and other environmental management strategies recommended to avoid, minimize or manage any identified potential adverse effects; and a discussion of potential effects of construction and operation of the Project following implementation of appropriate mitigation measures and other environmental management strategies. The cover letter also indicated that BC Hydro field coordinators were available to help answer any questions or concerns that First Nations may have when reviewing the material. BCTC requested that First Nations provide any preliminary comments on the draft discipline-specific technical reports by July 31, 2008, so that any preliminary comments could be incorporated into the final version of the EAC Application.¹⁶²

163. On or about July 16, 2008, a draft copy of Section 2.3 – First Nations Consultation - of the EAC Application was sent to each of the Section 11 Order First Nations. The draft contained a summary of consultations with First Nations carried out in relation to the ILM Project and a proposed consultation plan for consulting with First Nations during the EAC

¹⁶¹ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 66, l. 19 – p. 67. l.2, App. II.

¹⁶² Exhibit B-3-1, Supplemental Evidence, s. 2.23, p. 67, l. 4 - p. 68, l. 5, Apps. JJ and KK.

Application review stage. First Nations were encouraged to submit any comments they had on the draft by August 29, 2008.¹⁶³

164. In response to a request by some First Nations, on July 31, 2008, BCTC sent a letter to each of the Section 11 Order First Nations attaching a summary of the 17 draft discipline specific technical reports to assist First Nations in their preliminary review of the materials. The scope of the study, the preliminary results, and the proposed mitigation measures were summarized for each technical discipline.¹⁶⁴

165. While BCTC and BC Hydro generally did not expect to negotiate accommodation agreements with First Nations until after the detailed assessment of the potential impacts of the ILM Project and efforts to avoid or mitigate these impacts, BCTC and BC Hydro were prepared to enter into these discussions if a First Nation wished to do so.¹⁶⁵ BC Hydro and BCTC had negotiated one accommodation agreement with a First Nation in respect of the ILM Project prior to the August 5, 2008 CPCN decision. That agreement is confidential.¹⁶⁶

166. On August 5, 2008, the Commission granted a CPCN for the ILM Project.¹⁶⁷ In its decision, the Commission confirmed the need for the ILM Project, BCTC's choice of a new line between the Nicola Substation and the Meridian Substation, and the timing of the Project. All other issues were left to later stages of the ILM Project. BCTC was directed to provide an Update Report to the Commission prior to entering into a contract for the construction of the Project.

167. In respect of UEC alternative compared to the 5L83 Alternative, the CPCN decision concluded:¹⁶⁸

The Commission Panel concludes ... the PV of 5L83 is approximately \$100 million less than that of UEC.

...

¹⁶³ Exhibit B-3-1, Supplemental Evidence, s. 2.25, p. 69, l. 18 - p. 70, l. 2.

¹⁶⁴ Exhibit B-3-1, Supplemental Evidence, s. 2.23, p. 67, l. 22 - p. 68, l. 5.

¹⁶⁵ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 281, ll. 9 - 18.

¹⁶⁶ Exhibit B-10, BCTC Response to Kwikwetlem IR 1.8.

¹⁶⁷ In the Matter of the Utilities Commission Act, R.S.B.C. 1996 Chapter 473 and An Application by British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project, Order No. C-4-8.

¹⁶⁸ ILM CPCN Decision, August 5, 2008, pp. 90 and 96.

The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC side, and conclude that UEC is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capacity and lower losses.

168. None of these findings were appealed.

6. FIRST NATION INTERVENORS

6.1. Introduction

169. The following section discusses each of the First Nation Intervenors and BCTC's response to their "complaints", as described by the Court of Appeal, up to the point of the Commission's CPCN decision. The individual sections generally follow the order from the hearing process with the exception of SHAC, who follows STC given a significant overlap in their facts.

170. BCTC has not made submissions regarding the adequacy of consultation with individual First Nations who did not intervene in this proceeding. All First Nations that were identified as potentially impacted by the ILM Project were given an opportunity to participate in the Commission process, notwithstanding that they weren't Appellants in the Court of Appeal.¹⁶⁹ These First Nations have not made any complaints to the Commission about the adequacy of consultation to the date of the Commission's decision and have not intervened in this proceeding.

171. As discussed above, the Court of Appeal directed the Commission to hear the Appellants complaints about the adequacy of the consultation process up to the date of the Commission's CPCN decision. Since no complaints have been made by the non-Intervenor First Nations, BCTC submits that the Commission does not have an obligation to determine the adequacy of consultation with these First Nations. Accordingly, unless the Commission specifically requests that it do so, BCTC does not intend to address these First Nations and Tribal Councils further. BCTC does note its response to Commission IR 1.2.1 and 1.2.2 which identifies the issues raised by all First Nations and BCTC and BC Hydro efforts to respond to these.¹⁷⁰

¹⁶⁹ Order G-38-09 dated April 17, 2009, set out the Regulatory Timetable for the proceeding and provided that Intervenors or Interested Parties should register with the Commission by May 15, 2009. Order G-38-09 was provided to all 67 First Nations listed in Exhibit B-4 of the ILM CPCN Proceeding.

¹⁷⁰ Exhibit B-14.

172. Following the requirements in *Haida*, each of the individual Intervenor sections begins with a review of the assessment of the scope and content of the duty to consult for that Intervenor. The individual sections then address that Intervenor's complaints, as understood by BCTC, about the consultation which took place up to August 5, 2008, with the exception that, given that consultation on Existing Assets was raised by almost all of the First Nation Intervenor, this issue is addressed under a separate heading (Consultation on Impacts of Existing Assets). The individual Intervenor sections conclude with BCTC's submissions on whether the duty to consult had been met up to the Commission's CPCN decision in the context of each of the Intervenor's complaints.

173. In responding to each of the Intervenor's complaints, BCTC has not attempted to reproduce the whole of the consultation process with each Intervenor but has focused on what it considers to be the material evidence, again, given its current understanding of the First Nation Intervenor's complaints. While BCTC submits that the role of the Commission in this proceeding is to assess whether the duty to consult has been met up to August 5, 2008, for convenience, BCTC has divided these sections between period up to the filing of the ILM CPCN Application and the subsequent period to the date of the Commission's decision.

174. This section concludes with brief comments on the NTA, Nicomen, and Nooaitch who intervened in the proceeding but chose not to lead evidence or generally participate in the proceeding to date. Seabird is also discussed at this point.

6.2. *Kwkwetlem*

6.2.1. *Scope and Content*

175. The Kwkwetlem claimed territory includes parts of the 5L83 Alternative preferred alignment between Nodes T and U and all of the 5L83 Alternative preferred alignment between Nodes U and V. The green coloured area of the map shown at p. 49 of BCTC's response to BCUC IR 1.3.1 accurately depicts the external boundaries of S'olh Temexw.¹⁷¹ S'olh Temexw includes 5L83 between Nodes G1 and V.

176. In recognition that consultation is an iterative process, BC Hydro assessed the scope and content of the duty to Kwkwetlem twice in writing:

¹⁷¹ Exhibit B-13, BCTC Response to BCUC 1.3.1, p. 49; Exhibit C8-10, STC Response to BCTC's IRs 7.1 and 7.2.

(a) In April 2007, in relation to the New Line Alternative, Kwikwetlem's strength of claim was assessed as high and the preliminary assessment of level on consultation required was assessed at medium-high. This assessment took into account that BCTC had not formally concluded that the HVDC aspect of the New Line Alternative was not suitable at that time and there was still the possibility that there would need to be a significant expansion of the Meridian Substation if HVDC were pursued;¹⁷² and

(b) After it was confirmed that HVDC was not suitable in June 2007, Kwikwetlem's strength of claim was assessed as relatively strong and the level of consultation required was assessed as around the middle of the *Haida* spectrum (because the Meridian Substation did not need to be expanded for the 5L83 Alternative).¹⁷³

177. Kwikwetlem has not filed any evidence challenging the preliminary assessment of the Kwikwetlem's strength of claim or of the impacts of the ILM Project on the Kwikwetlem's asserted rights. In Kwikwetlem's response to BCUC IR 1.1 and 1.3, it admits:¹⁷⁴

...Kwikwetlem did not have formal evidence regarding the potential adverse effects of the Project on our rights and title interests...

No specific evidence of Kwikwetlem's rights and title evidence had been provided to BC Hydro in relation to the ILM Project prior to August 5, 2008 ...

178. BCTC submits that these admissions alone would justify BC Hydro's assessment of the scope and content of the duty owed to Kwikwetlem. However, BCTC submits that BC Hydro's assessment is also supported by the evidence of the Kwikwetlem on strength of claim and impacts in cross-examination:

(a) Kwikwetlem is not involved in the BC Treaty process (so there was no Statement of Intent for BC Hydro to review prior to consultation commencing);¹⁷⁵

(b) Prior to the commencement of consultation, Kwikwetlem had in its possession a study called Kwikwetlem First Nation Heritage Interests as Related to Gateway Program

¹⁷² Exhibit B-10-4, Interior to Lower Mainland Project First Nation Consultation Summary Report, May 2006 to April 2007, App. 3, Att. 4 to Coldwater IR 1.2.

¹⁷³ BCTC Response to BCUC IR 1.3.1, pp. 62 - 63; Exhibit B-13; Cross-examination of Ms. Holland, January 12, 2010, Vol. 5 p. 412 ll. 23 - p. 413 l. 4.

¹⁷⁴ Exhibit C4-11, Kwikwetlem Response to BCUC IR 1.1, p. 2.

¹⁷⁵ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1622, ll. 19 - 26.

Developments (the Brown and Oakes Gateway Study).¹⁷⁶ The area of interest of the Brown and Oakes Gateway Study was a part of Kwikwetlem's Traditional Territory traversed by 5L44, one of the lines that would be upgraded under the UEC Alternative. Kwikwetlem admitted that the UEC Alternative affected its interests. Seven Kwikwetlem members who reside in Kwikwetlem were interviewed for the study, including Mr. Chaffee and Ms. Joe. Mr. Chaffee and Ms. Joe attended all of the meetings with BC Hydro and BCTC. The Brown and Oakes Gateway Study was not provided to BCTC or BC Hydro prior to this proceeding;

(c) Mr. Chaffee was aware of potential house sites and burial mounds on the Coquitlam River but none of them were under the existing transmission line (and the most likely preferred alignment of the 5L83 Alternative).¹⁷⁷ None of the archaeological sites identified in the Brown and Oakes Gateway Study were located on Burke Mountain,¹⁷⁸ an area of specific concern identified by Mr. Chaffee in the meetings with BC Hydro. Mr. Chaffee was aware of an archaeological site near David Avenue but did not tell BCTC or BC Hydro about it.¹⁷⁹ Mr. Chaffee was also aware of spiritual sites near the existing transmission line on Burke Mountain and of some endangered species on Burke Mountain but did not tell BCTC or BC Hydro about either.¹⁸⁰ Mr. Chaffee admitted that knowledge exists within the Kwikwetlem about spiritual sites, hunting and berry picking on Burke Mountain.¹⁸¹ He also admitted that Chief and Council had discussed hunting rights on Burke Mountain.¹⁸² None of this specific information was provided to BC Hydro. BCTC submits that since none of this specific information was provided to BCTC or BC Hydro this strongly suggests that these rights and interests would not be affected by the Project;

¹⁷⁶ Exhibit C4-11, Kwikwetlem Response to BCUC IRs, Exhibit 1; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1662, l. 14 - p. 1663, l. 12, l. 19 - 26; Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1756, ll. 1 - 17, p. 1758, ll. 6-15, p. 1765, ll. 11 - 19.

¹⁷⁷ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1759, ll. 4-12.

¹⁷⁸ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1760, ll. 12-15.

¹⁷⁹ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1761, ll. 10 - 22; p. 1762, l. 19 - p. 1763, l. 4.

¹⁸⁰ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1781, l. 19 - p. 1783, l. 2.

¹⁸¹ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1804, l. 18 - p. 1806, l. 13; p. 1807, l. 20 - p. 1808, line 3.

¹⁸² Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1809, l. 21 - p. 1810, line 5.

(d) In his evidence, Mr. Chaffee acknowledged that the Katzie, Tsleil Waututh, Musqueam, Stó:lō Xwexwilmexw, and Hwlitsum all have claims that overlap the Kwikwetlem's asserted Traditional Territory.¹⁸³ The Kwikwetlem claimed territory includes parts of the 5L83 Alternative preferred alignment between Nodes T and U and all of the 5L83 Alternative preferred alignment between Nodes U and V. Mr. Chaffee admitted that he advised BCTC and BC Hydro at a meeting on October 2, 2007 that overlaps were, in his view, "not a BC Hydro or BCTC issue." As indicated above, the Supreme Court of Canada and other courts have confirmed that the existence of overlapping claims weakens aboriginal title claims;¹⁸⁴

(e) Before BCTC chose the 5L83 Alternative as the preferred alternative, the Kwikwetlem were asked at a February 1, 2007 meeting to provide, and agreed to provide, any "show stoppers" with respect to either alternative. The question was raised again at the March 26, 2007 meeting with the Kwikwetlem.¹⁸⁵ Ultimately, the only advice received from the Kwikwetlem in response to this request was that both alternatives would impact the Kwikwetlem;

(f) The potential for adverse effects is very low in this area. The preferred alignment does not require any expanded right-of-way between Nodes U and V. Accordingly, no parcels of land would be affected. Further, access to the entire segment would be from the adjacent existing right-of-way. The land between the Kwikwetlem main community and Reserves is highly developed and largely private land. Any work at the Meridian Substation will take place on private land, within the existing footprint of the current facility.¹⁸⁶

179. BCTC submits that the evidence demonstrates that the Kwikwetlem, including Mr. Chaffee, had knowledge relevant to the strength of the Kwikwetlem claims and the potential impacts of the ILM Project in their asserted Traditional Territory but did not provide the information about the strength of the claims or those impacts to BCTC or BC Hydro during the

¹⁸³ Exhibit B-20, Rebuttal Evidence, Att. A-21; Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1814, l. 8 - p. 1815, l. 2.

¹⁸⁴ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1813, l. 18 – p. 1814, l. 7.

¹⁸⁵ Exhibit B-10-15, Att. to BCTC Response to Kwikwetlem IR 1.15; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1684, ll. 5–25; January 21, 2010, Vol. 12, p. 1781, ll. 3-8.

¹⁸⁶ Exhibit B-13, BCTC Response to IR 1.3.1., p. 63.

period up to August 5, 2008. As indicated, there was no evidence filed by the Kwikwetlem in this proceeding to challenge BC Hydro's assessment.

180. When the overlapping claims are taken into account, the Kwikwetlem claim to aboriginal title is weak. When the fact that no new right of way is required within the Kwikwetlem asserted territory is taken into account, the impact of the New Line Alternative on aboriginal rights is minimal. As a result, BCTC submits that BC Hydro's conclusion that the duty to the Kwikwetlem falls in the middle of the *Haida* spectrum was a reasonable conclusion.

6.2.2. Kwikwetlem Complaint

181. The Kwikwetlem complaint about the consultation process is summarized in its written evidence:¹⁸⁷

... neither BC Hydro nor BCTC had ever engaged with us in a process of consultation prior to the CPCN decision in August 2008, nor had they ever purported to do so...

182. This complaint is particularized in Kwikwetlem's evidence as follows:¹⁸⁸

However, through 2007 and to August 2008:

- 1) no agreement was arrived at between the Kwikwetlem and BC Hydro as to how a consultation might be structured;
- 2) negotiations were ongoing with respect to the terms of a capacity funding agreement;
- 3) no interest assessment of any sort was funded or undertaken; and
- 4) no accommodation was arrived at with respect to the Project's impacts on the Kwikwetlem's interests.

183. BCTC submits that Kwikwetlem's complaint that it was unable to reach an agreement with BC Hydro with respect to capacity funding is strongly related to the other three issues raised in Kwikwetlem's evidence.

6.2.3. Capacity Funding

184. In addition to the evidence cited above, the Kwikwetlem evidence states:¹⁸⁹

¹⁸⁷ Exhibit C4-10, Kwikwetlem Evidence, p. 2.

¹⁸⁸ Exhibit C4-10, Kwikwetlem Evidence, p.1-2.

¹⁸⁹ Exhibit C4-10, Kwikwetlem Evidence, p. 24.

...No agreement was reached prior to August 5, 2008 with respect to capacity funding for Kwikwetlem ...

185. BCTC submits that the following evidence is relevant to the Kwikwetlem's complaints that no agreement was arrived at between the Kwikwetlem and BC Hydro as to how consultation might be structured, no interest assessment was funded, and no agreement was reached with respect to capacity funding before August 5, 2008:

(a) At the meeting with the Kwikwetlem of September 27, 2006, Ms. Oakes of Brown and Oakes suggested that a four-month archaeological study would cost approximately \$50,000.¹⁹⁰ Mr. Chaffee testified that this would be for two studies, one for Coquitlam dam, one for Burke Mountain, but the first study would be for the dam;¹⁹¹

(b) On November 27, 2006, BC Hydro wrote to Kwikwetlem offering \$10,000 in initial capacity funding along with a separate proposal for further funding under a CFA.¹⁹² The Appendix to the draft CFA included funding for "Specific Band involvement and technical specialists (ongoing Band staff involvement and specialized third party technical expertise and advice)." Mr. Chaffee understood that after the initial funding of \$10,000, there would be further funding for capacity.¹⁹³ Mr. Chaffee's description of the initial November 2006 capacity funding offer of \$10,000 was that it was "chump change" and the offer was not accepted;¹⁹⁴

(c) On January 24, 2007, BC Hydro sent a further letter to Mr. Chaffee again offering the initial \$10,000. This offer was also accompanied by a draft CFA for further funding, which could provide funding for specialized third party technical expertise and advice;¹⁹⁵

(d) On February 6, 2007, Mr. Chaffee sent an email to Ms. Isackson advising that "Council would like to complete the Contribution Agreement and have it signed as soon as possible to begin addressing our concerns for this project."¹⁹⁶ That did not happen, through no fault of BC Hydro or BCTC;

¹⁹⁰ Exhibit B-3-1, Supplemental Evidence, App. G.

¹⁹¹ Cross-examination of Mr. Chaffee, January 21, 2010, p. 1768, ll. 10 – 17 and p. 1769, ll. 8-14.

¹⁹² Exhibit B-20, Rebuttal Evidence, Att. A-11; Exhibit B-3-1, Supplemental Evidence, App. O.

¹⁹³ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1775, l. 21 - p. 1776, l. 20.

¹⁹⁴ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1640, ll. 5 – 15.

¹⁹⁵ Exhibit B-20, Rebuttal Evidence, Att. A-12.

¹⁹⁶ Exhibit C3-34; Cross-examination of Mr. Chaffee, January 20, 2010, p. 1678, ll. 10 – 22.

(e) On March 14, 2007, BC Hydro sent a revised initial capacity funding proposal to Mr. Chaffee offering \$10,000 for participation to the end of May, 2007, including comments on the alternatives;¹⁹⁷

(f) On April 5, 2007, Ms. Giroday sent a letter to BC Hydro requesting \$21,675 for capacity funding through the spring of 2007.¹⁹⁸ Attached to the letter was a budget from Westland Resource Group for reviewing the BCEAO draft TOR, conducting a field reconnaissance, holding a workshop, and preparing a report in the amount of \$11,175. Westland's budget included an estimate of \$2,560 to review the BCEAO draft TOR;

(g) On April 13, 2007, BC Hydro responded to Ms. Giroday's letter and offered \$13,500 to the Kwikwetlem, which included \$3,000 for an initial review by Westland of the BCEAO draft TOR.¹⁹⁹ Ms. Giroday admitted that the \$3,000 would allow Westland to undertake an initial review of the BCEAO draft TOR;²⁰⁰

(h) On May 1, 2007, following a number of attempts by BC Hydro to contact Kwikwetlem regarding the revised offer, Kwikwetlem sent a letter to BC Hydro agreeing to accept the funding of \$13,500 offered in the letter of April 13, 2007.²⁰¹ In that letter Kwikwetlem indicated that it would, "Provide BC Hydro with input either written or verbal on the two transmission reinforcement alternatives prior to May 10, 2007". Kwikwetlem did not do so;

(i) On June 29, 2007, following the decision on the preferred alternative, Chief Cunningham sent a letter to BC Hydro proposing funding for Kwikwetlem through September 2007 of \$82,175.²⁰² \$55,000 of the funding was for a TUS to be done by Brown and Oakes and \$8,175 was the balance of the budget from Westland to provide comments to BC Hydro on the BCEAO draft TOR. The Kwikwetlem tied capacity funding to interest assessments, so that an agreement regarding capacity funding had to be reached in order for any assessment to be conducted;

¹⁹⁷ Exhibit B-20, Rebuttal Evidence, Att. A-15; Exhibit C4-10, Kwikwetlem Evidence, Exhibit 1.

¹⁹⁸ Exhibit B-10-15, Att. to BCTC Response to Kwikwetlem IR 1.15.

¹⁹⁹ Exhibit B-3-1, Supplemental Evidence, Exhibit K; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1696, ll. 15-19.

²⁰⁰ Cross-examination of Ms. Giroday, January 20, 2010, Vol. 11, p. 1698, ll. 15-21.

²⁰¹ Exhibit B-3-1, Supplemental Evidence, App. L.

²⁰² Exhibit C4-10, Kwikwetlem Evidence, Exhibit 4.

(j) On July 25, 2007, BC Hydro sent a draft CFA to Chief Cunningham in response to his letter.²⁰³ The draft CFA proposed capacity funding to cover all regulatory processes related to the ILM Project and proposed that a Traditional Use Study could be funded under the CFA, which was reviewed by Ms. Giroday;²⁰⁴

(k) On August 2, 2007, BC Hydro wrote to Ratcliff and Company enclosing a cheque in the amount of \$8,175, which was the remaining funds sought by Kwikwetlem for the Westland work to provide comments on the BCEAO draft TOR.²⁰⁵ Ultimately, Kwikwetlem did not provide any comments to BC Hydro on the BCEAO draft TOR;

(l) By letter dated September 28, 2007, Chief Cunningham responded to the July 25 draft CFA.²⁰⁶ The letter was discussed by Chief and Council before it was sent.²⁰⁷ BC Hydro's draft CFA was revised to delete all references to regulatory processes and to limit the CFA to the BCEAO and CEAA processes to the extent that these were agreed to by the Kwikwetlem and to the level determined appropriate by the Kwikwetlem.²⁰⁸ In comparison to their earlier request, the Kwikwetlem now sought funding in the amount of \$235,670; however, the amount requested would not include the BCUC CPCN process.²⁰⁹ The Kwikwetlem acknowledged that its approach to the CFA was different from the one articulated in earlier conversations with BC Hydro but that it was "the model that will allow the Kwikwetlem to move forward".²¹⁰ This new approach linked discussions as to how consultation on the ILM Project might be structured with the discussions on the CFA;

²⁰³ Exhibit B 20, Rebuttal Evidence, Att. A-16.

²⁰⁴ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1788, ll. 13 – 21 and p. 1789, l. 21 - p. 1790, l. 1.

²⁰⁵ Exhibit B-20, Rebuttal Evidence, Att. A-17.

²⁰⁶ Exhibit B-20, Rebuttal Evidence, Att. A-21.

²⁰⁷ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1792, ll. 10 – 14 and p. 1793, ll. 6 – 11.

²⁰⁸ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1795, l. 8 - p. 1796, l. 5.

²⁰⁹ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1801, ll. 11 - 21.

²¹⁰ Exhibit C4-10, Kwikwetlem Evidence, Exhibit 7; Cross-examination of Mr. Ross, January 13, 2010, Vol. 6, p. 696, ll. 3-22.

(m) On November 28, 2007, Mr. Littledale emailed a revised version of the draft CFA to Ms. Giroday.²¹¹ Mr. Littledale reinserted the references to all regulatory processes being covered by the CFA and noted:²¹²

Leslie, I left this as is, as this would cover off all regulatory process related to the project. If something comes up that we don't anticipate, then we can adjust the budget along the way.

(n) On February 22, 2008, Ms. Giroday met with Mr. Littledale to discuss the draft CFA.²¹³ Ms. Giroday indicated that she would be meeting with Kwikwetlem early the following week and would get their response on the final draft of the CFA,²¹⁴

(o) On May 26, 2008, three months after the February meeting, Ms. Giroday wrote to Mr. Littledale with a revised version of the CFA.²¹⁵ In relation to participation in the EAO, CEAA and BCUC processes, the draft was qualified by the words "should the Kwikwetlem decide to do so" in two separate locations.²¹⁶ In addition, the revised draft CFA provided, among other things:²¹⁷

Nothing in this Agreement shall be construed as indicating that the Kwikwetlem First Nation have agreed that any of the EAO, CEAA, BCUC and other regulatory processes serve as an adequate or sufficient process for consultation regarding any potential impacts of the Project on Kwikwetlem First Nation Aboriginal Title and Rights, or that the Kwikwetlem will participate in these processes.

(p) The budget attached to the revised CFA was for \$236,687 which, if funded, would have brought total funding to the Kwikwetlem to approximately \$260,000, with an expectation from the Kwikwetlem that total funding would eventually be higher than \$260,000.²¹⁸ This funding was being sought without the Kwikwetlem providing any agreement to participate in the BCEAO, CEAA or BCUC processes;

²¹¹ Exhibit B-20, Rebuttal Evidence, Att. A-19.

²¹² Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1816, ll. 5-12.

²¹³ Exhibit B-20, Rebuttal Evidence, Att. A-20.

²¹⁴ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1817, l. 7 - p. 1818, l. 5.

²¹⁵ Exhibit C4-10, Kwikwetlem Evidence, Exhibit 9.

²¹⁶ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1819, l. 21 - p. 1820, l. 17.

²¹⁷ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1823, ll. 5-17.

²¹⁸ Exhibit B-28, Kwikwetlem First Nation Participation Budget; Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1825, l. 5 - p. 1826, l. 26.

(q) By August 2008, Kwikwetlem were still at the stage of talking about capacity funding.²¹⁹

186. The delay in funding \$13,500 until after Kwikwetlem accepted the funding on May 1, 2007 for comments on the choice of the new line alternative was not the fault of BC Hydro or BCTC. Funding offers were repeatedly made to Kwikwetlem commencing in November 2007 but, Kwikwetlem and its counsel took until May 1, 2007 to accept the funding. Then, after accepting the funding, the Kwikwetlem did not provide the comments they indicated that they would provide. In August 2007, BC Hydro provided the further portion of the agreed funding to allow Westland to provide comments on the BCEAO draft TOR. After receiving the funding, Kwikwetlem did not provide BC Hydro or BCTC with any comments on the BCEAO draft TOR.

187. BCTC submits that the Kwikwetlem's request in September 2007 for \$235,670 in funding, limited to the BCEAO and CEAA processes that were agreed to by the Kwikwetlem and to the level determined appropriate by the Kwikwetlem, was unreasonable. It did not include participation in the BCUC process and it was contingent on further agreements from the Kwikwetlem to actually participate. The delay between September 2007 and May 2008 was primarily because Kwikwetlem did not respond in a timely way to the November counter proposal from BC Hydro. BCTC submits that the Kwikwetlem's request in May of 2008 for \$236,687 in funding for regulatory processes which was contingent on "should the Kwikwetlem decide to do so" and which reserved the right to Kwikwetlem to take the funding and later allege that the processes were inadequate or insufficient was also unreasonable. In both cases, the Kwikwetlem sought funding of almost a quarter of a million dollars and were not prepared to commit to anything of substance in return. In addition, BCTC submits that the Kwikwetlem cannot complain that they were unable to reach an agreement on a consultation structure when it tabled this new structure in September 2007, a year after BC Hydro and BCTC first began consulting the Kwikwetlem.

188. To the extent that a TUS was necessary for the Kwikwetlem to provide information on the strength of their claim or the impact of the ILM Project on their asserted rights, which is not admitted, BCTC submits that it was the Kwikwetlem's unreasonable positions on funding which led to the inability to reach a funding agreement by August 5, 2008. Further, BCTC submits that it was the Kwikwetlem's positions on funding that resulted in no interest assessment occurring.

²¹⁹ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 304, l. 15 - p. 306, l. 1.

6.2.4. Consultation prior to November 2007²²⁰

189. Consultation is a two way street. BCTC was initially required to provide information to the Kwikwetlem about the ILM Project and the Kwikwetlem were initially required to provide information to BCTC about the strength of their claim and the potential impacts of the Project on their asserted rights. The efforts by BCTC to provide information to the Kwikwetlem are set out in BCTC's response to BCUC IR 1.1.1, along with the evidence provided by the BCTC/BC Hydro panel in this hearing.²²¹

190. Kwikwetlem has approximately 63 members of which about 31 reside on the Kwikwetlem reserves.²²² In 2010 there were about two or three elders.²²³ Mr. Chaffee was a Councillor of Kwikwetlem during the relevant period and was also Kwikwetlem's Head Negotiator.²²⁴

191. Mr. Chaffee, Ms. Joe and Mr. Glen Joe, each members of Kwikwetlem, met with Charles Littledale, Patricia Isackson and Stuart McGregor of BC Hydro on September 27, 2006.²²⁵ Nicole Oakes, of Brown and Oakes, was also at the meeting. While part of the discussion at the meeting was taken up with the Coquitlam Dam, the majority of the time was taken up with the discussion of the ILM Project.²²⁶ Kwikwetlem understood from the meeting that BC Hydro wanted to obtain input from the Kwikwetlem before the choice of the preferred alternative was made.²²⁷ If a new line was to be built it was likely to be adjacent to the existing line on Burke Mountain, subject to any overarching concerns with this location.²²⁸ At the meeting Mr. Chaffee noted that Kwikwetlem would welcome additional training and work opportunities.²²⁹ The BC Hydro representatives went through the Electricity Supply Challenges,

²²⁰ This review is not intended to be comprehensive but to focus on certain facts relevant to Coldwater et al's complaints. Additional reference should be made to Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 1 - 25; Exhibit B-20, Rebuttal Evidence, A.

²²¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 1 - 25.

²²² Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1755, ll. 5 – 18.

²²³ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1757, ll. 15 – 17.

²²⁴ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1646, l. 20 - p. 1647, l. 4.

²²⁵ Exhibit B-3-1, Supplemental Evidence, App. G; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1628, l. 4 - p. 1629, l. 1.

²²⁶ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1631, ll. 5 – 9.

²²⁷ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1636, l. 22 - p. 1637, l. 6.

²²⁸ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1638, l. 25 - p. 1639, l. 3 and January 21, 2010, Vol. 12, p. 1764, ll. 17 – 23

²²⁹ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1769, ll. 15 – 24.

Interior to Lower Mainland document.²³⁰ Mr. Chaffee raised general archaeological and environmental concerns.

192. On February 1, 2007, Mr. Chaffee and Ms. Joe met with Charles Littledale and Patricia Isackson and Ian Frank from Golder, who was at the meeting to explain the work that was proposed on the archaeological overview assessment and traditional use.²³¹ Mr. Chaffee provided three maps to BC Hydro showing Kwikwetlem Nation Core Territory, Halq'emelem place names associated with Kwikwetlem traditional territory, and recorded archaeological sites in the study area.²³² The maps were all discussed at the meeting in relation to the area of the ILM Project.²³³ Prior to this meeting, Mr. Chaffee knew that Brown and Oakes had worked with Golder, in part, on the Gateway project.²³⁴ BC Hydro went through a presentation entitled "Interior to Lower Mainland Transmission Reinforcement Project January 2007".²³⁵ Mr. Chaffee did not recall asking any questions about the non-wires solutions.²³⁶ He was told by BC Hydro that if Kwikwetlem had any outstanding concerns or issues, Kwikwetlem should let BC Hydro know.²³⁷ Mr. Chaffee advised that he would be walking the transmission line. He had walked parts of the line before the meeting and had picked berries on Burke Mountain. BC Hydro suggested that it would hold an Open House for the Kwikwetlem. Mr. Chaffee took that proposal back to Chief and Council but did not recall what the decision of Chief and Council was.²³⁸ Mr. Chaffee advised that Kwikwetlem's main concerns were fish and the environment but was not specific about the concerns.²³⁹ He also mentioned archaeology on Burke Mountain. During the meeting, Kwikwetlem was asked, and agreed to provide, any "show stoppers" with respect to either alternative.

²³⁰ Exhibit B-3-1, Supplemental Evidence, App. E; Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1763, ll. 12 – 21.

²³¹ Exhibit B-3-1, Supplemental Evidence, App. P; Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1778, l. 25 - p. 1779, l. 21; Cross-examination of Ms. Holland, January 12, 2010, Vol. 5, p. 394, ll. 16-23.

²³² Exhibits C3-31, 32 and 33, maps filed during proceeding; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1658, l. 17 - p. 1660, l. 19.

²³³ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1670, ll. 4 – 13.

²³⁴ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1771, ll. 7– 17.

²³⁵ Exhibit B 3-1, Supplemental Evidence, App. O.

²³⁶ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1772, ll. 3 – 12.

²³⁷ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1776, l. 21 - p. 1777, l. 1.

²³⁸ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1779, l. 22 - p. 1780, l. 15.

²³⁹ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1770, ll. 6-12.

193. On February 7, 2007, BC Hydro wrote Kwikwetlem informing it of the BCEAO Working Group meeting scheduled for February 21, 2007, and offering to provide funding to prepare for and attend the meeting. The Kwikwetlem did not attend the Working Group meeting. However, BC Hydro mailed out all of the materials provided during the meeting to the Kwikwetlem.²⁴⁰

194. On March 26, 2007, Chief Percy Cunningham, Mr. Chaffee, Ms. Joe and Mr. Glen Joe met with Charles Littledale and John Kafka, a consultant assisting BC Hydro.²⁴¹ Ms. Giroday attended as legal counsel for the Kwikwetlem. Mr. Chaffee advised BC Hydro that the Kwikwetlem had a land clearing company and were interested in jobs and training. Mr. Chaffee was aware that if the New Line Alternative was chosen as the preferred alternative, there was going to be some clearing.²⁴² Mr. Chaffee advised that Kwikwetlem's main concerns were impacts on archaeology, fisheries and native plants. He mentioned spiritual sites on Burke Mountain but did not provide any specifics. At this meeting, Kwikwetlem was asked again if they could identify any "showstoppers" regarding the alternatives.

195. On June 18, 2007, Mr. Chaffee, Ms. Joe and Mr. Glen Joe met again with Mr. Littledale and Mr. Kafka.²⁴³ Ms. Giroday again attended as legal counsel for the Kwikwetlem. At the meeting, Mr. Chaffee again mentioned archaeological sites on Burke Mountain. He did not have any specific sites in mind but was going by the history that his elders talked to him about.²⁴⁴

196. On July 30, 2007, Mr. Chaffee, Ms. Joe and Mr. Glen Joe participated in a helicopter reconnaissance trip over the existing transmission line arranged by BCTC and BC Hydro.²⁴⁵ During the flight, a number of potentially significant archaeological and cultural sites were identified as lying near the existing transmission line but it was noted that the associated clearing outside the right of way should not impact the sites. Kwikwetlem representatives also advised that they would like to be involved during construction as a monitor to help protect their cultural resources and spiritual places.

²⁴⁰ Exhibit B-3-1, Supplemental Evidence, Apps. S, U s. 2.5 pp. 42-44.

²⁴¹ Exhibit B-10-15, Att. to BCTC Response to Kwikwetlem IR 1.15.

²⁴² Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1783, ll. 3 – 21.

²⁴³ Exhibit B-20, Rebuttal Evidence, Att. A-10.

²⁴⁴ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1786, ll. 4 – 18.

²⁴⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 14; Exhibit C4-10, Kwikwetlem Evidence, p. 12; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1714, l. 17 - p. 1715, l. 3; Cross-examination of Ms. Holland, January 13, 2010, p. 564, l. 10 - p. 565, l. 2.

197. On July 31, 2007, Mr. Chaffee, Ms. Joe and Mr. Glen Joe met with John Kafka.²⁴⁶ At this meeting, Ms. Ellison from Ratcliff & Company attended as legal counsel for the Kwikwetlem. Mr. Chaffee advised that he was very pleased with the helicopter reconnaissance trip and he learned things that were invaluable from the flyover.²⁴⁷ BC Hydro explained the BCEAO and CPCN processes during this meeting, and offered to provide a presentation on the CPCN process. Kwikwetlem never asked BCTC or BC Hydro to provide that presentation.²⁴⁸

198. On September 20, 2007, Mr. Munson of Westland attended the September 2007 BCEAO Working Group meeting on behalf of the Kwikwetlem.²⁴⁹ The objective of the meeting was to finalize the draft TOR for the environmental assessment of the ILM Project, provide an update on the ILM Project, including potential route alignment options, right of way requirements, and field studies that were both underway and had been completed, and to discuss next steps in the environmental assessment of the Project. After the meeting, the BCEAO sent out the draft TOR a further time for First Nations' comments. As indicated, no comments were ever provided on behalf of Kwikwetlem.

199. On October 2, 2007, Mr. Chaffee and Ms. Joe met with Mr. Ross and Mr. Kafka from BC Hydro and Ms. Holland from BCTC.²⁵⁰ Mr. McDade and Ms. Giroday attended as legal counsel for the Kwikwetlem. Mr. Bergner attended as legal counsel for BC Hydro. Mr. McDade indicated that if BC Hydro and BCTC wanted to consult with the Kwikwetlem they had to follow the Kwikwetlem regulatory process.²⁵¹ Mr. Chaffee admitted on cross-examination that there is no written regulatory process.²⁵² Mr. McDade further advised that if BCTC and BC Hydro wanted to receive permission from Kwikwetlem, they needed to work under Kwikwetlem rules. Mr. Chaffee advised the question of permission had been discussed by Chief and council and that BCTC required Kwikwetlem's permission to build the new line. Mr. McDade went on to indicate that he didn't care about the Archaeology Branch's standards and that the primary

²⁴⁶ Exhibit B-10-16, Att. 1 to BCTC Response to Kwikwetlem IR 1.17.

