BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT
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

SUBMISSION OF HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA RE: BCTC ILM CPCN COURT OF APPEAL RECONSIDERATION

MARCH 1, 2010

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1. ISSUES TO BE ADDRESSED BY THE PROVINCE

1. On February 18, 2009, the Court of Appeal of British Columbia (the "Court") ordered that the decision of the British Columbia Utilities Commission the "Commission") dated February 21, 2008, with Reasons given March 5, 2008 (the "Scoping Decision") be remitted to the Commission for reconsideration in accordance with the Court's opinion, and directed that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellant First Nations had been met up to the point of the Commission's decision to grant the CPCN.

2. On May 15, 2009, the Province registered with the Commission as an Intervenor for the purposes of this reconsideration hearing. As an Intervenor, the submissions of the Province are not focused upon a detailed review of the specific consultation efforts of BCTC and BC Hydro up to the point of the Commission's decision to grant the CPCN, nor an examination of the strength of First Nation claims to Aboriginal rights and title. Accordingly, in the course of these submissions, the Province will address some, but not all, of the questions raised by the Commission at the close of the evidentiary phase of the hearing. The Province seeks to make a useful and unique contribution to the Commission's adjudication of the public law matters at issue, and in particular, will be address the following:

I. Reconciling the Commission's Public Law duty with the Crown's First Nation consultation obligations – framework for balancing interests.

II. The limits of the Crown's obligations under ***Haida v. British Columbia (Minister of Forests)***, 2004 SCC 73 ("***Haida Nation***"):

   a. Does it include pre-existing impacts?

   b. Does it include economic compensation?

3. While the Supreme Court of Canada in ***Haida Nation*** indicated that "[a]s the framework [established for consultation and accommodation] is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate", it is clear that it is not open to courts or tribunals to expand the boundaries of the framework such that the Crown is burdened with legal obligation which was never intended at the time the Supreme Court crafted the duty in 2004.

A. Reconciling Public Law Duties and the Crown's obligations to First Nations – framework for balancing interests

4. In ***Haida Nation,*** the Supreme Court stated at paragraph 50 that, "[w]here accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests." The Supreme Court established a framework for determining when the duty to consult and accommodate arises, and the scope and content of the duty to consult and accommodate. Although the Court did explain the trigger for the duty to accommodate (which is reviewed later in these submissions), the Court did not address at length the approach to be taken by Crown decision makers in balancing the impact of the decision on asserted Aboriginal rights or title with other societal interests. This is perhaps because in earlier jurisprudence involving proven or established aboriginal interests, the Court established a staged framework for balancing those interests against other societal interests. While perhaps a technical point, it is important for the Commission to understand this staged approach to balancing these interests, otherwise the public interest supporting the Crown's contemplated conduct is at risk of being displaced. Given the submission from First Nations that they were entitled to be consulted on all possible alternatives, including those which were determined not to be viable in the public interest (within the meaning of the *Utilities Commission Act)*, suggests that the Supreme Court's mandated approach for balancing interests needs to be addressed.

Public law obligations are those that govern the relationship between the public and the institutions of government. The Commission, as a regulatory agency of the provincial government, exercises public law obligations. The Commission, along with all other administrative tribunals, was created for the purpose of implementing government policy. In the implementation of that policy, the Commission is required to make quasi-judicial decisions. The Commission's public law functions are designed to protect the collective interests of all consumers in the Province vis-à-vis the reality of a monopoly utility. The question that arises is how the Commission can meet its public law duty to determine, in the public interest, the need and desirability of a proposed public utility project, while also assessing the adequacy of First Nation consultation as directed by the Court.

5. The Court identified the Commission's public law duty as follows:

> 9 The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. **Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy.** At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)
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> 63 The certification decision is the first important decision in the process of constructing a power transmission line. **It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.**
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> (emphasis added)

6. The public law obligations of utility commissions were most recently considered by the Supreme Court of Canada in ***ATCO Gas and Pipelines***

Ltd. v. Alberta (Energy and Utilities Board), [2006] 1 S.C.R. 140, which stressed the need to respect the confines of their public interest jurisdiction. At paragraphs 2 and 7 the Court states:

> 2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). **More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority** (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10)....
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> 7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. **The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.**
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> (emphasis added)

7. The Commission's public law duty in the circumstances of this case arises under sections 45 and 46 of the *Utilities Commission Act* ("*UCA*"). In deciding whether to issue a CPCN, the Commission must determine whether a project meets the test of public convenience and necessity, and properly

conserves the public interest. The Commission has indicated that there is a broad range of interests that should be considered in determining whether a proposed project is in the public interest, and that they should not exclude from consideration any class or category of interests which form part of the totality of the general public interests.

8. While public convenience and necessity, or public interest, are not defined under the *UCA*, the Legislature under section 46(3.1) has specified certain matters that the Commission must consider in determining whether a project is in the public interest and meets the test of public convenience and necessity.