²⁴⁷ Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1790, l. 2 - p. 1791, l. 1.

²⁴⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 15.

²⁴⁹ Exhibit B-3-1, Supplemental Evidence, App. DD; Cross-examination of Mr. Chaffee, January 20, 2010, Vol. 11, p. 1701, ll. 14 – 22.

²⁵⁰ Exhibit B-20, Rebuttal Evidence, Att. A-21.

²⁵¹ Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1810, l. 6 - p. 1811 l. 23.

²⁵² Cross-examination of Mr. Chaffee, January 21, 2010, Vol. 12, p. 1812, ll. 7 – 15.

concern was that Kwikwetlem's standards were met. On cross-examination, Ms. Giroday admitted that the Kwikwetlem do not have such standards in writing.²⁵³

200. Unfortunately, there were no further meetings between members of Kwikwetlem and representatives of BC Hydro or BCTC. All further meetings took place with Kwikwetlem's counsel and were primarily related to the attempts to agree on the terms of the CFA.²⁵⁴

201. BCTC submits that the information provided by Kwikwetlem about the potential impacts of the ILM Project prior to November 2007 when the ILM CPCN Application was filed can be summarized as follows:

- (a) Both the UEC and New Line Alternatives would impact the Kwikwetlem;
- (b) Even though BC Hydro requested that the Kwikwetlem identify any show stoppers with respect to the UEC or the New Line Alternatives on two separate occasions, and Kwikwetlem said they would provide such information to BC Hydro, no show stoppers were provided by the Kwikwetlem to BCTC before or after the choice of the New Line Alternative as the preferred alternative;
- (c) Kwikwetlem had concerns about Burke Mountain but did not identify with any specificity what those concerns were;
- (d) Kwikwetlem knew that the New Line Alternative would require some clearing and advised BC Hydro that they had a clearing company and could use the work; and
- (e) After being advised of the choice of the preferred alternative, Kwikwetlem did not raise any objection to the New Line Alternative in relation to the other alternatives prior to November 2007 and specifically sought to exclude the BCUC CPCN process from the draft CFA that was under discussion at the time. In addition, Kwikwetlem never followed up on BC Hydro's offer to provide a presentation on the BCUC CPCN process.

202. Ms. Holland testified:²⁵⁵

²⁵³ Cross-examination of Ms. Giroday, January 21, 2010, Vol. 12, p. 1830, ll. 6 – 17.

²⁵⁴ Exhibit C4-10, Kwikwetlem Evidence, p. 13.

²⁵⁵ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 300, l. 21 – p. 301, l.4; p. 323, ll. 12 – 26; January 12, 2010, Vol. 5, p. 389, l. 24 - p. 391, l. 11; p. 423, ll. 5 – 21; p. 444, l.23 - p. 445, l. 10; p. 462, ll. 19 – 24; p. 463, l. 26 - p. 464, l. 22; p. 520, l. 7 - p. 521, l. 2.

MS. HOLLAND: A: And in that first meeting, they also told us that Burke Mountain was of import to them, and we knew that if the 5L83 alternative was going to be chosen, we would be constructing along the existing right-of-way on Burke Mountain. We also knew that if we were going to do the upgrade option, that we would be doing some work along the right-of-way south of the Meridian substation. So when Kwikwetlem said in the very first meeting, "Burke Mountain is important to us," we noted that, and we heard that.

...So, with respect to Kwikwetlem, given that they had raised concerns about archaeology sites on Burke Mountain, we had undertaken a heritage overview assessment. No show-stoppers had been identified in that document, which was part of the information I used in making my recommendation. I did not go back to Kwikwetlem to say anything further to them about Burke Mountain, post the main [sic] decision. We did subsequently offer to fund traditional use studies for Kwikwetlem to undertake in their traditional territory, and we also funded Brown and Oakes, the archaeologists of choice, for Kwikwetlem to undertake the archaeology work in the Kwikwetlem territory, and I believe those two items did help to address parts of the concerns raised by Kwikwetlem....

Kwikwetlem was offered to participate in a TU component that was part of a Heritage overview assessment being undertaken to make a decision on the preferred alternative. Kwikwetlem refused to participate in that and, as we stated yesterday, we did not undertake broad-ranging traditional use studies with any First Nation on an individual basis prior to the May, 2007 decision because we did not think it was prudent to undertake traditional use studies at a detailed level with each individual First Nation prior to making a decision on which alternative to proceed with. What we did know, and what we did often hear from First Nations, and what First Nations often are aware of, are the generally large issues that might be encountered if you say you're going to construct a large piece of infrastructure in an area. Typically there is enough traditional use knowledge within the First Nation community to identify those bigger issues and, as Kwikwetlem did identify to us, they had concerns on Burke Mountain, and we knew that going into our May, 2007 decision. And there were other broad-ranging and some very narrow-ranging items of traditional use that had been identified by other First Nations prior to the May, 2007 decision. And the Heritage overview assessment concluded that there were no significant items that had been found, either areas of traditional use or archaeological sites, or spiritual sites, that the Golder team did not believe could be avoided or mitigated through project design.

MR. McDADE: Q: So are you saying to me that you relied entirely on the Golder report to -- for your information about what the Kwikwetlem elders would be concerned about on a broad picture?

MS. HOLLAND: A: We relied on the Golder report, and we also relied on our meetings with the different First Nations, and Kwikwetlem specifically in our meetings with them prior to May of 2007 had identified some traditional use activities, and also concerns specifically with Burke Mountain....

MS. HOLLAND: A: I had turned my mind to the fact that if we were able to construct the line within the existing right of way, and if that right of way did not

contain any specific archaeological sites, that we would be able to avoid those. If we were able to construct the line such that it clear-spanned waterways, that we would be able to avoid potential impacts to fisheries. That if there were issues raised around impacts to other traditional uses such as hunting or gathering, that we might be able to either mitigate those or we would need to enter into accommodation discussions for potential impacts to those. So in answer, yes, I had turned my mind to various aspects that would be required for avoidance mitigation and that might potentially lead into accommodation discussions. ...

MS. HOLLAND: A: And so in making my decision in May, I relied on this report as well as the summary consultation report that was built up out of strength of claim analysis as well as our preliminary meetings with First Nations and some of our detailed meetings with First Nations. And so we knew that there were some concerns from Kwikwetlem on Burke Mountain. We knew of other concerns with other First Nations. I knew that in the Kwikwetlem traditional territory, we would be constructing the line on an existing rightof- way for that portion of the route, and I felt comfortable in making the recommendation in May to proceed with the new line alternative, based on the information I had in front of me at the time ...

MS. HOLLAND: A: I think in addition I would add that post announcing the decision on the preferred alternative, we did not hear from any First Nation of a specific traditional use issue that would have changed our decision on recommending proceeding with the 5L83 line. ...

MS. HOLLAND: A: In detailed specifics I did not know how. At the time of making the alternatives decision I knew that the upgrade existing circuits alternative would require some work on an existing line south of the Meridian substation on existing right of way. I knew that -- in May 2007 I knew that we would likely be able to construct the 5L83 alternative within an existing right of way, potentially with clearing outside. I wasn't sure whether we would need to widen that right of way or not within Kwikwetlem traditional territory. I knew that we would be able to do work at the substation, that's the Meridian substation, within the fence line, and we knew that Kwikwetlem had identified concerns on Burke Mountain. And again, you have pointed out that there was a data gap in traditional use in the Heritage overview assessment and traditional use was one component of that assessment report. An archaeological overview assessment was also undertaken. And at the time of making the decision, I believe we made a good decision. And we made it with the information on hand. And I'm comfortable with the decision that we did make....

MS. HOLLAND: A: I believe we've answered that question earlier today a number of times, in that at the time of making the alternatives decision in May, 2007, we did not think it was appropriate to undertake detailed TUS on a First Nation by First Nation basis for all First Nations involved in both the upgrade existing circuits as well as the new line alternative. That we believed an overview assessment -- Heritage overview assessment that contained a TU component would be sufficient. We asked First Nations for participation and input in that. We asked Kwikwetlem in specific, as well as other First Nations, if there were any specific issues that they were able to identify in making a recommendation to us on a preferred alternative from their viewpoint. And to respond to the question around the \$10,000, we actually provided an agreement for the proposed funding

of thirteen and a half thousand. On May 1st, 2007 we came to that agreement and we also agreed that further work on traditional use, if it was required for the new line, we would be funding traditional use going forward, and that was understood at the time.

203. The Kwikwetlem were given numerous opportunities to provide input to BCTC prior to BCTC's choice of the 5L83 Alternative as the preferred alternative. The Kwikwetlem were notified of the choice to pursue the 5L83 Alternative as the preferred alternative in June, 2007, over four months before the ILM CPCN Application, and provided no information to BCTC questioning the choice of the 5L83 Alternative. In addition, when the draft CFA was revised by Kwikwetlem in September 2007, the Kwikwetlem deliberately restricted the CFA to the BCEAO and CEAA processes because no decision had been made about the CPCN process. This was a new structure, and it was provided well into the consultation process. In the circumstances, BCTC submits that the consultation efforts with the Kwikwetlem prior to the CPCN Application were reasonable and Ms. Holland's conclusions were entirely reasonable concerning the Kwikwetlem. Based on the information provided to BCTC by the Kwikwetlem, the overlapping claims which weaken the Kwikwetlem claim to title, BCTC's willingness to address operational issues with respect to the existing line and the fact that no new right of way would be required, the steps BCTC took to determine the concerns of the Kwikwetlem and address them were reasonable.

6.2.5. Consultation to August 5, 2008

204. As set out above, the consultation after October 2, 2007 was through counsel for Kwikwetlem and was focussed on attempting to negotiate the terms of a CFA. The reasons for the failure to agree on the terms of a CFA are discussed above. Kwikwetlem's unreasonable position on the CFA made agreement prior to August 5, 2008 impossible. As submitted above, BCTC submits that any complaints by the Kwikwetlem which depend on the CFA, such as the inability to complete a TUS or other studies, are complaints of the Kwikwetlem's own making.²⁵⁶

205. In respect of consultation overall, Ms. Holland testified as follows concerning issues identified by Kwikwetlem:²⁵⁷

MS. HOLLAND: A: Kwikwetlem asked for a flight overview to understand and to show some of the activities that were going on in their area. So in one sense I

²⁵⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 18-25.

²⁵⁷ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 306, ll. 3 – 18 and January 13, 2010, Vol. 6, p. 703, l. 12 - p. 705, l. 24.

would actually say yes, they asked for and were provided that opportunity. Kwikwetlem did not ask specifically for a member of the overhead team to come out. They didn't raise an issue that required somebody from engineering to attend to answer the questions. A lot of Kwikwetlem's focus was on archaeology and traditional use, so we funded Kwikwetlem's choice of archaeologists to work under the Golder archaeology permit to make sure that Kwikwetlem's interests were represented when undertaking the archaeology fieldwork. We had Golder go out to several meetings with Kwikwetlem to answer technical questions on the archaeology nature....

MR. McDADE: Q: Right. So I'm trying to get a sense of what additional -- other than the information you got in the helicopter trip in July, you had nothing more from the Kwikwetlem in terms of issues identification between May of 2007 and the time of this application in November, 2007. That's right, isn't it?

MS. HOLLAND: A: You mean what other issues Kwikwetlem had identified to us by August 2008? Kwikwetlem specifically, other than what had been raised in the meeting notes had not -- and I include in there the field recognizance trip, had not identified any other issues than those documented in our notes.

MR. McDADE: Q: So the process of identifying those issues was stalled at the TUS stage.

MS. HOLLAND: A: Kwikwetlem had been provided the opportunity to meet with, and talk -- and I actually believe met with Chris Coles who was the Golder -- he did the analysis on the hydrology. So there was an opportunity there, and again, I need to go back to the Kwikwetlem narrative. If you give me a moment, please, Mr. McDade.

MR. McDADE: Q: Let me ask this question of you.

MS. HOLLAND: A: If you could just give me a moment --

MR. CARPENTER: She's in the middle of answering the last question.

MS. HOLLAND: A: -- I would appreciate that. I did ask you, you did agree; I'm not done yet. There is a lot of material. In addition to what we've talked about, Chris Coles who was doing the hydrology assessment for Golder, on July 4th telephoned Kwikwetlem. So this is in response to one of their concerns and issues raised which was to understand, and I may be paraphrasing, but they had concerns around water and the watershed and what potential effects or impacts there would be. So we had Chris Coles from Golder who was going to be doing that analysis contact Kwikwetlem. And that was the day after Kwikwetlem had asked for that. We also -- so Chris indicated when he would be doing that work and Kwikwetlem was, I believe, invited to participate. On July 4th, in response again to the concerns and issues raised in respect to fisheries and wildlife, Kwikwetlem was contacted around the proposed dates for that fieldwork, and we did that in July 4th. So again, just going back to your question, Mr. McDade, which was what other information did we have, we sort of spent time between the May decision and the Golder activities that were preparing for the environmental assessment trying to identify issues, and Kwikwetlem had then provided the

opportunity to help shape that by being offered an opportunity to comment on the work plans that shaped the field studies, by being offered the opportunity to comment on the draft terms of reference that shaped the environmental assessment application, by being offered opportunities to participate in fieldwork related to concerns and issues that they had raised, a field trip which we went out in a helicopter with them to take a look from the air at sites. So we did a fair amount of work to work towards identifying issues and getting more specific on what those issues were and how we might be able to address them.

206. Further, Kwikwetlem's complaint that no accommodation was reached by August 5, 2008, is premature. As explained by BCTC and BC Hydro, early on in the process it did not know which alternative it would be pursuing; therefore, it did not know what it would have been accommodating.²⁵⁸

MS. HOLLAND: A: Can I just add one more thing? In the early days, I'm not sure what we would have been accommodating, given that we hadn't made a decision on what method to reinforce the interior to Lower Mainland. So in those early days, again, we didn't know what alternative we were going to be pursuing.

207. Once the preferred alternative was selected, BC Hydro and BCTC still needed to determine what specific impacts may arise from the ILM Project for Kwikwetlem and whether it could avoid or mitigate those impacts prior to attempting to accommodate them. BC Hydro and BCTC were unable to determine what impacts may potentially arise because Kwikwetlem would not provide traditional use information which it was aware of, and any studies were tied the discussions regarding capacity funding.

6.2.6. Conclusion

208. It appears from Kwikwetlem's evidence that it is Kwikwetlem's view that:

- (a) Consultation requires obtaining the permission of Kwikwetlem to construct the ILM Project;
- (b) BCTC was required to follow Kwikwetlem archaeological standards when there are no such written standards and none were provided;
- (c) BCTC was required to follow Kwikwetlem rules for consultation when there are no such written rules and none were provided;

²⁵⁸ Cross-examination of Ms. Holland, January 11, 2010, Vol. 4, p. 302, l. 24 –p. 303 l. 3.

- (d) BCTC was required to advance significant funds to Kwikwetlem in exchange for the hope that Kwikwetlem might agree to participate in the consultation process; and
- (e) Consultation does not start until Kwikwetlem agrees that it has started.

209. BCTC submits that the unfortunate fact is that Kwikwetlem did not provide the information required by the consultation process to make it workable. Kwikwetlem's unreasonable demands for funding and failure to provide information to BCTC are the primary reason why, up to August 5, 2008, capacity funding was still being negotiated and Kwikwetlem had not provided any specific information of substance to BCTC. This approach delayed any interest assessments and, in the end, created a new consultation structure. Any accommodation that may be necessary could not be arrived at prior to August 5, 2008, as the Kwikwetlem needed to identify the potential impacts from the ILM Project on their asserted rights so that BCTC and BC Hydro could first determine if they could be avoided or mitigated.

210. The duty owed to the Kwikwetlem was at the middle of the *Haida* spectrum. Based on *Haida*,²⁵⁹ BCTC submits that this duty was more than reasonably met by the following:

- (a) BCTC sought to gather information from the Kwikwetlem to test the different alternatives to reinforce the ILM grid;
- (b) BCTC put forward proposals for the different alternatives and then for route alignment that were not yet finalized;
- (c) BCTC sought Kwikwetlem's opinion on those proposals;
- (d) BCTC and BC Hydro informed Kwikwetlem of all relevant information upon which the proposals were based;
- (e) BCTC did not promote one alternative or one route alignment but instead listened with an open mind to what Kwikwetlem had to say;
- (f) BCTC was prepared to alter its proposals; and
- (g) BCTC provided feedback to the Kwikwetlem up to and including the date of the CPCN decision.

²⁵⁹ *Haida* at para. 46.

211. The 5L83 Alternative will not require additional right of way within Kwikwetlem's asserted traditional territory. As set out in the previous paragraph, the steps that BCTC took to determine the concerns of the Kwikwetlem were reasonable. Consultation with respect to the ILM Project is a staged process as acknowledged by the Supreme Court of Canada and the BC Court of Appeal and therefore, up to August 5, 2008, BCTC submits that it had discharged whatever consultation obligations it had to the Kwikwetlem.

6.3. STC

6.3.1. Scope and Content

212. The members of STC participating in the this proceeding (Cheam, Kwaw-kwaw-a-pilt, Shxw'ow'hamel, Soowahlie and Sumas) assert that they have existing aboriginal rights and title to S'olh Temexw.²⁶⁰ The green coloured area of the map shown at p. 49 of BCTC's response to BCUC IR 1.3.1 accurately depicts the external boundaries of S'olh Temexw.²⁶¹ The six First Nations represented by SHAC also assert aboriginal rights and title over the same area.²⁶² S'olh Temexw is overlapped by claims by the ONA, Nlaka'pamux, Kwikwetlem and Hwlitsum.²⁶³ S'olh Temexw includes 5L83 between Nodes G1 and V. Nlaka'pamux claimed territory includes 5L83 between Nodes A and O1.

213. In recognition that consultation is an iterative process, BC Hydro assessed the scope and content of the duty to the STC members in writing twice:

- (a) In April, 2007, in relation to the New Line Alternative:
 - (i) Cheam's strength of claim was assessed as high and the preliminary assessment of level of consultation required was medium, and
 - (ii) Shxw'ow'hamel's strength of claim was assessed as high and the preliminary assessment of level of consultation required was medium.²⁶⁴

²⁶⁰ Exhibit B-17, App. 1, p. 191, App. III, p. 166; Exhibit C8-11, STC Response to BCUC IRs, App. A.

²⁶¹ Exhibit B-13, BCTC Response to BCUC 1.3.1, p. 49; Exhibit C8-10, STC Response to BCTC's IRs 7.1 and 7.2.

²⁶² Exhibit C9-6, SHAC Response to BCTC IRs 4.1 and 4.2.

²⁶³ Exhibit C5-8-1, UNIB and ONA Evidence, App. C, p. 240; Exhibit C1-11, maps 19 and 20, Tab 21; Exhibit C4-10, Kwikwetlem Evidence, Exhibit 10.

²⁶⁴ Exhibit B-10-4, Interior to Lower Mainland Project First Nation Consultation Summary Report, May 2006 to April 2007, App. 3, Att. 4 to Coldwater IR 1.2. No assessment was done in April 2007 for Kwaw-kwaw-a-pilt, Soowahlie or Sumas.

- (b) After the 5L83 Alternative was chosen as the preferred alternative:²⁶⁵
- (i) Cheam's strength of claim was assessed as medium for aboriginal title and fairly strong for aboriginal rights and the preliminary assessment of level of consultation required was the middle of the *Haida* spectrum;
 - (ii) Shxw'ow'hamel's strength of claim was assessed as moderately strong for aboriginal rights and title and the preliminary assessment of level of consultation required was the middle of the *Haida* spectrum;
 - (iii) Kwaw-kwaw-apilt's strength of claim was assessed as weak for aboriginal rights and title and the preliminary assessment of level of consultation required was low on the *Haida* spectrum;
 - (iv) Soowahlie's strength of claim was assessed as weak for aboriginal rights and title and the preliminary assessment of level of consultation required was low on the *Haida* spectrum; and
 - (v) Sumas' strength of claim was assessed as weak for aboriginal rights and title and the preliminary assessment of level of consultation required was at the lower end of the *Haida* spectrum.

214. In response to BCUC IR 1.1 and 2.1, STC stated:²⁶⁶

The STC understands the Crown and its agents to be proceeding on the basis that the Crown acknowledges a duty to consult with the STC First Nations at the "higher end" of the *Haida* spectrum in respect of the ILM Project. Accordingly, the STC does not believe it necessary or appropriate for the Commission to review or assess the Crown's "strength of claim" analysis in this reconsideration proceeding, and evidence supporting the rights and title claims of the STC and its members is therefore not relevant.

In the absence of a completed TUS (and any follow up work to the TUS), BC Hydro was not able to identify and communicate specific adverse impacts on STC First Nations' right and title, because those rights had not yet been identified with the requisite degree of specificity.

²⁶⁵ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 52, 53 and 58.

²⁶⁶ Exhibit C8-11, STC Response to BCUC IRs, pp. 1 – 2.

215. BC Hydro's assessments do not conclude that the level of consultation required is at the higher end of the *Haida* spectrum as asserted. As set out above, the highest assessment is at the middle of the *Haida* spectrum.

216. The formal position of STC does not include any evidence which contradicts BC Hydro's assessment of the scope and content of the duty owed to the members of the STC on the *Haida* spectrum. In addition, BCTC submits that BC Hydro's assessment is supported by the evidence of STC on strength of claim and impacts in cross-examination:

- (a) There are overlapping claims within and over S'olh Temexw (strength of claim);
- (b) STC is not involved in the BC Treaty process (strength of claim);²⁶⁷
- (c) STC identified as a concern power lines through existing reserves. None of STC reserves will be crossed by 5L83 (no impact);²⁶⁸
- (d) STC identified vegetation management as a concern and BCTC was willing to discuss and provide information on vegetation management, herbicide and pesticide use to STC (impact mitigation);²⁶⁹ and
- (e) If STC had identified any show stoppers with respect to the New Line Alternative it would have had an impact on Ms. Holland's recommendations for the choice of the preferred alternative. Ultimately, no show stoppers were identified by STC (no impact identified as between alternatives).²⁷⁰

217. Based on BCTC's response to BCUC IR 1.3.1 and the strength of claims identified by STC and the impacts identified, BCTC submits that the evidence confirms that the duty owed to the members of STC ranges between the low end and the middle of the *Haida* spectrum.

²⁶⁷ Cross-examination of Grand Chief Pennier, January 21, Vol. 12, 2010, p. 1886, ll. 13-18.

²⁶⁸ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1899, l. 16 - p. 1901, l. 1.

²⁶⁹ Exhibit B-20, Rebuttal Evidence, Att. E-2; Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1276, ll. 2 – 8; p. 1302, ll. 7 – 19; Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1889, ll. 13 – 24; 1913, l. 15 - p. 1914, l. 3; 899, l. 16 - p. 1901, l.

²⁷⁰ Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1296, l. 14 - p. 1298, l. 1.

6.3.2. STC Complaint

218. The STC complaint about the consultation process is summarized in their written evidence:²⁷¹

The STC's evidence, when read together with the supplemental evidence provided by BCTC, confirms that there was no meaningful consultation with the STC with respect alternatives (or otherwise) prior to August 5, 2008.

219. STC's specific complaints about the consultation process are:

(a) STC had little or no capacity to engage in a meaningful consultation process;²⁷²

(b) STC indicated from the outset that information had to be gathered and discussed with its leadership before meaningful consultation could take place. However, a traditional land use study, which had as its stated objective the gathering of information to be used in a proper consultation process, was not completed until January 2009;²⁷³ and

(c) BCTC gave little or no indication that they considered themselves to be engaging in a consultation process with STC prior to August 5, 2008, and the parties believed that consultation would come later. STC states that the vast majority of evidence put forward by BCTC has on its face little or nothing to do with consultation.²⁷⁴

220. In the following section, BCTC addresses STC's claim that it had little or no capacity to engage in a meaningful consultation process. BCTC then reviews STC's remaining complaints through a review of the overall consultation process that took place with STC in relation to the ILM Project.

6.3.3. Capacity Funding

221. It appears the key component of STC's complaint that no consultation took place with it prior to August 5, 2008 is:²⁷⁵

²⁷¹ Exhibit C8-8-1, STC Evidence, p. 1.

²⁷² Exhibit C8-8-1, STC Evidence, p. 1.

²⁷³ Exhibit C8-8-1, STC Evidence, p. 1.

²⁷⁴ Exhibit C8-8-1, STC Evidence, p. 1.

²⁷⁵ Exhibit C8-8-1, STC Evidence, p.1.

The STC had little or no capacity to engage in a meaningful consultation process throughout the entire time period prior to the Commission's decision in August of 2008, and virtually no capacity at all in the period leading up to BCTC's selection of its preferred alternative in May of 2007.

222. BCTC's submits that the following evidence is relevant to STC's complaint that it had little or no capacity to engage in a consultation before August 5, 2008:

(a) Although STC met with representatives of BC Hydro on September 7, 2006 and October 16, 2006, at neither meeting did STC request capacity funding for consultation. At the October 16, 2006 meeting, the reference to capacity was for training and capacity building agreements with other utility companies;²⁷⁶

(b) BC Hydro wrote to Grand Chief Pennier on November 27, 2008 offering \$10,000 in initial capacity funding along with a separate proposal for further funding under a CFA.²⁷⁷ The Appendix to the draft CFA included funding for "Specific Band involvement and technical specialists (ongoing Band staff involvement and specialized third party technical expertise and advice)." Grand Chief Pennier turned the letter over to Andy Phillips, the STC Senior Policy Adviser to review. Grand Chief Pennier assumed that there would be additional funding available if STC were to accept the initial funding;²⁷⁸

(c) On January 29, 2007, BC Hydro gave STC letters offering funding of \$10,000 to STC and \$10,000 for each of its members at a meeting between members of STC and BC Hydro;²⁷⁹

(d) On February 7, 2007, BC Hydro wrote to STC and each of its members offering funding to attend the BCEAO Working Group meeting on February 21, 2007;²⁸⁰

(e) On March 7, 2007, BC Hydro wrote to STC and each of its members again offering funding of \$10,000 to STC and \$10,000 to each of the STC members. Mr.

²⁷⁶ Exhibit B-20, Rebuttal Evidence, Atts. E-1 and E-2.

²⁷⁷ Exhibit B-3-1, Supplemental Evidence, App. H.

²⁷⁸ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1894, ll. 7 – 25, p. 1897, ll. 13 – 23.

²⁷⁹ Exhibit B-20, Rebuttal Evidence, Att. E-3.

²⁸⁰ Exhibit C3-16, BC Hydro IR to STC, Atts. 1, 4, 5, 8 and 14.

Phillips of STC sent an email on the same date to Corry Archibald of BC Hydro offering to draft letters to expedite the funding process;²⁸¹

(f) In early April, 2007 capacity funding cheques in the amount of \$10,000 each were delivered to the STC and its members, including members not participating in this proceeding, totalling \$90,000.²⁸² The STC used some of the funding to employ Chief Jasper who was the contact person for the STC in relation to the ILM Project after he was hired;²⁸³

(g) On April 10, 2007, BCTC and BC Hydro executed terms of reference dated April 4, 2007 to fund a Cultural Heritage Overview Impact Assessment (CHOIA) for, *inter alia*, STC.²⁸⁴ The terms of reference were initially approved by BC Hydro on February 1, 2007. The amount approved for Phase 1 of the CHOIA (there were three phases contemplated) is set out at Attachment 1 to Exhibit C3-23-1 (Confidential) and the amount for Phase 2 is set out at Attachment 2 to Exhibit C3-23-1 (Confidential).²⁸⁵ The agreement was executed on behalf of the SRRMC by Albert McHulsie who was a member of the Shxw'ow'hamel;²⁸⁶

(h) On July 18, 2007, at a meeting between STC and BC Hydro, Chief Jasper asked whether a TUS would be outside of capacity funding. BC Hydro responded that it could be included or could be separate;²⁸⁷

(i) On July 25, 2007, BC Hydro sent a further draft CCFA to STC;²⁸⁸

(j) On August 2, 2007, STC met with BC Hydro to discuss the draft CFA. At the end of the meeting the STC were to determine how to proceed with the CFA and to provide written notice to BC Hydro about how to proceed;²⁸⁹

²⁸¹ Exhibit C3-16, BC Hydro IR to STC, Att. 16; Exhibit B-3-1, Supplemental Evidence, App. K.

²⁸² Exhibit B-20, Rebuttal Evidence, Section E, pp. 2 – 4.

²⁸³ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1908, l. 11 - p. 1909, l. 10; 1926, l. 23 - p. 1927, l. 3; p. 1938, ll. 15 – 22.

²⁸⁴ Exhibit C3-19-1, Att. 1 (filed confidentially).

²⁸⁵ Exhibit C3-23-1, Atts. 1 and 2 (filed confidentially).

²⁸⁶ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1902, l. 20 - p. 1903, l. 14.

²⁸⁷ Exhibit B-20, Rebuttal Evidence, Att. E-7; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1871, ll. 16-25.

²⁸⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.16, p. 56, ll. 12 – 21.

(k) On September 24, 2007, STC and BC Hydro met to discuss the TUS. As Chief Jasper testified:²⁹⁰

MR. WILLMS: Q: ... I'd like to go to tab 31 in the B.C. Hydro binder, which is Exhibit B20, attachment E9. And you'll see this is a meeting of September 24th, 2007. And it indicates that you attended this, Chief Jasper, and then a number of chiefs or representatives from STC members, correct?

CHIEF JASPER: A: Correct.

MR. WILLMS: Q: The first note at the bottom says:

"Jim Ross overview TUS and provided a hard copy document to everyone. He stated it was a guideline and that B.C. Hydro expects First Nations to develop their own terms of reference."

Do you recall a discussion at the meeting about traditional use studies? With Hydro wanting First Nation input into that?

CHIEF JASPER: A: Yes. Yeah, I remember this meeting as the first time, I think, Jim Ross was introduced to us.

MR. WILLMS: Q: Right. And then again, if you go to the next p. -- sorry, the next p. after that. At the bottom of the p., there should be a reference.

"Otis Jasper asked what level of information Hydro was looking for in a TUS."

You see that note?

CHIEF JASPER: A: Yeah.

MR. WILLMS: Q: "Can it be generalized? There are fears of where the information will go with the strength of claim papers being produced. Is there a certain amount of information you're looking for? Jim Ross said that it's up to your discretion. B.C. Hydro wants it to be meaningful. Issues of confidentiality and ownership are critically important. Ross is seeing information characterized in general terms, information that has never left the room. It's up to you, you own it."

Do you remember that discussion?

CHIEF JASPER: A: Yeah, I generally remember that.

²⁸⁹ Exhibit B-20, Rebuttal Evidence, Att. E-8; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1910, ll. 5-22.

²⁹⁰ Exhibit B-20, Rebuttal Evidence, Att. E-9; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1916, l. 5 - p. 1918, l. 17.

MR. WILLMS: Q: Okay. And did you consider that at the time to be a reasonable approach to traditional use information?

CHIEF JASPER: A: Well, as far as approach, I think what we were working at here is trying to get this -- to bridge the gap in our communication, and the challenges that we face. When we go into our communities, to access this information, we are challenged in getting the information because of the fears of our community members as to what we're going to do with that information. Where it's going to appear, you know, examples of having our different medicine areas and sacred areas that people have being exposed and being manipulated.

MR. WILLMS: Q: Right, but the part that I read to you, which I believe you said you remember Mr. Ross saying, I am just suggesting, was that approach something that gave you some comfort about the use of that information? Especially where he says,

"Ross has seen information characterized in general terms, information that has never left the room, it is up to you, you own it."

Did that give you some comfort?

CHIEF JASPER: A: I suppose.

(l) On December 18, 2007 Grand Chief Pennier signed terms of reference under which BC Hydro agreed to provide funding to STC for an Environmental Researcher and an Environmental Research Assistant.²⁹¹ Grand Chief Pennier agreed that the funding would allow the matters subject to the agreement to be done appropriately.²⁹² The projected maximum budget was a very significant sum of money;

(m) On January 17, 2008, Grand Chief Pennier signed terms of reference under which BC Hydro agreed to provide funding to STC for, *inter alia*, a Traditional Land and Resource Use Impact Assessment Study ("TUS") to be completed by September 30, 2008.²⁹³ The projected maximum budget was a very significant sum of money; and

(n) On February 5, 2008, Doug Kelly executed a letter from BC Hydro dated January 11, 2008 agreeing to amendments to the CFA dated January 11, 2008. The CFA itself was executed by Grand Chief Pennier. The proposed budget for the CFA, to be paid by BC Hydro, was a very significant sum of money. The CFA was supported by letters from

²⁹¹ Exhibit C3-23-1, Att. 3, p. 7 of 7 (filed confidentially); Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1918, ll. 18 – 24.

²⁹² Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1920, ll. 4 – 6.

²⁹³ Exhibit C3-19-1, Att. 2 (filed confidentially). Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1918, l. 25 - p. 1920, l.6.

each of the STC members who agreed that consultation with each of them would take place through STC. The CFA also attached a letter from Grand Chief Pennier to the BCEAO confirming that the purpose for the CFA was to, in effect, provide funding for consultation.²⁹⁴

223. Chief Jasper testified.²⁹⁵

MR. WILLMS: Q: Well, there was money that was paid, and there was money that was offered for future work, correct?

CHIEF JASPER: A: Correct.

MR. WILLMS: Q: Prior to August, 2008.

CHIEF JASPER: A: The \$20,000 to Tribal Council.

MR. WILLMS: Q: No, no, I'm talking now not just about the \$90,000 that went to the First Nations plus the tribal council. That was in 2007. I'm talking about the funding that went for example for the CHOIA in 2007. And the funding that was promised and paid for the environmental researcher in December of 2007. And the funding that was promised for the TUS in January of 2008, which led to a preliminary report in the summer of 2008. I'm suggesting that money was provided to the STC for all of that prior to August, 2008. Isn't that true?

CHIEF JASPER: A: Yes, money was available.

224. BCTC submits that it is evident that the STC complaint about lack of capacity is not supported by and in fact, is refuted by, the evidence. The STC had ample capacity to participate in consultation with BCTC.

6.3.4. Consultation with STC was Reasonable

225. In this section, BCTC addresses STC's general complaint that BCTC and BC Hydro did not consult with it prior to August 5, 2008 and STC's more specific complaints that:

(a) STC indicated from the outset that information had to be gathered and discussed with its leadership before meaningful consultation could take place. However, a traditional land use study, which had as its stated objective the gathering of information

²⁹⁴ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1920, l. 7 - p. 1921, l. 21.

²⁹⁵ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1928, l. 14 - p. 1929, l. 6.

to be used in a proper consultation process, was not completed until January 2009;²⁹⁶ and

(b) BCTC gave little or not indication that they considered themselves to be engaging in a consultation process with STC prior to August 5, 2008, and the parties believed that consultation would come later. STC states that the vast majority of evidence put forward by BCTC has on its face little or nothing to do with consultation.²⁹⁷

226. The efforts by BCTC to provide information to STC and consult with the members of STC are set out in BCTC's response to BCUC IR 1.1.1, along with the evidence provided by the BCTC/BC Hydro panel in this hearing.²⁹⁸

6.3.5. Consultation prior to November 2007²⁹⁹

227. Grand Chief Pennier met with Claire Marshall of BCTC on September 7, 2006.³⁰⁰ At that meeting Chief Pennier advised Ms. Marshall that STC would take a leadership role in dealing with BC Hydro with respect to the ILM Project. By leadership role, Chief Pennier meant that STC would act for them as a collective.³⁰¹ Ms. Marshall was introducing the concept of a need to reinforce the grid, looking at two alternatives and would like to begin meeting with STC on the topic.³⁰²

228. Grand Chief Pennier, Tyrone McNeil and Grand Chief Doug Kelly from the STC met with Claire Marshall and Darrell Mounsey and Corry Archibald of BC Hydro on October 16, 2006. Also attending were Chief Sidney Douglas of the Cheam, Chief Betty Henry of the Kwaw-kwaw-a-pilt, Chief Dalton Silver of the Sumas, Councillor Nelson Kahana from the Soowahlie and Councillor Andy Phillips from the Scowlitz.³⁰³ The presentation entitled Interior-Lower Mainland Project First Nations Briefing October 2006 by BC Hydro was well received and

²⁹⁶ Exhibit C8-8-1, STC Evidence, p. 1.

²⁹⁷ Exhibit C8-8-1, STC Evidence, p. 1.

²⁹⁸ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 228 – 250.

²⁹⁹ This review is not intended to be comprehensive but to focus on certain facts relevant to Coldwater et al's complaints. Additional reference should be made to Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 228 - 250; Exhibit B-20, Rebuttal Evidence, E.

³⁰⁰ Exhibit B-20, Rebuttal Evidence, Att. E-1.

³⁰¹ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1839, l. 8 - p. 1840, l.3.

³⁰² Cross-examination of Ms. Holland, January 18, 2010, Vol. 9, p. 1253, l. 23 - p. 1254, l. 8.

³⁰³ Exhibit B-20, Rebuttal Evidence, Att. E-2.

the STC noted that it could lead to opportunities for work.³⁰⁴ In particular Grand Chief Doug Kelly, Councillor Nelson Kahama and Chief Sidney Douglas were interested in contracts and training including vegetation management.³⁰⁵

229. Grand Chief Pennier met again with Charles Littledale and Corry Archibald of BC Hydro and Melissa Holland of BCTC on November 20, 2006.³⁰⁶ Also attending the meeting was Dave Schaepe of SRRMC. During the meeting Mr. Schaepe advised that technical input was not consultation and that, in his view, consultation would not start until technical studies were complete. Mr. Schaepe did not speak on behalf of STC when he made the statement and BCTC did not have the impression that Grand Chief Pennier shared Mr. Schaepe's views.³⁰⁷ At the meeting, Grand Chief Pennier confirmed that STC would pass information on to its members.³⁰⁸ Mr. Schaepe asked Ms. Holland what First Nations input means to BCTC's decision criteria. Ms. Holland advised that BCTC wants to hear from First Nations about both reinforcement options. She said that BCTC will consider the concerns and interests identified by First Nations what can be done to mitigate them. Ms. Holland testified:³⁰⁹

MS. HOLLAND: A: We -- the principal objective from our perspective was to talk further about the project, to talk about how SRMC would be involved, and we talked about capacity, and capacity funding. And we heard very clearly from the Grand Chief that he was concerned about building capacity in his community, and he characterized it from the perspective of, if his community was going to continue to be called upon to participate in large regulatory processes like an environmental assessment, that he wanted not to be reliant on external resources, but wanted to be able to build capability within his own community, and he would look to us to help him fund and ensure that resources from the community were trained, and that this might be a good project to achieve that on. And we also talked with Dave, Mr. Schaepe, about SRMC's role as well.

230. Grand Chief Pennier, Ernie Crey and Tyrone McNeil from the STC met again with Darrell Mounsey and Corry Archibald and Donna McGeachie of BCTC on January 29, 2007.³¹⁰ Also attending the meeting was Chief Betty Henry of Kwaw-kwaw-a-pilt, Councillor

³⁰⁴ Exhibit B-3-1, Supplemental Evidence, App. D.

³⁰⁵ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1886, l. 20 - p. 1887, l. 13; p. 1888, l. 10 - p. 1889, l. 12; p. 1890, l. 12 - p. 1891, l. 7.

³⁰⁶ Exhibit B-3-1, Supplemental Evidence, App. P.

³⁰⁷ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1891, l. 15 - p. 1892, l. 7; Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1263, l. 25 - p. 1264, l. 5.

³⁰⁸ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1892, l. 26 - p. 1893, l. 2.

³⁰⁹ Cross-examination of Melissa Holland, January 18, 2010, Vol. 18, p. 1257, ll. 6 - 22.

³¹⁰ Exhibit B-20, Rebuttal Evidence, Att. E-3.

Andy Phillips from Scowlitz and Councillor Seridan Roberts from Soowahlie. The BCEAO Working Group meeting of February 21, 2007 was raised and BC Hydro indicated that it was prepared to provide funding for those that wanted to attend the meeting. In its evidence, STC states that there is no mention of any discussion of alternatives at this meeting in BCTC's evidence.³¹¹ However, the January presentation was given at the meeting and it was clear from that presentation that BCTC was asking First Nations for input into the choice of the preferred alternative prior to May 2007.³¹²

231. On February 21, 2007, the first BCEAO Working Group meeting took place.³¹³ Andy Phillips from the STC attended along with Chief Douglas, Dora Demers and June Quipp from Cheam, and Councillor Kahama from Soowahlie. Grand Chief Pennier did not attend the meeting because he did not think the meeting was any form of consultation.³¹⁴ There was no indication prior to the meeting that this was the case and, in fact, BC Hydro had encouraged STC to attend.³¹⁵

232. BC Hydro met with Andy Phillips of the STC on April 2, 2007.³¹⁶ Mr. Phillips indicated that STC appreciated BC Hydro taking the approach of consulting with the communities since STC was concerned that some of its communities did not have the capacity to raise concerns. During the meeting, Mr. Phillips stated, among other things, that STC was interested in environmental, visual, spiritual, traditional hunting and archaeological issues and would like to see minimal impact on fish and trees. Mr. Phillips further stated that, with respect to the two options, BCTC and BC Hydro need to choose the right option for the system.

233. On April 23, 2007, SRRMC delivered the Phase 1 Cultural Heritage Overview Assessment Report to STC, BCTC and BC Hydro. The report noted potential general impacts of the Project but did not indicate any specific impacts in relation to either of the UEC or the New Line Alternatives.³¹⁷

³¹¹ Exhibit C8-8-1, STC Evidence, p. 3.

³¹² Exhibit B-3-1, Supplemental Evidence, App. O, pp. 3-10; Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1282, ll. 20-25; Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1846, l. 11 - p. 1847, l. 13.

³¹³ Exhibit B-3-1, Supplemental Evidence, App. U.

³¹⁴ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1851, ll. 7-15.

³¹⁵ Exhibit B-4-5, STC Consultation Log, pp. 3-5.

³¹⁶ Exhibit B-20, Rebuttal Evidence, Att. E-4.

³¹⁷ Exhibit B-20, Rebuttal Evidence, Att. E-15 (filed confidentially); Cross-examination of Ms. Holland and Mr. Anderson, January 18, 2010, Vol. 9, p. 1268, ll. 16 – 21.

234. Chief Jasper, Andrea Dickson and Laurie Kelly from STC met with Darrell Mounsey and Patricia Isackson of BC Hydro and Melissa Holland and Allison McMillan of BCTC on May 23, 2007.³¹⁸ At this meeting, STC raised, for the first time, the issue of past grievances related to the existing lines. BC Hydro explained at the meeting that it did not have a mandate to negotiate past grievances.³¹⁹ However, it also indicated that existing practices on the existing lines, such as vegetation management, could be discussed. In addition, Ms. Holland testified:³²⁰

MS. HOLLAND: A: If I could just respond to part of your question at the beginning, which was the assumption that this was the only meeting that took place prior to the May decision. There was a meeting that we held on the 23rd of May with Otis Jasper of the Sto:lo Tribal Council, and that was I believe the day before I made my presentation to the board and we discussed with Otis at that -- Mr. Jasper at that meeting the recommendation that we'd be going to the board the next day. At that meeting we didn't hear anything additional that would change the nature of our presentation.

MR. UNDERHILL: Q: We know, though, Ms. Holland, and we'll come to that meeting in a moment or perhaps after the break, but you had, as you said, you had formulated your recommendation well before May 23rd, is that correct?

MS. HOLLAND: A: As we outlined earlier, the decision making process took place in a staged manner over the course of May. If the Sto:lo Tribal Council on May 23rd had said something that was of such great significance as to potentially affect the alternatives decision I would have been on the phone to my executive immediately.

MR. UNDERHILL: Q: So to use your words earlier today, if they had raised a huge showstopper that might have had an impact on your decision-making process, is that what you're telling me?

MS. HOLLAND: A: Potentially, yes. I just was reacting to your statement that we didn't have any further meetings prior to the decision and my comment was this meeting actually took place before the board meeting, so it was just correcting the time sequence.

235. On June 13, 2007, Chief Jasper advised a reporter from the Agassiz Observer:³²¹

MR. BERGNER: Q: And the next paragraph,

³¹⁸ Exhibit B-20, Rebuttal Evidence, Att. E-5; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1906, ll. 8-17.

³¹⁹ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1907, l. 14 - p. 1908, l.10.

³²⁰ Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1295, l. 16 - p. 1296, l. 22.

³²¹ Exhibit C3-39, excerpt from the Observer newspaper; Exhibit C3-40, excerpt from the Observer newspaper; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1865, ll. 2 - 17.

"He says B.C. Hydro's efforts to engage in meaningful consultation with First Nations is encouraging. Others have participated in the consultation process but none have on this level, he says."

Those are quotes attributed to you. Are those statements you recall making?

CHIEF JASPER: A: Yeah, we had a lengthy conversation. I met the reporter at the open house, and from there we started talking about -- in this conversation we talked about a range of issues dealing with industry and government and First Nations and First Nations history. And the level of consultation or the level of engagement of First Nations was part of our dialogue.

236. Chief Jasper and Chief Phillips from the STC met with Darrell Mounsey, Corry Archibald and Jennifer Hooper of BC Hydro and Melissa Chaun of Golder on July 18, 2007.³²² Also attending the meeting was June Quipp from Cheam. Fieldwork opportunities and vegetation management opportunities were discussed along with the CFA (discussed above). Action items included Golder advising of field positions available and provision of information to Chief Jasper about herbicide use.

237. On August 2, 2007, as discussed above, a meeting with STC took place to discuss the CFA.³²³

238. On September 20, 2007, the second BCEAO Working Group meeting took place.³²⁴ Chief Jasper from the STC attended along with Martin Edwards of the Shxw'ow'hamel. Chief Jasper stated in evidence in relation to a note from the minutes of the meeting:

MR. WILLMS: Q: If you go to p. 11, at the top of the p., you'll see a reference -- it says:

"TUS information is often difficult for First Nations to provide."

And then the answer:

"A contract has not yet been awarded for TUS. It is the intention to have as much First Nation involvement in the TUS as possible. The scope of the TUS will be open to definition by First Nations, including historical aspects where applicable. As much First Nation involvement as possible is being encouraged by the proponent."

³²² Exhibit B-20, Rebuttal Evidence, Att. E-7.

³²³ Exhibit B-20, Rebuttal Evidence, Att. E-8; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1910, ll. 5-22.

³²⁴ Exhibit B-3-1, Supplemental Evidence, App. DD.

Do you recall that discussion at the meeting?

CHIEF JASPER: A: Again, not specifically, but the conversations.

MR. WILLMS: Q: Yes. I was just going to get to that. Those kinds of conversations did take place with the STC.

CHIEF JASPER: A: Yeah, we had discussions about what the TUS would look like.³²⁵

239. On September 24, 2007, STC met with BC Hydro (discussed above) to discuss the TUS.³²⁶

240. Based on the above, in relation to the November 2007 CPCN Application, BCTC submits that:

- (a) Numerous opportunities were provided to STC to provide input on the choice of the preferred alternative;
- (b) SRRMC provided a report to BC Hydro, BCTC and STC (funded by BCTC and BC Hydro) which did not identify any specific issues with the New Line Alternative;
- (c) Ample capacity funding had been provided to STC and its members and to SRRMC prior to the choice of the preferred alternative;
- (d) On the day prior to the BCTC Board meeting on the choice of the preferred alternative Ms. Holland met with STC about the alternatives and no show stoppers were identified (and subsequent to the choice of the preferred alternative no show stoppers were identified);
- (e) After being advised of the BCTC choice of the preferred alternative to pursue a CPCN for the 5L83 Alternative, Chief Jasper publicly stated that he was encouraged by BC Hydro's consultation efforts to date;
- (f) Discussions on capacity funding for a TUS continued throughout the summer and fall of 2007; and

³²⁵ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1915, ll. 4-24.

³²⁶ Exhibit B-20, Rebuttal Evidence, Att. E-9; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1916, l. 5 - p. 1918, l. 17.

(g) At no time prior to the CPCN Application, did the STC object to the choice of the 5L83 Alternative as the preferred alternative or suggest that the choice of the 5L83 Alternative should not have been made and another alternative should have been pursued.

241. It was likely for these reasons, amongst others, that Ms. Holland was not seriously challenged on the adequacy of consultation with the STC prior to the ILM CPCN Application. When the facts set out in the previous paragraph are considered, BCTC submits that it is clear that BCTC sought information on impacts of the alternatives from STC and attempted to address them. Based on the information provided to Ms. Holland, the consultation efforts in relation to the New Line Alternative were more than reasonable.

6.3.6. Consultation to August 5, 2008

242. As discussed in relation to capacity funding above, after the filing of the ILM CPCN Application, numerous agreements were reached with STC in December 2007 and January and February 2008 for studies and research to be done. During this period, the parties took steps to implement those various agreements.

243. Chief Jasper met with Corry Archibald, Gary Barnett, one of BC Hydro's transmission planners, and Melissa Holland on April 23, 2008.³²⁷ Also attending the meeting were numerous representatives from SRRMC and some STC member First Nations who are not participating in this proceeding. The purpose of the April 23 meeting was to review and get input on potential route alignments for the ILM Project. Instead, the discussion centered around allegations of existing infringements.³²⁸

MR. WILLMS: Q: My question is wrong and your answer is right. There's a question and answer on the third page. My friend took you to it, but he didn't take you to this statement, Chief Jasper. It's in the middle of the page and it's again Ms. Archibald pointing out that Hydro didn't have a mandate to discuss past grievances. It appears that you said that you need a parallel process. Do you remember making a statement like that?

CHIEF JASPER: A: Yes. Yes. Yes, this is the meeting, I think that was at Coquiltza, where there was a lot of technical people in the room and a mix of leadership; not leadership that STC was representing but leadership. And I think the intention of this meeting was to talk about route alignment, although we got

³²⁷ Exhibit B-20, Rebuttal Evidence, Att. E-10.

³²⁸ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1922, l. 10 - p. 1923, l. 1. See also Cross-examination of Melissa Holland, January 18, 2010, p. 1313, l. 21 - p. 1314, l. 3.

stuck talking about rights and title and the other issues of infringements, and ongoing infringements.

244. On June 4, 2008, the SRRMC issued its Initial Project Update/Preliminary Report to BCTC, BC Hydro and STC.³²⁹ The report contained a mitigation framework table developed by the SRRMC to mitigate impacts of the ILM Project on various site types.

245. A separate meeting took place to discuss existing infringements on June 6, 2008.³³⁰

246. On June 19, 2008, STC was sent hard copies of the drafts of 17 of 18 discipline-specific technical reports that were prepared for the EAC Application. BCTC requested any preliminary comments on the draft discipline-specific technical reports by July 31, 2008 so that comments could be incorporated into the final version of the EAC Application. STC notes in its evidence that it requested an extension of time beyond the July 31 deadline to respond to the reports. On July 24, 2008 BCTC wrote to SRRMC in response to its concern about the deadlines for comments on the discipline-specific reports. BCTC advised that once the EAC Application for the ILM Project was submitted, a formal review period would commence. BCTC acknowledged that the EAC Application would be a large application to review and, given comments received by a number of First Nations on the amount of information to review and the time needed to do so, BCTC chose to send out the draft reports while it was still in the pre-application phase to provide First Nations with additional review time and opportunity for comment. The purpose of the 180-day formal application review period which would commence after the EAC Application was filed was for the Technical Working Group, made up of First Nations, provincial agencies and local government, to review and comments on the EAC Application which would include the discipline-specific reports.³³¹

247. No further meetings or other communications took place with STC prior to August 5, 2008.

6.3.7. Reasonableness of Consultation

248. BCTC submits that the STC's complaints of no consultation to August 5, 2008 must be considered in the above context. First, it is important to note that BCTC understood

³²⁹ Exhibit B-20, Rebuttal Evidence, Att. F-5 (filed confidentially); Cross-examination of Chief Jasper, Vol. 12, p. 1925, l. 6 - p. 1926, l. 4.

³³⁰ Exhibit C3-28, June 6 Meeting Notes.

³³¹ Exhibit B-13, BCUC IR 1.1.1, pp. 248-249; C8-8-1, STC Evidence, p. 5.

that the SRRMC was to assist the STC and its members with respect to the technical aspects of consultation. As Ms. Holland testified:³³²

MS. HOLLAND: A: We do recollect, and my recollection is that similar to situations with other First Nations that we've discussed over the last week is, then there's a question of, okay, so how do we provide the funding? So we're getting direction from the Grand Chief and we were also receiving direction similarly, I believe, at the same time from some of the other Sto:lo Bands that SRMC was going to do a lot of the technical work and they were going to rely on SRMC to do that. So how do we ensure that there's funding in place? How do we ensure that we're able to work with the technical organization and still consult politically and ensure that we're still engaging at the political level?

249. However, it appears from the evidence of Grand Chief Pennier and Chief Jasper that some of the consultation difficulties encountered by STC, and its members was because of poor internal coordination on consultation with staff and in relation to the work of the SRRMC. This is supported by the following evidence.³³³

MR. WILLMS: Q: You don't, okay. Did anyone to your recollection explain what the regulatory processes were going to be, at the meetings in the fall of 2006? Or is that something that you were relying on others to look after?

GRAND CHIEF PENNIER: A: Oh, we depended more on the staff that we had and we never really discussed these at our Tribal Council meetings because we didn't have information in which to discuss.

MR. WILLMS: Q: I'm not -- I'm just asking about whether you understood that the process might require an application to this Commission, and your answer is that at the time you didn't?

GRAND CHIEF PENNIER: A: No, because information doesn't come to us....

..

MR. WILLMS: Q: Yeah, I just -- what I'm trying to understand is, this is -- there were a couple of meetings already in the fall of 2006 attended by you and other members of the Tribal Council. There is this meeting in February of 2007, attended by members of the Tribal Council and also Chiefs and other members. I was just wondering whether you had some method by which people who attended these meetings would report back to the Tribal Council about what happened at the meetings.

GRAND CHIEF PENNIER: A: No, we didn't. One of the things we do is when we set our agendas, we ask people for their -- whether they want to add any agenda

³³² Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1262, ll. 10 – 23.

³³³ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1903, l. 22 - p. 1904, l. 21; p. 1905, l. 16 - p. 1906, l. 7.

items, and they chose not to, and this became one of those items that was never brought forth by any of the Band representatives.³³⁴

...

MR. WILLMS: Q: This is the question for both of you. How did either one of you or both of you keep track about what SRRMC was doing? Did you have meetings with them, or a regular reporting arrangement? Or what did you do?

CHIEF JASPER: A: Over time, there was -- we had a steering committee set up. I'm not sure when that came into effect. So we would have meetings. I can't recall when that began. It wasn't until after, I think, our researchers came on board -- environmental researchers. So probably next -- probably in May, June, July some time of '08.

MR. WILLMS: Q: Right.

CHIEF JASPER: A: That we might have formed that committee. But as far as the SRMC, a little bit of a context there is, I believe it's in 2004, there's a split that occurs between the Sto:lo Tribal Council and the Sto:lo Nation. And the SRMC existed as the service provider when it was all one organization. And what happened is, we went both ways, so essentially the capacity to do this research for the SRMC was left as its own stand-alone entity. So, really during this time it's been a process of relying on them, at the same time trying to develop our communication process, and it's definitely in process still.

...

MR. WILLMS: Q: But would they need -- for example this agreement contemplates that certain things might take place involving interviews with elders. Is that something that SRRMC was authorized to enter into on their own? Could they just enter into agreements like that or did they need the STC to say that it was okay?

CHIEF JASPER: A: At that time, around this time of April 4th and probably till the end of 2007, like I said, we were working out that strategy and how we were going to communicate. At that time the STC for this project and the purposes of this project, the only two -- the only community that was working directly with STC was Soowahlie, so the rest of the communities -- STC would have reviewed this and been a part of looking at this document, but it ultimately would have went back to the communities to make and do some sort of decision on their own, like how their members would be accessed.

250. Second, although STC alleges that no consultation took place, or at least no consultation took place properly, it is clear that no such objections were made clear at the time:

MR. WILLMS: Q: Okay. The -- your evidence says at the bottom of p. C8-8-1:

³³⁴ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1895, l. 22 - p. 1896, l. 11, p. 1902, ll. 4-19.

"The vast majority of the 'evidence' now put forward by BCTC to support its position that it consulted with First Nations including the STC has on its face little or nothing to do with proper consultation as that term is understood in the context of the Crown's constitutional obligations to First Nations. In any event, it was certainly not understood by the STC to be consultation."

And I'm just wondering, based on the minutes that we've been through, that you attended meetings, and Mr. Jasper -- Chief Jasper, sorry, and Chief Pennier, you attended meetings. Can you point out to me where in the meetings you told BCTC or B.C. Hydro what they needed to do to consult properly?

CHIEF JASPER: A: Yeah. As far as a specific reference in these notes, we can't think of anything as far as specific what they should do. There was, you know, as mentioned, it's a common occurrence to have the -- this is not a consultation, as initial statement in a meeting. And, you know, as far as BCTC or B.C. Hydro, it was -- they were unresponsive to those comments as though it was, you know, a common understanding that we had a different interpretation. It was as though they weren't willing to go there in conversation.

MR. WILLMS: Q: Are you talking about statements at meetings where someone said this is not consultation and BCTC didn't disagree with that, they were just quiet? Is that what you're talking about?

CHIEF JASPER: A: Yeah, I guess so, and there was conversations between Corry and myself about this disagreement and this lack of understanding or a willingness to see things from more of a -- consultation as something beyond the dictionary definition of consultation.

MR. WILLMS: Q: But can you point to me any meeting or letter or from your recollection any communication that you had with anyone at BCTC where you told them what you thought BCTC or B.C. Hydro needed to do to consult properly?

CHIEF JASPER: A: The best thing I can think of is -- I don't know if I can find it in here, where some of the leadership would speak. Perhaps it's at the Shxw'ow'hamel meeting that took place June 6th, maybe, of 2008, where I believe they referenced -- this isn't a direct quote, but having to hear us and not come in with mandates. That in order to begin a process of consultation we need to start and sit down and create a process, but not where we come in with mandates.

MR. WILLMS: Q: I think to help you, Chief Jasper, it's at Tab 42 of the B.C. Hydro binder. It's Exhibit C3- 28.

...

MR. UNDERHILL: C8-14.

MR. WILLMS: Q: Is this it, Chief Jasper, C8-14?

CHIEF JASPER: A: This is the meeting that -- yeah.

MR. WILLMS: Q: Okay, and can you direct the Commission to the part of the notes where the STC advised on what needed to be done in order to have consultation, proper consultation?

CHIEF JASPER: A: I believe there's some reference to what I'm alluding to. Again, that wasn't a direct quote, on I believe it's p. 3, Doug -- Doug is talking about, "so don't ask for information if you're not going to use it. Why can't you take our info into account and then plan the proposal."³³⁵

...

MR. WILLMS: Q: Okay. Is there anything else that you can think of in terms of advice that was given by the STC about the proper way to consult?

GRAND CHIEF PENNIER: A: I guess there is -- I'd just like to say, that there is no real advice given by the STC in particular, because we didn't write anything -- I didn't write anything on behalf of the Sto:lo Tribal Council to say this is how you should go about consulting with us. Because the process that was going on, there was a number of different meetings where a number of different representatives attended, and in all those meetings they listen and sometimes they talked about the different impacts that were going to be created or they thought that were going to be created by the new project. And as I mentioned earlier, that as part of our process of decision making we have information in front of us so that we can discuss it before we make a decision on whether we approve or disapprove anything. And I am saying that we didn't go through that process as the STC to write a letter to BCTC or B.C. Hydro about how we should think they should conduct consultations.³³⁶

251. BCTC submits that there is no merit to STC's claim that BCTC gave little or no indication that they considered themselves to be engaging in a consultation process with the STC prior to August 5, 2008, and the parties believed that consultation would come later. BCTC and BC Hydro's conduct from August 26, 2006, when BCTC first contacted STC, through to August 5, 2008, was clearly consultation:

- (a) BCTC sought to gather information from STC and its members to test the different alternatives to reinforce the grid;
- (b) BCTC put forward proposals:
 - (i) for the different alternatives; and

³³⁵ Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1930, l. 21 - p. 1933, l. 20.

³³⁶ Cross-examination of Grand Chief Pennier, January 21, 2010, Vol. 12, p. 1934, l. 16 - p. 1935, l. 12.

- (ii) for the route alignment;
that were not yet finalized;
- (c) BCTC sought STC and its members' opinions on those proposals;
- (d) BCTC and BC Hydro informed STC and its members of all relevant information upon which the proposals were based;
- (e) BCTC did not promote one alternative and one route alignment but instead listened with an open mind to what STC and its members had to say;
- (f) BCTC was prepared to alter its proposals; and
- (g) BCTC provided feedback to STC and its members to and including the date of the CPCN decision.

6.3.8. Conclusion

252. There is no serious challenge by the STC to BC Hydro's determination of the scope and content of the duty to consult on the *Haida* scale. In light of the fact that the duty ranges between the lower end and the middle of the *Haida* spectrum, BCTC submits that the consultation efforts by BCTC and BC Hydro up to August 5, 2008, were more than reasonable. The 5L83 Alternative will require very little additional right of way within S'olh Temexw. S'olh Temexw is a vast area and the STC did not identify any site specific concerns, other than operational concerns, which were addressed. As set out in the previous paragraph, the steps that BCTC took to determine the concerns of the STC were reasonable. Consultation with respect to the ILM Project is a staged process as acknowledged by the Supreme Court of Canada and the BC Court of Appeal and therefore, up to August 5, 2008, BCTC submits that it had discharged whatever consultation obligations it had to the STC. The STC complaint that no consultation had taken place prior to August 5, 2008 is devoid of merit.

6.4. SHAC

6.4.1. Scope and Content

253. SHAC (Aitchelitz, Leq'a:mel, Skawahlook, Skowkale, Tzeachten, and Yakweakwioose) asserts that the First Nations it is representing have existing aboriginal rights

and title to S'olh Temexw.³³⁷ The green coloured area of the map shown on page 49 of BCTC's response to BCUC IR 1.3.1 accurately depicts the external boundaries of S'olh Temexw.³³⁸ The five First Nations represented by STC in this proceeding also assert aboriginal rights and title over the same area.³³⁹ S'olh Temexw is overlapped by claims by the ONA, Nlaka'pamux, Kwikwetlem, and Hwlitsum.³⁴⁰ S'olh Temexw includes the preferred alignment between Nodes G1 and V. Nlaka'pamux claimed territory includes the preferred alignment between Nodes A and O1.

254. In recognition that consultation is an iterative process, BC Hydro assessed the scope and content of the duty to the SHAC First Nations in writing twice:

- (a) In April, 2007, in relation to the alternatives (which included HVDC at the time) the:
 - (i) Leq'a:mel's preliminary assessment of level of consultation required was low; and
 - (ii) Skawahlook's preliminary assessment of level of consultation required was low.³⁴¹
- (b) After the 5L83 Alternative was chosen as the preferred alternative:
 - (i) Aitchelitz's strength of claim was assessed as weak for aboriginal title and rights and the preliminary assessment of level of consultation required was the low end of the *Haida* spectrum;
 - (ii) Leq'a:mel's strength of claim was assessed as weak for aboriginal title and stronger for aboriginal rights and the preliminary assessment of level of consultation required was the lower end of the *Haida* spectrum;

³³⁷ Exhibit B-17, BCTC IRs, App. I, p. 191, App. III, p. 166; Exhibit C8-11, App. A.

³³⁸ Exhibit B-13, BCTC Response to BCUC 1.3.1, p. 49; Exhibit C9-6, SHAC Response to BCTC IRs 4.1 and 4.2.

³³⁹ Exhibit C8-10, STC Response to BCTC IRs 7.1 and 7.2.

³⁴⁰ Exhibit C4-10, Kwikwetlem Evidence, Exhibit 10; Exhibit C1-11, Hwlitsum Evidence, Maps 19 and 20, Tab 21; Exhibit C5-8-1, ONA and UNIB Evidence, App. C, p. 240.

³⁴¹ Exhibit B-10-4, Interior to Lower Mainland Project First Nation Consultation Summary Report, May 2006 to April 2007, App. 3, Att. 4 to Coldwater IR 1.2.

- (iii) Skawahlook's strength of claim was assessed as weaker for aboriginal title and medium strong for aboriginal rights and the preliminary assessment of level of consultation required was the low to middle end of the *Haida* spectrum;
- (iv) Skowkale's strength of claim was assessed as weak for aboriginal rights and title and the preliminary assessment of level of consultation required was the low end of the *Haida* spectrum;
- (v) Tzeachten's strength of claim was assessed as weak for aboriginal title and rights and the preliminary assessment of level of consultation required was the low end of the *Haida* spectrum; and
- (vi) Yakweakwioose's strength of claim was assessed as weak for aboriginal title and rights and the preliminary assessment of level of consultation required was the low end of the *Haida* spectrum.³⁴²

255. In response to BCUC IR 6.1 and 6.3, SHAC stated:

In terms of specific evidence of the adverse impacts of the ILM Project on the aboriginal rights and title of the SHAC First Nations, this too had not been gathered and assessed as of August 5, 2008... As noted, however, evidence with respect to the specific impacts of the ILM Project was to be gathered, assessed, and presented in the form of the SHAC AIUS. This evidence was not at hand as of August 5, 2008.

...

The SHAC did not, prior to August 5, 2008, provide more specific evidence of the asserted aboriginal rights and title of the SHAC First Nations because the evidence with respect to the ILM Project was in the process of being gathered for inclusion in the SHAC AIUS. The understanding of the SHAC was that consultation with regard to the assertion of aboriginal rights and title and the potential impacts on those rights would occur once the AIUS was complete.³⁴³

256. Near the end of their evidence, SHAC submits:³⁴⁴

[...] SHAC asserts what it considers to be a strong claim of aboriginal rights and title to the areas potentially affected by the ILM Project, and has identified a

³⁴² Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 54-56.

³⁴³ Exhibit C9-7, SHAC Response to BCUC IRs, pp. 9 and 10.

³⁴⁴ Exhibit C9-4, SHAC Evidence, p. 19.

range of serious impacts associated with the ILM Project and existing infrastructure.

257. SHAC did not lead any evidence to support this submission.

258. BCTC submits that there is nothing in SHAC's evidence that contradicts BC Hydro's assessment of the scope and content of the duty owed to the members of the SHAC on the *Haida* spectrum.³⁴⁵ In addition, BCTC submits that BC Hydro's assessment is supported by the following evidence of strength of claim and impacts:

(a) There are overlapping claims by NNTC, Kwikwetlem, and Hwlitsum within and over S'olh Temexw;

(b) Aitchelitz, Skowkale, Tzeachten and Yakweakwioose are all south of the Fraser River, while the preferred alignment is well north of the Fraser River;

(c) Although Leq'a:mel and Skawahlook are north of the Fraser River, their communities are still some distance from the preferred alignment and little widening of the right of way is expected to take place in the area near their communities;³⁴⁶ and

(d) SRRMC provided a report to BC Hydro, BCTC and the SNS (funded by BCTC and BC Hydro) which did not identify any specific issues with the New Line Alternative.³⁴⁷

259. Based on the above, BCTC submits that the duty owed to the members of the SHAC ranges between the low end and the middle of the *Haida* spectrum.

6.4.2. SHAC Complaint

260. SHAC's primary complaint about the consultation process appears to be summarized in their evidence as follows:³⁴⁸

At the time of the issuance of the CPCN, the Parties had not yet engaged in direct consultation to discuss the rights of the SHAC First Nation and the impacts on those rights associated with the ILM Project.

³⁴⁵ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 54 – 56.

³⁴⁶ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 55 and 56.

³⁴⁷ Exhibit C3-23-1, Att. 1 (filed confidentially).

³⁴⁸ Exhibit C9-4, SHAC Evidence, pp. 2 and 3.

261. In support of this complaint SHAC says that:

- (a) Much of the evidence included in BCTC's summary of consultation efforts is not, from the perspective of SHAC, evidence of consultation. Rather, SHAC says that these communications are "more accurately described as pre-consultation",³⁴⁹
- (b) Many of the communications between BCTC, BC Hydro and SHAC prior to August 5, 2008, involved notifying SHAC of decisions that had already been made or were pending, and planning for how consultation would occur, rather than consultation itself;³⁵⁰
- (c) Around the time the CPCN was issued:
 - (i) SHAC had just gained the capacity to meaningfully engage in consultation through a CFA and had commenced work to develop an Aboriginal Interest and Use Study;³⁵¹
 - (ii) The parties had not yet engaged in direct consultation to discuss the rights of SHAC and the impacts on those rights;³⁵²
 - (iii) Certain threshold issues raised by SHAC during preliminary discussions had not been addressed; and³⁵³
 - (iv) BCTC had not provided accommodation for the impacts of the ILM Project on the aboriginal rights and title of SHAC.³⁵⁴

262. Other, more specific complaints about specific aspects of the consultation process are made in the remainder of SHAC's evidence.

263. BCTC submits that the evidence is clear that BCTC and BC Hydro were engaged in a meaningful consultation process with the members of SHAC, and had sought the necessary input from SHAC regarding the impacts of the ILM Project on their asserted rights, up to August

³⁴⁹ Exhibit C9-4, SHAC Evidence, p. 2.

³⁵⁰ Exhibit C9-4, SHAC Evidence, p. 2.

³⁵¹ Exhibit C9-4, SHAC Evidence, p. 2.

³⁵² Exhibit C9-4, SHAC Evidence, pp. 2-3.

³⁵³ Exhibit C9-4, SHAC Evidence, p. 3.

³⁵⁴ Exhibit C9-4, SHAC Evidence, p. 3.

5, 2008.³⁵⁵ In the following section, BCTC addresses SHAC's claim that it had little or no capacity to engage in a meaningful consultation process. BCTC then reviews SHAC's remaining complaints through a review of the overall consultation process that took place with SHAC on the ILM Project. BCTC addresses SHAC's complaint regarding consultation on Existing Assets in the section on Consultation on Impacts of Existing Assets.

6.4.3. Capacity Funding

264. One of the primary basis for SHAC's complaint that no consultation took place with it prior to August 5, 2008 is:³⁵⁶

Up until the point at which capacity dollars began to flow, the SHAC First Nation did not have the ability to meaningfully participate in a consultation process or to carry out the work required to advance that process.

265. BCTC submits that the following evidence is relevant to SHAC's complaint that it had little or no capacity funding to engage in the consultation process before August 5, 2008:

(a) Although the SNS met with representatives of BC Hydro on September 22, 2006, capacity funding was not requested. The members of SHAC are members of SNS;³⁵⁷

(b) On October 12, 2006, representatives of BC Hydro met with representatives of Skawahlook. Chief Chapman asked if capacity funding would be available and was advised that it would be;³⁵⁸

(c) On November 27, 2006, BC Hydro wrote to each of the SHAC First Nations offering \$10,000 in initial capacity funding along with a separate proposal for further funding under a CFA.³⁵⁹ The Appendix to the attached draft CFA included funding for "Specific Band involvement and technical specialists (ongoing Band staff involvement and specialized third party technical expertise and advice)";

³⁵⁵ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 251 - 276.

³⁵⁶ Exhibit C9-4, SHAC Evidence, p. 8.

³⁵⁷ Exhibit B-20, Rebuttal Evidence, Att. F-1; Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 265.

³⁵⁸ Exhibit B-20, Rebuttal Evidence, Att. F-1.

³⁵⁹ Exhibit B-3-1, Supplemental Evidence, App. H; Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 254.

(d) On February 7, 2007, BC Hydro wrote to the SNS and each of the members of SHAC offering funding to attend the BCEAO Working Group meeting on February 21, 2007;³⁶⁰

(e) Between February 9 and 14, 2007, BC Hydro again wrote to each of the members of SHAC and the SNS offering \$10,000 in initial capacity funding along with a separate proposal for further funding under a CFA. The letters were identical to the letters sent in November, 2006;³⁶¹

(f) On March 5, 2007, BC Hydro wrote to the SNS and each of the members of SHAC enclosing the materials from the February 21 BCEAO Working Group meeting and offered capacity funding to review these materials and participation in the BCEAO Working Group;³⁶²

(g) On March 14, 2007, BC Hydro wrote to the SNS and the members of SHAC offering funding of \$10,000 to, amongst other things, provide comments on the alternatives;³⁶³

(h) On April 10, 2007, BCTC and BC Hydro executed terms of reference dated April 4, 2007 to fund a Cultural Heritage Overview Impact Assessment for, *inter alia*, the SNS and members of SHAC. The TOR was initially approved by BC Hydro on February 1, 2007. The amount approved for Phase 1 of the CHOIA (there were three phases contemplated) is set out at Attachment 1 to Exhibit C3-23-1 and the amount for Phase 2 is set out at Attachment 2 to Exhibit C3-23-1;³⁶⁴

(i) Between June 5, 2007 and June 27, 2007, cheques in the amount of \$10,000 were sent to the SNS and all the members of SHAC, except Skowkale, after the SNS and its members confirmed that they wished to receive the initial capacity funding.

³⁶⁰ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 256.

³⁶¹ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 256.

³⁶² Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 257.

³⁶³ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 258-259; Exhibit B-3-1, Supplemental Evidence, App. K.

³⁶⁴ Exhibit C3-19-1, Att. 1 (filed confidentially); Exhibit C3-23-1, Atts. 1 and 2 (filed confidentially).

Skowkale later requested funding and received a \$10,000 cheque on July 30, 2007. All six SHAC First Nations and the SNS executed funding letters;³⁶⁵

(j) On July 25, 2007, BC Hydro wrote to the SNS attempting to enter into discussions regarding broader capacity funding and attaching a draft CFA;³⁶⁶

(k) On January 10, 2008, Chief Joe Hall signed terms of reference dated December 13, 2007 under which BC Hydro agreed to provide funding to SHAC for an Environmental Researcher and an Environmental Research Assistant. The projected maximum budget was a very significant sum of money;³⁶⁷

(l) On January 10, 2008, Chief Joe Hall signed a terms of reference dated January 9, 2008 under which BC Hydro agreed to provide funding to the SHAC for, *inter alia*, a TUS to be completed by September 30, 2008. The projected maximum budget was a very significant sum of money;³⁶⁸ and

(m) The CFA with the SHAC Intervenors was dated April 1, 2008 and was signed by Chief Joe Hall.³⁶⁹ The CFA was supported by letters from each of the SHAC members who agreed that consultation with them could be done through the SNS. The CFA also attached a letter from Chief Hall of the SNS to the BCEAO dated April 9, 2008 confirming that the purpose for the CFA was to, in effect, provide funding for consultation.³⁷⁰

266. Based on the above, BCTC submits that SHAC's complaint about lack of capacity funding is not supported by and, in fact, is refuted by, the evidence. The evidence shows that SHAC had ample capacity to participate in consultation with BCTC and BC Hydro.