> 46(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider
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> (a) the government's energy objective [a defined term under s.1];
>
> (b) the most recent longer-term resource plan filed by the public utility under section 44.1, if any, and
>
> (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 and 64.01, if applicable.

Section 64.01 specifies a self-sufficiency objective for B.C. Hydro which was also the subject of a special direction to the Commission ("SD 10") issued on June 25, 2007. Section 3 of the *Act* authorizes the issuance of a direction to the Commission with which the Commission must comply. Of further consideration is the fact the Commission has accepted that the public interest requires ILM grid reinforcement regardless of decisions on re-powering of Burrard Thermal Generating Station. Further the Commission has determined that 5L83 provides higher transfer capability and lower losses than UEC.

9. The Court identified the Commission's constitutional duty as follows:

> 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[1] 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.**
>
> 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.**
>
> (emphasis added)

10. How is the Commission to go about meeting its public law duty to determine, in the public interest, the need and desirability of a proposed public utility project, while also meeting its constitutional duty to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project? While the interests of the general public may conflict, these persons are owed a duty of procedural fairness in the process of the Commission making its determination of where the public interest lies. In ***Sierra Club of Canada (British Columbia) v. British Columbia (Utilities Commission),*** 2008 BCCA 98, the Court of Appeal states:

> **25** A tribunal is required to provide those affected with a meaningful opportunity to be heard fully and fairly, and to have decisions made in a fair, impartial, and open process appropriate to the attendant statutory, institutional, and social context: ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, per L'Heureux-Dubé J. at para. 28. There is nothing in the record that suggests the appellants were denied any measure of the procedural fairness to which they were entitled.

However, as explained in ***Haida Nation,*** before final claims resolution, the Crown acting honourably may be required to take steps contrary to or inconsistent with

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[1] At paragraph 2 of the Court's judgment, they define "ILM Project" to mean "BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres."

other societal interests in order to preserve the Aboriginal interest. The assertion of Aboriginal rights and title under s.35(1) of the *Constitution Act, 1982,* may give rise to legal obligations by the Crown that are different from administrative law obligations which may be owing to other Canadians. As noted by the Court at paragraph 60 in ***Kwikwetlem First Nation v. British Columbia (Utilities Commission)***, 2009 BCCA 68, "[i]t was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them." How can the Commission make a well-balanced determination in accordance with its legislative public interest mandate, and also satisfy itself that the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project?

11. In the Province's submission, the Commission must approach these duties in stages. First the Commission must reach a conclusion on whether the ILM project (the project applied for) meets the test of public convenience and necessity, and if it does then the Commission must assesses whether the Crown's duty of consultation has been fulfilled with respect to the subject matter of the application. Obviously, if a project is not in the public interest within the meaning of *UCA*, then it is not going to receive a CPCN and there is no need to assess the adequacy of First Nation consultation. If a project is deserving of a CPCN, then the task of the Commission is to determine whether First Nation consultation and accommodation, if indicated, has been fulfilled to that stage of the project development (i.e. "the Crown's consultation efforts leading to BCTC's selection of its preferred option").

12. While consultation obligations would have arisen in regard to viable alternatives still under consideration by BCTC, once BCTC determined that the ILM Project was the project deserving of a CPCN, the issue then became the adequacy of consultation in regards to that contemplated project. As a matter of process this means that prior to deciding on the ILM Project the First Nations are accorded a reasonable opportunity to express how the viable alternatives would,

at a conceptual level, impact upon their asserted Aboriginal rights and title. This does not mean, as the First Nations suggest, that the Crown had a duty to consult with them and address accommodation requirements on the full range of potential alternatives to address provincial energy needs. If that was the law, the Crown, as well as the Commission in carrying out is function under its *Act,* would not be in a position of meeting their public law duties. The Commission is not required to opine on the adequacy of Crown's consultation efforts on possible alternatives to the ILM Project which are not projects which BCTC contemplates building. It is in this regard that the Province says that scope and content of the duty to consult changes as the ILM project moved through different stages (reference: **Commission Question 2(a)).**

13. Under its public law duties (as found under its constituent legislation), the Commission seeks to determine whether the proposed project appropriately protects the interests of all affected members of the public, while balancing the interests of the monopoly utility. However, if the Commission was only allowed to grant a CPCN to an alternative which has the least potential impact on asserted Aboriginal Interests[2], the Commission might as well just skip its public law duties and public interest assessment and move directly to the assessment of First Nation consultation and accommodation. Public interest duties would be subordinated to the point of undermining the public interest objective which the Commission is legislatively mandated to protect. That is clearly not a satisfactory result, and is contrary to the processes established by the Supreme Court of Canada for maintaining the honour of the Crown and effecting reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake.