³⁶⁵ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 261 to 263; Exhibit B-3-1, Supplemental Evidence, App. "L".

³⁶⁶ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 263.

³⁶⁷ Exhibit C3-23-1, Att. 3, p. 7 of 7 (filed confidentially).

³⁶⁸ Exhibit C3-19-1, Att. 2, p. 13 of 13 (filed confidentially).

³⁶⁹ Exhibit C3-22-1, Att. 2 (filed confidentially).

³⁷⁰ Exhibit C3-22-2-1, Att. 3 (filed confidentially).

6.4.4. Consultation prior to November 2007³⁷¹

267. The efforts by BCTC and BC Hydro to provide information to SHAC and consult with its members are set out in BCTC's response to BCUC IR 1.1.1.³⁷²

268. Claire Marshall and Charles Littledale met with Willie Hall of the SNS (of which each of the SHAC First Nations are members) and Dave Schaepe of SRRMC on September 22, 2006 to review the need for the ILM Project and the identified alternatives. SNS indicated that they would coordinate the information flow on the ILM Project for their members.³⁷³

269. On October 12, 2006, Claire Marshall met with Chief Maureen Chapman, Councillor Darlene Sneider, and Administrator Sharon Young of Skawahlook. During the meeting, Skawahlook stated that they were pleased that BCTC was relaying information early in the process and that they wanted to be engaged directly. Skawahlook also asked whether capacity funding would be made available, and Ms. Marshall confirmed that it would.³⁷⁴

270. Dave Schaepe of SRRMC met with Charles Littledale and Corry Archibald of BC Hydro and Melissa Holland of BCTC on November 20, 2006 to discuss how SRRMC would provide technical assistance to the SNS related to the ILM Project.³⁷⁵

271. BC Hydro, BCTC and SNS met again on January 8, 2007. Representatives of each of the six members of SHAC attended the meeting. During the meeting, BC Hydro and BCTC made the Interior Lower Mainland Transmission Reinforcement Project November 2006 presentation and provided information about the regulatory and environmental assessment processes. Following the presentation, BC Hydro and BCTC asked the SNS members in attendance if they had any questions or concerns. The SNS raised numerous questions and several topics were discussed including capacity funding, the potential location of the capacitor station, the possibility of undergrounding the lines, and Traditional Use Studies.³⁷⁶

³⁷¹ This review is not intended to be comprehensive but to focus on certain facts relevant to Coldwater et al's complaints. Additional reference should be made to Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 251 - 276; Exhibit B-20, Rebuttal Evidence, F.

³⁷² Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 251-276.

³⁷³ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 251; Exhibit B-20, Rebuttal Evidence, Att. F-1.

³⁷⁴ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 252; Exhibit B-20, Rebuttal Evidence, Att. F-1.

³⁷⁵ Exhibit B-20, Rebuttal Evidence, Att. F-1.

³⁷⁶ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 255; Exhibit B-20, Rebuttal Evidence, Att. F-1; Exhibit B-3-1, Supplemental Evidence, App. M.

272. On February 21, 2007, Barb Leggat of the Leq'a:mel attended the first BCEAO Working Group meeting.³⁷⁷ SHAC says in its evidence that in its opinion the Working Group meetings were “not a mechanism for direct or meaningful consultation”.³⁷⁸ BCTC respectfully submits that this position is unfounded. As set out above, the BC Court of Appeal has determined that joint consultations can be an effective tool to satisfy the duty to consult. The BCEAO Working Group meetings did provide an opportunity to share common information, seek input, and respond to questions and comments. A detailed review of these meetings is contained in BCTC’s response to BCUC 1.1.1 and the materials from these meetings.³⁷⁹ These were only one of a number of tools used to consult with First Nations on the ILM Project.

273. On April 23, 2007, SRRMC delivered the Phase 1 Cultural Heritage Overview Assessment Report to SNS, BCTC and BC Hydro. The report noted general impacts of the potential alternatives but did not indicate any specific impacts.³⁸⁰

274. SHAC indicates that SRRMC is an organization that provides services to the Stó:lō primarily in the fields of land and resource management, research, archaeology and collections management. While the SHAC First Nations indicate that they support the technical work of SRRMC, the SRRMC does not have the authority to represent SHAC in consultation with regard to the impacts of the ILM Project on their aboriginal rights and title.³⁸¹

275. Ms. Holland confirmed that while technical matters were addressed with SRRMC, BCTC and BC Hydro also ensured that they were still consulting with the appropriate First Nation representatives.³⁸² SRRMC’s work was intended to provide input into the potential effects of the ILM Project on SHAC’s members’ rights, including for the choice of the preferred alternative.

276. Charles Littledale of BC Hydro and Melissa Holland of BCTC met with members of Skowkale on April 30, 2007 and made a further presentation on the ILM Project. After the presentation, Skowkale, BCTC and BC Hydro discussed when the choice of alternatives decision would be made, ownership of TUS information, and the nature of energy supply, trade,

³⁷⁷ Exhibit B-3-1, Supplemental Evidence, App. U.

³⁷⁸ Exhibit C9-4, SHAC Evidence, p. 4.

³⁷⁹ Exhibit B-13, BCTC Response BCUC IR 1.1.1, pp. 256, 264; Exhibit B-3-1, Supplemental Evidence, Apps. T, U, and DD.

³⁸⁰ Exhibit B-20, Rebuttal Evidence, Att. F-2, pp. 18-20 (filed confidentially).

³⁸¹ Exhibit C9-4, SHAC Evidence, p. 3.

³⁸² Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1262, ll. 10 – 23.

and conservation in general. BCTC and BC Hydro committed to providing Skowkale with notice of the alternatives decision in writing once it was made and assured Skowkale that each First Nation is typically the owner of TUS information.³⁸³

277. In May of 2007, BCTC chose the 5L83 Alternative as the preferred alternative for increasing the transmission capacity of the ILM grid.³⁸⁴ BC Hydro notified each of the SHAC members of BCTC's selection of the 5L83 Alternative as the preferred alternative on June 6, 2007.³⁸⁵ At no time did SHAC complain about the choice of the preferred alternative or seek to provide further input into it, including in this proceeding.³⁸⁶

278. On July 3, 2007, Darrell Mounsey and Corry Archibald of BC Hydro met with Dave Schaepe of SRRMC and others regarding archaeological studies.³⁸⁷

279. On September 20, 2007, the second BCEAO Working Group meeting took place. Chief Alice Thompson of the Leq'a:mel, and Nicole LaRock on behalf of the Yakweakwioose and Skowkale First Nations attended along with Mr. Rogachevsky, counsel for the SNS.³⁸⁸

280. On October 29, 2007, BC Hydro had a meeting with representatives from Aitchelitz, Leq'a:mel, Skawahlook, Tzeachten, and Yakweakwioose, who were as of that time referring to themselves collectively as the Stó:lō Hydro Ad Hoc Committee (at this time SHAC did not yet represent the interest of Skowkale). During the meeting, SHAC and BC Hydro discussed the EAO process, capacity funding, the work being undertaken by SRRMC, the regulatory review process, and whether the ILM Project would require new right of way.³⁸⁹

281. In summary, SHAC describes its overall position regarding consultation during this period (August 2006 to October 2007) as follows:³⁹⁰

During this period of time, some general information about the ILM Project was provided to the SHAC First Nations. On at least three occasions (documented in

³⁸³ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 260-261; Exhibit B-20, Rebuttal Evidence, Att. F-1.

³⁸⁴ Exhibit B-3-1, Supplemental Evidence, s. 2.12, p. 53, l. 19-21.

³⁸⁵ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 261.

³⁸⁶ Commission questions of Ms. Holland, January 20, 2010, Vol. 11, p. 1546, ll. 4 - 17.

³⁸⁷ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 262; Exhibit B-20, Rebuttal Evidence, Att. F-1.

³⁸⁸ Exhibit B-3-1, Supplemental Evidence, App. DD.

³⁸⁹ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 265.

³⁹⁰ Exhibit C9-4, SHAC Evidence, p. 4.

BCTC summary), the Proponent was advised that these preliminary discussions were not to be considered consultation.

282. In response to SHAC's comments that meetings were not to be considered consultation, Mr. Anderson described the approach of BCTC and BC Hydro when that happened as follows:

MR. ANDERSON: A: I wouldn't necessarily characterize it as a conflict, and while I wasn't at this meeting it's something that we talked about as a team, not just on this project but on other projects, and that is what do you do when faced with this notion of you're showing up to a meeting, your intent is to either start consultation or have it be part of a consultation process, and you get there and the opening words is, "well this isn't consultation". And frankly, we found it -- or at the time, to just be much more effective to not get into a debate over it at that point in time. B.C. Hydro, BCTC would never agree that something isn't consultation, but to get into a fight off the opening statement as to whether such a meeting was consultation simply wasn't an effective use of anybody's time. Our practice was to carry on with the meeting, to continue to do and work through the process as we had set it up, and simply just avoid that discussions.³⁹¹

283. BCTC submits that SHAC's general position over this period of time is not supported by the evidence. During the time period leading up to the ILM CPCN Application:

- (a) Numerous opportunities were provided to the members of SHAC to provide input on the choice of the preferred alternative, including:
 - (i) meetings on September 22, 2006, October 12, 2006, November 20, 2006, January 8, 2007, and April 30, 2007; and
 - (ii) the February 21, 2007, BCEAO Working Group meeting;
- (b) SRRMC provided a report to BC Hydro, BCTC and the SNS which noted general impacts of the potential alternatives but did not identify any specific problems with either the UEC or New Line Alternatives;
- (c) Significant capacity funding had been provided to SRRMC prior to the choice of the preferred alternative and to the members of SHAC after the choice of the preferred alternative (when they accepted the March 2007 initial capacity funding);

³⁹¹ Cross-examination of Mr. Anderson, January 18, 2010, Vol. 9, p. 1265, ll. 7 - 25.

(d) Discussions on capacity funding for a TUS continued throughout the summer and fall of 2007; and

(e) At no time prior to the CPCN Application did the SHAC object to the choice of the 5L83 Alternative as the preferred alternative or suggest that the choice of the 5L83 Alternative should not have been made and another alternative should have been pursued.

284. When the facts set out in the previous paragraph are considered, BCTC submits that it is clear that BCTC and BC Hydro sought information on impacts of the alternatives from SHAC and attempted to address them. Based on the information provided to Ms. Holland, the consultation efforts in relation to the New Line Alternative were more than reasonable.

6.4.5. Consultation from November 2007 to August 5, 2008

285. On December 6, 2007, BC Hydro met with representatives of SNS and SHAC. During the meeting, the parties discussed the work being done by SRRMC, the BCEAO process, SHAC's potential involvement in the field studies being undertaken, SHAC's capacity needs, and the draft CFA.³⁹² In its evidence, SHAC states that during this meeting it reiterated its view that consultation outside of the EAC process was required to address potential impacts on aboriginal rights and title.³⁹³ As Mr. Anderson and Ms. Holland explained on a number of occasions, BC Hydro undertook a coordinated consultation process and did not set out or attempt to consult with First Nations separately on the CPCN Application as distinct from the EAC Application. Rather, BC Hydro sought to consult with First Nations in respect of the ILM Project as a whole.³⁹⁴

286. One of SHAC's complaints from early in the post-CPCN filing period is as follows:

Despite the fact that the SHAC had just been convened, and that limited capacity funding had been provided with which to engage technical support, the SHAC was called upon to meet a deadline for responding to the draft Terms of Reference for the EAC Application.

287. With respect, BCTC submits that this complaint is not supported by the evidence. The BCEAO draft TOR were first presented to First Nations during the February 21, 2007,

³⁹² Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 267.

³⁹³ Exhibit C9-4, SHAC Evidence, p. 7.

³⁹⁴ Exhibit B-10, BCTC Response to Kwikwetlem's IR 1.17.

BCEAO Working Group meeting. All of the members of SHAC were invited to the meeting and Leq'a:mel, Skowkale, and Yakweakwioose attended the meeting.³⁹⁵ At the meeting, the draft TOR were discussed with the meeting participants, and First Nations were encouraged to submit their comments on the draft TOR when ready, with a view to receipt of comments on the draft TOR prior to the next Working Group meeting in September 2007. In June and July 2007, each of the members of SHAC accepted initial capacity funding of \$10,000; one of the purposes of which was to provide funding for commenting on the draft TOR. At the September 20, 2007, Working Group meeting the time for First Nation comments on the draft TOR was extended to November 2, 2007 at the request of First Nations. Based on the above, BCTC submits that it is not reasonable for SHAC to complain that the draft TOR review process was advanced to a certain stage when SHAC was convened in October 2007. SHAC was convened as a collective of First Nations who had been consulted with by BCTC and BC Hydro since August of 2006.

288. SHAC in fact provided its comments on the BCEAO draft TOR on November 2, 2007. SHAC's evidence is that its comments on the draft TOR raised three general themes that it raised consistently with BCTC and BC Hydro:

- (a) The need for a consultation process to assess the impacts of the ILM Project on the aboriginal rights and title of the SHAC First Nations;
- (b) The need for a process to contemplate accommodation for impacts of aboriginal rights and title (as opposed to mitigation of site-specific environmental concerns); and
- (c) The need for a process to assess the impacts of existing BC Hydro works.³⁹⁶

As described in the review of BCTC and BC Hydro's approach to consultation, items (a) and (b) were part of BC Hydro's consultation process from the initial contact with First Nations onward. SHAC's concern about having a process to address the impacts of existing BC Hydro works is addressed in the section on Consultation of the Impacts of Existing Assets.

289. As discussed in relation to capacity funding above, after the CPCN Application was filed, numerous agreements were reached with SHAC in December 2007 and January and

³⁹⁵ ILM CPCN Application, B-1, Application, s. 7.1.1.1, p. 96, l. 2 - p. 97, l. 14; B-3-1, Supplemental Evidence, s. 2.5, 2.19, p. 42, l. 19 - p. 47, l. 2, p. 62, l. 24 - p. 63, l. 4.

³⁹⁶ Exhibit C9-4, SHAC Evidence, p. 7.

February, 2008 for studies and research to be done. During this period, the parties took steps to implement those various agreements.

290. BC Hydro met with SHAC's legal counsel on March 17, 2008, to discuss the CFA. The parties were unable to conclude the agreement at the meeting but agreed to further discussions.³⁹⁷

291. On or about March 19, 2008, BC Hydro invited each of the SHAC members to attend two First Nation only route alignment Open Houses. The first was to be held in Merritt on March 25, 2008, and the second in Chilliwack on March 26, 2008. The invitation noted that there were three primary areas along the ILM Project corridor between Nicola and Meridian where there were route alignment options and stated that, based on environmental assessment studies and the work of BCTC's engineering team, BCTC had identified these route alignment options as the ones with the least potential of affecting the environment. The invitation also noted that BC Hydro and BCTC were seeking First Nations' comments and input on these route alignment options and encouraged the attendance of First Nations at the Open Houses.³⁹⁸

292. On March 26, 2008, members of Skowkale attended the route alignment options Open House in Chilliwack.³⁹⁹

293. On March 31, 2008, BC Hydro and Golder met with SHAC and SNS to discuss the socio-economic assessment which was being undertaken as part of the EAC process. In response to questions and concerns raised by SHAC and SNS, Golder explained the methodology behind the socio-economic study and the opportunities for the participation of First Nations.⁴⁰⁰

294. On April 10, 2008, BC Hydro held a meeting with representatives of the SNS, Skowkale, Matsqui and the Stó:lō Development Corporation to discuss the CFA.⁴⁰¹

295. Michael Watson of the SNS and Councillor Jeffery Point of Skowkale, met with Corry Archibald and Gary Barnett from BC Hydro, Melissa Holland from BCTC and Don Gamble

³⁹⁷ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 269.

³⁹⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 65, ll. 11-13, App. HH.

³⁹⁹ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 270.

⁴⁰⁰ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 270.

⁴⁰¹ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 271.

from Golder on April 23, 2008.⁴⁰² Also attending the meeting were numerous representatives from SRRMC and other First Nations. The purpose for the meeting was to discuss route alignment options for the new line. Instead, the discussion centered around allegations of existing infringements.⁴⁰³

296. On May 5, 2008, Golder wrote to SHAC in response to issues raised at the March 31, 2008, meeting about the socio-economic assessment.⁴⁰⁴ On May 8, 2008, BC Hydro and Golder met again with SHAC to discuss the socio-economic assessment. The purpose of this meeting was to follow-up on the concerns raised by SHAC at the meeting on March 31, 2008. During the meeting, the parties discussed the scope and methodology of the socio-economic assessment, environmental data, and timelines.⁴⁰⁵ In its evidence, SHAC expresses a concern that the draft Work Plan for the socio-economic assessment stated that the study area for the assessment would include 46 First Nations and 6 Tribal Councils, but that Golder's May 5 letter stated that the study area would include only 10 First Nations.⁴⁰⁶ SHAC describes this change as a "contravention" of the Work Plan that had been previously submitted. SHAC's evidence does not indicate that the July 2007 Work Plan was a "draft" plan, and that the May 5 letter explained how the 10 First Nations were determined.⁴⁰⁷ In any event, the outcome of the meetings with SHAC regarding the socio-economic assessment concerns that it raised resulted in BC Hydro providing funding for SHAC to undertake their own socio-economic study.⁴⁰⁸

297. On June 4, 2008, the SRRMC issued its Initial Project Update/Preliminary Report. The report contained a mitigation framework table developed by the SRRMC to mitigate impacts of the ILM Project on various site types.⁴⁰⁹

298. BCTC notified SHAC about the decision on the preferred route alignment on June 6, 2008.⁴¹⁰ Similar to their position on the BCEAO Working Group meetings, SHAC says

⁴⁰² Exhibit B-20, Rebuttal Evidence, Att. F-4.

⁴⁰³ Cross-examination of Melissa Holland, January 18, 2010, Vol. 9, p. 1313, l. 21 - p. 1314, l. 3; Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1922, l. 10 - p. 1923, l. 1.

⁴⁰⁴ Exhibit C9-4, SHAC Evidence, p. 9.

⁴⁰⁵ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 272 – 273.

⁴⁰⁶ Exhibit C9-4, SHAC Evidence, p. 9.

⁴⁰⁷ Exhibit C9-4, SHAC Evidence, App. C

⁴⁰⁸ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 273

⁴⁰⁹ Exhibit B-20, Rebuttal Evidence, App. F-5 (filed confidentially); Cross-examination of Chief Jasper, January 21, 2010, Vol. 12, p. 1925, l. 6 - p. 1926, l. 4.

⁴¹⁰ Exhibit C9-4, SHAC Evidence, p. 12.

that the First Nation Open Houses on the preferred route alignment decision were not, from SHAC's perspective, "an appropriate or meaningful form of consultation".⁴¹¹

299. As indicated above, BCTC submits that joint consultations are an appropriate vehicle for consultation in certain circumstances. The invitation to the Open Houses made clear that First Nations were invited to comment and provide input on the various route alignment options. Members of Skowkale actually attended the route alignment options Open House in Chilliwack.⁴¹²

300. Further, BCTC and BC Hydro did not limit consultation on the preferred route alignment to the Open Houses. Following the Open Houses, BCTC and BC Hydro held meetings with several First Nations, including arranging a meeting with SHAC on April 23 (although that meeting ended up primarily discussing other topics). BCTC made clear in the June 6 letter that "this route alignment can be modified should new information emerge during the review of the EAC Application, prior to final detailed design and if necessary modifications to the alignment can be made during the construction phase".⁴¹³ On July 3, 2008, BC Hydro, BCTC and Golder met with SHAC and their consultant, Westland Resources, to discuss the alignment options for the ILM Project.⁴¹⁴

301. On June 19, 2008, SHAC was sent hard copies of the drafts of 17 of 18 discipline-specific technical reports that were prepared for the EAC Application. BCTC requested any preliminary comments on the draft discipline-specific technical reports by July 31, 2008, so that comments could be incorporated into the final version of the EAC Application.⁴¹⁵

302. On July 9, 2008, Chief Hall wrote to the BCEAO (copying BCTC and BC Hydro) on behalf of SHAC to advise that SHAC would not be able to meet the deadline to respond to the draft discipline-specific technical reports.⁴¹⁶

303. On July 24, 2008, the BCEAO responded to SHAC's July 9 letter. The BCEAO acknowledged that comments from SHAC would not be submitted until late August 2008 and requested that any initial comments be submitted prior to September 2008. The BCEAO

⁴¹¹ Exhibit C9-4, SHAC Evidence, pp. 12-13.

⁴¹² Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 270.

⁴¹³ Exhibit B-3-1, Supplemental Evidence, s. 2.22, p. 65, l. 16 – p. 66, l. 6 and App. HH.

⁴¹⁴ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 274.

⁴¹⁵ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 274.

⁴¹⁶ Exhibit C9-4, SHAC Evidence, p. 13

confirmed that there would be further opportunity to submit comments during the review and comment period which would occur once the EAC Application had been accepted for review.⁴¹⁷

304. No further meetings took place prior to August 5, 2008. BCTC notes that, as set out in SHAC's evidence, a number of letters were sent by SHAC commenting on the BCEAO process over this period of time.⁴¹⁸ BCTC has responded above where it appears that these expressed general concerns about BCTC and BC Hydro's consultation process. There is no evidence that any concerns were expressed about the CPCN process during this period of time (or previously).

6.4.6. Conclusion on Reasonableness of Consultation

305. As stated above, SHAC's overall complaint is effectively that consultation never occurred prior to August 5, 2008. It particularizes this complaint by saying that:

- (a) The activities that did occur prior to August 5, 2008, with SHAC were "pre-consultation" activities; and
- (b) A number of activities were ongoing when the August 5, 2008 decision was made.

306. There is no law that parties to consultation can unilaterally determine when consultation does, and does not occur, simply by virtue of saying so, nor is there a concept at law known as "pre-consultation". BCTC submits that, based on the above and BCTC's response to BCUC 1.1.1, it is clear that it and BC Hydro were engaged in a consultation process on the ILM Project with the members of SHAC up to and including August 5, 2008.

307. With respect to its second comment, SHAC identifies a number of activities that it was engaged in as of August 5, 2008:

- (a) SHAC states that it was preparing an AIUS which was intended to provide information on the strength of claim of the SHAC members over the areas affected by the Project, and on the impacts of the Project on SHAC's members' rights;⁴¹⁹

⁴¹⁷ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, p. 275.

⁴¹⁸ Exhibit C9-4, SHAC Evidence, pp. 4 – 6, 10 -12.

⁴¹⁹ Exhibit C9-4, SHAC Evidence, p. 14.

- (b) SHAC was reviewing the draft technical reports that it had been sent for the EAC process;⁴²⁰
- (c) SHAC was reviewing BC Hydro's summary of consultations with First Nations (Section 2.3 of the EAC Application);⁴²¹ and
- (d) Finally, SHAC says that when the CPCN was issued there had been no discussions about how impacts of the ILM Project on the rights and title of the SHAC First Nations might be accommodated.⁴²²

308. BCTC disagrees that there had been no discussions with the members of SHAC about how SHAC's asserted rights and title might be accommodated. BCTC and BC Hydro were engaged in discussions with the members of SHAC from August 2006 onwards regarding ways that their asserted rights might be accommodated, if necessary. Various decisions were made over this time to accommodate First Nations interests.⁴²³ However, BCTC agrees that there was ongoing discussions and work with the members of SHAC as of August 5, 2008. This work was not necessary for the purposes of the Commission's CPCN decision. Finally, as explained by Mr. Anderson and Ms. Holland, BCTC and BC Hydro's general approach to accommodation discussions was that these would take place (if appropriate) after detailed studies had been undertaken and steps taken, if necessary, to avoid or mitigate these potential effects.⁴²⁴ While BCTC and BC Hydro were prepared to engage in these discussions earlier if requested, there was no request from the members of SHAC for these discussions to take place prior to August 5, 2008.⁴²⁵

309. In summary, BCTC submits that there is no serious challenge by the SHAC to BCTC's determination of the scope and content of the duty to consult on the *Haida* scale. In light of the fact that the duty ranges between the low and middle levels of the *Haida* spectrum, BCTC submits the consultation efforts of BCTC were more than reasonable in relation to the SHAC and its members. This duty was met by the following:

⁴²⁰ Exhibit C9-4, SHAC Evidence, p. 14.

⁴²¹ Exhibit C9-4, SHAC Evidence, p. 14.

⁴²² Exhibit C9-4, SHAC Evidence, pp. 2-3.

⁴²³ Exhibit B-11, BCTC Response to Coldwater IR 1.8.

⁴²⁴ Cross-examination of Ms. Holland, January 12, 2010, Vol. 5, p. 457, l. 11 – p. 458, l. 4 and p. 460, l. 3 – p. 461, l. 7.

⁴²⁵ Exhibit B-13, BCTC Response to BCUC IR 1.1.1, pp. 251 – 276.

- (a) BCTC sought to gather information from the SHAC and its members to test the different alternatives to reinforce the grid;
- (b) BCTC put forward proposals for:
 - (i) the different alternatives; and
 - (ii) route alignment;that were not yet finalized;
- (c) BCTC sought SHAC and its members' opinions on those proposals;
- (d) BCTC and BC Hydro reasonably informed the SHAC and its members of all relevant information upon which the proposals were based;
- (e) BCTC did not promote one alternative and one route alignment but instead listened with an open mind to what the SHAC and its members had to say;
- (f) BCTC was prepared to alter its proposals; and
- (g) BCTC provided feedback to the SHAC and its members to and including the date of the CPCN decision.

310. The 5L83 Alternative will require very little additional right of way within S'olh Temexw. S'olh Temexw is a vast area and the SHAC did not identify any site specific concerns, other than operational concerns, which were addressed. As set out in the previous paragraph, the steps that BCTC took to determine the concerns of the SHAC were reasonable. Consultation with respect to the ILM Project is a staged process as acknowledged by the Supreme Court of Canada and the BC Court of Appeal and therefore, up to August 5, 2008, BCTC submits that it had discharged whatever consultation obligations it had to the SHAC. The SHAC complaint that BCTC had "not yet engaged in direct consultation to discuss the rights of the SHAC First Nation and the impacts on those rights associated with the ILM Project" prior to August 5, 2008 is devoid of merit.⁴²⁶

⁴²⁶ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, p. 56.

6.5. Coldwater, Cook's Ferry, Siska and Ashcroft

6.5.1. Scope and Content

311. The Coldwater, Cook's Ferry, Siska and Ashcroft bands are four of the fifteen members of the Nlaka'pamux Nation.⁴²⁷ The NNTC Intervenors are a further six members of the Nlaka'pamux Nation. The other five members of the Nlaka'pamux Nation, none of whom have filed evidence in this proceeding, are Boston Bar, Lower Nicola, Nicomen, Nooaitch and Shackan. The Nlaka'pamux assert that they hold aboriginal title to an area that includes the Lower Thompson River area, the Fraser Canyon, the Nicola Valley, the Coldwater River Valley and the Coquihalla area.⁴²⁸ Nlaka'pamux claimed territory includes the 5L83 Alternative preferred alignment between Nodes A and O1. This area overlaps with S'olh Temexw which includes Nodes G1 to V and with ONA claimed territory which includes Nodes A to C.⁴²⁹

312. In recognition that consultation is an iterative process, BC Hydro assessed the scope and content of the duty to Coldwater et al in writing twice:

(a) In April, 2007, in relation to the UEC and New Transmission Line Alternatives (which included HVDC at the time) for Siska and, in relation to the New Line Alternative, for Coldwater and Cook's Ferry:⁴³⁰

- (i) Coldwater's strength of claim was assessed as high and the preliminary assessment of the level of consultation required was medium;
- (ii) For Cook's Ferry, the preliminary assessment of the level of consultation required was de minimus (very low); and
- (iii) Siska's strength of claim was assessed as medium and the preliminary assessment of level of consultation required was also de minimus.

There was no preliminary assessment of the strength of claim for Ashcroft.

⁴²⁷ Exhibit C6-5, Coldwater et al Evidence, p. 1 - 2; Cross-examination of Chief Walkem, January 26, 2010. Vol. 14, p. 2160 l. 19 – p. 2161, l. 4; Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 14 – 16.

⁴²⁸ Exhibit C6-6, Coldwater Response to BCTC IR 8.1.

⁴²⁹ Exhibit B-20, Rebuttal Evidence, Att. B-12, C-9; Exhibit C5-8-1, UNIB and ONA Evidence, App. C, p. 240, Exhibit B-17, App. 1, p. 191, App. III, p. 166; Exhibit C8-11, STC Response to BCUC IRs, App. A.

⁴³⁰ Exhibit B-10-4, Interior to Lower Mainland Project First Nation Consultation Summary Report, May 2006 to April 2007, App. 3, Att. 4 to Coldwater IR 1.2.

- (b) After the 5L83 Alternative was chosen as the preferred alternative:⁴³¹
- (i) Coldwater's strength of claim was assessed as strong for aboriginal rights and title and the preliminary assessment of level of consultation required was the middle of the *Haida* spectrum; and
 - (ii) Cook's Ferry, Siska and Ashcroft were assessed at the low level of consultation on the *Haida* spectrum because of their remote location relative to the proposed line.

313. This assessment included consideration of the fact that the area between Nodes A to C is subject to an overlapping claim by ONA, and the area between Nodes H to P is subject to overlapping claims of S'olh Temexw.⁴³²

314. Coldwater et al does not provide further evidence about the strength of their claim in their evidence and declined to provide evidence in response to the Commission's Information Request on this issue.⁴³³ Coldwater et al does not challenge BC Hydro and BCTC's assessment of the strength of their claims to aboriginal rights or title in its evidence.⁴³⁴

6.5.2. Coldwater et al Complaints

315. Coldwater et al's general complaint about the ILM consultation process is summarized in their evidence as follows:⁴³⁵

Neither the Coldwater, Cook's Ferry, Siska nor the Ashcroft were consulted about the ILM Project up to the time of the B.C. Utilities Commission's decision in August 2008 to grant the CPCN.

316. Coldwater also identifies other more specific complaints:

- (a) BC Hydro's offers of capacity funding were insufficient,⁴³⁶
- (b) No economic accommodation was offered to Coldwater et al,⁴³⁷

⁴³¹ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, p. 24.

⁴³² Exhibit B-13, BCTC Response to BCUC IR 1.3.1, p. 19-20.

⁴³³ Exhibit C6-6, Coldwater et al Response to BCUC IR 1.1.1, 1.1.2, p. 1-2.

⁴³⁴ Exhibit C6-5, Coldwater et al Evidence, p. 12.

⁴³⁵ Exhibit C6-5, Coldwater et al Evidence, p. 6.

⁴³⁶ Exhibit C6-5, Coldwater et al Evidence, p. 7.

⁴³⁷ Exhibit C6-5, Coldwater et al Evidence, p. 8.

- (c) BC Hydro said that it had no mandate to discuss the issue of accommodation for existing infringements;⁴³⁸
- (d) That they were not consulted regarding the alternatives other than 5L83;⁴³⁹ and
- (e) That they were not provided with various documents relied on for the May 2007 decision.⁴⁴⁰

317. BCTC will address each of these complaints below except Coldwater's et al's complaint that BC Hydro did not have a mandate to discuss accommodation for existing infringements. BCTC will address this issue in the section on Consultation on Impacts of Existing Assets.

6.5.3. Capacity Funding

318. BCTC submits that the following evidence is relevant to Coldwater et al's complaint that the offers of capacity made before August 5, 2008 were insufficient:

- (a) On November 27, 2006, BC Hydro sent letters to Coldwater, Cook's Ferry, and Siska offering \$10,000 in initial capacity funding. BC Hydro noted that, while it was committed to this initial capacity funding, it believed that there was value in entering into a more formal consultation and CFA and attached a draft Options Definition Phase-Capacity Funding Agreement for consideration and further discussion;⁴⁴¹
- (b) BC Hydro followed up its earlier offer of capacity funding and in late January and early February, 2007 sent Coldwater, Cook's Ferry and Siska a further copy of the November 27 \$10,000 initial capacity funding offer and the attached draft Options Definition Phase-Capacity Funding Agreement;⁴⁴²
- (c) Between February 7 and 12, 2007, BC Hydro sent letters offering capacity funding for Coldwater et al to attend the February 21 Working Group meeting. BC Hydro

⁴³⁸ Exhibit C6-5, Coldwater et al Evidence, p. 8 – 9.

⁴³⁹ Exhibit C6-5, Coldwater et al Evidence, p. 10.

⁴⁴⁰ Exhibit C6-5, Coldwater et al Evidence, p. 10-12.

⁴⁴¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 27, 50, 70.

⁴⁴² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 28, 51, 71.

followed-up with an email enclosing a copy of the meeting Agenda and again offering capacity funding;⁴⁴³

(d) On February 22, 2007, Ashcroft sent BC Hydro an invoice for \$10,500 for Phase 1 Participation Funding.⁴⁴⁴

(e) On March 5, 2007, BC Hydro sent a letter to Cook's Ferry advising that, since Cook's Ferry had been unable to attend the February Working Group meeting, BC Hydro was enclosing the materials that were provided at the meeting and indicated that BC Hydro was willing to provide capacity funding for Cook's Ferry to review the Working Group materials. BC Hydro also indicated that it was prepared to provide capacity funding to participate in the BCEAO process.⁴⁴⁵

(f) On March 6, 2007, Cornerstone sent a letter to Cook's Ferry confirming an upcoming meeting on March 19, 2007 and the \$10,000 in initial capacity funding.⁴⁴⁶

(g) On or about March 7, 2007, BC Hydro sent Siska, Coldwater and Cook's Ferry a further offer of initial capacity funding. The letter also indicated that BCTC was in the process of determining whether to pursue the New Line Alternative or the UEC Alternative and that, if the New Line Alternative was chosen as the preferred alternative, BCTC would be proceeding through the BCEAO process.⁴⁴⁷

(h) On March 13, 2007, BC Hydro sent an email to Mr. Phillips asking if he and Coldwater Chief and Council could meet regarding the project. In his response, Mr. Phillips asked which Nlaka'pamux Bands had requested the \$10,000 in initial capacity funding. BC Hydro responded and asked whether the initial capacity funding letter could be signed off by Coldwater so that funding could be sent;⁴⁴⁸

(i) On March 14, 2007, BC Hydro sent Ashcroft a \$10,000 cheque.⁴⁴⁹

⁴⁴³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 29, 52, 71, 87.

⁴⁴⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 87.

⁴⁴⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 53.

⁴⁴⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1., p. 54.

⁴⁴⁷ Exhibit B-11, Commission IR 1.1.1., p. 73; Exhibit B-3-1, Supplemental Evidence, p. 31, l. 16 to p. 32, l. 10.

⁴⁴⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 30.

⁴⁴⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 88.

(j) On March 16, 2007, BC Hydro met with Mr. Phillips to discuss the initial capacity funding letter. Mr. Phillips indicated that it raised certain legal issues that should be discussed before signing the letter. He indicated that the meeting that the First Nations were organizing would seek to address the specific scope and objective of capacity funding,⁴⁵⁰

(k) On March 19, 2007, BC Hydro and BCTC met with Cook's Ferry. During the meeting, BC Hydro explained the purpose of the initial capacity funding of \$10,000;⁴⁵¹

(l) On March 21, 2007, BC Hydro emailed Coldwater and Mr. Phillips and asked if the cheque for initial capacity funding could be dropped off on a without prejudice basis. Mr. Phillips indicated that providing the cheque on a without prejudice basis was acceptable. The cheque for \$10,000 was delivered to Coldwater and was cashed on March 21, 2007;⁴⁵²

(m) On April 4, 2007, BC Hydro and BCTC met again with Siska. During the meeting, BC Hydro discussed the consultation process and also explained the purpose of the initial capacity funding. BC Hydro also indicated that a more comprehensive capacity funding offer was expected to come later. Siska indicated that it would not accept the initial capacity funding offer given that it was already well-informed about the Project;⁴⁵³

(n) On April 12, 2007, BC Hydro again emailed Mr. Phillips asking if there were any updates and if there were any suggested changes to the capacity funding letter which had been provided. Mr. Phillips did not respond;⁴⁵⁴

(o) On April 13, 2007, in response to a request from Siska, BC Hydro sent a letter to Siska clarifying and providing more information about the deliverables for the initial capacity funding;⁴⁵⁵

⁴⁵⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 74.

⁴⁵¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 55.

⁴⁵² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 31.

⁴⁵³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 74.

⁴⁵⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 56.

⁴⁵⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 75.