14. It would place the Crown and the Commission in an impossible and unworkable situation, if their public interest mandates had to be determined by First Nation interests which may not be consistent with those mandates, and may in many instances conflict or overlap as between First Nations. For example, is it

[2]A determination which in practical terms could never be reached with over 60 First Nations, and a number of project alternatives.

more honourable to impact upon the claimed Aboriginal rights and title interests of local First Nations by the development of local power sources, than to impact the claimed Aboriginal rights and title interests of other First Nations by constructing an interior to lower mainland transmission line? Ultimately, it is the Crown (or regulatory agencies, such as the Commission) that has to decide how the public interest is best met, and then against that determination, the Crown must either justify infringements (as in the case of proven Aboriginal rights and title), or seek to take reasonable steps to consult and accommodate, where indicated, First Nations who asserted aboriginal interests are impacted by that contemplated conduct.

15. A proposed project, which in the opinion of the Commission meets the public law criteria as being required for public convenience and necessity, may also, in the opinion of the Commission, be a project in which the Crown has failed to meet its duty of consultation and, where indicated, accommodation to First Nations. In such a situation, the Commission would have to determine whether it is appropriate to deny a CPCN on this basis, grant a CPCN with conditions, or possibly take some other action intended to address the consultation issue. The case law supporting these conclusions follows.

i. Balancing Public Law Duties and Established Rights or Title - a staged approach

16. Duties arising from legislative or executive action are public law duties. The Supreme Court of Canada in ***Guerin v. Canada,*** [1984] 2 S.C.R. 335, at paragraphs 98 to 109 established that the existence of a public law duty does not exclude the possibility that the Crown, in the discharge of that public law duty, having a *sui generis* obligation "in the nature of a private law duty" towards aboriginal people. The *sui generis* obligation was said to arise from the nature of Indian title and the historic powers and discretion assumed by the Crown over Indian lands.

17. Post 1982, the court expanded the *sui generis* obligations described in ***Guerin,*** to include Aboriginal and treaty rights protected by s.35 of the ***Constitution Act, 1982*** (referred to as constitutional duties by the Court of Appeal).

18. Although in the circumstance currently before the Commission we are dealing with asserted Aboriginal rights and title, it is useful to briefly review the case law as it has developed with regard the exercise of public law duties and the Crown's duty to act honourably in terms of proven or defined aboriginal rights or title. While the Crown's duty to First Nations is more onerous in terms of proven or defined aboriginal rights and title, as opposed to asserted aboriginal rights and title, in both situations the impact on those interests by Crown conduct taken in the name of public interest is at issue.

19. With regard to proven or defined aboriginal rights and title, the responsibility to act in accordance with the honour of the Crown is reflected in the fact that the Crown must justify any infringement of s.35 rights. In the justification process, the court is asked to balance and reconcile the potentially conflicting interests of Aboriginal peoples, on the one hand, and of the wider Canadian society, on the other. The Crown has the burden of first establishing that the actions taken satisfy a valid legislative objective. Secondly, the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples. This may involve asking such questions as: whether there has been as little infringement as possible to effect the desired public interest result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted.

Sparrow at paras.81, 82;
R. v. Gladstone, [1996] 2 S.C.R. 723 at paras.54, 55

20. The Court in ***Gladstone*** at para. 73 described how the Crown's ability to continue to take actions of compelling and substantial importance to the

community as a whole is a necessary part of the reconciliation between Aboriginal and non-Aboriginal societies:

> 73 Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. **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.**
>
> (emphasis added)

21. Similarly, the same principles govern the justification process for the infringement of proven Aboriginal title. Lamer C.J. stated as follows in ***Delgamuukw v. British Columbia,*** [1997] 3 S.C.R. 1010, at para.165:

> 165 The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. **Whether a particular measure or government act can be explained by reference to one of those**

> **objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.**
>
> (emphasis added)

22. The justification process for the infringement of proven Aboriginal rights and title necessarily involves the Crown identifying at the first stage a Crown decision which is of substantial and compelling importance to the community as a whole. At the next stage that decision is considered in light of the Crown's fiduciary obligations. In ***R. v. Lefthand,*** [2007] 4 C.N.L.R. 281 (Alta.C.A.), Slatter J.A. at paragraphs 141 and 142 explains the process as follows:

> 141 **The analysis of whether the impairment of the Aboriginal right is minimal cannot be conducted in isolation from the "valid legislative objective". The two must be balanced. What the inquiry seeks is the minimal infringement that will still leave room for some level of achievement of the objective.** The Supreme Court of Canada has held that s.35 of the *Charter* does more than literally "recognize and affirm" Aboriginal rights, but it does not completely subordinate all other valid social objectives to them. There may be cases where the achievement of the objective is so inconsistent with the Aboriginal right that the objective must be abandoned, or achieved through other measures. **But generally there would be no point in identifying a valid social objective if that objective must in every case be subordinated to accommodate an infringement that is minimal, regardless of what that would mean to the achievement of the social objective. If that was the rule, one might as well just move to the minimal impairment analysis first.**
>
> 142 In balancing the valid legislative objective with the degree of impairment of the Aboriginal right, regard must be had to another of the *Sparrow* factors, the "special trust relationship and the responsibility of the government *vis-à-vis* aboriginals", a rule that is often associated with the phrase "honour of the Crown". Where broader social objectives conflict with the rights of the Aboriginal minority, the advantages to society as a whole cannot just override Aboriginal rights on the basis that the "greatest good to the greatest number" prevails. **But as previously discussed, (*supra*, paras. 102 ff.) the government has not been stripped of its power to balance competing social objectives.**
>
> (emphasis added)

23. This two stage justification process reflects that a necessary part of reconciliation includes the power of the Crown to exercise its public law responsibilities, but that those decisions must then be evaluated in light of the "honour of the Crown".

24. In the context of the Crown deciding whether to expropriate Aboriginal interests in *Indian Act* reserve land to construct an irrigation canal needed by the community as a whole, the Court in ***Osoyoos Indian Band v. Oliver (Town)***, [2001] 3 S.C.R. 746, 2001 SCC 85, explained how the two-stage process addresses conflicts between the Crown's public law duties and its fiduciary duty to the Band. At paragraph 53 Iacobucci J., for the majority stated as follows (agreed to by the minority at para. 135):

> 53. **This two-stage process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation**. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.
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> (emphasis added)

25. It is useful to note that the Court of Appeal in ***Kwikwetlem First Nation***, while not specifically referring to the two stage process, does reference the ***Osoyoos Indian Band*** decision in regard to the *sui generis* nature of the aboriginal interest in land.

26. In the context of existing or defined s.35 aboriginal interests, the Supreme Court of Canada has found that to avoid inconsistencies between the Crown's public law duties and its duty to Aboriginal peoples whose interests may be infringed by the Crown, a two stage process is followed.

ii. Public Law Duties and Asserted Rights and Title

27. If the two-stage process is what is required in circumstances in which s.35 aboriginal rights have already been proven or defined, it cannot be expected that the Crown is under greater obligations in circumstances in which s.35 aboriginal rights have been asserted, but not yet proven or defined (as in this case).

28. It is the Province's position that this two-stage process must also necessarily apply in the context of the Crown's interim duty of consultation and accommodation recognized in ***Haida Nation.*** Although the honour of the Crown does not give rise to a fiduciary duty in the context of Aboriginal rights and title which have been asserted but have not been defined or proven (***Haida Nation,*** para.18), the duty of consultation and, where indicated, accommodation was found by the Court to be more than the common law "duty of fairness" which is based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness (***Haida Nation,*** para.28).

29. As explained in ***Haida Nation,*** before final claims resolution, the Crown may need to take steps contrary to or inconsistent with other societal interests in order to preserve the Aboriginal interest. The Court states:

> 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, [page535] 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**....
>
> 49 This flows from the meaning of "accommodate". **The terms "accommodate" and "accommodation" have been defined as**

> **to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise"**: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.
>
> 50. The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights.... Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.
>
> (emphasis added)

30. In the Province's submission, the Commission should, as a decision-making framework, conceptually approach these two duties in stages. This does not mean that the Crown was required to engage in two separate or sequential processes – consultation is intended to take place in response to contemplated conduct but before a decision has been made. What it means, however, is that to minimize any inconsistency between the Crown's public law duties and its duty to consult and accommodate First Nations, the Crown's contemplated conduct should be considered in stages:

Stage 1 Public Law Duty: Does public convenience and necessity require the construction of the ILM Project as proposed? This involves the Commission making its decision in accordance with its public interest mandate under its legislation. At this stage, the Crown's consultation efforts with First Nations are not considered.

Stage 2 Constitutional Duty: If the ILM Project is required for public convenience and necessity, have the Crown's consultation efforts on the ILM Project satisfied its duty up to that decision point? In the words of the Court, "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." (emphasis added).

B. The limits of the duty to consult under Haida

31. Consideration of the constitutional duty in Stage 2 itself requires separate steps. First, the Crown is required to make a preliminary assessment of both the strength of the asserted rights or title claim and of the significance of potential impacts of the contemplated conduct on the asserted rights or title. This assessment is necessary in order to determine the scope of the duty to consult and the appropriateness of accommodation. Depending on the results of the Crown's preliminary assessment, it then engages in consultation. It is important to bear these steps in mind in considering the appropriateness and applicability of this framework to pre-existing infringements.

i. Does the duty to consult include pre-existing infringements?