(p) On July 23, 2007, Esh-kn-am sent BC Hydro a proposed budget for the completion of the AOA/HOA and the wildlife and plant fieldwork for Coldwater and Cook's Ferry;⁴⁵⁶

(q) On July 25/26 2007, BC Hydro attempted to reopen the issue of capacity funding and wrote to Coldwater and Cook's Ferry about capacity funding for the ILM Project. Attached to the letter was a copy of a draft CCFA. BC Hydro's letter indicated that the CCFA was without prejudice to aboriginal title or rights and that, if Cook's Ferry was in agreement with the CCFA, to sign both copies and return one copy to BC Hydro;⁴⁵⁷

(r) On August 9, 2007, Ashcroft told BC Hydro that, due to other priorities, it would be unable to deliver whatever may be required by accepting capacity funding;⁴⁵⁸

(s) On August 14, 2007, BC Hydro emailed Coldwater and informed it that the proposed budget for the completion of the AOA for Coldwater and Cook's Ferry had been approved and that a cheque would be mailed out the following week;⁴⁵⁹

(t) On August 15, 2007, BC Hydro emailed Coldwater asking it to sign initial Capacity Funding Letter. On August 16, 2007, Coldwater responded that the construction of a new high voltage transmission line was a complicated issue and requested advance funding of \$10,000 which it would use to help alleviate initial administrative and travel costs for Chief and Council while attending meetings with BC Hydro and BCTC;⁴⁶⁰

(u) On September 21, 2007, BC Hydro emailed Coldwater requesting that it put together paperwork to support the \$10,000 in capacity funding that had been provided in the Spring. BC Hydro asked if the full \$10,000 had not been spent, whether some of it could it be used to cover some of the funding for the HOA Report that Golder was still waiting for. If the \$10,000 had been spent, then BC Hydro could provide the further funds for the HOA work once the paperwork was received;⁴⁶¹

⁴⁵⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 35.

⁴⁵⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 35, 59.

⁴⁵⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 90.

⁴⁵⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 36.

⁴⁶⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 37.

⁴⁶¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 38.

(v) On September 26, 2007, Esh-kn-am telephoned BC Hydro apologizing for not having provided their input to Golder for the HOA Report. Esh-kn-am inquired as to when Coldwater would receive the reimbursement for the Report. BC Hydro responded that the \$5,000 would be released once the Report was received by Golder,⁴⁶²

(w) On October 24, 2007, Siska sent a letter to BC Hydro indicating that Siska estimated a minimum of \$5,000 for it to fully engage in discussions, activities, and the ILM EAC process. On November 2, BC Hydro responded that it would be pleased to provide Siska with a CFA to allow Siska to participate and make comments on the ILM Project. BC Hydro also indicated that it would release \$5,000 in funding upon the receipt of a signed CFA,⁴⁶³

(x) On November 7, 2007, BC Hydro sent a letter to Siska attaching a draft CCFA,⁴⁶⁴

(y) On November 8, 2007, Esh-kn-am sent a proposal and budget for the TUS/Traditional Knowledge study for the ILM Project to BC Hydro on behalf of Coldwater, Cook's Ferry and Siska. On November 16, 2007, BC Hydro requested Band Council Resolutions from Coldwater, Cook's Ferry, and Siska to confirm that Esh-kn-am was representing them for the purposes of the TUS. These were provided on November 26,⁴⁶⁵

(z) On January 22, 2008, BC Hydro emailed Mr. Phillips indicating that it would like to continue working to develop the terms of the CFA and budget, and asked whether they could meet later in the week. BC Hydro also set out the recent discussions with Esh-kn-am concerning the TUS for Coldwater, Cook's Ferry and Siska and asked about developing terms of reference for the TUS and whether the funds for the TUS could be included in the CFA,⁴⁶⁶

(aa) On January 23, 2008, in response to a further email from Esh-kn-am, BC Hydro called Esh-kn-am to discuss the TUS. BC Hydro indicated that it had been meeting with Mr. Phillips who was representing a number of Nlaka'pamux First Nations, and BC

⁴⁶² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 38.

⁴⁶³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 79 – 80.

⁴⁶⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 80.

⁴⁶⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 80.

⁴⁶⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 40.

Hydro was attempting to get a broader CFA in place prior to proceeding with the TUS. BC Hydro indicated that it would continue to communicate with Mr. Phillips to have this addressed;⁴⁶⁷

(bb) On January 29, 2008, after further discussion of the TUS and capacity funding with Mr. Phillips, BC Hydro emailed Cook's Ferry with sample terms of reference for the TUS and a powerpoint presentation on TUS for Cook's Ferry's review. The email also indicated that BC Hydro understood that Coldwater, Cook's Ferry and Siska were agreeable to starting the TUS as a parallel process to completing the CFA that was being developed with Mr. Phillips. BC Hydro asked Cook's Ferry to provide terms of reference for the TUS, as well as a revised time estimate to complete and provide both a draft and final report. BC Hydro indicated that, once it received this information, it could quickly provide a letter of agreement;⁴⁶⁸

(cc) During an April 28, 2008 meeting between BC Hydro, BCTC and Coldwater, Coldwater indicated that it did not have the capacity to review the upcoming discipline-specific reports. BCTC inquired whether Coldwater had a CFA and it was indicated that this was still with Mr. Phillips.⁴⁶⁹ BCTC also subsequently provided summaries of the reports;⁴⁷⁰

(dd) On May 26, 2008, BC Hydro sent Coldwater, Cook's Ferry and Siska a letter indicating that BC Hydro had approved their proposal for work on the AIA for the Project and attached a Letter Agreement for their consideration. The AIA agreement was signed by Coldwater, Cook's Ferry and Siska on June 6, 2008. The Letter Agreement stated that, in response to concerns expressed regarding the potential conflicts between ILM Project impacts and heritage sites, BC Hydro was providing funding to support Coldwater, Cooks Ferry and Siska input into the AIA being prepared for the ILM Project;⁴⁷¹

⁴⁶⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 41.

⁴⁶⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 64.

⁴⁶⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 44.

⁴⁷⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 49.

⁴⁷¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 67.

(ee) Throughout June 2008, Coldwater and BC Hydro continued to negotiate the terms and deliverables for a collective TUS agreement between BC Hydro, Coldwater, Cook's Ferry, Siska and Boston Bar;⁴⁷² and

(ff) On July 15, 2008, BC Hydro provided Esh-kn-am with the final terms of reference for the TUS.⁴⁷³

319. Based on the above, BCTC submits that Coldwater et al's complaints about the capacity funding offers being insufficient is not supported by the evidence. Coldwater et al received capacity funding and had ample opportunity to receive further capacity funding to participate in consultation with BCTC. Any delays in receiving capacity funding was not due to any fault or lack of diligence on the part of BCTC and BC Hydro.

6.5.4. Consultation Prior to November 2007⁴⁷⁴

320. On August 31, 2006, BC Hydro met with Coldwater, Cook's Ferry, Siska and the NTA at the Coldwater Community Hall. During the meeting, BC Hydro responded to a wide-range of questions about the ILM Project and whether capacity funding was available.⁴⁷⁵

321. On September 7, 2006, BC Hydro met again with Coldwater. During this meeting, Coldwater identified the ILM Project as one of many competing priorities.⁴⁷⁶

322. As discussed above, on November 27, 2006, BC Hydro sent letters to Coldwater, Cook's Ferry, and Siska offering initial capacity funding. BC Hydro also attached a draft "Options Definition Phase-Capacity Funding Agreement" for consideration and further discussion.⁴⁷⁷

323. On November 27, 2006, BC Hydro and BCTC hosted a dinner for Coldwater in order to meet with Band members and provide a presentation on the ILM Project. During the meeting, Coldwater members asked BC Hydro and BCTC numerous questions about the

⁴⁷² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 48.

⁴⁷³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 48.

⁴⁷⁴ This review is not intended to be comprehensive but to focus on certain facts relevant to Coldwater et al's complaints. Additional reference should be made to Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 26 – 95; Exhibit B-20, Rebuttal Evidence, D.

⁴⁷⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 26, 50, 70.

⁴⁷⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 26.

⁴⁷⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 27, 50, 70.

Project. At the close of the meeting, Coldwater indicated that its members would like to have another meeting with the full Band and leaders at the same time.⁴⁷⁸

324. On January 10, 2007, BC Hydro, BCTC and Golder met with the NTA and T'mixw Research. The purpose of the meeting was to provide an overview of the ILM Project and to discuss the AOA and T'mixw's involvement with the AOA. At the conclusion of the meeting, Golder and T'mixw agreed to work out the archaeology information needs together.⁴⁷⁹ At the time, Coldwater, Cook's Ferry and Siska were each member of T'mixw.⁴⁸⁰

325. On January 11, 2007, Mr. Phillips contacted BC Hydro and indicated that he had been retained by Coldwater to assist them with their negotiations on the ILM Project. Mr. Phillips indicated that he was not able to attend the meeting that had been set for January 26 but that he would be providing a letter to BC Hydro once he had further instructions.⁴⁸¹

326. As again indicated above, in late January and early February, 2007 BC Hydro sent Coldwater, Cook's Ferry and Siska a further copy of the November initial capacity funding offer and the attached draft Options Definition Phase-Capacity Funding Agreement.⁴⁸²

327. On February 7, 2007, BC Hydro met with Siska to review the draft Project Description, discuss capacity funding arrangements, and review the environmental and regulatory processes if the New Line Alternative were chosen as the preferred alternative.⁴⁸³ At the meeting, BC Hydro presented the Interior to Lower Mainland Transmission Reinforcement Project November 2006 which, in part, reviewed the reinforcement options and indicated that a decision on BCTC's preferred alternative would be made around May 2007.⁴⁸⁴

328. On February 15, 2007, BC Hydro and BCTC met with a number of First Nations, including Ashcroft, to discuss, among other things, developing a consultation protocol.⁴⁸⁵

⁴⁷⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 26-27.

⁴⁷⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 27 – 28.

⁴⁸⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 27, 50, and 70.

⁴⁸¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 28.

⁴⁸² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 28, 51, 71.

⁴⁸³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 71.

⁴⁸⁴ Exhibit B-3-1, Supplemental Evidence, Appendix M, p. 16.

⁴⁸⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 87.

329. On February 21, 2007, Coldwater and Ashcroft attended the BCEAO Working Group meeting. As described above, during the Working Group meeting, BCTC gave a presentation on project alternatives. BCTC described the New Line and UEC alternatives and fielded questions from First Nations regarding each.⁴⁸⁶

330. On March 5, 2007, BC Hydro sent Cook's Ferry a copy of the materials from the February Working Group meeting and offered capacity funding to review the materials.⁴⁸⁷

331. On March 13, 2007, Mr. Phillips advised BC Hydro that the Nlaka'pamux leadership he had spoken to was concerned with both the New Line and UEC Alternative because neither issue dealt with past impacts.⁴⁸⁸

332. On March 16, 2007, BC Hydro met with Mr. Phillips to discuss the initial capacity funding letter. Mr. Phillips indicated that it raised certain legal issues that should be discussed before signing the letter. He went on to indicate that the meeting that the First Nations were organizing would seek to address the specific scope and objective of capacity funding.⁴⁸⁹

333. On March 19, 2007, BC Hydro and BCTC met with Cook's Ferry in Spence's Bridge. Among other things, BC Hydro and BCTC made a presentation on the two reinforcement alternatives, the regulatory process and the schedule for the proposed project. BC Hydro then explained the purpose of the initial capacity funding, including providing feedback on the UEC and 5L83 Alternatives.⁴⁹⁰

334. BC Hydro also met with Siska on March 19. Siska advised that it was assessing a "tribal approach" through NTA because of the potential impacts on the whole Nlaka'pamux territory.⁴⁹¹

335. As indicated above, on March 21, 2007, BC Hydro delivered a capacity funding letter to Coldwater. This letter indicated, among other things, that BC Hydro was seeking input on the choice of the preferred alternative for the ILM Project.⁴⁹²

⁴⁸⁶ Exhibit B-3-1, Supplemental Evidence, App. U, p. 6.

⁴⁸⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 53 – 54.

⁴⁸⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 30 – 31.

⁴⁸⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 31.

⁴⁹⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 55.

⁴⁹¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 74.

⁴⁹² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 31.

336. On March 29, 2007, Golder met with T'mixw to discuss the GIS database of archaeological and traditional use sites and archaeological predictive modelling.⁴⁹³

337. On April 4, 2007, BC Hydro and BCTC met again with Siska. Siska indicated that all the information on the Project was received and that it was well-informed. As indicated, at this point Siska indicated that it would not accept the capacity funding offer of \$10,000.⁴⁹⁴

338. During the week of April 9, 2007, Project Update No. 1 was sent to each of the members of Coldwater et al. Project Update No. 1 indicated that BCTC was studying alternatives to reinforce the capacity of the transmission system between the Interior and the Lower Mainland and that this reinforcement was necessary in order to meet growing electricity needs. The Project Update also provided a brief description of the alternatives and when the choice of the preferred alternative would be made.⁴⁹⁵

339. On June 6, 2007, BCTC informed each of the members of Coldwater et al that the 5L83 Alternative had been chosen as the preferred alternative for the ILM Project and that BCTC would be proceeding to seek the necessary approvals.⁴⁹⁶

340. During the week of June 4, 2007, Project Update No. 2 was sent to each of the members of Coldwater et al. Project Update No. 2 highlighted BCTC's choice of the preferred alternative, the public comment period for the BCEAO draft TOR, and further Open Houses scheduled for June 2007.⁴⁹⁷

341. On June 20, 2007, Cornerstone, on behalf of BC Hydro, met with Ashcroft. Ashcroft advised that Chief and Council should be directly involved, but with a different approach since the impacts of the ILM Project affected Ashcroft's affiliated bands more than Ashcroft itself. Ashcroft indicated that being informed may be adequate and, if Chief and Council agreed to this, then Ashcroft would send a letter defining what they believed "being informed" meant.⁴⁹⁸

⁴⁹³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 31 – 32.

⁴⁹⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 74.

⁴⁹⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.11, p. 52, l. 20 - p. 53, l. 11, App. V.

⁴⁹⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 34, 57, 77, 89; Exhibit B-3-1, App. W.

⁴⁹⁷ Exhibit B-3-1, Supplemental Evidence, s. 2.14, p. 55, ll. 20 - 26.

⁴⁹⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 89; see also B-20, Rebuttal Evidence, pp. 2-3.

342. On July 20, 2007, BC Hydro and Golder met with Esh-kn-am, Coldwater, Cook's Ferry, and Siska's research company, about the ILM environmental field studies.⁴⁹⁹

343. On August 1, 2007, Golder contacted Esh-kn-am to discuss the schedule for the wildlife and plant study fieldwork.⁵⁰⁰

344. On August 9, 2007, Ashcroft advised BC Hydro that it would only stay updated on the ILM Project. As indicated above, Ashcroft advised BC Hydro that, due to other matters, Ashcroft would be unable to deliver whatever may be required to accept capacity funding. Ashcroft indicated that it was happy to have provided feedback on the BCEAO draft TOR and Section 11 Order. Ashcroft indicated that BC Hydro should keep sending letters to Chief Blain, copying the Ashcroft Band Manager and, if there was no response, BC Hydro should assume no participation on the part of Ashcroft.⁵⁰¹ BC Hydro did so.⁵⁰²

345. Project Update No. 3 was sent to each of the members of Coldwater et al during the week of August 20, 2007. Among other things, Project Update No. 3 indicated that BCTC would be filing a CPCN Application with the Commission for the 5L83 Alternative and provided a link to the Commission's website for information on how to participate in the CPCN process.⁵⁰³

346. On September 13, 2007, BC Hydro met with Siska, Cook's Ferry, and a number of other Nlaka'pamux bands. Various issues and concerns were discussed, including the project alternatives, the CPCN process, and the need for the ILM Project. Mr. Anderson from BC Hydro also indicated that BC Hydro wanted to work with a process to address accommodation where needed.⁵⁰⁴

347. On September 20, 2007, the second BCEAO Working Group meeting took place. Coldwater and Siska attended this meeting.⁵⁰⁵

⁴⁹⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 35.

⁵⁰⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 36.

⁵⁰¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 90.

⁵⁰² Exhibit B-20, Rebuttal Evidence, Tab D, pp. 2-4.

⁵⁰³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 37, 61, 78, and 90.

⁵⁰⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 37; Exhibit B-20, Att. B-4.

⁵⁰⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 38, 61 - 62, 79, 91.

348. On October 5, 2007, BC Hydro and BCTC attended the NTA Annual General Meeting. BC Hydro had a booth displaying the ILM Project mapping and Project Updates, the BC Energy Plan and BC Hydro's scholarship and work opportunities.⁵⁰⁶

349. On November 2, 2007, Mr. Phillips provided comments to the BCEAO on the draft TOR.⁵⁰⁷

350. Coldwater et al did not raise any concerns at any time prior to the filing of the ILM CPCN Application about BCTC's choice of the preferred alternative or suggest that BCTC should not file an CPCN Application for the 5L83 Alternative.

6.5.5. Consultation to August 5, 2008

351. On January 11, 2008, BC Hydro met with Coldwater, Cook's Ferry, Lytton and Mr. Phillips. During the meeting, Mr. Phillips indicated that BC Hydro had to settle historical grievances with regard to the existing high voltage line, and that there were heritage sites along the route for both lines. In addition, the bands were interested in having employment and contracting opportunities on the table and they felt that they needed to increase employment levels in the communities. BC Hydro stated that it had the mandate to negotiate in respect of consultation, capacity funding, and benefits, with the exception of revenue sharing. BC Hydro explained that BCTC does not have a mandate to negotiate revenue sharing, but that some First Nations would negotiate business deals into their impact and benefit agreements. The First Nations affirmed that they were open to discussing benefits with regard to impacts to their territory as a whole, not just with individual communities.⁵⁰⁸

352. On February 12, 2008, Golder sent copies of the HOA report to each of the members of Coldwater et al.⁵⁰⁹

353. On February 21, 2008, BC Hydro met with Esh-kn-am to provide a Project update and review the HOA, TUS and capacity funding.⁵¹⁰

⁵⁰⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 38 – 39.

⁵⁰⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 39.

⁵⁰⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 40.

⁵⁰⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 41, 64, 81, and 92.

⁵¹⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 42.

354. As indicated above, various other meetings and communications regarding capacity funding and the TUS study also took place over this period of time.

355. On March 4, 2008, BC Hydro sent a letter to each of the members of Coldwater et al indicating that BCTC would be focussing on determining a preferred route alignment for the ILM Project and sought their input.⁵¹¹

356. On April 10, 2008, BC Hydro met with Esh-kn-am to discuss the completion of the HOA report and Esh-kn-am's participation in the AIA.⁵¹²

357. On April 28, 2008, BC Hydro and BCTC met with Coldwater and Esh-kn-am to discuss and get Coldwater's input on the route alignment options.⁵¹³

358. On May 23, 2008 BC Hydro emailed Coldwater electronic files for the route alignment options and all of the transportation lines in the southern part of the province.⁵¹⁴

359. On June 6, 2008, BCTC wrote to each of the members of Coldwater et al advising them that it had selected the preferred route alignment (with the exception of the Cascade Creek area), along with summarizing the process that followed to determine the preferred alignment.⁵¹⁵

360. On June 19, 2008, each of the members of Coldwater et al were sent drafts of 17 of 18 discipline-specific technical reports that were prepared for the ILM EAC Application for review and comment.⁵¹⁶

361. On June 30, 2008, Golder met with Coldwater to discuss the socio-economic assessment for the ILM Project.⁵¹⁷

362. On July 4, 2008, a BC Hydro design engineer met with Coldwater on Coldwater Road under the existing transmission lines to discuss potential locations where transmission towers might be placed on either side of the Coldwater River.⁵¹⁸

⁵¹¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 42, 65, 82, and 92.

⁵¹² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 43.

⁵¹³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 44.

⁵¹⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 46.

⁵¹⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 46, 67, 84, and 93.

⁵¹⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 46 - 47, 68 - 69, 85 - 86, and 94.

⁵¹⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 47.

363. On July 9, 2008, BC Hydro and BCTC met with Coldwater to follow up on the July 4, 2008 site visit.⁵¹⁹

364. Ms. Holland described the route alignment discussions with Coldwater as follows:⁵²⁰

MS. HOLLAND: A: What Coldwater was interested in, very much so, and it did affect them, was the Coquihalla/Coldwater River crossing, and subsequently in July we have Chief Aljam and our overhead design engineers standing on the side of the highway with Mark Lapointe, our overhead design engineer, explaining to Chief Aljam where he can and can't go. And then we have a subsequent meeting in Chief Aljam's office to talk about that, and Chief Aljam's concerns are around snowdrift fencing, cattle, can -- if we do need to go on the side hill and take up additional right-of-way, can Chief Aljam have special seeding laid down that's more conductive -- better cattle feed. And those are the kinds of discussions we're having with him. He said, along the areas, there's old hunting cairns and that those would be discovered once the archaeological impact assessment for that area had been completed.

But Aljam, Chief Aljam, didn't have major concerns about us trying to squeeze it onto right-of way on unstable slopes versus going on to the new right-of-way on the side hill. And those were the discussions. But in terms of the big route option decision and the Anderson, Chief Aljam said "Go to Boston Bar." And we did talk to Boston Bar.

365. On July 17, 2008, BC Hydro sent each of the members of Coldwater et al a draft copy of the First Nation consultation section of the ILM EAC Application for review and comment.⁵²¹

366. On July 31, 2008, BCTC sent a summary of the discipline-specific technical reports to each of the members of Coldwater et al to assist in their review.⁵²²

367. No further meetings took place with Coldwater et al prior to August 5, 2008. At no time prior to this did Coldwater et al raise any concerns about BCTC's choice of the preferred alternative.

⁵¹⁸ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 48.

⁵¹⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 48.

⁵²⁰ Cross-examination of Ms. Holland, January 18, 2010, Vol. 9, p. 1231, l. 12 to p. 1232, l. 10.

⁵²¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 48, 69, 86, and 94.

⁵²² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 49, 69, 86, and 94.

6.5.6. Pre-Consultation and Accommodation

368. Coldwater et al say that none of the interaction set out above constituted consultation.⁵²³ Coldwater et al's definition of consultation is set out below.⁵²⁴

MR. CARPENTER: Q: So, I'm going to ask you some questions. I suspect I know what your answers to these are, but I feel like I should run through them. When B.C. Hydro gives you notice of a potential activity that might adversely affect your rights and title, you say that's not part of consultation. Correct?

CHIEF ALJAM: A: Correct. Giving you notice.

...

MR. CARPENTER: Q: When B.C. Hydro provides you with information about potential activities that might adversely affect your rights or title, you take the position that that's not part of consultation.

CHIEF WALKEM: A: It's -- I assume that's the first -- the preliminary stage of information sharing and not consultation.

MR. CARPENTER: Q: And I –

CHIEF WALKEM: A: So just informing me that there's going to be something I don't believe is consultation.

...

MR. CARPENTER: Q: When B.C. Hydro asks for your input on a potential activity that might adversely affect your rights or title your position is that's not consultation?

CHIEF WALKEM: A: If I have no capacity to provide that input, which is the case in this, that's what we were trying to do is get the capacity, that's not consultation.

MR. CARPENTER: Q: There's some input that you're capable of providing without capacity, correct?

CHIEF WALKEM: A: What do you mean?

MR. CARPENTER: Q: I mean that I can ask you certain questions about for instance where Nlaka'pamux traditional territory is. You're capable of answering that question without capacity funding, correct?

CHIEF WALKEM: A: Yes.

⁵²³ Exhibit C6-5, Coldwater et al Evidence, pp.1 and 6-7.

⁵²⁴ Cross-examination of Chief Aljam and Chief Sampson, January 26, 2010, Vol. 14, p. 2247, ll. 8 – 15, p. 2248, l. 20 – p. 2249, l. 4, p. 2250, ll. 8 – 23, p. 2251, l. 23 – p. 2252, l. 19, p. 2253, ll. 16 – 24.

...

MR. CARPENTER: Q: When B.C. Hydro is asked to make a presentation and answer questions at the community level itself, your position is that's not part of the consultation process?

CHIEF WALKEM: A: Correct.

MR. CARPENTER: Q: When B.C. Hydro agrees to partner with your research organization to provide input on archeological overview work and preliminary TUS work, that's not part of consultation?

CHIEF WALKEM: A: That's the pre-consultation aspect of getting the necessary information to inform the consultation itself.

MR. CARPENTER: Q: Go through my whole list -- I don't think -- but just hit on a couple of other ones. When B.C. Hydro asks you, "Do you wish to participate in various field studies, to assess the environmental and other effects of a potential activity that might adversely affect your rights and title?", do you take the position that's not consultation?

CHIEF WALKEM: A: Once again, if we do not have the capacity to be able to meaningfully participate, that's not consultation.

...

MR. CARPENTER: Q: Yes. Chief Aljam, this one's for you. When B.C. Hydro and BCTC meets with you on three separate occasions to discuss route alignment options near to your community, do you take the position that's not consultation?

CHIEF ALJAM: A: I would say that it's not consultation, but it's to give direction and when we can start discussing the impacts that these changes will cause.

369. Coldwater et al's complaints about capacity funding have been addressed above. With respect, BCTC submits that Coldwater et al's definition of what constitutes consultation does not accord with what is anticipated in *Haida*. As the evidence demonstrates, BCTC and BC Hydro provided ongoing information to Coldwater et al about the ILM Project, provided numerous opportunities for Coldwater et al to participate in the ILM decision-making process, and responded to concerns and input provided by Coldwater et al.

370. BCTC submits that it is clear that it and BC Hydro were engaged in a consultation process with Coldwater et al from August 2006 up to the date of the Commission's CPCN decision.

6.5.7. Economic Accommodation

371. In its evidence, Coldwater et al complain that they raised the issue of economic accommodation with BC Hydro and BCTC, but they were not provided with any such accommodation prior to the Commission's CPCN decision.⁵²⁵

372. Although *Haida* does not appear to contemplate economic accommodation, where accommodation is considered necessary, BCTC and BC Hydro were still prepared to engage in discussions regarding potential economic accommodation.⁵²⁶ During cross-examination, Chief Walkem admitted, notwithstanding Coldwater et al's complaint that no economic accommodation had been provided prior to August 5, 2008, that this was in line with Coldwater et al's expectations:⁵²⁷

MR. CARPENTER: Q: Thank you. Now, just before we move on to the question of what you call accommodation for existing infringements, your statement just above that heading, at p. 8 of the evidence. You see that sentence?

"However, no economic accommodation was offered or an agreement concluded prior to the CPCN decision."

That's your evidence."

CHIEF WALKEM: A: Yes.

MR. CARPENTER: Q: And I think that you say somewhere else -- I've got the reference to it later on in my notes, but maybe we're of the same mind on it. Effectively given the way that the discussions had unfolded with Coldwater, Cook's Ferry, Siska, nor was there expected to be a conclusion on economic accommodation at that time, as I think you say elsewhere in your evidence. You didn't expect those conversations to take place until after the TUS work was done, and after the other things that you felt needed to be completed before you were in a position to engage in those discussions took place. Correct?

CHIEF WALKEM: A: Yes, we have stated all along that we needed to be informed, to have meaningful consultation around these issues. And being informed was having that evidence, our traditional use study, as part of it. Evidence in front of us, in front of us all.

MR. CARPENTER: Q: And part of that was that as further information came onto the table there would be efforts to design the project in a way that attempted to minimize impacts on rights and then, at the end of the day, if you will, it was --

⁵²⁵ Exhibit C6-5, Coldwater et al Evidence, p. 8.

⁵²⁶ See description of the January 11, 2008, meeting above.

⁵²⁷ Cross-examination of Chief Walkem, January 26, 2010, Vol. 14, p. 2230, l. 16 to p. 2232, l. 4, p. 2242, ll. 8 to 21.

and what other issues are still on the table? And that's when we talk about those issues, correct?

CHIEF WALKEM: A: I believe that's correct. And in terms of -- we were attempting to work to gather the information to minimize the impact on our title and rights, and get to a point where we could be consulted on what's left, and what kind of impacts, benefit agreements, economic agreements that we could come to terms with.

...

CHIEF WALKEM: A: Well, although -- you know, Hydro said they were interested, they -- up until the time period that we're talking, they never did talk to Cook's Ferry about any economic benefits or anything else.

MR. CARPENTER: Q: And we've also already talked about the fact that those -- it was a common understanding, and I think you say that in your evidence, that those discussions would take place after the TUS work was completed, and there was all the information on the table, as I think you already indicated.

CHIEF WALKEM: A: That was our understanding of the process. I have no idea what Hydro's understanding was.

373. BCTC submits that, based on the evidence above, there is no justification for Coldwater et al's complaint that they had not received any form of economic accommodation prior to August 5, 2008. They did not expect to. BCTC and BC Hydro anticipated that they would be offering and looking to negotiate economic accommodation after August 2008, but first BC Hydro intended to attempt to avoid and mitigate any potential adverse effects as consultation progressed.⁵²⁸ BCTC notes that this does not mean that there was no accommodation which took place regarding the ILM Project prior to August 5, 2008.⁵²⁹

6.5.8. Failure to Consult on Project Alternatives

374. BCTC will not review the evidence above on consultation on alternatives in detail. BCTC submits that, based on this evidence, it is clear that BCTC consulted reasonably on Project Alternatives and Coldwater et al were given numerous opportunities to provide input into this choice.

375. As indicated, at no time did Coldwater et al complain about the choice of the 5L83 Alternative as the preferred alternative.

⁵²⁸ Cross-examination of Mr. Anderson, January 18, 2010, Vol. 9, p. 1246 ll. 21-26.

⁵²⁹ Exhibit B-11, BCTC Response to Coldwater IR 1.8.

6.5.9. Failure to Provide the Documents for the Choice of the Preferred Alternative

376. With respect to Coldwater et al's complaint that it was not provided with the First Nations Consultation Summary Report or the strength of claim analysis, Mr. Anderson explained in cross-examination that it is not BC Hydro's practice to share strength of claim analysis because BC Hydro believed that providing this information up front would be problematic.⁵³⁰

MR. ANDERSON: A: No, we did not -- and wasn't our practice, and we did not go and indicate to certain First Nations "We believe you have a high strength of claim," or "We believe you have a low strength of claim." We looked to undertake consultation with all the First Nations, and I think our experience would suggest that providing that information up front and prior to even making a decision on the options could be problematic in terms of allowing you to carry out further consultation.

...

I think it is problematic to go up to a First Nation and say, "We think you have a high strength of claim, or we think you necessarily are owed a medium or high or low level in terms of duty to consult", especially prior to making certain decisions along the way and carrying out further consultation, but it certainly would, in my mind, be an impediment to opening up fruitful conversations about the project.

377. This position applies equally with respect to the Consultation Summary Report, which included an analysis of the strength of claim for First Nations.

378. With respect to the draft HOA, while BCTC had intended to provide it to First Nations, it could not be provided because it was not completed, and BCTC and BC Hydro were still awaiting input from First Nations with respect to traditional use.

379. As indicated in BCTC's response to Commission Question 4(a), BCTC submits that there is no duty on the Crown to share its strength of claim and impact assessments with First Nations in all cases. Rather, BCTC submits that any obligation to do so is governed by the requirements in *Haida* to act reasonably and in good faith.

380. BCTC has indicated why the strength of claim, impact assessment and draft HOA were not provided. BCTC submits that these actions were justified. These documents were never requested by Coldwater et al at the time of the May decision and were produced

⁵³⁰ Cross-examination of Mr. Anderson, January 12, 2010, Vol. 5, p. 416, ll 8-17; Commission Counsel questions of Mr. Anderson, January 19, 2010, Vol. 10, p. 1483, l. 21 – p. 1484 l. 3.

when requested. Since being produced, Coldwater et al has not indicated any disagreement with the documents in question.

6.5.10. Conclusion

381. Cook's Ferry, Siska, and Ashcroft are all at the low end of the *Haida* spectrum, and, consequently, BCTC's and BC Hydro's duty to these First Nations was to "give notice, disclose information, and discuss any issues raised in response to the notice."⁵³¹ BCTC and BC Hydro's consultation efforts with Cook's Ferry, Siska, and Ashcroft far exceeded these requirements.

382. Coldwater was assessed at the middle of the *Haida* spectrum. BCTC submits that this duty was more than reasonably met by the following:

- (a) BCTC sought to gather information from Coldwater to test the different alternatives;
- (b) BCTC put forward proposals for:
 - (i) the different alternatives; and
 - (ii) route alignment;that were not yet finalized;
- (c) BCTC sought Coldwater's opinions on those proposals;
- (d) BCTC and BC Hydro reasonably informed Coldwater of all relevant information upon which the proposals were based;
- (e) BCTC did not promote one alternative and one route alignment but instead listened with an open mind to what Coldwater had to say;
- (f) BCTC was prepared to alter its proposals; and
- (g) BCTC provided feedback to Coldwater to and including the date of the CPCN decision.

⁵³¹ *Haida* at para. 43.

383. There is no serious challenge by Coldwater et al to BC Hydro's determination of the scope and content of the duty to consult on the *Haida* scale. In light of the fact that the duty ranges between the middle and lower end of the *Haida* spectrum, BCTC submits that the consultation efforts by BCTC and BC Hydro up to August 5, 2008, were more than reasonable. Consultation with respect to the ILM Project is a staged process as acknowledged by the Supreme Court of Canada and the BC Court of Appeal and therefore, up to August 5, 2008, BCTC submits that it had discharged whatever consultation obligations it had to Coldwater et al.

6.6. UNIB / ONA

6.6.1. Scope and Content

384. The ONA is a contemporary political organization made up of the Lower Similkameen, the Osoyoos Indian Band, the Penticton Indian Band, the Westbank First Nation, the Upper Similkameen Indian Band, the Okanagan Indian Band, and UNIB.⁵³² The claims of the ONA and UNIB overlap the claims of the Nlaka'pamux Nation and S'olh Temexw.⁵³³ ONA and UNIB claimed territory includes the 5L83 Alternative preferred alignment between Nodes A and C. Nlaka'pamux claimed territory includes the 5L83 Alternative preferred alignment between Nodes A and O1.

385. In recognition that consultation is an iterative process, the scope and content of the duty to UNIB and ONA was assessed in writing by BCTC twice.

386. In April 2007, BC Hydro made a preliminary assessment of the strength of claim and scope of consultation. They assessed UNIB with a high strength of claim and high scope of consultation. BC Hydro was unable to obtain sufficient information from the ONA to assess the strength of claim for the other ONA members at the time; however, they assessed Upper Similkameen and the Okanagan Indian Band as having a low scope of consultation because of the minimal impact of the ILM Project.⁵³⁴ There was no assessment made with respect to the strength of claim or scope of consultation for the Penticton, Westbank, or Lower Similkameen Indian Bands because it was assessed that the ILM Project had no potential to impact them. This was consistent with ONA's explanation at a meeting on September 1, 2006, that UNIB and

⁵³² Exhibit C5-8-1, ONA / UNIB Evidence, p. 2 at para. 2.

⁵³³ Exhibit B-20, Att. B-12, C-9; Exhibit C5-8-1, UNIB / ONA Evidence, App. C, p. 240, Exhibit B-17, App. 1, p. 191, App. III, p. 166; Exhibit C8-11, STC Response to BCUC IRs, App. A.

⁵³⁴ Exhibit B-10-4, Interior to Lower Mainland Project First Nation Consultation Summary Report, May 2006 to April 2007, App. 3, Att. 4 to Coldwater IR 1.2.

Okanagan Indian Bands were the only Okanagan Nations with the potential to be affected by the ILM Project.⁵³⁵

387. BC Hydro later undertook a more detailed assessment of the potential impacts and concluded that there would be a fairly minimal effect on both the ONA and UNIB between Nodes A and B because the majority of access would be by way of existing access and much of the new right of way would be over private lands.⁵³⁶

388. The potential impact between Nodes B and C was assessed as moderate with respect to UNIB because of the need to clear new right of way on Crown land in close proximity to UNIB communities and in areas where they assert aboriginal title and rights. Combined with UNIB's claim to aboriginal rights and title, BC Hydro assessed the scope of consultation at a medium to deep level.⁵³⁷

389. UNIB and ONA have not filed any evidence in this proceeding challenging the assessment of the strength of claim of UNIB and ONA or of the impacts of the ILM Project on their asserted claims. In fact, UNIB and ONA adopted BC Hydro's assessment, and declined to provide detailed evidence, apart from general statements in their direct evidence, that would support that assessment to the Commission.⁵³⁸

6.6.2. UNIB / ONA Complaint

390. UNIB and ONA's complaint about the ILM consultation process appears to be two-fold: there was no consultation on the alternatives to the ILM Project and the scope of consultation did not include consultation and accommodation on the Existing Assets. In their evidence, UNIB / ONA state as follows:⁵³⁹

For Upper Nicola and the ONA, the central issues regarding consultation on the proposed ILM Expansion Project includes [sic] the question of the consideration of alternatives to the ILM Expansion Project and the scope of consultation triggered by the ILM Expansion Project.

...

⁵³⁵ Exhibit C5-8-1, ONA / UNIB Evidence, p. 2 at para. 2.

⁵³⁶ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 7-11.

⁵³⁷ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 11-12.

⁵³⁸ Exhibit C5-12, p. 1-2, ONA / UNIB Response to BCUC IR 1.1; Exhibit C5-8-1, ONA / UNIB Evidence, paras. 1-9, Apps. A-E.

⁵³⁹ Exhibit C5-8-1, ONA / UNIB Evidence, p. 9 at paras. 25, p. 12-13 at para. 48.

From the beginning of their interaction with BCH regarding the proposed ILM Expansion Project, Upper Nicola and the ONA advised that consultation must include a consideration of the existing and ongoing adverse effects of the existing transmission lines (5L81 and 5L82), the existing right of way and the Nicola Substation (the “Existing ILM Project”) because the ILM Expansion Project relied on and benefited from the Existing ILM Project and there had been no consultation and accommodation regarding the Existing ILM Project.

391. In response to BCUC IR 1.1.1(b), UNIB / ONA also state:⁵⁴⁰

... as of August 5, 2008 the process of engagement between Upper Nicola and ONA, and BCTC/BC Hydro was at a pre-consultation stage. BCTC/BC Hydro had at all times advised that an assessment of impacts from the ILM Expansion Project would occur through the EA process, as would consultation concerning those impacts. Consequently, prior to August 5, 2008 there had been no, or limited, exchange of meaningful information concerning potential adverse impacts. The engagement between Upper Nicola and ONA, and BCTC/BC Hydro that occurred up to that point was at a general level to introduce the project and proposed consultation process, and solicit initial statements of concern and interest from Upper Nicola and ONA.

392. BCTC will respond to the UNIB / ONA’s complaint about lack of consultation on alternatives and their suggestion that BCTC and BC Hydro and the UNIB / ONA were engaged in “pre-consultation” below. BCTC will respond to the UNIB / ONA’s complaint about the scope of consultation in the section on Consultation on Impacts of Existing Assets.

6.6.3. Consultation on Alternatives

393. UNIB is a member of both the NTA and the ONA. Chief Tim Manuel is the elected chief of UNIB and a member of the Chiefs’ Executive Council for the ONA. As Chief of UNIB, Chief Manuel would take information that he received that affects the Band to the Council for further discussion and mandate to proceed. In addition, Chief Manuel testified that UNIB had the lead role in the ILM Project on behalf of the ONA, and that part of this role is to collect information and bring it back to the Chiefs’ Executive Council.⁵⁴¹

394. BCTC’s and BC Hydro’s efforts to consult with UNIB and ONA are generally set out in BCTC’s response to BCUC IR 1.1.1, along with the evidence provided by the BCTC / BC Hydro panel in this hearing.⁵⁴²

⁵⁴⁰ Exhibit C5-12, ONA / UNIB Response to BCUC IR 1.1(b), p. 3.

⁵⁴¹ Cross-examination of Chief Manuel and Councillor Manuel, January 25, 2010, Vol. 13, p. 1966, l. 21 - p. 1967 l. 20, p. 1970, ll. 6-12, p. 2047 l. 4 – p. 2048, l. 18.

⁵⁴² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 96-121; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 154-166.

395. In its evidence, UNIB / ONA state that BC Hydro did not “engage in meaningful consultations with Upper Nicola and ONA concerning alternatives that would not require the construction or upgrading of infrastructure in Okanagan territory” and “did not offer to consult with either Upper Nicola or the ONA regarding the Alternatives Decision.”⁵⁴³

396. UNIB / ONA further state that BC Hydro’s offer of capacity funding on November 27, 2006, “was not provided to support consultation between BCH and either Upper Nicola or the ONA on the Alternatives Decision.” Finally, UNIB and ONA state that the purpose of the meetings it had with BC Hydro in the fall of 2006 was not for BC Hydro “to provide an overview of alternatives to the ILM Expansion Project or consultation on the Alternatives Decision” and that “any discussion of alternatives to the ILM Expansion Project took place in the context of BC Hydro informing Upper Nicola and the ONA of the alternatives it had considered in the course of developing the EAC Application for the ILM Expansion Project.”⁵⁴⁴

397. BCTC submits that the UNIB / ONA’s position regarding consultation on alternatives is not supported by the evidence. The following evidence is relevant to the UNIB / ONA’s complaint regarding consultation on the choice of the preferred alternative:

(a) During a meeting between BC Hydro and UNIB on August 31, 2006, BC Hydro provided UNIB with a copy of the handout entitled Electricity Supply Challenges.⁵⁴⁵ The Electricity Supply Challenges document identified the need for the ILM Project, discussed the alternatives being considered, including alternatives that would not take place in ONA Traditional Territory, indicated when a decision would likely be made on the preferred alternative, and sought input from First Nations on how they would like to be consulted and any further information they required along with providing contact information,⁵⁴⁶

(b) By letter dated November 27, 2006, BC Hydro offered UNIB \$10,000 capacity in initial capacity funding, along with attaching a further draft CFA. BC Hydro’s November 27 letter stated that the funding was for, among other things, “providing input on the ILM

⁵⁴³ Exhibit C5-8-1, ONA / UNIB Evidence, at para. 32, 40.

⁵⁴⁴ Exhibit C5-8-1, ONA / UNIB Evidence, at para. 28 - 34.

⁵⁴⁵ Exhibit B-20, Rebuttal Evidence, Tab C, p. 9.

⁵⁴⁶ Exhibit C3-15, BC Hydro IR to ONA / UNIB, Att. 1.

upgrade option.”⁵⁴⁷ The attached draft CFA was called draft Options Definition Phase Capacity Funding Agreement. The Options Definition Phase CFA was intended to be used to attempt to negotiate Options Definition Phase CFAs with First Nations;⁵⁴⁸

(c) At a meeting on November 28, 2006, between BCTC, BC Hydro and ONA, BC Hydro and BCTC provided a review of the ILM Project and reviewed maps of each of the UEC and New Line Alternatives. BC Hydro also offered \$10,000 in initial capacity funding to ONA with the letter dated November 27, 2006, along with the attached draft Options Definition Phase Capacity Funding Agreement;⁵⁴⁹

(d) BC Hydro was providing the \$10,000 capacity funding to UNIB and ONA to seek consultation input on the alternatives, in particular the UEC and 5L83 Alternatives;⁵⁵⁰

(e) On January 10, 2007, Chief Manuel met with Ms. Holland and Mr. Littledale to discuss the ILM Project. During that meeting, Ms. Holland gave the January power point presentation which explained that BCTC was analyzing several alternatives to reinforce the Interior to Lower Mainland transmission system, including “Non Wires” solutions that could defer the need for additional transmission:⁵⁵¹

- Upgrade Existing Lines – a package of system upgrades to existing circuits
- New Transmission Line – a new 500 kV circuit from the Nicola Substation near Merritt to the Meridian Substation in Coquitlam
- Additional coastal generation
- Higher Demand Side Management targets
- Additional imports from the US

(f) The January presentation also indicated that BCTC’s Executive would likely decide on the preferred alternative in May 2007, and set out the target dates for the ILM

⁵⁴⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 96; Exhibit B-3-1, Supplemental Evidence, App. H.

⁵⁴⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.3, p. 28, l. 6 – p. 34, l.2, and App. I.

⁵⁴⁹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 154.

⁵⁵⁰ Cross-examination of Mr. Anderson and Ms. Holland, January 14, 2010, Vol. 7, p. 769 l. 9 - p. 770 l. 3.

⁵⁵¹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 97; Exhibit B-3-1, Supplemental Evidence, App. O; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 1969, ll. 12-22; Exhibit B-20, Rebuttal Evidence, Tab C, pp. 3-4.

Project if either the New Line or UEC alternatives were selected. BC Hydro also provide UNIB with a further copy of the November capacity funding letter along with another copy of the draft Options Definition Phase Capacity Funding Agreement. UNIB indicated that it would bring this information to the UNIB Council meeting the next day;

(g) On February 21, 2007, the first BCEAO Working Group meeting took place and representatives from both ONA and UNIB attended.⁵⁵² As described above, during the Working Group meeting, BCTC gave a presentation on project alternatives. BCTC described the New Line and UEC alternatives and fielded questions from First Nations regarding each;⁵⁵³

(h) On March 16, 2007, BC Hydro sent UNIB a cheque for \$10,000 and asked for input on the transmission reinforcement alternatives prior to April 2, 2007 among other things. The cheque for \$10,000 was cashed on June 25, 2007;⁵⁵⁴

(i) On March 16, 2007, BC Hydro also sent ONA a capacity funding cheque of \$10,000 together with the March 16, 2007 letter seeking input on the reinforcement alternatives. The cheque was cashed on August 9, 2007;⁵⁵⁵

(j) Beginning in March 2007, Golder began attempting to get traditional use input from UNIB and ONA for the Heritage Assessment Overview which was intended to support the choice of the preferred alternative. On April 19, 2007, Golder conducted interviews with five UNIB elders and three UNIB support staff members. Golder provided that information to UNIB and on May 15, 2007 sought comments from UNIB on its notes. UNIB never provided any comments;⁵⁵⁶

(k) During the week of April 9, 2007, Project Update No. 1 was sent to each of UNIB and ONA.⁵⁵⁷ Project Update No. 1 indicated that BCTC was studying alternatives to reinforce the capacity of the transmission system between the Interior and the Lower

⁵⁵² Exhibit B-3-1, Supplemental Evidence, p. 42, ll. 19 - 23.

⁵⁵³ Exhibit B-3-1, Supplemental Evidence, App. U, p. 6.

⁵⁵⁴ Exhibit B-3-1, Supplemental Evidence, App. K; Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 100; Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 853, ll. 22 – p. 854, l. 8; Exhibit B-20, Rebuttal Evidence, Tab C, p. 4.

⁵⁵⁵ Exhibit B-3-1, Supplemental Evidence, App. K; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 157, 159.

⁵⁵⁶ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 102-103.

⁵⁵⁷ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 102, 157.

Mainland and that this reinforcement was necessary in order to meet growing electricity needs. The Project Update also provided a brief description of the alternatives and when the choice of the preferred alternative would be made;⁵⁵⁸

(l) On June 6, 2007, BCTC informed UNIB and ONA that the 5L83 Alternative had been chosen as the preferred alternative for the ILM Project and that it would be proceeding to seek the necessary approvals;⁵⁵⁹

(m) During the week of June 4, 2007, Project Update No. 2 was sent to each of UNIB and ONA.⁵⁶⁰ Project Update No. 2 highlighted BCTC's choice of the preferred alternative, the public comment period for the BCEAO draft TOR, and further Open Houses scheduled for June 2007,⁵⁶¹ and

(n) On July 19, 2007, in response to a UNIB request that BC Hydro meet with the community, BC Hydro presented an overview of the ILM Project at a UNIB community meeting, to approximately 25 UNIB members. During that meeting, among other items, there was a discussion of the alternatives to the 5L83 Alternative and the reasons why BCTC had chosen the 5L83 Alternative as the preferred alternative. BCTC and BC Hydro responded to any outstanding questions they were unable to answer during the meeting of July 19, 2007, later in July and in early August.⁵⁶²

398. At no time have UNIB or ONA raised any complaints about the choice of the preferred alternative or the consultation that took place regarding the preferred choice of alternatives, and the issue was not raised again during consultations with ONA or UNIB up to August 5, 2008.⁵⁶³

6.6.4. Conclusion

399. BCTC submits that the UNIB / ONA's complaints about consultation on the choice of alternatives are not supported by the evidence. To the contrary, the evidence confirms that the UNIB / ONA were given numerous opportunities to obtain information on the

⁵⁵⁸ Exhibit B-3-1, Supplemental Evidence, s. 2.11, p. 52, l. 20 - p. 53, l. 11, App. V.

⁵⁵⁹ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 104; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, pp. 157-158.

⁵⁶⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 104 and 158.

⁵⁶¹ Exhibit B-3-1, Supplemental Evidence, s. 2.14, p. 55, ll. 20 - 26.

⁵⁶² Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 105-106.

⁵⁶³ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 96-121 and pp. 154-166.

full range of alternatives being considered and to provide their input on these alternatives, including capacity funding to help them do so and participating in the preparation of the HOA.

400. BCTC further submits that the UNIB / ONA's position raised in their Information Response that they were at the "pre-consultation" stage is not supported by the law or the facts. There is no legal concept known as "pre-consultation" under *Haida*. BCTC relies on the whole of BCTC's response to BCUC 1.1.1 as evidence that BCTC and BC Hydro attempted throughout the period from August 2006 to August 2008 to engage UNIB and ONA in a reasonable process of consultation on the ILM Project. To the extent that BCTC and BC Hydro were not successful in doing so, which was not always the case, this was a result of the UNIB/ONA's ultimate position that they would not engage in further consultation on the ILM Project until an agreement had been reached on consulting on the Existing Assets and the ILM Project together.

401. As indicated, BCTC responds to UNIB / ONA's complaint about the scope of consultation in the section on Consultation on the Impacts of Existing Assets.

6.7. NNTC

6.7.1. Scope and Content

402. The NNTC intervenors are six members of the Nlaka'pamux aboriginal nation. The Coldwater, Cook's Ferry, Siska and Ashcroft bands are four of the fifteen members of the Nlaka'pamux aboriginal nation. The other five members of the Nlaka'pamux aboriginal nation, none of whom have filed evidence in this proceeding are Boston Bar, Lower Nicola, Nicomen, Nooaitch and Shackan. The Nlaka'pamux assert they have existing aboriginal title to an area that includes the Lower Thompson River area, the Fraser Canyon, the Nicola Valley, the Coldwater River Valley and the Coquihalla area. Nlaka'pamux claimed territory includes the 5L83 Alternative preferred alignment between Nodes A and O1. This area overlaps with S'olh Temexw which includes 5L83 between Nodes G1 and V and with ONA and UNIB claimed territory which includes 5L83 between Nodes A and C.⁵⁶⁴

403. The NNTC is a political organization that represents six of the sixteen Nlaka'pamux Nation Bands with respect to the ILM Project: Skuppah, Spuzzum, Boothroyd,

⁵⁶⁴ Exhibit B-20, Rebuttal Evidence, Att. B-12, C-9; Exhibit C5-8-1, UNIB and ONA Evidence, App. C, p. 240, Exhibit B-17, App. 1, p. 191, App. III, p. 166; Exhibit C8-11, STC Response to BCUC IRs, App. A.

Kanaka Bar, Oregon Jack Creek, and Lytton.⁵⁶⁵ Chief Pasco represents the political leadership of the NNTC.⁵⁶⁶

404. In recognition that consultation is an iterative process, BC Hydro assessed the scope and content of the duty to consult with NNTC in writing twice.

405. In April 2007, BC Hydro made a preliminary assessment on the strength of claim in the area of the ILM Project, and the scope of consultation owed for potentially impacted First Nations. Of the NNTC Bands, BC Hydro assessed the Boothroyd Indian Band as having a moderate strength of claim in the area of the ILM Project, but a low scope of consultation, and Spuzzum with a strong strength of claim in the area of the ILM Project, and high scope of consultation. Skuppah was assessed as having a moderate strength of claim, Kanaka Bar was assessed with a low to moderate strength of claim, and Lytton and Oregon Jack were assessed with low strengths of claim. BC Hydro did not assess the scope of consultation in its preliminary assessment for Skuppah, Kanaka Band, Lytton or Oregon Jack, each of which are located reasonably far away from the ILM Project.⁵⁶⁷

406. BC Hydro later undertook a more detailed assessment of the strength of claim and potential impacts of the ILM Project. BC Hydro concluded that the Spuzzum and Boston Bar First Nations both have a strong strength of the claim for aboriginal rights and title in the area of the ILM Project between Nodes E-G1-H and that, since the Project could potentially adversely affect these rights because the 5L83 Alternative preferred alignment requires new ROW and widening of existing ROW on Crown land along that portion of the route, the scope of consultation is deep.⁵⁶⁸

407. BC Hydro also noted that the other NNTC communities are farther away from the ILM Project. Boothroyd, Kanaka Bar and Skuppah are significantly upstream along the Fraser River. Oregon Jack Creek is 75 km away from the ILM Project along the Thompson River, and Lytton is 46 km away from the ILM Project at the junction of the Fraser and Thompson Rivers.⁵⁶⁹

⁵⁶⁵ Exhibit C5-10, NNTC Responses to BC Hydro IRs 1.1.2, 1.1.3, 1.1.4, pp. 1-2.

⁵⁶⁶ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2352 II. 1-9.

⁵⁶⁷ Exhibit B-10-4, Interior to Lower Mainland Project First Nation Consultation Summary Report, May 2006 to April 2007, App. 3, Att. 4 to Coldwater IR 1.2.

⁵⁶⁸ Exhibit B-13, BCTC Response to BCUC 1.3.1, p. 29-30.

⁵⁶⁹ Exhibit B-13, BCTC Response to BCUC 1.3.1, p. 17, 29-31.

408. Although BCTC and BC Hydro included the other five member communities of the NNTC in the same consultation activities and treated them as having strong claims for aboriginal rights in the area, BCTC and BC Hydro would not assess the individual Nlaka'pamux bands as separately requiring the same level of consultation on the *Haida* spectrum as Spuzzum or Boston Bar.⁵⁷⁰ That is because the other communities are located so far away from the ILM Project, and only the area between Nodes C to G is relatively free of overlapping claims. Spuzzum is located along Nodes E-G1-H, and Boston Bar is the closest First Nation to Nodes C-D-E.

409. Since assessing the scope of consultation for Boston Bar, BC Hydro has also learned that the NNTC is not representing Boston Bar in respect of the ILM Project.⁵⁷¹ The NNTC also attempts to assert a greater strength of claim in its evidence by relying on the strength of the claims of other Nlaka'pamux Nations that it does not represent. In its evidence, the NNTC asserts that the BCEAO's "Assessment Report for the Interior to Lower Mainland Transmission Project" supports a strong *prima facie* case for aboriginal title between Nodes A to G; however, it relies on the strength of Coldwater, Lower Nicola, and UNIB in making that assertion, none of which are represented by the NNTC.⁵⁷²

410. The NNTC has generally adopted the BC Hydro assessment, and has not filed any evidence challenging the assessment of the strength of claim of NNTC or of the impacts of the ILM Project on their asserted claims.⁵⁷³

6.7.2. NNTC Complaint

411. NNTC's complaint about the ILM consultation process appears to be two-fold: there was no consultation on the alternatives to the ILM Project and the scope of consultation did not include consultation and accommodation on the Existing Assets. In their evidence, NNTC states as follows:⁵⁷⁴

For NNTC the central issues regarding consultation on the proposed ILM Expansion Project includes the question of the consideration of alternatives to

⁵⁷⁰ Exhibit B-20, Rebuttal Evidence, Tab B, p. 2.

⁵⁷¹ Cross Examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2387, ll. 6-22.

⁵⁷² Exhibit C5-7-1, NNTC Evidence, paras. 14-15, App. D, p. 171.

⁵⁷³ Exhibit C5-9, NNTC Response to BCUC IR 1.1; Cross-examination of Ms. Abbott and Chief Pasco, January 29, 2010, Vol. 16, p. 2410, ll. 1-24.

⁵⁷⁴ Exhibit C5-7-1, NNTC Evidence, at paras. 26, 29, 41.

the ILM Expansion Project and the scope of consultation triggered by the ILM Expansion Project.

...

From the beginning of their interaction with BCH regarding the proposed ILM Expansion Project, the NNTC advised that consultation must include a consideration of the existing and ongoing adverse effects of the existing transmission lines (5L81 and 5L82), the existing right of way and associated infrastructure (the "Existing ILM Project") because the ILM Expansion Project relied on and benefited from the Existing ILM Project and there had been no consultation and accommodation regarding the Existing ILM Project.

412. In addition, the NNTC assert that the two years of consultation prior to August 5, 2008 was only pre-consultation.⁵⁷⁵

413. In response to BC Hydro IR 4.1, the NNTC revised their filed written evidence to describe their central issue as follows:⁵⁷⁶

The central issue identified was the scope of consultation concerning either the UEC or the ILM Expansion Project alternatives and in particular the necessity to consult regarding the existing and ongoing impacts of BC Hydro's facilities in Nlaka'pamux territory. With respect to the consideration of alternatives, BC Hydro did not offer to engage in a consideration of alternatives that would not affect Nlaka'pamux Aboriginal title and rights and focused its discussions with the NNTC on the EA review for the ILM Expansion Project.

414. BCTC will respond to the NNTC's complaint about lack of consultation on alternatives and its suggestion that BCTC and BC Hydro and the NNTC were engaged in "pre-consultation" below. BCTC will respond to the NNTC's complaint about the scope of consultation in the section on Consultation on the Impacts of Existing Assets.

6.7.3. Consultation on Alternatives

415. BCTC and BC Hydro's efforts to consult with the NNTC on generally are set out in BCTC's response to BCUC IR 1.1.1, along with the evidence provided by the BCTC/BC Hydro panel in this hearing.⁵⁷⁷

416. In its evidence, NNTC states that that it was not consulted "concerning options that did not involve new or upgraded transmission works within the Nlaka'pamux territory", that

⁵⁷⁵ Exhibit C5-11, NNTC Response to BCTC IR 1.9.2, p. 4.

⁵⁷⁶ Exhibit C5-10, NNTC Response to BC Hydro IR 4.1, p. 4.

⁵⁷⁷ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 129-153.

BC Hydro “did not disclose to the NNTC, or engage in meaningful consultations concerning, alternatives that would not require the construction or upgrading of transmission infrastructure in Nlaka’pamux territory”, and that there was “no discussion of any alternative to the ILM Expansion Project, other than the UEC Upgrade option”. The NNTC also stated that when BC Hydro offered capacity funding in November 2006 “that the consultation between BCH and the NNTC was to focus on the EAC process regarding the ILM Expansion Project.”⁵⁷⁸

417. BCTC submits that NNTC’s position regarding consultation on alternatives is not supported by the evidence. The following evidence is relevant to the NNTC’s complaint regarding consultation on the choice of the preferred alternative:

(a) On August 29, 2006, BCTC left a detailed message with the NNTC receptionist, explaining that BCTC was looking to reinforcement alternatives for the grid, and wanted to discuss them with the NNTC;⁵⁷⁹

(b) On September 5, 2006, BC Hydro and BCTC met with Chief Campbell of the Boothroyd Indian Band to discuss the ILM Project. They discussed a variety of issues including whether the Community Development Fund would be adjusted if a new transmission line was built. Chief Campbell also stated that his community would prefer electricity over cash;⁵⁸⁰

(c) On November 16, 2009⁵⁸¹ and November 23, 2006,⁵⁸² BC Hydro sent emails to NNTC requesting a meeting to discuss the ILM Project, and noting that BC Hydro and BCTC were committed to consultations with First Nations to provide information and obtain input on the alternatives and plans for improving the transmission system as well as building lasting respectful relationship with First Nations;

(d) In letters dated November 27, 2006, BC Hydro offered \$10,000 in initial capacity funding, along with attaching a further draft CFA to each of the communities NNTC represents: Boothroyd Indian Band, Oregon Jack Creek, Kanaka Bar, Skuppah,

⁵⁷⁸ Exhibit C5-7-1, NNTC Evidence, paras. 30, 32, 34-35, 37.

⁵⁷⁹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 129; Cross-examination of Ms. Holland, January 14, 2010, Vol. 7, p. 954 l. 1 – p. 955 l. 19.

⁵⁸⁰ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 129; Exhibit B-20, Rebuttal Evidence, Att. B-1.

⁵⁸¹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 129-130.

⁵⁸² Exhibit C3-13, BC Hydro IR to NNTC, Att. 1; Exhibit B-20, Rebuttal Evidence, Tab B, p. 1.

Spuzzum and Lytton.⁵⁸³ The total amount offered for initial capacity funding was \$60,000. BC Hydro's November 27 letter stated that the funding was for, among other things, "providing input on the ILM upgrade option."⁵⁸⁴ The attached draft CFA was called draft Options Definition Phase Capacity Funding Agreement. The Options Definition Phase Capacity Funding Agreement was intended to be used to attempt to negotiate Options Definition Phase Capacity Funding Agreements with First Nations,⁵⁸⁵

(e) On February 15, 2007, BC Hydro and BCTC met with the NNTC, and some other Nlaka'pamux communities, and gave the January power point presentation regarding the alternatives for the ILM Project and the need for more power in the Lower Mainland.⁵⁸⁶ In attendance at the meeting were Chief Pasco (NNTC and Oregon Jack), Chief Webster (Lytton), Donnie Sam, representing Chief McIntyre (Skuppah), Councillor Wilson (Ashcroft) Councillor Edwards (Spuzzum), Ms. Duncan (Heritage Manager, NNTC), Chief Spinks (Restorative Justice, NNTC), Ms. Brown (Lands Manager, Lytton), Mr. Raymond Phillips, legal counsel, Ms. Holland (BCTC), Mr. Littledale, and Mr. Wake (BC Hydro). The 5L83 and UEC Alternatives were discussed during the meeting. Ms. Holland showed Mr. Raymond Phillips, legal counsel, and Mr. Gordie Edwards, a councillor for Spuzzum First Nation, maps that showed the UEC Alternative would not take up more land, and that 5L83 would not affect the Upper Fraser Canyon. The power point presentation explained that BCTC was analyzing several alternatives to reinforce the Interior to Lower Mainland transmission system, including "Non Wires" solutions that could defer the need for additional transmission:⁵⁸⁷

- Upgrade Existing Lines – a package of system upgrades to existing circuits
- New Transmission Line – a new 500 kV circuit from the Nicola Substation near Merritt to the Meridian Substation in Coquitlam
- Additional coastal generation

⁵⁸³ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 154; Exhibit B-3-1, Supplemental Evidence, App. H.

⁵⁸⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 96; Exhibit B-3-1, Supplemental Evidence, App. H.

⁵⁸⁵ Exhibit B-3-1, Supplemental Evidence, s. 2.3 and App. I.

⁵⁸⁶ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2341, ll. 9 – p. 2342 ll. 2.

⁵⁸⁷ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 131-132; Exhibit B-20, Rebuttal Evidence, Att. B-2.

- Higher Demand Side Management targets
- Additional imports from the US

(f) The January presentation also indicated that BCTC's Executive would likely decide on the preferred alternative in May 2007, and set out the target dates for the ILM Project if either the 5L83 or UEC alternatives were selected. BC Hydro also provide UNIB with a further copy of the November capacity funding letter along with another copy of the draft Options Definition Phase Capacity Funding Agreement;

(g) On February 21, 2007, the BCEAO held its first Working Group meeting. Although NNTC did not attend the meeting, the materials were all sent to the NNTC members afterwards.⁵⁸⁸ Those materials included discussions about the 5L83 and the UEC Alternatives, the fact that BCTC would be making a decision about the preferred alternative, and the criteria it would consider, including First Nations' input;

(h) On March 7, 2007, BC Hydro wrote to Lytton with respect to capacity funding, to "discuss how the upgrade option is being reviewed by BC Hydro to bring more electricity to the Lower Mainland would affect Lytton Indian Band interests...".⁵⁸⁹ The Lytton Band would be impacted by the 5L41 line, and is not impacted by the 5L83 Alternative.⁵⁹⁰ BC Hydro also sent letter agreements offering capacity funding to the NNTC, Skuppah, Oregon Jack, Kanaka Bar and Boothroyd. These letter agreements sought "input either written or verbal on the two transmission reinforcement options" prior to the end of March or early April 2007;⁵⁹¹

(i) On March 14, 2007, Cornerstone emailed Mr. Phillips asking for input from NNTC communities as to which preferred alternative would be preferable;⁵⁹²

(j) During the week of April 9, 2007, Project Update No. 1 was sent to each of the NNTC communities. Project Update No. 1 indicated that BCTC was studying alternatives to reinforce the capacity of the transmission system between the Interior and the Lower Mainland and that this reinforcement was necessary in order to meet growing

⁵⁸⁸ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 132; Exhibit B-3-1, Supplemental Evidence, p. 44.

⁵⁸⁹ Exhibit B-3-1, Supplemental Evidence, App. K.

⁵⁹⁰ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2350, ll. 4-24.

⁵⁹¹ Exhibit B-3-1, Supplemental Evidence, p. 31, App. K.

⁵⁹² Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 135.

electricity needs. The Project Update also provided a brief description of the alternatives and when the choice of the preferred alternative would be made;⁵⁹³

(k) On June 6, 2007, BCTC informed NNTC that the 5L83 Alternative had been chosen as the preferred alternative for the ILM Project and that it would be proceeding to seek the necessary approvals;⁵⁹⁴

(l) During the week of June 4, 2007, Project Update No. 2 was sent to each of the NNTC member communities.⁵⁹⁵ Project Update No. 2 highlighted BCTC's choice of the preferred alternative, the public comment period for the BCEAO draft TOR, and further Open Houses scheduled for June 2007;⁵⁹⁶

(m) During a meeting on September 7, 2007, BC Hydro provided NNTC with a further overview of the ILM Project, the BCEAO Application process and the CPCN Application process.⁵⁹⁷ BC Hydro also responded to concerns raised by the NNTC regarding de-vegetation, archaeological areas in a trail from Anderson Creek to Nicola River Valley, power exports, the Columbia River Treaty. NNTC indicated that it would like to present a paper, at BC Hydro's cost, on the Environmental Assessment Process and the effects that the hydro line and other projects will have on NNTC territory, including all of the BC Hydro infrastructure in the area.⁵⁹⁸ During the meeting Chief Pasco stated that he agreed the line is needed, so NNTC could not say no, but needed to sort out how to craft a qualified yes.⁵⁹⁹ NNTC also requested to meet with BC Hydro executives with regards to the Existing Assets; and

(n) On September 20, 2007, the second BCEAO Working Group meeting took place. Of the NNTC member communities, Spuzzum and Lytton attended. Project route, right of way requirements, right of way clearing and considerations, field study updates and the draft TOR were all discussed.⁶⁰⁰

⁵⁹³ Exhibit B-3-1, Supplemental Evidence, s. 2.11, p. 52, l. 20 - p. 53, l. 11, App. V.

⁵⁹⁴ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 137; Exhibit B-3-1, Supplemental Evidence, App. W; Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2394, ll. 12-25.

⁵⁹⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, pp. 104 and 158.

⁵⁹⁶ Exhibit B-3-1, Supplemental Evidence, s. 2.14, p. 55, ll. 20 - 26.

⁵⁹⁷ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 140; Exhibit B-20, Rebuttal Evidence, Att. B-3.

⁵⁹⁸ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2360, ll. 16-19.

⁵⁹⁹ Cross-examination of Mr. Littledale, January 15, 2010, Vol. 8, p. 1105, ll. 8-16, p. 1107 ll. 14-23.

⁶⁰⁰ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 141.

418. At no time have NNTC or its member communities raised any complaints about the choice of the preferred alternative or the consultation that took place regarding the preferred choice of alternatives, and the issue was not raised again during consultations with NNTC up to August 5, 2008.⁶⁰¹

419. BCTC submits that it sought opportunities to provide information regarding the alternatives to the NNTC and provided that information when it was given the opportunity to do so. Although there was a focus on the UEC and 5L83 alternatives, there was information provided about the other alternatives and they were open for discussion.⁶⁰²

420. In addition, the alternatives of additional coastal generation, higher demand side management targets and additional imports from the US were not alternatives that required consultation as they did not impact the member communities of the NNTC. Nonetheless, BCTC and BC Hydro explained that they were alternatives being considered and Chief Pasco appeared to recognize that fact in the meeting of September 7, 2007, when he agreed the line was needed.⁶⁰³

6.7.4. Conclusion

421. BCTC submits that the NNTC's complaints about consultation on the choice of alternatives are not supported by the evidence. To the contrary, the evidence confirms that the NNTC was given numerous opportunities to obtain information on the full range of alternatives being considered and to provide their input on these alternatives.

422. BCTC further submits that the NNTC's position raised in their Information Response that they were at the "pre-consultation" stage is not supported by the law or the facts. There is no legal concept known as "pre-consultation" under *Haida*. BCTC relies on the whole of BCTC's response to BCUC 1.1.1 as evidence that BCTC and BC Hydro attempted throughout the period from August 2006 to August 2008 to engage NNTC in a reasonable process of consultation on the ILM Project. To the extent that BCTC and BC Hydro were not successful in doing so, this was a result of the NNTC's position that they would not generally engage in further consultation on the ILM Project until an agreement had been reached on consulting on the Existing Assets and the ILM Project together.

⁶⁰¹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, pp. 129-153

⁶⁰² Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, 772, l. 20 - 773 l. 6.

⁶⁰³ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 140; Exhibit B-20, Rebuttal Evidence, Att. B-3.

423. As indicated, BCTC will respond to NNTC's complaint about the scope of consultation in the section on Consultation on the Impacts of Existing Assets.

6.8. Hwlitsum

6.8.1. Scope and Content

424. The Hwlitsum assert a traditional territory that encompasses a large portion of the Lower Mainland, the Gulf Islands, and a portion of Vancouver Island.⁶⁰⁴ The Hwlitsum claimed territory appears to extend between Nodes N to V. S'olh Temexw includes 5L83 between Nodes G1 and V. The Kwikewtlem claimed territory includes Nodes V to T.

425. The Hwlitsum are not a recognized band under the *Indian Act*.⁶⁰⁵

426. The Hul'qumi'num Treaty Group (HTG) is a group that includes six First Nations on Vancouver Island and the Gulf Islands: Chemainus, Cowichan Tribes, Halalt, Lake Cowichan, Lyackson, and Penelakut. HTG is participating in the BC Treaty Commission Process. The core traditional territory of the HTG includes portions of Vancouver Island, the Gulf Islands, and marine traditional territory up the Fraser River as far east as Yale.⁶⁰⁶

427. In 2005, the HTG filed evidence in the Vancouver Island Transmission Reinforcement Project (VITR) proceeding in which they stated:⁶⁰⁷

The Hwlitsum First Nation is a community of registered Indians under the *Indian Act*, and, although not currently an Indian Act Band, have applied to be registered as a Band.

...

The Chiefs of the Hul'qumi'num Treaty Group have acknowledged that the Hwlitsum members are members of the Hul'qumi'num Tribal Group, and have formally passed a resolution stating their acceptance of Hwlitsum First Nation as part of the Hul'qumi'num Mustimuhw.

...

⁶⁰⁴ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 67.

⁶⁰⁵ Cross-examination of Mr. Grove, January 27, 2010, Vol. 15, p. 2299, l. 13 - 2300, l. 1.

⁶⁰⁶ Exhibit B-13, BCTC Response to Commission IR 1.3.1, pp. 69-70

⁶⁰⁷ Cross-examination of Mr. Grove, January 27, 2010, Vol. 15, p. 2299, l. 2 - p. 2301, l. 12; VITR Proceeding, Exhibit C27-5.

The Hul'qumi'num Treaty Group and the Hwlitsum First Nation are engaged in the exploration of options for the Hwlitsum First Nation to be a member of the Treaty Group.

428. The HTG's filed evidence in VITR included a map of the HTG traditional territory. The traditional territory shown on the HTG's map overlaps considerably with the asserted traditional territory of the Hwlitsum.⁶⁰⁸

429. BCTC and BC Hydro did not initially identify the Hwlitsum as a First Nation that might be adversely affected by the ILM Project.⁶⁰⁹

MR. ANDERSON: A: ... So when B.C. Hydro/BCTC first looked at the 5L83 option, and who it might impact, which First Nations it might impact, we came up with a preliminary list and I don't have the exact number. It's 35 or 40 Bands. And that's really how we proceeded from the August through December timeframe.

As we started to have dialogue with the Environmental Assessment Office, at the time that BCTC was looking to file the project description, through discussions with the Environmental Assessment Office, and their initial look at the project in and around, again, the end of December '06 through the beginning of January, 2007, they came up with an expanded list that included the 60 First Nations and 7 tribal councils that we currently have. And it's through those discussions that Hwlitsum was added to the list.

Thereby the first face-to-face discussions that occurred were the Environmental Assessment Office working group meeting in February, 2007 and the letters from B.C. Hydro and the Environmental Assessment Office, inviting them to those meetings, are the first records that are on.

430. BC Hydro assessed the Hwlitsum strength of claim in the Project area as weak. However, the Hwlitsum's strength of claim for aboriginal rights (fishing) in the area was noted as medium. As it was expected that there was very little potential for adverse effects on the Hwlitsum's asserted aboriginal rights (fishing), BC Hydro's preliminary assessment of the level of consultation required for Hwlitsum was the low end of the Haida spectrum.⁶¹⁰

431. BC Hydro's assessment is supported by the evidence of strength of claim in the Project area and the potential impacts to the Hwlitsum's asserted rights:

⁶⁰⁸ Cross-examination of Mr. Grove, January 27, 2010, Vol. 15, p. 2301, l. 13 - p. 2304, l. 12; Exhibit C1-11, Tab 21.

⁶⁰⁹ Cross-examination of Mr. Anderson, January 19, 2010, Vol. 10, p. 1392, l. 25 - p. 1393, l. 20.

⁶¹⁰ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 68-69.

(a) The Hwlitsum asserted Traditional Territory overlaps with claims by the HTG, Kwikwetlem, Katzie, Musqueam, STC, SHAC and the Tsleil-Waututh.⁶¹¹

(b) The Hwlitsum First Nation is generally far removed from the ILM Project area.⁶¹² Approximately half of the Hwlitsum's 300 to 350 members live in Delta. The other half of the Hwlitsum's members are in the Lower Mainland, Gulf Islands and Vancouver Island. The Hwlitsum's "main community" is called "Canoe Pass", which is approximately 36 km from the preferred alignment. Chief Wilson of the Hwlitsum was born and resides in Delta, and the office of the Hwlitsum is located on the Tsawwassen Reserve.⁶¹³

(c) The ancestors to the Hwlitsum, the Lamalchi, spent winters on Kuper Island, in the Gulf Islands, and summers at Canoe Pass (which, as stated above, is 36 km from the preferred alignment).⁶¹⁴ A large portion of Kuper Island is currently a Reserve of the Penelakut First Nation.⁶¹⁵

(d) There is very little potential for adverse effects on the aboriginal rights (fishing) asserted by Hwlitsum, since there are no anticipated impacts on fishing. Through DFO's participation in the BCEAO process, DFO has advised that a harmful alteration, disruption, and destruction of fish habitat associated with the Project could be avoided by using clearspan bridges on fish-bearing streams crossed by access roads, and by complying with established best management practices, including approved work practices for riparian vegetation and applicable DFO operational policy statements.⁶¹⁶

432. In May 2008, the Hwlitsum were accepted into Stage 2 of the BC Treaty Process but neither Canada nor British Columbia have agreed to negotiate a treaty with the Hwlitsum. The Hwlitsum did not notify BCTC or BC Hydro of this fact.⁶¹⁷

⁶¹¹ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 68; Exhibit C1-11, maps 19 and 20, Tab 21; Exhibit C4-10, Kwikwetlem Evidence, Exhibit 10; Exhibit B-17, App. 1, p. 191, App. III, p. 166; Exhibit C8-11, STC Response to BCUC IRs, App. A.