32. The First Nations have submitted that the honour of the Crown and the duty of consultation and accommodation require that the consultation and accommodation process entail an examination of the existing facilities, and include a reconciliation of the existing project. (Transcript: page 216, lines 15 to 21; page 225, lines 25 to 26; page 232, lines 19 to 21) The Province submits that while information on impacts from the existing transmission line may be relevant in considering the ability of First Nations to currently exercise their asserted aboriginal rights in a meaningful way, and could assist in identifying and potentially avoiding or mitigating impacts from the ILM Project (i.e., the new

conduct being contemplated), the Crown's duty of consultation and accommodation does not require consultation or accommodation on the historical decision to construct the line. (Reference: **Commission Question 5(a)**).

33. The purpose of s.35(1) of the ***Constitution Act, 1982*** is the "reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". The Supreme Court of Canada has established several processes to assist in reconciliation: the duty to consult and accommodate;; treaty interpretation; proof of Aboriginal rights and title; and justification for infringement of treaty rights or proven Aboriginal rights. The treaty making process agreed upon by Canada, the Province, and the First Nations Summit is at the heart of efforts to achieve reconciliation. The framework for each process broadly defines different duties in different circumstances, each geared toward maintaining the Crown's honour and effecting an orderly reconciliation between the Crown and Aboriginal peoples.

34. The duty to consult established in Haida Nation is the Court's most recent contribution to the reconciliation process. However, it was not intended to replace other avenues for reconciliation. Nor is it an appropriate means of addressing historical infringements in the way that the First Nations seek to do here. The First Nations assert that the Commission, in assessing the adequacy of consultation and accommodation, must satisfy itself *post facto* that the Crown consulted and accommodated the First Nations regarding the construction in the late 1960s and 1970s of the existing transmission line. The First Nations argue that BCTC and B.C. Hydro seek to take fresh advantage of an ongoing infringement that has never been addressed in that the ILM Project is totally integrated into, dependent upon and will form a part of the existing transmission infrastructure. Further, they argue that it is not appropriate or logical for the impacts of the proposed line to be assessed separate and apart from the impacts of the right-of-way and infrastructure upon which the construction and operation of the line depend.

35. In the Province's submission, the position taken by the First Nations on the issue of existing impacts goes beyond the consultation framework established under ***Haida Nation.*** This conclusion is informed by three points:

I. At the time the existing transmission line was contemplated and then constructed, the case law in British Columbia did not support the existence of Aboriginal title in the Province. For example, in the 1973 decision of the Supreme Court of Canada in ***Calder v. British Columbia (Attorney-General),*** [1973] S.C.R. 313, three judges ruled that the Crown's absolutely sovereignty over all the lands of British Columbia was inconsistent with any conflicting interest, including on as to aboriginal title. Five years later, the full Court in ***R. v. Kruger,*** [1978] 1 S.C.R. 104, noted that the issues discussed in *Calder* still had not been determined and would not be determined in that appeal. It was not until 1982 that existing aboriginal rights obtained constitutional protection under s.35(1) of the *Constitution Act, 1982.* Further, It was not until the Court's judgment in ***Delgamuukw v. British Columbia,*** [1997] 3 S.C.R. 1010, that the Court concluded that the province of British Columbia, from the time it joined Confederation in 1871, did not have the jurisdiction to extinguish the rights of Aboriginal peoples, including Aboriginal title. Given the state of the law at that time, it would have been reasonable for the Crown to proceed on the basis that asserted title claims were not strong. It would be unfair to both the Crown and decision makers to characterize decisions made in good faith based on the information available to them and the law at the time as dishonourable conduct. The Crown's conduct in the 1960s and 70s cannot be measured in hindsight based on its legal obligations to First Nations under the existing state of the law. To find otherwise is to place in grave doubt the legal consequences of all Provincial actions in the settlement and development of the

Province since Confederation. Such a result is not the vision of reconciliation which the Court has stated s.35 demands.

II. In 2004, the Supreme Court of Canada in the landmark decision of ***Haida Nation*** fashioned new rules and principles establishing a legally enforceable duty and framework for Crown consultation with First Nations prior to proof of asserted rights or treaty settlement. The Court defined the duty as an essential corollary to the honourable process of reconciliation that s.35 *Constitution Act, 1982* demands. This represented a substantial change in the law, necessarily demanding prospective effect only. As stated by the Supreme Court of Canada in ***Canada (Attorney General) v. Hislop,*** 2007 SCC 10, at para.86, "[w]hen the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than retroactive remedy." Further, at paragraph 93 the Court states, "...when a court is developing new law with the broad confines of the *Constitution,* it may be appropriate to limit the retroactive effect of its judgment." (see paragraphs 81 to 108). In the Province's submission, the establishment of the ***Haida Nation*** framework for consultation and accommodation is one of those situations in which it would be appropriate to only issue prospective remedies. The First Nations here are seeking to give ***Haida Nation*** retroactive effect.

III. It is clear on a proper reading of the Supreme Court's decision in ***Haida Nation***, that the duty to consult and, where indicated, accommodate is intended to operate prospectively based upon possible adverse impacts on asserted aboriginal rights or title arising from the contemplated conduct of the Crown. It is this last point which is developed further below.