⁶¹² Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 67.

⁶¹³ Cross-examination of Mr. Grove, January 27, 2010, Vol. 15, p. 2279, l. 15 - p. 2280, l. 11 and p. 2285, l. 15 - 2287, l. 12.

⁶¹⁴ Cross-examination of Dr. Miller, January 27, 2010, Vol. 15, p. 2281, l. 2 - p. 2282, l. 1.

⁶¹⁵ Cross-examination of Mr. Grove, January 27, 2010, Vol. 15, p. 2282, ll. 2-23.

⁶¹⁶ Exhibit B-13, BCTC Response to BCUC IR 1.3.1, pp. 69; Exhibit B-10, BCTC Response to Hwlitsum IR 1.3.a.

⁶¹⁷ Cross-examination of Mr. Grove, January 27, 2010, Vol. 15, p. 2295, l. 3 - 17.

6.8.2. Hwlitsum Complaint

433. Hwlitsum filed evidence in this proceeding on October 20, 2009. Hwlitsum's filed evidence did not provide any description or account of Hwlitsum's concerns with the consultation regarding the ILM Project.⁶¹⁸

434. BCTC asked Hwlitsum to describe its position regarding the adequacy of consultation in an Information Request. Hwlitsum's response was that it would address this issue in final argument.⁶¹⁹

1.0. Does the Hwlitsum First Nation take the position that consultation with the Hwlitsum was inadequate to the date of the Commission's decision? If so, please indicate why and provide all documentary or other evidence that the Hwlitsum rely on in support of this position.

Response of Hwlitsum First Nation

The Hwlitsum First Nation is reviewing and analyzing the scope and extent of BCTC and BC Hydro's consultation with the Hwlitsum First Nation in the ILM Project CPCN Application. Therefore, it is premature for the Hwlitsum First Nation to respond to this information request now. The Hwlitsum First Nation will address this in final argument.

435. At the outset of the hearing, BCTC addressed Hwlitsum's failure to provide particulars of their complaint regarding the consultation process. On behalf of BCTC, Mr. Carpenter advised as follows:⁶²⁰

MR. CARPENTER: Thank you, Mr. Chair. Very briefly, I'm not sure whether the Panel is aware of this, but I had spoken with Mr. Fulton earlier. We have been engaged in some conversations with the Hwlitsum First Nation to try to get further particulars, if you will, of why they say that consultation was inadequate to the point of the Commission's decision, and that's effectively what they have told us, to this stage, is simply that their position is, consultation was inadequate. We indicated that we may bring an application to compel further particulars of that. In further conversation with Hwlitsum I think it's fair to say, and I'll let my friend comment if she wants to, that at this point in time they really don't have any further particulars of that. I have discussed with her and them the cross-examination of this panel, and what I believe is, in terms of the fairness of the process, that they should have the opportunity to know beforehand the -- what the essence of that complaint or position is. And they informed me that their cross-examination is going to be limited strictly to what is on the evidentiary record, to this point in time.

⁶¹⁸ Exhibit C1-11, Hwlitsum Filed Evidence.

⁶¹⁹ Exhibit C1-12, Hwlitsum Response to BCTC IR 1.0.

⁶²⁰ January 14, 2010, Vol. 7, p. 758, l. 15 - p. 760, l. 18.

And I've also discussed with basically the same concept with respect to our cross-examination of their panel and that we don't want to be hearing things in cross-examination that haven't been previously raised at least in terms of their essential component. And at this point Hwlitsum says that they do not plan on making an opening statement. I don't think that they've taken their finger off the piece, if you will, on that issue at this point in time, but their current plan is not to do so.

So I rise just to make sure that that is on the record and to indicate that if at some point in time, having discussed this matter on a number of occasions with Hwlitsum and not had any response, we do see particulars coming out which we've asked for and have not been previously disclosed, we do reserve the right to object to those at the time, whether that be as we continue the evidentiary phase or in argument, if we believe things are being said in argument that we should have had the opportunity to explore during the evidentiary phase. I just wanted to make sure that that was captured on the record.

THE CHAIRPERSON: Thank you, Mr. Carpenter. Ms. Muir, do you have anything to say?

MS. MUIR: Mr. Carpenter is correct in that he was beginning to ask me this past Saturday what the position of Hwlitsum was on consultation. It is our position that consultation was inadequate for the Hwlitsum and we indicated that we would limit our cross-examination to the existing record. To do otherwise would be to disclose strategy and our final arguments.

436. Despite Ms. Muir's agreement to limit cross-examination to the existing record, Ms. Muir went beyond the record.⁶²¹

437. During cross-examination, BCTC did not agree that consultation with the Hwlitsum had been inadequate.⁶²²

MS. MUIR: Q: Ms. Holland, the Hwlitsum have concluded that there's been inadequate consultation of them on the CPCN application for the ILM project, from February 14th, 2007 to August 5th, 2008. Ms. Holland, would you concede that?

MS. HOLLAND: A: I do not.

438. Because of Hwlitsum's refusal to provide any explanation of why it alleges that consultation on the ILM Project was inadequate, BCTC is unable in this submission to respond to Hwlitsum's concerns. BCTC will address any concerns raised by Hwlitsum in Reply.

⁶²¹ Examination in Chief of Professor Miller, January 27, 2010, Vol. 15, p. 2269, l. 6 - p. 2271, l. 4.

⁶²² Cross-examination of Ms. Holland, January 19, 2010, Vol. 10, p. 1456, ll. 9 - 14.

6.8.3. Conclusion

439. In *Haida*, the Supreme Court described consultation at the low end of the spectrum as follows.⁶²³

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.

440. The uncontradicted evidence in this proceeding is that the duty to the Hwlitsum is at the low end of the *Haida* spectrum and that BCTC more than reasonably met the duty to the Hwlitsum.

6.9. Consultation with Intervenor First Nations Not Adducing Evidence in this Proceeding

6.9.1. Seabird

441. On May 5, 2009, Seabird Island First Nation (Seabird) registered in this proceeding as an intervenor.⁶²⁴ In a letter dated May 29, 2009, Seabird advised that it was affiliated with STC and that it was partnering with STC in their submissions to apply for an Interim Cost Award for the BCUC ILM Reconsideration Inquiry.⁶²⁵ In a letter dated November 10, 2009, Seabird reiterated its affiliation with STC and advised that it concurred with the appointment of two additional Commissioners.⁶²⁶ Notwithstanding that above, during the cross-examination of STC's panel, STC's counsel advised that the STC panel was not giving evidence on behalf of and did not speak for Seabird:

MR. BERGNER: Q: Thank you. For the sake of completeness, Seabird Island has intervened in this proceeding, but am I correct in understanding your evidence today is also on behalf of Seabird Island?

MR. UNDERHILL: Let me clarify that. This panel is just the Sto:lo Tribal Council. I do appear in this proceeding acting on behalf of

⁶²³ *Haida*, at para. 43.

⁶²⁴ Exhibits C10-1 and C10-2, Seabird Island First Nation – Online Registration dated May 14, 2009.

⁶²⁵ Exhibit C10-3, Letter dated May 29, 2009.

⁶²⁶ Exhibit C10-4, Letter dated November 10, 2009.

both entities, but Seabird Island First Nation is not part of this panel.⁶²⁷

442. As a result, it is unclear what position Seabird is taking in this proceeding. Consequently, BCTC will respond to Seabird in Reply, if necessary.

6.9.2. NTA, Nicomen and Nooaitch

443. Each of NTA, Nicomen, and Nooaitch intervened in this proceeding on May 15, 2009, although Nicomen and Nooaitch are members of the NTA.⁶²⁸ Since that date, Nicomen and Nooaitch have not participated further; they have not filed any evidence, nor have they made submissions. NTA took the subsequent step of filing a one page letter as evidence, stating that “it is a service-delivery organization through which federal funds flow for the provision of advisory services to the Tribal Association's member bands and their respective memberships.” Furthermore, the letter stated.⁶²⁹

NTA is not a governing body, has no political function and holds no aboriginal rights or title on behalf of its membership. It does not have the mandate or authority to represent any of its member bands for the purposes of consultation.

444. The NTA later filed a one-page response to BC Hydro's IR, stating:⁶³⁰

Further to BC Hydro's Information Request 1.1 and letter dated October 29, 2009 (attached), this is to confirm that the past Chief Finance Officer (CFO) of Nicola Tribal Association, Les J. Leibbrandt sent the November 15, 2007 letter (Attachment 1) to BC Hydro regarding the Capacity Funding Arrangement.

Regarding BC Hydro's Information Request 1.2 this is also to confirm that the Nicola Tribal Association entered a Capacity Funding Agreement with BC Hydro, which was signed by past Chief Finance Officer (CFO) of Nicola Tribal Association, Les J. Leibbrandt on November 19, 2007. This Agreement was submitted to BC Hydro in confidence and is subject to the confidentiality provisions of the Agreement

445. BCTC also delivered IRs to NTA attempting to test their evidence with respect to the assertion that they are merely a service-delivery organization. Despite more than one attempt to get the NTA to answer BCTC's IR, NTA did not do so. The NTA did not present a panel and their suggestion that they are solely a service delivery organization is not part of the

⁶²⁷ Cross-examination of STC Panel, January 21, 2010, Vol. 12, p. 1877, ll. 4 – 11.

⁶²⁸ Exhibits C12-1, C13-1, C14-1.

⁶²⁹ Exhibit C13-2.

⁶³⁰ Exhibit C13-4.

sworn evidence in the proceeding. This statement is contradicted by BCTC and BC Hydro's evidence. BCTC and BC Hydro attempted to and did undertake consultation with the NTA over the two-year period from August 2006 to August 2008.⁶³¹ This included, in addition to providing written information about the ILM Project, attending the NTA Annual General Meeting on October 6, 2007, a meeting with the NTA on November 27, 2006 in which a presentation on the ILM Project was delivered, meeting on January 10, 2007 to discuss the ILM Project and its alternatives, a meeting on September 13, 2007, the Annual General Meeting on October 5, 2007, a meeting on February 21, 2008 to provide a project update and discuss the progress on the NTA's AOA work, a meeting on April 22, 2008, a meeting on May 6, 2008, a meeting on May 7, 2008 regarding Archaeological Impact Assessment and TUS, and a meeting on June 17, 2008.⁶³² In addition, in March 2007, BC Hydro provided \$10,000 in capacity funding to NTA, as well as \$10,000 as an initial payment for AOA work that T'mixw Research was conducting for NTA, and then a further \$5,000 in July 2007, and then NTA confirmed that it would enter into a CFA on November 15, 2007.⁶³³

446. As set out above, the Court of Appeal in *Kwikwetlem* held that the Commission was to consider the *complaints* of the Appellants. While the NTA, Nooaitch and Nicomen intervened in the proceeding, they have not identified any complaints with the adequacy of consultation. Accordingly, BCTC will not address the adequacy at this time. If any of the NTA, Nicomen or Nooaitch file submissions in response to this submission, then BCTC will respond in Reply.

447. BCTC does ask that the Commission make a finding of fact that each of the NTA, Nicomen and Nooaitch intervened in the proceeding but did not identify any complaints with the adequacy of consultation to the date of the Commission's CPCN decision, despite being given the opportunity to do so. BCTC respectfully requests that the Commission make a further finding of fact that at no time during the period from August 2006 to August 2008 did the NTA or any of its members indicate that the NTA was only a service-delivery organization as now alleged. To the contrary, the NTA and its members gave every indication that it should be consulted on the ILM Project. BCTC and BC Hydro acted reasonably, given these indications, in consulting with the NTA.

⁶³¹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, pp. 167-188.

⁶³² Exhibit B-12, BCTC Response to BCUC IR 1.1.1, pp. 167-169, 179, 182, 184-186.

⁶³³ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, pp. 172-174, 177, 1801.

7. CONSULTATION ON IMPACTS OF EXISTING ASSETS

448. A number of First Nation Intervenors take the position that BCTC and BC Hydro had a duty to consult them on the “past, existing and future” impacts of Existing Assets at the same time as consulting them on the ILM Project. The identified Existing Assets included existing transmission lines and stations, generating facilities, and related assets such as access roads (the Existing Assets). The First Nations say that their rights were infringed without being consulted when the Existing Assets were put in place and that consultation and accommodation needs to take place on the Existing Assets at the same time as consultation on the ILM Project in order to fulfill the Crown’s duty to consult.

449. With respect, BCTC submits that the Crown’s duty to consult under *Haida* is directed at contemplated conduct that has the potential to adversely affect asserted rights. This duty exists for the purpose of preserving those rights pending proof or settlement (and to foster a relationship between the parties which may assist in ultimate reconciliation). BCTC submits that this duty does not require the Crown to account for all past conduct and, in the context of the ILM Project, did not require BCTC and BC Hydro to consult on all of the impacts of the Existing Assets at the same time as consulting on the ILM Project. Other Crown obligations and remedies exist outside the *Haida* framework that are directed at past actions.

450. BCTC and BC Hydro confirmed that they were prepared to discuss the impacts of the Existing Assets where the identification of and information on those impacts could assist in identifying and potentially avoiding, minimizing or mitigating the impacts of the ILM Project. BCTC and BC Hydro also confirmed that they would consult on the ongoing operational impacts of the Existing Assets (i.e., vegetation management, access, etc.) and that they were prepared to discuss specific grievances such as promises or contractual commitments that had not been honoured, such as offers for jobs.⁶³⁴

451. In short, BCTC submits that BCTC and BC Hydro were not required to consult on and accommodate all of the past, present and future impacts of the Existing Assets at the same time as consulting on the ILM Project and further submits that BCTC and BC Hydro’s actions regarding the Existing Assets were reasonable. If the Commission finds that BCTC and BC

⁶³⁴ Exhibit C-5-8-1, at para. 60; Exhibit B-20, Rebuttal Evidence C, Att. C-5; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 2103 ll. 1-22, p. 2105, ll. 2-13, p. 2106 l. 20 - p. 2107 l. 11; Cross-examination of Ms. Bobb, January 29, 2010, Vol. 16, p. 2383, ll. 9-22, p. 2399 ll. 6 – p. 2400, ll. 23; Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 921 l. 3 – p. 922 l. 7.

Hydro were required to consult with respect to the full impacts of the Existing Assets, then BCTC submits that the offer of a parallel process to explore these impacts satisfied this obligation and that the First Nations' position that there needed to be a single combined process on both the Existing Assets and the ILM Project was unreasonable. The remainder of this portion of BCTC's submission sets out BCTC's submission on this issue in more detail.

7.1. Facts

452. Each of UNIB/ONA, NNTC, Coldwater et al, STC, SHAC and Kwikwetlem raised issues during the consultation process regarding the existence and impacts of Existing Assets. The NNTC and UNIB/ONA raised this issue most frequently, with other First Nations raising it to varying degrees, in some cases only once or twice. During the last few months of the consultation process leading up to the Commission's CPCN Decision, NNTC and UNIB/ONA took the lead on this issue, although some other First Nations participated in these discussions. Accordingly, BCTC will concentrate its submissions on the discussions which took place with NNTC and UNIB/ONA on Existing Assets with reference to other First Nation's positions from time to time. However, BCTC's submissions on these issues are intended to apply to all Intervenor First Nations.

453. There was no attempt during the consultation process to catalogue all of the Existing Assets. Based on BCTC's understanding, the majority of the Existing Assets that were of concern were put in place in the 1970's; certainly this is the case with respect to the Nicola Substation, the 5L81 and 5L82 lines, and the related assets which were addressed in NNTC and UNIB/ONA's respective evidence.⁶³⁵

454. The Existing Assets were put in place under the authority of the *British Columbia Hydro and Power Authority Act* (the *BC Hydro Act*)⁶³⁶ and Order in Council 2193/65. OIC 2193/65 stated:⁶³⁷

THAT in accordance with and pursuant to the British Columbia Hydro and Power Authority Act, 1964, and all other powers thereunto enabling, approval be given under Section 14(1) of the said Act to British Columbia Hydro and Power Authority having power

(1) to generate, manufacture, distribute and supply power;

⁶³⁵ Exhibit C-5-8-1, paras. 10, 13; Exhibit C-5-7-1, para. 6.

⁶³⁶ 1964, S.B.C. 1964, c. 7, s.14.

⁶³⁷ OIC 2193/65, July 30, 1965.

...

(5) to build, make, construct, and establish every kind of structure, excavation, or installation and install every kind of equipment or facility;

...

(7) to acquire in accordance with the provisions of any statute relating thereto the right to enter upon roads, highways, railways, rivers, streams, water-ways, and other public places to erect on, under, or over the same anything required for the generation or supply of power;

...

(12) to do anything necessary or desirable for the carrying out of any of the powers and purposes mentioned herein.

455. UNIB/ONA and NNTC knew about the construction of the Existing Assets at the time they were built; at least 5L81, 5L82, the Nicola Substation and related assets.⁶³⁸ UNIB/ONA and NNTC say that they suffered impacts on their rights at the time the Existing Assets were built, and ongoing impacts since that time.⁶³⁹ Prior to being approached for consultation on the ILM Project, NNTC had not raised these issues with BC Hydro or BCTC.⁶⁴⁰ There is also no evidence that UNIB/ONA had done so.⁶⁴¹

456. In 2002, each of ONA (including UNIB) and the Nlaka'pamux Nation brought a lawsuit against the Province of British Columbia and Canada for damages in relation to the authorization of and impacts from the Existing Assets, along with many other alleged historical infringements in and through their respective territories. The members of Coldwater et al are also plaintiffs in the action brought by Nlaka'pamux Nation.⁶⁴² These actions have not been pursued.⁶⁴³

7.1.1. UNIB/ONA

457. At a meeting on October 16, 2007, UNIB/ONA raised concerns regarding the Existing Assets, and stated that its participation depended on discussions regarding mitigation of the

⁶³⁸ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2420 II. 12-23; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 2090 II. 5 -14.

⁶³⁹ Exhibit C-5-8-1, paras. 13-21; Exhibit C-5-7-1, paras. 19-23.

⁶⁴⁰ Cross-examination of Ms. Abbott, January 29, 2010, Vol. 16, p. 2427, II. 7-21.

⁶⁴¹ Exhibit C5-14, reference 11.1, 12.1, 13.2 and 14.2, pp. 5-7.

⁶⁴² Exhibit B-20, B-12, C-9.

⁶⁴³ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2426 II. 4 -14.

substation. In response to these concerns, BC Hydro indicated that it had appointed a Chief Negotiator to discuss these issues and arranged a meeting between UNIB/ONA and BC Hydro, with BC Hydro's Chief Negotiator, Mr. Denhoff, on November 8, 2007.⁶⁴⁴

458. At the November 8 meeting, UNIB/ONA stated that the main issue for them was regarding compensation and mitigation for the Existing Assets.⁶⁴⁵ In response, BC Hydro offered to discuss a process for dealing with concerns regarding the Existing Assets. Chief Manuel asked for this offer to be made in writing. BC Hydro also offered to provide omnibus funding to the ONA to enable its participation in consultation on the ILM Project, the Mica 5 and 6 Project consultations, and Protocol/Framework Agreement discussions. UNIB/ONA agreed with this proposal and BC Hydro indicated that it would amend the existing Consultation Agreement to provide approximately \$25,000. In mid-December 2007, UNIB/ONA and BC Hydro met to discuss this further capacity funding, but unfortunately were unable to reach agreement.

459. On December 3, 2007, BC Hydro wrote Chief Manuel regarding the Existing Assets as follows:⁶⁴⁶

...

BC Hydro is prepared to engage in discussions with you concerning current installations in the area that you have identified as UNIB territory without prejudice to the outcome of those discussions.

BC Hydro views these discussions as exploratory in nature and we look forward to you identifying any potential direct impacts these facilities might have on aboriginal interests. We will undertake these discussions separate from the ILM consultation process and would like to propose a meeting on January 14th or 17th 2008.

460. In cross-examination, Mr. Anderson explained that this offer was for a separate, but parallel, process from consultation on the ILM Project:⁶⁴⁷

MR. ANDERSON: A: So again in maybe just a little bit of context. Overall, I would say generally that that's a correct articulation. We were going into this—well, maybe back before the April meeting, with Upper Nicola in particular, I believe, in December, we first heard concerns from Upper Nicola, December, '07, around

⁶⁴⁴ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 109-110.

⁶⁴⁵ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 160-161.

⁶⁴⁶ Exhibit C5-8-1, App. J.

⁶⁴⁷ Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 895, l. 3 to 18.

past grievances. And at that time, we put forward a proposal that said, “Okay, we hear you, and we’re willing to talk about that.” And we sent them a letter in December that said, “We’re willing to entertain a process, an exploratory process, of looking at what these past grievances arising from those existing assets, what they are.” Also indicating that we would like to do those in parallel, but separate from the ILM 5L83 engagement on that project. ...

461. Between December 2007 and August 2008, a number of meetings took place with UNIB/ONA and NNTC regarding the Existing Assets. These are discussed below. On May 23, 2008, Ms. Hooper of BC Hydro spoke with Chief Manuel. Chief Manuel advised Ms. Hooper that he wanted the Province to be involved in the discussions about Existing Assets and that, while UNIB was interested in undertaking a Traditional Use Study, it would not do so until the issues relating to “past, existing and future” impacts of Existing Assets were dealt with.⁶⁴⁸

7.1.2. NNTC

462. During a meeting on September 7, 2007 between BC Hydro and NNTC, NNTC asked to meet with BC Hydro executives regarding the Existing Assets.⁶⁴⁹

463. In response to the NNTC’s request, BCTC and BC Hydro arranged a meeting for November 13, 2007, which included BC Hydro’s Director of Aboriginal Relations and Negotiations, Mr. Viereck.⁶⁵⁰ In attendance were Chief Pasco of NNTC and Oregon Jack, Chief Campbell of Boothroyd, Chief Spinks of Lytton, Ms. Cathy Speth of Spuzzum, and Ms. Abbott, the Executive Director of the NNTC. During the meeting, the NNTC provided BC Hydro with a letter setting out the NNTC’s proposals for ways in which they may move toward an agreeable process of engagement concerning the ILM Project and Existing Assets. The NNTC outlined a process under which it would complete a preliminary report outlining strategic-level issues that must be addressed, the scope and nature of studies required to properly engage about those issues, and more generally on rights and title issues. The NNTC’s process would also include a process for consultation and accommodation discussions on the Existing Assets between the NNTC, the Province, BC Hydro and BCTC, which would be informed by the preliminary report and the additional studies completed pursuant to the report.⁶⁵¹

⁶⁴⁸ Exhibit B-20, Rebuttal Evidence C p. 7, Att. C-4.

⁶⁴⁹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 140; Exhibit B-20, Att. B-3; Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2360, ll. 16-19; Cross-examination of Mr. Littledale, January 15, 2010, Vo. 8, p. 1107 ll. 12-23.

⁶⁵⁰ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 142.

⁶⁵¹ Exhibit C5-7-1, App. H; Exhibit C3-50; Cross-examination of Chief Pasco January 29, 2010, Vol. 16, 2368 l. 7 - p. 2369 l. 16.

464. On November 23, 2007, BC Hydro met again with the NNTC and Mandell Pinder. Mr. Denhoff was in attendance, as was Chief Pasco, Chief Spinks, Chief Campbell and Ms. Abbott. During that meeting, the NNTC representatives raised the impacts on Nlaka'pamux territory from highways, gas lines, and railroads. BC Hydro responded that it could not change railroads or highways cumulative impacts, but that it would work with the NNTC and that it was prepared to look at larger impacts of the ILM Project.⁶⁵²

465. On December 5, 2007, BC Hydro met again with the NNTC and Mandell Pinder. During this meeting, the NNTC presented a draft "Consultation Process".⁶⁵³ The NNTC's Consultation Process was based on a combined consultation process on the Existing Assets and the ILM Project. Chief Pasco testified that the NNTC's Consultation Process was not just about understanding the impacts from the Existing Assets but presented a single cohesive process that would deal with the past, present and future impacts of the Existing Assets and the ILM Project at the same time.⁶⁵⁴ The NNTC's Consultation Process stated that, "No site preparation or construction related to the Project will take place until completion of the Process."⁶⁵⁵ In response, BC Hydro indicated that it was willing to discuss the ILM Project and the Existing Assets in separate but concurrent processes because it believed there could not be lengthy negotiation processes tied to the consultation and review process for the ILM Project.⁶⁵⁶ Notwithstanding this, BC Hydro indicated that it would consider the NNTC's proposed Consultation Process further.⁶⁵⁷

466. Following BC Hydro's review of NNTC's proposed Consultation Process, on January 17, 2008, BC Hydro wrote to Chief Pasco setting out its continued desire to enter into a consultation agreement with NNTC on the ILM Project and enclosed a draft Consultation Agreement to this effect. BC Hydro's letter indicated:⁶⁵⁸

...

⁶⁵² Exhibit B-20, Att. B-5; Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2366 I. 18 - p. 2367 I. 19.

⁶⁵³ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 144; Exhibit B-20, Att. B-6; Exhibit C5-7-1, App. I.

⁶⁵⁴ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2429 II. 25 - p. 2430 II. 10.

⁶⁵⁵ Exhibit C-5-7-1, App. K, p. 4.

⁶⁵⁶ Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2372, I. 12-18.

⁶⁵⁷ Exhibit B-20, Rebuttal Evidence B, Att. B-6.

⁶⁵⁸ Exhibit C5-7-1, App. K.

BC Hydro is committed to engaging in a comprehensive consultation process with you concerning the ILM project, to providing funding to enable you to participate in the British Columbia Environmental Assessment Office (BCEAO) review process and to working with you to find co-operative solutions to issues which may arise during consultations. In support of this commitment, we have reviewed your draft proposal for a Hydro/NNTC Consultation Process (the "Process") that was received on December 5th, 2007, and have responded accordingly in our attached draft.

In addition to consultation on ILM, we understand NNTC has issues regarding past grievances and will be responding to this in a separate letter.

BC Hydro would like to propose a meeting to discuss the Process with you and to conclude the consultation agreement as quickly as possible to enable NNTC to move forward with the ILM consultations. ...

467. On January 18, 2008, BC Hydro wrote a separate letter to Chief Pasco regarding the Existing Assets:⁶⁵⁹

BC Hydro is prepared to engage in discussions with you concerning current installations in the area that you have identified as NNTC territory without prejudice to the outcome of those discussions.

BC Hydro views these discussions as exploratory in nature and we look forward to you identifying any potential direct impacts these facilities might have on aboriginal interests. We will undertake these discussions separate from the ILM consultation process and would like to propose a meeting at your earliest convenience.

468. On February 5, 2008, BC Hydro met again with the NNTC and Mandell Pinder. During this meeting, NNTC reiterated its position that the past and present must be dealt with together and that it wanted to negotiate "historical grievances" and the ILM Project together. In response, BC Hydro repeated its offer to engage in two separate, simultaneous discussions. During the meeting, NNTC asked to meet with more senior people at BC Hydro and BCTC in order to further discuss these issues.⁶⁶⁰

469. On March 14, 2008, Mr. Viereck wrote to Chief Pasco in response to the NNTC's request for a meeting between NNTC and the BC Hydro Board.⁶⁶¹ Mr. Viereck suggested a meeting with Mr. John Irving, Vice President and General Counsel of BCTC, and Mr. Bruce

⁶⁵⁹ Exhibit C5-7-1, App. L; Exhibit B-20, Rebuttal Evidence B, p. 5, Att. B-7.

⁶⁶⁰ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 146-147; Exhibit B-20, Rebuttal Evidence B, Att. B-8.

⁶⁶¹ Exhibit C3-51; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 149.

Barrett, Vice President Major Projects of BCTC. This meeting ultimately took place on April 22, 2008 and is discussed below together with further meetings on the Existing Assets.⁶⁶²

7.1.3. Multi First Nation Discussions

470. On September 13, 2007, BC Hydro and BCTC met with 11 of the 15 Nlaka'pamux First Nations, including Lytton, Boothroyd and Skuppah, who are represented by NNTC, and Siska and Cook's Ferry, who are part of Coldwater et al. In attendance were Chief Spinks and Councillor Charlie (Lytton), Chief Sampson (Siska), Chief Aljam (Coldwater), Chief Walkem (Cooks Ferry), Chief Percy Joe and Band Manager Gerald Etienne (Shackan), Chief Quinn and Councillor Edwards (Nicomen), Chief Shackelly (Nooaitch), Councillor Joe (Lower Nicola), Councillor Campbell (Boothroyd), Councillor Brown (Lytton), Councillor McIntyre (Skuppah), Les Liebrandt (CEO, NTA), John Warren, (Administrator, Boston Bar), Alison Duncan (NNTC), Raymond Phillips, Legal Counsel, Mr. Mounsey, Mr. Anderson, Mr. Littledale and Mr. Wake (BC Hydro), and Ms. Holland (BCTC).⁶⁶³ The First Nations in attendance stated that the BCEAO process should be looking at impacts from the Existing Assets. Mr. Anderson testified that by this point in time and going forward, the discussions regarding a consultation protocol that had been occurring through the Spring and Summer of 2007, started to blend together with the discussions related to "past grievances".⁶⁶⁴

471. On April 22, 2008, BCTC and BC Hydro met with NNTC, UNIB/ONA and Lower Nicola. Chief Pasco (NNTC and Oregon Jack Creek), Chief Bobb (Spuzzum), Ms. Abbott (NNTC), Chief Spinks (Lytton), Chief Moses (Lower Nicola), Chief Campbell (Boothroyd), Chief Manuel (UNIB), Councillor Dan Manuel (UNIB), Ms. Terbasket (ONA) and Mr. Johnston (ONA) were at the meeting. Mr. Irving and Mr. Barrett attended the meeting from BCTC, and Mr. Viereck, Mr. Anderson and Mr. Denhoff attended the meeting from BC Hydro. During the meeting, UNIB/ONA stated they did not want to proceed further on the ILM Project until the historical impacts of the Existing Assets had been dealt with or faithfully negotiated. NNTC indicated that its concerns about past grievances had never been addressed and that the sooner the past was addressed the sooner the parties could move forward. Chief Pasco also explained that he had a mandate to deal with the negotiations of past grievances. In response, BCTC and BC Hydro explained that they had a mandate to deal with concerns, to address issues to improve the ILM

⁶⁶² Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2380 II. 5-14.

⁶⁶³ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 141; Exhibit B-20, Att. B-4; Cross-examination of Ms. Bobb, January 29, 2010, Vol. 16, p. 2362 II. 20-24.

⁶⁶⁴ Cross-examination of Mr. Anderson, January 15, 2010, Vol. 8, p. 1110 I. 6- p.1111 I. 16.

Project, to avoid impacts and to compensate where impacts could not be avoided. However, BCTC and BC Hydro reiterated that they did not have a legal mandate to deal with “historic grievances”. BC Hydro and BCTC also again confirmed that they were able to discuss issues such as reliability, issues related to current operations such as vegetation management and past issues related to BC Hydro itself such as promises of jobs.⁶⁶⁵ NNTC, UNIB and ONA reiterated that they wanted to see a mandate to negotiate issues with respect to the Existing Assets and the ILM Project jointly.⁶⁶⁶ No site specific concerns were raised during this meeting, and the accommodation sought for the Existing Assets was compensation.⁶⁶⁷ At the end of the meeting, the parties agreed to meet again on May 6, 2008.

472. On May 6, 2008, a further meeting took place between the senior management of BC Hydro and BCTC and NNTC, UNIB and ONA, Mandell Pinder, as well as some members of the NTA. In particular, Chief Pasco, Chief Manuel, Chief Walkem of Cook’s Ferry, Ms. Terbasket and Mr. Johnston of ONA, and Ms. Speth of Spuzzum were present. Mr. Danesh and Ms. Gaertner of Mandell Pinder and Mr. Raymond Phillips were present as counsel. During the meeting, UNIB/ONA again stated that concerns regarding the Existing Assets had to be dealt with before the ILM Project could be looked at. Mandell Pinder then presented a further framework for a Protocol respecting “existing and on-going issues.” This Protocol set out the following goals of the First Nations: “to have Hydro engage in negotiations regarding all of their facilities in their respective Territories as part of consultation and accommodation for any new projects”,⁶⁶⁸ and, that “Hydro and the [First Nations] will enter into negotiations to reach a final accommodation for existing and on-going issues, together with the proposed new projects prior to the completion of the environmental assessment review for the ILM Project or any other new project.” It also stated that a core element of the Protocol was that the First Nations and BC Hydro “will engage in negotiations to achieve final resolution of the issues identified.” Even if that was all achieved, the Protocol also clearly stated that it was “not an agreement by the [First Nations] to the proposed ILM Project.”⁶⁶⁹ BC Hydro then presented its own proposal for terms of

⁶⁶⁵ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 115; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 163; Exhibit B-20, Rebuttal Evidence C, p. 6, Att. C-2; Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 921 I. 3 – p. 922 I. 7.

⁶⁶⁶ Cross-Examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2384 I. 17 – p. 2385 I. 9; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 1984 II. 3 – p. 1985 II. 1.

⁶⁶⁷ Exhibit B-20, Rebuttal Evidence B, p. 5, Att. B-9, Rebuttal Evidence C, p. 6, Att. C-2.

⁶⁶⁸ Exhibit C-5-7-1, App. P. p. 1; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 2005 I. 9 – p. 2006 I. 9.

⁶⁶⁹ Exhibit C-5-7-1, App. P. p. 2, 3.

reference for exploratory discussions on issues related to the Existing Assets, which would involve a separate process. To attempt to reconcile the differences between the two proposals, the parties agreed to form a smaller Working Group.⁶⁷⁰

473. On May 12, 2008, the Working Group held a conference call to discuss the two proposals. While they identified the differences between the two proposals, they were unable to resolve them.⁶⁷¹

474. On May 13, 2008, NNTC and ONA wrote to the Honourable Richard Neufeld, Minister of Energy, Mines and Petroleum Resources requesting a meeting to discuss their concerns.⁶⁷²

475. On May 16, 2008, the Working Group met in person to discuss the respective proposals and attempt to come to some common understanding. The focus of the discussion was around whether the Existing Assets would be discussed in the same process as the ILM Project or a different process. Ms. Gaertner, counsel for UNIB/ONA and the NNTC, stated that the First Nations were not interested in separating the issues of the Existing Assets from consultation on the ILM Project. She also stated that the scoping of the work was very intense and did not think that First Nations could adequately scope the issues by September 30, 2008 when the EAC Application was to be filed. The Working Group also discussed whether BC Hydro would seek a mandate to negotiate compensation for Existing Assets. Ultimately, the Working Group was again unable to resolve all of the differences in the proposals and decided that these issues needed to be brought back to the larger group.⁶⁷³

476. A further meeting of the larger group took place on June 17, 2008. In attendance were representatives of NNTC, UNIB/ONA, the NTA, Lower Nicola, STC, and Coldwater et al, as well as Mandell Pinder. Mr. Barrett attended for BCTC and Mr. Denhoff and Mr. Anderson attended for BC Hydro. The parties discussed the issues from the May 16, 2008 meeting and identified the primary issue that BC Hydro and BCTC did not have a mandate to address all aspects of the Existing Assets. BC Hydro reiterated that it could address operational issues such as vegetation management and reliability issues, or specific grievances such as promises or

⁶⁷⁰ Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 115-116; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 163-164; Exhibit B-20, Rebuttal Evidence C, p. 3; Exhibit C3-41.

⁶⁷¹ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 151.

⁶⁷² Exhibit C-5-7-1, para. 61, App. Q.

⁶⁷³ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 151; Exhibit B-20, Rebuttal Evidence C, p. 7, Att. C-3.

contractual commitments that had not been honoured, but that it could not negotiate “past grievances”.⁶⁷⁴ During the meeting and during cross-examination, Chief Manuel recognized that the Province needed to be involved.⁶⁷⁵ Once again, the parties were unable to resolve their differences.

477. On July 18, 2008, Chief Pasco and Grand Chief Stewart Phillip of the ONA wrote to Minister Neufeld asking that the Province either give BC Hydro and BCTC a clear mandate to engage regarding the Existing Assets, or that the Ministry of Energy, Mines and Petroleum Resources must be directly involved in the consultation to address existing and proposed BC Hydro facilities.⁶⁷⁶

478. There were no further meetings on the impacts of the Existing Assets prior to August 5, 2008.

7.2. Law

7.2.1. Honour of the Crown in Aboriginal Relations

Haida

479. In *Haida*, the Supreme Court of Canada held that the Crown has a constitutional duty to consult with respect to asserted claims of aboriginal rights and title. In doing so, the Court made it clear that this duty arises when the Crown contemplates conduct that might adversely affect a claimed right:⁶⁷⁷

35. But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J. [emphasis added]

⁶⁷⁴ Cross-examination of Chief Manuel and Councillor Manuel, January 25, 2010, Vol. 13, p. 2103 ll. 1-22, p. 2105, ll. 2-13, p. 2106 l. 20 - p. 2107 l. 11; Cross-examination of Ms. Bobb, January 29, 2010, Vol. 16, p. 2399 ll. 6 – p. 2400, ll. 23.

⁶⁷⁵ Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 152; Exhibit B-20, Rebuttal Evidence B, Att. 11, Rebuttal Evidence C, Att. 5; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 2031 ll. 12-26.