36. The duty to consult a First Nation with yet unproven Aboriginal rights does not arise in all aspects of a Crown-First Nations relationship. Only when the Crown "contemplates conduct" which might "adversely affect" claimed Aboriginal interests, does the honour of the Crown require consultation and, if appropriate, accommodation of those interests. This process allows the Crown to amend contemplated conduct so that when a treaty is concluded or rights are proven Aboriginal peoples do not find their land and resources irreparably changed and denuded. Past conduct and pre-existing adverse impacts are not resolved through the interim consultation process. To find otherwise would impair the Province in the exercise of its responsibilities over the management of land and resources, and diminish incentives to reconciling Aboriginal claims with Crown sovereignty through the process of treaty negotiations.

37. The position of the First Nations on this issue represents a fundamental misapplication of the framework for consultation and accommodation established by the Supreme Court of Canada in ***Haida Nation.***

38. British Columbia has the responsibility under the ***Constitution Act, 1867*** to manage the land and resources within its boundaries. The management of land and resources within the province has historically included the establishment and expansion of agriculture, mining, oil and gas development, forestry and hydroelectric power. It is through the exercise of these powers and responsibilities that the Province is able to meet the needs of the broader public, Aboriginal and non-Aboriginal.

39. It was not the Court's intention in ***Haida Nation*** to impose a constitutional duty upon the Provincial Crown to consult with First Nations in all instances of Provincial conduct relating in some fashion to the historical management of land and resources. Not only would such an obligation be too onerous and impractical (on the Crown and First Nations), it would create great uncertainty in the management of land and resources in the Province and would ultimately be a barrier to effective negotiations and reconciliation through treaty.

40. The Province does not deny or minimize First Nations' concerns regarding the historical development of lands and resources by the Crown. It is, in fact, this background that led in 1982 to the elevation of existing Aboriginal rights from common law status, "dependent upon the good will of the Sovereign", to constitutional status.

> ***R. v. Sparrow*** [1990] 1 S.C.R. 1075 at paras. 46 to 66; ***Mitchell v. M.N.R.***, [2001] 1 S.C.R. 911; 2001 SCC 33 at paras. 9 to 12

41. In what follows, the Province notes the various processes for reconciliation, and the circumstances in which one of these processes, the duty of consultation, arises at law. This is done for the purpose of explaining why the duty of consultation does not arise in respect of historical decisions, and how the honour of the Crown is otherwise satisfied in these circumstances.

a. Different Processes or Tools for Reconciliation

42. Since 1982 when Aboriginal rights obtained constitutional protection, various processes have been developed to aid in the broader "process of reconciliation" of the pre-existence of Aboriginal societies with the sovereignty of the Crown. All of these processes are grounded in the honour of the Crown:

- the process for proving Aboriginal rights and title: ***R. v. Van der Peet***, [1996] 2 S.C.R. 507; ***Mitchell v. M.N.R.***, [2001] 1 S.C.R. 911; ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010; ***R. v. Marshall, R. v. Bernard***, [2005] 2 S.C.R. 220, 2005 SCC 43; ***R. v. Sappier, R. v. Gray***, [2006] 2 S.C.R. 686, 2006 SCC 54;

- the justificatory process for an infringement of proven or defined Aboriginal rights and title: ***R. v. Sparrow*** [1990] 1 S.C.R. 1075; ***R. v. Gladstone***, [1996] 2 S.C.R. 723; ***Delgammukw***; ***R. v. Badger***, [1996] 1 S.C.R. 771;

- the process of treaty implementation: ***R. v. Badger***; ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, [2005] 3 S.C.R. 388; 2005 SCC 69;

- the process of treaty making: ***Haida Nation***; ***Mikisew Cree***; and
- the process of consultation and accommodation: ***Haida Nation***; ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),*** [2004] 3 S.C.R. 550, 2004 SCC 74; ***Mikisew Cree.***

43. Chief Justice McLachlin in ***Haida Nation*** explains that while the honour of the Crown is always at stake in its dealings with Aboriginal peoples the honour of the Crown gives rise to different duties in different circumstances. Maintaining the distinction amongst the above noted processes assists in determining the circumstances in which they arise and their content.

b. In what circumstances does the Duty to Consult arise?

44. When does the duty to consult arise? The answer to this question comes from the purpose that the duty fulfills, namely to preserve claimed Aboriginal interests pending proof (through the process of proving Aboriginal rights or title) or determination through treaty (through the process of treaty making). In ***Haida Nation***, the Court states the following at paras. 27 and 38:

> 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.
>
> 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)

45. The duty to consult is described as the preferable alternative to the remedy of an interlocutory injunction for preserving Aboriginal interests pending their final determination. Both remedies are interlocutory or interim in nature and are a response to contemplated conduct that may adversely affect interests pending claims resolution.

Haida Nation at paras.12 to 15

46. It is with this purpose in mind that the Supreme Court of Canada defined in ***Haida Nation*** at paras. 35 and 64, when the duty to consult arises:

> 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.
>
> 64. The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and **contemplated conduct** that might adversely affect them ...
>
> (emphasis added)

47. The duty to consult does not exist at large, nor does it arise in all aspects of a Crown-First Nations relationship. The requirement for an adverse impact

from contemplated conduct is predicated on the purpose of the consultation process, namely, for the Crown to make appropriate changes to its proposed action based on information obtained through consultation, thereby preserving Aboriginal rights pending final resolution. In ***Taku River Tlingit First Nation*** the Supreme Court of Canada stressed at para. 25 that, "responsiveness is a key requirement of both consultation and accommodation."

48. In ***Haida Nation***, at para. 39, it was established that the scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case for the existence of the rights or title, and the seriousness of the potentially adverse effect upon those rights or title. Where a strong *prima facie* claim exists, the consequences of the "government's proposed decision" are of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, addressing the Aboriginal concerns may require taking steps to minimize the effects of infringement or avoid irreparable harm, pending final resolution of the underlying claim (***Haida Nation***, paras. 44 and 47). Logically, without identification of an adverse impact, the scope and content of the duty to consult cannot be determined, nor can an appropriate Crown response.

49. The Supreme Court of Canada in ***Mikisew Cree*** further commented on the trigger for the duty to consult in the context of a proposed "taking-up" under Treaty 8. Based upon its decision in ***Haida Nation***, the Court stressed the need for measurable adverse impact arising from <u>proposed</u> government decisions prior to the duty to consult arising. At para. 55 the Court states:

> 55. ...This does not mean that whenever a **government proposes** to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, **no matter how remote or unsubstantial the impact**. The duty to consult is, as stated in Haida Nation, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were **clear, established and demonstrably adverse to**

> **the continued exercise of the Mikisew hunting and trapping rights over the lands in question.**
>
> (emphasis added)

50. The requirement for "contemplated" or "proposed" government decisions also reflects the opportunity for the court to fashion a useful remedy for a failure to consult. Where the Crown has failed to consult but has not yet completed its course of action, the court may remedy a breach by ordering that meaningful consultation occurs prior to implementation of the government proposal.

> ***R. v. Lefthand***, [2007] 4 C.N.L.R. 281 (Alta.C.A) at paras.161 to 169; ***Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*** 2005 BCCA 140, (2005) 210 B.C.A.C. 122; ***Mikisew Cree*** at paras. 57 to 59 and 69; ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*** 2005 BCCA 128, (2005), 209 B.C.A.C. 219, at paras. 101 to 105; ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, 1999 BCCA 470, 64 B.C.L.R. (3d) 206 at para.160.

51. The "contemplated conduct" at issue in ***Haida Nation*** was the replacement of a Tree Farm Licence ("T.F.L.") which granted the exclusive right to harvest during the term of the licence (25 years). At para. 73 of ***Haida Nation***, the Court states:

> 73. Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights **of the decision to replace T.F.L. 39.**
>
> (emphasis added)

52. The scope and content of the duty to consult as ordered in ***Haida Nation*** was in respect of the terms of the proposed T.F.L. that could adversely impact the claimed Aboriginal interests. The consultation, and accommodation if

necessary, was not in respect of what might be viewed as the "existing infringement" (the fact that the Crown had authorized logging on Haida Gwai since about the time of World War I), but rather the impact of the government's proposed decision. While the historical logging of old growth cedar was relevant to the continuing ability of the Haida Nation to exercise their claimed Aboriginal right to harvest this timber, it did not mean that the Crown was required to carry out consultation and accommodation in regard to those historical decisions. The focus of the consultations was on the potential impact of the contemplated T.F.L. replacement decision in the context of the current state of affairs, and whether changes were required to proposed T.F.L. in order to preserve the ability of the Haida Nation to exercise this claimed right, pending proof or treaty settlement. The starting point for an assessment of the duty to consult is the status quo, not historical impacts.

53. Similarly, in ***Taku Tlingit First Nation***, the duty to consult concerned a decision to reopen the Tulsequah Chief Mine with the potential to adversely affect the substance of the First Nation's claims – it was not about the original authorization and operation of the mine in the 1950s.

> ***Haida Nation v. British Columbia (Minister of Forests)*** 2000 BCSC 1280, [2001] 2 C.N.L.R. 83, at para.7; ***Taku River Tlingit*** at paras. 27 and 28; See also: ***Mikisew Cree*** at para.61; ***R. v. Douglas*** 2007 BCCA 265 at para.44; ***Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*** 2008 YKCA 13 at paras. 90 and 95; ***Musqueam Indian Band v. Canada*** 2008 FCA 214 at paras. 52 to 58; ***Lefthand*** at para.35; ***Dene Tha' First Nation v. Canada (Minister of Environment)***, 2008 FCA 20, 165 A.C.W.S. (3d) 3, at para.9; ***Labrador Metis Nation v. Canada (Attorney General)*** 2006 FCA 393, 277 D.L.R. (4th) 60 at paras. 20 to 24; 27 and 28; ***Cook v. British Columbia (Minister of Aboriginal Relations and Reconciliation)*** 2007 BCSC 1722, [2008] 1 C.N.L.R. 1, at paras. 172 to 177.

c. What does the Honour of the Crown Require in regard to "existing infringements"?