⁶⁷⁶ Exhibit B-32.

⁶⁷⁷ *Haida* at para. 35.

480. As further explained by the Court, the purpose of the *Haida* duty to consult and accommodate relates to the preservation of asserted aboriginal rights prior to their resolution by claim or treaty:

38. I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation; see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 Can. Bar Rev. 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown. [emphasis added]

481. BCTC submits that it is clear that the duty to consult in *Haida*, as triggered by the ILM Project, is intended to apply to prospective government action (e.g., "contemplated" Crown conduct) to attempt to preserve the asserted rights in question pending settlement or proof. This duty does not apply to past government action where impacts have already taken place. Other processes and responsibilities are available to address allegations of past infringements.⁶⁷⁸

482. BCTC submits that this is clear based on the express wording of *Haida*. BCTC also submits that this interpretation is supported by a review of the state of the law prior to the enactment of section 35 of the *Constitution Act, 1982*. This review is set out below.

Consultation and Section 35 Rights pre-1982

483. The law regarding aboriginal rights and title prior to 1982 is significantly different than the law after 1982. Prior to the enactment of section 35, aboriginal rights and title were common law rights without constitutional protection. The case law is clear that, prior to 1982, both aboriginal rights and aboriginal title could be extinguished by an Act of the Parliament of Canada.

⁶⁷⁸ Proving aboriginal rights and title: *Van der Peet*, *Mitchell v. M.N.R.*, 2001 SCC 33; *Delgamuukw*, *Marshall & Bernard*; Justificatory process for an infringement of proven or defined aboriginal rights and title: *Sparrow*, *Gladstone*, *Delgamuukw*, *R. v. Badger*, [1996] 1 S.C.R. 771; and Treaty making: *Haida*, *Mikisew*.

484. The enactment of section 35⁶⁷⁹ significantly changed the legal landscape in Canada. Similarly so did the enactment of the *Charter of Rights* in 1982. This change is important because, as the Supreme Court of Canada explained in *R. v. Gamble* (a case dealing with the *Charter of Rights*), the lawfulness of actions must be determined by the law in effect at the time of the action, not retroactively.⁶⁸⁰

7 I agree with Wilson J. that in order to determine whether the Charter is applicable law a court must ask whether the Charter is in force at the time at which the act or event which is alleged to infringe the Charter took place or had its effect. As this court recently stated in *R. v. Stevens*, [1988] 1 S.C.R. 1153 at 1158, 64 C.R. (3d) 297, 41 C.C.C. (3d) 193, 28 O.A.C. 243, 86 N.R. 85, the following formulations of Tarnopolsky J.A. in *R. v. James*, 55 O.R. (2d) 609, [1986] 2 C.T.C. 288, (sub nom. *R. v. James; Dzagic v. R.*) 86 D.T.C. 6432, 27 C.C.C. (3d) 1 at 21, 15 O.A.C. 319, affirmed [1988] 1 S.C.R. 669, 63 O.R. (2d) 635, [1988] 2 C.T.C. 1, 88 D.T.C. 6273, 40 C.C.C. (3d) 576, 15 O.A.C. 319, 85 N.R. 1, are correct:

... one applies the law in force at the time when the act that is alleged to be in contravention of a Charter right or freedom occurs.

And at p. 25:

... it is important that actions be determined by the law, including the Constitution, in effect at the time of the action. [emphasis added]

485. The concept of the honour of the Crown existed prior to 1982; however, prior to the enactment of section 35, it only applied when the Crown was dealing with treaty rights or the extinguishment of aboriginal rights or title, it did not require consultation prior to actions taking place which may affect aboriginal rights. As the Supreme Court explained in *R. v. Badger*, the honour of the Crown is always at stake in treaty interpretation and in determining whether aboriginal rights have been extinguished by the Crown.⁶⁸¹

41. At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at

⁶⁷⁹ Section 35 was not fully enacted until 1983, however, for the purposes of this submission the distinction is irrelevant.

⁶⁸⁰ [1988] 2 S.C.R. 595 at para. 7.

⁶⁸¹ *Badger* at para. 41; See also: *Mitchell v. M.N.R.* at para. 9; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R v. Marshall*, [1999] 3 S.C.R. 456, at para. 50; *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, at 103-104; *Mikisew* at para. 51; *R. v. White and Bob*, [1964] B.C.J. No. 212 (B.C.C.A.).

p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of “sharp dealing” will be sanctioned. See *Sparrow, supra*, at pp. 1107-8 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Simon, supra*, at p. 402; *Sioui, supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be “strict proof of the fact of extinguishment” and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon, supra*, at p. 406; *Sioui, supra*, at p. 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404.

486. Historically, British policy recognized the rights of aboriginal people to occupy their traditional lands after the assertion of sovereignty by the Crown. In *Calder v. Attorney-General of British Columbia*, the Supreme Court of Canada concluded that aboriginal title could be found to exist in Canada, but that it could be extinguished at the will of the Crown by a clear and plain legislative act.⁶⁸²

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right”. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was “dependent on the goodwill of the Sovereign”.

...

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be “clear and plain”. There is no such proof in the case at bar; no legislation to that effect.

487. In *Delgamuukw v. British Columbia*, Lamer C.J. reaffirmed that the government of Canada could extinguish aboriginal title prior to 1982.⁶⁸³

⁶⁸² *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at 328-329 (per Martland, Judson and Ritchie, JJ.) and at 404 (per Hall, Spence and Laskin, JJ.)

⁶⁸³ *Delgamuukw* at para. 173.

Since 1871, the exclusive power to legislate in relation to “Indians, and Lands reserved for the Indians” has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.

488. With respect to aboriginal rights, the Supreme Court has also found that prior to 1982, these rights did not have constitutional status and as common law rights, they could also be extinguished by the Crown. In *R. v. Van der Peet*, Lamer C.J. wrote:⁶⁸⁴

At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 112; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v; it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.

And L’Heureux-Dubé (in dissent but not on this point) stated:⁶⁸⁵

Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were “dependent upon the good will of the Sovereign”: see *St. Catherine’s Milling and Lumber Co. v. The Queen*, *supra*, at p. 54, also *R. v. George*, [1966] S.C.R. 267, *Sikyea v. The Queen*, [1964] S.C.R. 642, and *Calder v. Attorney- General of British Columbia*, *supra*.

489. Finally, in *Bernard & Marshall*, the majority of the Supreme Court of Canada stated:⁶⁸⁶

Prior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible. The Crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1113. This process can be seen as a way of reconciling aboriginal interests with the interests of the broader community.

490. Based on the above, BCTC submits that it is clear that, prior to 1982 the honour of the Crown would not have been an impediment to the extinguishment of aboriginal title or rights by the Parliament of Canada so long as the legislation extinguishing the title or rights was clear and plain. Further, the honour of the Crown was not an impediment to the application of provincial laws which may have impacted upon asserted aboriginal rights and title; those laws would apply

⁶⁸⁴ *Van der Peet* at para. 28.

⁶⁸⁵ *Van der Peet* at para 125.

⁶⁸⁶ *Marshall & Bernard* at para 39.

either of their own force or through section 88 of the *Indian Act* (an issue which need not be decided in these proceedings).⁶⁸⁷

491. A plain reading of *Haida* demonstrates that the constitutional duty to consult under *Haida* on the assertion of unproven aboriginal rights and title owes its existence to section 35(1) of the *Constitution Act, 1982*. In addition, a consideration of the law concerning the honour of the Crown prior to 1982 supports this reading. In short, there was no *Haida* duty of consultation prior to the enactment of section 35 of the *Constitution Act, 1982*.

7.3. Analysis

7.3.1. The Haida Duty was Satisfied

492. Based on the above, BCTC submits that the *Haida* duty to consult as a framework for reconciliation is not intended to apply to past activities. The Supreme Court of Canada was clear that the duty to consult is triggered when the Crown proposes or contemplates activity that might adversely affect an asserted aboriginal right or title. It requires the Crown to balance societal and aboriginal interests when it makes decisions that may impact these rights. As part of that process, the Crown may be required to modify its proposed activity; it may also need to make decisions in the face of disagreement from aboriginal peoples as to the adequacy of its consultation.⁶⁸⁸ These are all considerations and steps that may be taken with respect to proposed (contemplated) activities; BCTC submits that they are not conducive to addressing activities that occurred close to 40 years ago.

493. To be clear, BCTC does not take the position that the Existing Assets are irrelevant to consultation on the ILM Project. During the consultation process, BCTC and BC Hydro confirmed that they were prepared to discuss the impacts of the Existing Assets where the identification of and information on those impacts could assist in identifying and potentially avoiding, minimizing or mitigating the impacts of the ILM Project. BC Hydro and BCTC also confirmed that they would consult with respect to any concerns about the operation of the Existing Assets, such as vegetation management and access.⁶⁸⁹ Finally, BC Hydro and BCTC

⁶⁸⁷ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31.

⁶⁸⁸ *Haida* at paras. 35, 45, 46 and 47; *Douglas* at para. 45.

⁶⁸⁹ Exhibit C-5-8-1, at para. 60; Exhibit B-20, Rebuttal Evidence C, Att. C-5; Cross-examination of Chief Manuel January 25, 2010, Vol. 13, p. 2103 ll. 1-22, p. 2105, ll. 2-13, p. 2106 l. 20 - p. 2107 l. 11; Cross-examination of Ms. Bobb, January 29, 2010, Vol. 16, p. 2383, ll. 9-22, p. 2399 ll. 6 - p. 2400, l. 23; Cross-examination of Chief Sampson, January 26, 2010, Vol. 14, p. 2240, ll. 2-22.

confirmed that they were prepared to discuss any specific grievances related to the Existing Assets such as promises or contractual commitments that had not been honoured. For example, in response to the concern regarding power surges, in 2007, BCTC established the Fraser Canyon Reliability Committee. The Committee was established in response to concerns raised by Spuzzum that power surges had been causing blackouts and damaging electronic equipment.⁶⁹⁰ Notwithstanding this, UNIB/ONA and NNTC provided very few details during the consultation process regarding the impacts of the Existing Assets, beyond the fact that they were seeking some form of compensation or accommodation.⁶⁹¹

494. BCTC submits that the topics on which it offered to consult regarding Existing Assets align well with the duty to consult in *Haida*. Information on the type of impacts from the Existing Assets could assist in avoiding or mitigating these impacts in the design of the ILM Project. Consultation with respect to the operation of the Existing Assets is in relation to ongoing operational issues which may affect First Nations, and could also assist in avoiding or mitigating the potential effects of the ILM Project.

495. Ironically, it appears that a number of the concerns that the UNIB/ONA raised with the Existing Assets might be addressed through the consultation that BCTC and BC Hydro offered.⁶⁹²

MR. CARPENTER: Q: Maybe we can do it this way. In paragraph 16, and appreciate that this doesn't deal with the whole of the issues identified in paragraph 16, but if you go down to -- halfway down that paragraph, it says, "The construction of the ILM transmission facilities has also increased road access to this area, which has led to an increase in non-aboriginal access and interference with the exercise of hunting rights by Upper Nicola members.

You see that, and that's one of your issues, correct?

CHIEF T. MANUEL: A: Correct.

MR. CARPENTER: Q: And you're aware that one of the issues that BCTC and B.C. Hydro said that they were prepared to talk about was the issue of access, correct?

CHIEF T. MANUEL: A: The issue of access into the existing right-of-way?

⁶⁹⁰ Rebuttal Evidence B, Att. B-9; Cross-examination of Ms. Bobb, January 29, 2010, Vol. 16, p. 2380 II. 24 – p. 2383 I. 22, 2399 I. 6 – p. 2400, I. 23.

⁶⁹¹ Cross-examination of Councillor Manuel, January 25, 2010, Vol. 13, p. 2117, II. 8-16.

⁶⁹² Cross-examination of Chief Manuel January 25, 2010, Vol. 13, p. 2103 II. 1-22, p. 2105, II. 2-13, p. 2106 I. 20 - p. 2107 I. 11.

MR. CARPENTER: Q: Yes.

COUNCILLOR D. MANUEL: A: As it related to the operation of the existing facilities, I believe, yes.

...

MR. CARPENTER: Q: Then paragraph 18, "The natural ecosystem that supports these plants has been altered by the introduction of invasive species, in particular knapweed, since this area was opened up...ongoing vehicle access related to the ILM transmission system.

And again the issue of vegetation management in terms of the operation of the existing lines was something that BCTC and B.C. Hydro said that they were prepared to talk to you about, correct?

COUNCILLOR D. MANUEL: A: Correct.

...

MR. CARPENTER: Q: They weren't prepared to talk about all the issues you wanted to talk about, but they were prepared to talk about operational issues such as access and vegetation management.

COUNCILLOR D. MANUEL: A: Outside of the consultation, or outside of operational -- outside of the ILM project, those were specifically related to operational issues. So operation of the -- of not only this facility but other facilities. So it wasn't -- it wasn't in the context of the ILM.

MR. CARPENTER: Q: And if I take what you were saying -- effectively they were saying "We're prepared to talk to you about those any time, it doesn't have to be in relation to the existing or future project," correct?

COUNCILLOR D. MANUEL: A: That's what was in the meetings that we went through this morning, I think, that was the message, yes.

496. BCTC and BC Hydro's confirmation that they would consult on ongoing operational issues associated with the Existing Assets may also be able to address at least some of the NNTC concerns with the Existing Assets.⁶⁹³

497. For the remaining issues associated with Existing Assets, which were generally described as the past impacts or existing and ongoing infringements of the Existing Assets,⁶⁹⁴ BCTC and BC Hydro consistently advised First Nations that they did not have a mandate to

⁶⁹³ Exhibit C-5-7-1, at para. 57; Exhibit B-20, Rebuttal Evidence B-11, Att. C-5; Cross-examination of Chief Pasco, January 29, 2010, Vol. 10, p. 2429 I. 25 – p. 2430 I. 10; Cross-examination of Ms. Bobb, January 29, 2010, Vol. 16, p. 2383, II. 9-22, p. 2399 II. 6 – p. 2400, I. 23;

⁶⁹⁴ Cross-examination of Councillor Manuel, January 25, 2010, Vol. 13, p. 2112 II. 6-10.

address these issues and that the First Nations should raise these directly with the Province.⁶⁹⁵ In response, UNIB/ONA and NNTC would only agree to a process that required BC Hydro and BCTC to negotiate about the impacts from the Existing Assets and the ILM Project jointly, as a single cohesive process.⁶⁹⁶ They took the position that consultation and accommodation of any new project has to include consultation and accommodation with respect to the full existing, ongoing and future impacts of the Existing Assets and that would achieve some form of accommodation or compensation for the Existing Assets.⁶⁹⁷

498. Both the Nlaka'pamux Nation and the ONA have commenced actions against the Province and Canada seeking damages in relation to the authorization of and impacts from the Existing Assets, among many other alleged historical infringements in and through their respective territories. In addition, Provincial representatives have offered to meet with the UNIB/ONA and NNTC in order to discuss and attempt to resolve these issues.⁶⁹⁸

499. In summary, BCTC submits that the duty of the Crown in *Haida* addresses contemplated conduct, not past conduct. Consistent with this, BCTC submits that the Commission's consideration of the reasonableness of BC Hydro and BCTC's consultation process up to the point of the Commission's CPCN decision should be limited to the ILM Project and its potential impacts. To find otherwise would be to ignore the express wording in *Haida* and also treat the *Constitution Act, 1982* as being retroactive and provide constitutional protection to aboriginal rights and title prior to its enactment. Prior to 1982, the Crown had no duty to consult with or seek to accommodate the Intervenor First Nations with respect to allegations that the Existing Assets adversely affected asserted aboriginal rights and title. To the contrary, the Crown was authorized to impact and even extinguish asserted aboriginal rights. The Existing Assets were authorized by an Order in Council pursuant to the *BC Hydro Act*.⁶⁹⁹ The *BC Hydro Act* was a law of general application. With the exception of the construction of the Existing Assets on Indian Reserves, the *BC Hydro Act* applied of its own force to aboriginal rights and title. As a

⁶⁹⁵ Exhibit B-3-1, Table 1-5, p. 78; Exhibit B-11, BCTC Response to BCUC IR 1.1.1, p. 115; Exhibit B-12, BCTC Response to BCUC IR 1.1.1, p. 163; Exhibit B-20, Rebuttal Evidence C, p. 6, Att. C-2; Cross-examination of Chief Jasper, January 21, 2010, Volume 12, p. 1907, l. 14 - p. 1908, l.1. (Note, the further offer of a parallel process is discussed below).

⁶⁹⁶ Cross-examination of Chief Manuel, January 25, 2010, Vol. 13 p. 1992, ll. 5-19; Cross-examination of Chief Pasco, p. 2429 l. 25 – p. 2430 l. 10.

⁶⁹⁷ Cross-examination of Ms. Abbott, January 29, 2010, Vol. 16, p. 2428 ll. 3-13; Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2429 ll. 25-p. 2430 ll.10, p. 2432 ll. 7-18; Cross-examination of Chief Manuel and Councillor Manuel, January 25, 2010, Vol. 13, p. 2117 ll. 1-17.

⁶⁹⁸ *Nlaka'pamux Nation Tribal Council*.

⁶⁹⁹ S.B.C. 1964 c. 7

result, the honour of the Crown was not engaged in relation to assertions of unproven, common law aboriginal rights or title during the construction of the Existing Assets.

500. BCTC submits that its actions and proposals regarding the impacts of Existing Assets was reasonable. By contrast, BCTC submits that the positions taken by UNIB/ONA and NNTC, and others, by insisting that all of the past, present and future impacts of the Existing Assets be addressed at the same time as the ILM Project clearly go beyond what the obligations in *Haida* require.

7.3.2. The Offer of a Parallel Process was Reasonable

501. In the alternative, if broader consultation was required with respect to the Existing Assets, BCTC submits that this obligation was satisfied through the offer of a parallel process.

502. Notwithstanding that BCTC and BC Hydro did not believe that there was any legal obligation to do so, BCTC and BC Hydro offered to attempt to address the concerns that UNIB/ONA and NNTC had with respect to the Existing Assets through a parallel process.⁷⁰⁰

503. BC Hydro and BCTC repeatedly offered this parallel process to UNIB/ONA and NNTC. In particular, during meetings on April 22, 2008, May 6, 2008, May 16, 2008, May 23, 2008, June 17, 2008 and July 23, 2008, as set out above.

504. Mr. Anderson explained that the parallel process was intended to explore the impacts of the Existing Assets, and then possibly seek a separate mandate.⁷⁰¹

MR. ANDERSON: A: I think that's taken a little bit out of context. So, consistently we said we don't have a mandate to deal with past grievances. That's consistent. What we have done on occasion is offer a process, and a parallel process that looks to understand what the impacts from those existing facilities might be, what those past grievances might be. And thereupon understanding them, there is a possibility of -- through discussion with the province, seeking a separate mandate.

505. In answer to Commissioner Vivian's questions, Mr. Anderson also explained that BC Hydro and BCTC were offering the process, even though they believed issues with respect to the Existing Assets should be taken up with the Province.⁷⁰²

⁷⁰⁰ Exhibit C-5-8-1, App. J; Exhibit C-5-7-1, App. L; Exhibit B-20, Att. C-5; Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2371 ll. 24 – p. 2372 ll. 18, p. 2406, ll. 9-17.

⁷⁰¹ Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 896 l. 22 – p. 897 l. 5.

⁷⁰² Commission Questions of Mr. Anderson, January 20, 2010, Vol. 11, p. 1549, l. 24 - p. 1550, l.11.

I think what we did is offered up to most who were—most who were pushing us on that, we ultimately offered a parallel process for some exploratory discussions around that, and still maintaining, I would say, that our belief was still that those particular items that we just talked about rest with the province, but we're saying that we're offering to have a process and to look at what those are and move forward from there.

COMMISSIONER VIVIAN: And that parallel process, did you consider that as part of the ILM process or not?

MR. ANDERSON: A: No. It would have been—

COMMISSIONER VIVIAN: A sidebar, if you like.

MR. ANDERSON: A: It was a separate process.

506. This offer was not acceptable to the UNIB/ONA and NNTC. Mr. Anderson explained his understanding of their position as follows:⁷⁰³

MR. ANDERSON: ...

And that's a position that was maintained through the April/May time frame. At the May 16th meeting where Mr. Howard just took us, in the notes, we get into two points where effectively counsel from Mandell Pinder at the time made it clear, again that their clients were not interested in having that parallel but separate process. It had to be a joint process. And also made it clear that—well, at least indicated that while their initial position had been maybe a joined process could be done by the time of our EA application for 5L83, there was some doubt shed on that timeline as well.

But—so then up through the May 16th time frame, B.C. Hydro/BCTC maintained that offer of that parallel position. Then when we get into June, and the meeting notes that we're looking at now, effectively we're at a point where we're understanding that that—that there is a fundamental disagreement that the process that we've outlined won't work for Upper Nicola and vice versa.

...

MR. ANDERSON: A: There's a bunch of points you made in there, and I'd have to say I don't agree with any of them. The discussion we had yesterday, first of all, didn't start with B.C. Hydro withdrawing an offer. Out of the May 16th meeting, it became crystal-clear to us that your clients were not prepared to accept the offer that we had consistently made around addressing—looking to have exploratory discussions related to past grievances as part of a separate process. And given that they were not prepared to accept that, we said, "Fine, we understand. We understand that that is no longer on the table."

⁷⁰³ Exhibit B-20, Rebuttal Evidence C, Att. C-3; Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 895, l. 19 - p. 896 l. 12, January 15, 2010, Vol. 8, p. 1129, l. 25 - p. 1130, l. 24.

MR. STADFELD: Q: I put to you, Mr. Anderson, that is not reflected on the record. There is nothing in the record that I can see, perhaps you can point me to it, which indicates that our clients took that position.

MR. ANDERSON: A: Your clients consistently took the position that they did not want to have a separate but parallel process. Your clients insisted throughout the discussions on having a joint process, on having B.C. Hydro look at addressing past grievances related from the—past grievances as they relate to our existing B.C. Hydro infrastructure and that the infringements on aboriginal rights and particularly on aboriginal asserted title from those.

507. This was confirmed by Chief Pasco and Ms. Abbott on behalf of NNTC.⁷⁰⁴

MR. CARPENTER: Q: Just so that I understand, I want to sum up the position, because there's been a bunch of discussion back and forth about people saying, "Oh, well, you needed to deal with the past before you can deal with the future," and I don't want to have those debates. But your perspective is that consultation and accommodation of any new project had to include consultation and accommodation with respect to the existing, ongoing and future impacts of existing facilities, correct?

MS. ABBOTT: A: Yes.

...

MR. CARPENTER: Q: I'll try to ask my question another time, Chief Pasco. It wasn't just about understanding the impacts from the existing facilities so that you could make sure that some of those were avoided with respect to the new facilities. It was about – and these are your words, I think, when you said "single cohesive process". It was about a single cohesive process that would deal with the past, present and future impacts of the existing facilities, along with the new proposed facilities, at the same time. Correct?

CHIEF PASCO: A: Yes.

508. Chief Manuel, explained that they would not deal with the ILM Project without a commitment from the Province to address "current and ongoing infringement" first.⁷⁰⁵

MR. CARPENTER: Q: Can I add one more to the list, just in terms of what the discussion with respect to the ILM project has been, and that's -- we can't deal with the future until we've dealt with the past, correct?

CHIEF T. MANUEL: A: That's the true part of reconciliation, if we are going to move forward in a positive manner, the reconciliation does need to take place in this province, yes.

⁷⁰⁴ Cross-examination of Ms. Abbott, January 29, 2010, Vol. 16, p. 2428 II. 3-13; Cross-examination of Chief Pasco, January 29, 2010, Vol. 16, p. 2429 I. 25 – p. 2430 I. 10.

⁷⁰⁵ Cross-Examination of Chief Manuel, January 25, 2010, Vol. 13, p. 2067 II. 4-25.

MR. CARPENTER: Q: Your position is that it has to take place at the same time, correct?

CHIEF T. MANUEL: A: In regards to the ILM?

MR. CARPENTER: Q: Yes.

CHIEF T. MANUEL: A: We had looked for commitment, a commitment to this process. Commit that the province or B.C. Hydro were willing to deal with the current and ongoing infringement into our territory.

MR. CARPENTER: Q: At the same time as dealing with the proposed project, correct?

CHIEF T. MANUEL: A: Well, they were wanting to, but we were wanting to deal with—have that commitment first.

509. BCTC submits that, if it and BC Hydro were required to consult more broadly on the impacts of Existing Assets than they confirmed that they would, then their offer of a parallel process was reasonable. It offered to attempt to deal with the subject matter of UNIB/ONA and NNTC concerns with Existing Assets. While there was no guarantee that this process would be successful, there is no guarantee that any consultation process will be successful. First Nations do not have a veto under the duty to consult.

510. The one issue of the UNIB/ONA and NNTC that the offer of the parallel process did not address is the UNIB/ONA and NNTC's insistence that this process be undertaken together as one process with the consultation on the ILM Project. BCTC and BC Hydro were not prepared to do so. As described by Mr. Anderson, this was a fundamental concern:⁷⁰⁶

MR. HOWARD: Q: So isn't that a matter -- isn't that timing issue something that you would expect to sit down and talk over with Upper Nicola? Isn't that something that you should have brought to this meeting and said, "Well, look, here's my timeline. We're prepared to be a bit flexible. Can you be a bit flexible?" Isn't that what you should have done?

MR. ANDERSON: A: So I disagree with the characterization in that again, the central theme of disagreement wasn't at that point necessarily whether studies may be able to be concluded by the (a) time frame or not. While Ms. Holland has indicated we certainly did not believe they could be, and that was backed up by Mandell Pinder. At the same time the fundamental disagreement between the parties was as to whether it should be a combined process of evaluating existing lines and new project, or whether it could be a separate but parallel process.

⁷⁰⁶ Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 906 I. 19 – 907 I. 10.

511. Although BCTC and BC Hydro were not prepared to tie these processes together, they were prepared to undertake the separate process on Existing Assets in parallel to consultation on the ILM Project.

512. While there was an attempt to address timing during the course of the UNIB/ONA's proposals, the timing associated with their combined process was clearly uncertain.⁷⁰⁷

MR. HOWARD: Q: Okay. And Upper Nicola communicated to you that they were prepared to pursue that consultation process that would address existing and the new line. They were prepared to pursue that in a way that worked with the EA timelines. They communicated that to you, didn't they?

MR. ANDERSON: A: Yes and no. So, yes, it was communicated once, and then following in the -- let me just get the reference. The May 6th meeting, the proposal that was put forward, the discussions at that time were that -- putting forward that they may be able to complete that process within the EA time frames. The subsequent meeting, on May 16th, which was the working group meeting, counsel for Upper Nicola, Mandell Pinder, indicated that they thought it unlikely that they would be able to complete the scoping. I can point you to that reference. So that's the May 16th --

MR. HOWARD: Q: So that's attachment C-3.

MR. ANDERSON: A: Right. I don't have the attachment numbers.

MS. HOLLAND: A: That's correct. Attachment C-3 to Exhibit B-20.

MR. ANDERSON: A: On the second page, one, two, three, four bullets down, "BG" was Brenda Gaertner, Mandell Pinder, had some experience with these type of processes, "said that the scoping of the very work is very intense, does not think that First Nations could adequately scope the issues by September 30th, 2008." So while we heard it in one way, then the next meeting we heard that it's likely not possible.

MR. HOWARD: Q: Mr. Anderson, to be clear though, you didn't expect Ms. Gaertner was communicating that we definitely can't meet the EA timelines. You didn't understand them to be saying that, did you?

MS. HOLLAND: A: I was at the meeting and I understood that very much....

513. Even with best efforts, there could be no guarantee when the single process could be completed. BC Hydro's previous experience with the negotiation of historical grievances is that

⁷⁰⁷ Cross-examination of Mr. Anderson and Ms. Holland, January 14, 2010, Vol. 7, p. 903 I. 1 - p. 904 I. 12

these can be very lengthy processes.⁷⁰⁸ It appears that the NNTC have also had a similar experience.⁷⁰⁹

514. Based on the exchanges that took place, it was clear that there were numerous issues that still needed to be addressed. One of these was the scope of the undertaking and the approach:⁷¹⁰

MR. ANDERSON: A: And if I can just add to Ms. Holland's—so, the—your clients were not only looking to undertake studies to the—or look at past grievances arising out of the existing 5L81 and 5L82 lines, as their proposals indicated, they were looking to undertake studies related to all of B.C. Hydro/BCTC's assets in the territory. That's a much broader area. So if you look—and I can reference that. The May 6th meeting, which again, can you find the reference for me?

...

MS. HOLLAND: A: Maybe I could speak to the May 16th meeting. There was I don't think any conclusion reached about how the studies would be scoped, and I believe Brenda Gaertner, and I apologize if I have her name wrong, with your firm stated it was going to take until the end of September to go back to the communities and to actually get a scoping. But the discussion at the meeting sort of came in and out depending on which chief from which First Nation was speaking. So sometimes you have Chief Manual speaking and he seems to be speaking more for Upper Nicola, you have Chief Pasco speaking for NNTC, and this group is in the room. The scoping of the studies that we were talking about was related to studies for the existing assets. In some cases those related to 5L81 and 82 and sometimes the picture got a little bit bigger, but the discussion was how would you even go about undertaking those studies for something that was placed there 30 years ago if you are speaking of 5L81 and 82. So the scoping study question certainly wasn't answered at that meeting, and it was very confusing as to what the scope ultimately would be, and I don't think there was agreement amongst NNTC and Upper Nicola in the room on what they were trying to see scoped.

MR. ANDERSON: A: And coming out of that meeting, what I took back from the people who attended, and certainly in the June 17th meeting that followed, I can't—your clients never backed off of the position. And it's also contained in this document, just glancing through it, p. 2, First Nations position related to the scope of the agreement that we're talking about, that there should be one agreement that includes the proposed ILM project and existing facilities within each First Nation territory. Again, my understanding of that entire sequence of

⁷⁰⁸ Re-examination of Mr. Anderson, January 20, 2010, Vol. 11, p. 1588 I. 3 – p. 1589 I. 21.

⁷⁰⁹ Cross-examination of Chief Pasco and Ms. Abbott, January 29, 2010, Vol. 16, p. 2434 I. 26 –p. 2435 I. 12.

⁷¹⁰ Exhibit B-20, Att. C-3; Cross-examination of Mr. Anderson, January 14, 2010, Vol. 7, p. 908, I. 18 to p. 909, I. 1; Cross-examination of Ms. Holland, January 15, 2010, Vol. 8, p. 1132 I. 4 – p. 1133 I. 21.

events is that your clients never backed off of the position of having past grievances, existing project, carried out under one process at the same time.

515. The other was the involvement of other First Nations. For example, Coldwater et al indicated that all First Nations would have had to agree on the process in question.⁷¹¹ As part of what they saw taking place, Coldwater et al sought a broad study to attempt to assess the impacts of the Existing Assets:⁷¹²

MR. CARPENTER: Q: So at that meeting that took place on January 10th, 2007, as I understand it, what T'mixw in their technical role was saying if the upgrade existing circuits option is chosen in May, then we're going to -- we think that we should go back and try to assess what the historical impacts of those existing facilities were, correct?

CHIEF SAMPSON: A: Correct.

MR. CARPENTER: Q: And I don't think it's mentioned in your evidence but when I went to the notes it was mentioned there, and they also took the position that that should be done not based on what I'll call a corridor approach but on an integrated – system approach. Everything that effectively might be connected to those facilities, not just the specific place where the lines exist.

CHIEF SAMPSON: A: That would be correct. When we looked at the existing lines and the level of encroachment and infringement within the territory, and there was never traditional use studies done, they certainly impacted a lot of the traditional fishing sites with the development of that B.C. Hydro line. And there was absolutely no discussion at that time with First Nations in any way, shape or form.

516. None of this takes into account the other First Nation Intervenor who were also interested in the Existing Asset issue; and undoubtedly those that would be interested if BCTC and BC Hydro had agreed with the UNIB/ONA and NNTC's proposal for addressing these impacts and the ILM Project.

517. In short, while BCTC and BC Hydro offered a parallel process to attempt to address the UNIB/ONA and NNTC's concerns with Existing Assets, they were not prepared to tie the approval and implementation of a needed major public infrastructure project - the ILM Project - to the uncertain process of uncertain duration that the UNIB/ONA and NNTC insisted on. BCTC

⁷¹¹ Cross-examination of Chief Walkem and Chief Aljam, January 26, 2010, Vol. 14, p. 2161 I. 22 – p. 2162 I. 22; See also: Cross-examination of Chief Pasco and Ms. Abbott, January 29, 2010, Vol. 16, p. 2409 II. 8-21; Cross-examination of Chief Manuel, January 25, 2010, Vol. 13, p. 2048 I. 19 – p. 2049 I. 4.

⁷¹² Cross-examination of Chief Sampson, January 26, 2010, Vol. 14, p. 2233, I. 24 – p. 2234 I. 21; See also: Cross-examination of Chief Walkem, January 26, 2010, Vol. 14, p. 2236, II. 3-9.

submits that this was reasonable and, if there was an obligation to consult on broader impacts, the offer of a parallel process was reasonable. In contrast, BCTC submits that the UNIB/ONA and NNTC's insistence that all of the impacts of the Existing Assets be addressed as part of a single, combined process was unreasonable and does not represent the balance of First Nation and societal interests required under the *Haida* framework.

8. CONCLUSIONS AND ORDER SOUGHT

518. In BCTC's response to Commission IR 1.4.1, BCTC and BC Hydro responded as follows:

BCTC and BC Hydro believe that the consultation process with respect to the ILM Project has been reasonable to the point of the Commission's decision. BCTC and BC Hydro believe that the consultation process has provided First Nations with the opportunity to participate in the ILM decision-making process and, in particular, that the consultation process has reasonably ensured that First Nations were provided with all necessary information in a timely way so that they had an opportunity to express their interests and concerns, and to ensure that their representations were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

This has included the opportunity for First Nations to provide meaningful input on the Project, to raise concerns regarding any potential adverse effects of the Project on their unresolved rights and title, and to be able to engage in discussions on avoiding, mitigating or otherwise accommodating potential adverse effects on their rights - to the degree appropriate at this stage of the decision-making process on the Project.

In turn, BCTC and BC Hydro believe that they have conducted themselves in a manner which respects the importance of the rights in question and have attempted to respond to First Nations input, whenever possible, again recognizing where the consultation process was at in relation to the ILM decision-making process.

BCTC and BC Hydro also believe that the consultation duty has been discharged to the point of the Commission's decision. BCTC and BC Hydro expect to make further submissions on this question in final argument.

519. BCTC submits that the evidence continues to support this conclusion.

520. BCTC will not repeat its submissions on each of the First Nation Intervenor complaints here. BCTC submits that many of these complaints are not supported by the evidence, such as complaints about the lack of capacity funding. Other complaints appear to arise from a different interpretation of *Haida* and the definition of consultation, such as the position that consultation had not begun as of August 5, 2008 and that the parties were still engaged in a "pre-consultation" process. BCTC submits that this position is not supported by either the law or the facts. A further theme was the scope of consultation and the insistence that BCTC and BC Hydro consult on all of the past, present and future impacts of Existing Assets at the same time, and as part of the same consultation process, as the ILM Project. BCTC strongly believes this scope is not required by *Haida* but that, in any event, the insistence

that consultation on the impacts of Existing Assets take place as part of one process with the ILM Project was unreasonable as a condition of consultation on a needed major public infrastructure project.

521. From BCTC's perspective, a common theme among many of the First Nations complaints is that they were not raised during the course of the consultation process. However, an even more common perspective is the failure by many of the First Nation Intervenor to acknowledge the subject matter of the ILM CPCN Application and the staged decision-making process for the ILM Project. Notwithstanding that this staged approach was expressly recognized by the BC Court of Appeal in directing the Commission to review the adequacy of consultation to the point of its CPCN decision, the fact that consultation and accommodation did not need to be complete prior to, or even at the end of, the CPCN Application process is ignored by many, if not all, of the First Nations.

522. BCTC addresses each of the First Nation Intervenor complaints as it currently understands these in the main submission. Based on these submissions, BCTC submits that these complaints are not justified and that BCTC and BC Hydro met the duty to consult each of the First Nation Intervenor to the point of the CPCN decision on the subject matter of that decision.

523. Based on the above, BCTC seeks an Order that the Crown's duty to consult and accommodate the Kwikwetlem, STC, SHAC, Coldwater et al, ONA/UNIB, NNTC and Hwlitsum was met up to the date of the Commission's CPCN Decision. BCTC also seeks an Order rescinding the suspension of the CPCN.

524. In the alternative, if the Commission finds that the Crown's duty to consult and accommodate any of the above First Nations or Tribal Councils was not met, BCTC submits that further time should be given to discharge the duty as outlined in the Commission's Decision. BCTC has considered whether it can provide any further input on this. Unfortunately, given the various potential conclusions that the Commission could arrive at, BCTC believes that there is too broad a range of possibilities to consider and address without knowing the Commission's specific determination, what this relates to, and the Commission's conclusions regarding the other First Nation intervenors. Rather than speculate on these issues, BCTC submits that, if the Commission were to find that the Crown's duty to consult and accommodate any of the First

Nation Intervenors was not met, the relevant parties should be given the opportunity to address the appropriate remedy at that time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF MARCH 2010

FASKEN MARTINEAU DuMOULIN LLP

Per:

“original signed on behalf of”

A.W. (Sandy) Carpenter

“original signed on behalf of”

Charles Willms