54. What then does the honour of the Crown require in regard to existing infringements? The Province submits that the Supreme Court has mandated treaty negotiations (which include interim agreements) and land claim settlements as the preferable process to achieve such reconciliation. At paragraphs 20 and 25 in ***Haida Nation*** the Court states:

> 20. Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. **Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.** Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). **This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.** This, in turn, implies a duty to consult and, if appropriate, accommodate.
>
> 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.
>
> (emphasis added)

55. The current British Columbia Treaty Process was agreed to by Canada, British Columbia and the First Nations Summit and is the treaty process for resolving disputes over Aboriginal rights and title in British Columbia (see ***Cook***

v. British Columbia (Minister of Aboriginal Relations and Reconciliation, [2008] 1 C.N.L.R. 1 (B.C.S.C.) at paragraphs 77 to 85). The fact that a First Nation may choose not to participate in the voluntary treaty process does not mean that the interim duty of consultation and accommodation should be expanded to address issues properly addressed through a treaty negotiation. Clearly, such a result would only discourage rather than encourage the parties to resolves these disputes through treaty negotiations.

56. Alternatively, First Nations may seek to prove their Aboriginal rights and title in court and claim that the Province has unjustifiably infringed upon those interests. Whether a final resolution is realized through the negotiation of a treaty or by proof in court, the First Nations have more appropriate remedies available to them. Moreover, in the present case, First Nations seek to put to one side their dealings with Canada at the time the existing lines were constructed. Where a project impacts both asserted traditional territory as well as reserves that fall under federal jurisdiction, additional questions regarding the duties of the federal Crown should inform the analysis.

57. If Aboriginal groups have a claim against the federal or provincial Crown in relation to historical impacts, then that claim should be pursued either through the treaty process or through litigation where the appropriate parties are before the court, where discovery procedures can be used to ensure that relevant evidence is obtained, and where both the claims and defences of the Crown can be properly canvassed. The duty to consult in Haida Nation is premised on the Crown being able to make a prima facie assessment of the strength of the asserted right or title claim and of the impacts in order to determine the scope of the duty and the level of consultation required. It would be both unfair and impractical to make historical infringements the subject of that analysis. It would require the creation of at least a new stage in the analysis if not an entirely new test that allows for consideration of equitable doctrines such as the reasons for First Nations' delay in advancing their claims. To the extent that First Nations

have claims of unjustified infringements or past wrongs, those should be pursued either in treaty or in an appropriate action against the Crown. Recourse for such wrongs should not depend upon the possibility that the Crown might contemplate new conduct that touches on a past alleged wrong. Nor should First Nations be encouraged to seize upon such contemplated conduct as an opportunity to advance claims that are more appropriately addressed elsewhere.

58. In conclusion on this point, the Supreme Court has recognized a variety of processes, engaged under different circumstances, intended to maintain the honour of the Crown and to further the orderly reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. The duty to consult and, if appropriate, accommodate is one of those processes which 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". When considered within the context in which it was established, and alongside the other reconciliation processes described by the Court (in particular treaty making), it is readily apparent that the duty is not intended to operate retroactively.

59. To find otherwise would fundamentally alter the function of the interim duty to consult from a forward looking process of preventing or minimizing significant harm to claimed Aboriginal interests pending final resolution of claims, to an imprecise lengthy process of assessing the complex history of past Crown conduct which may have impacted claimed Aboriginal interests and attempting to resolve those historical grievances.

60. In effect, such a result would conflate the duty to consult with the separate treaty making process addressed in ***Haida Nation***. Such a process would be unwieldy, impractical, lengthy and exceedingly expensive for First Nations and the Crown, and would come at a great cost to the citizens of the Province as it would truly frustrate the government's responsibility for the day-to-

day management of the land and resources. Furthermore, the Supreme Court of Canada's intention that, pending final claims resolutions the Crown can manage the land and resources at issue, would not be realized.

61. Additionally, the preferred process of achieving ultimate reconciliation through treaty negotiations would also be put at risk as the focus and resources of the parties would necessarily be redirected, and the incentive by First Nations to enter treaty would be greatly diminished. Rather than an interim process aimed at preserving Aboriginal interests pending final claims resolution through treaty, the consultation process would be focused on attempting to justify or compensate for the impact of historical decisions. This would not foster a relationship between the parties that encouraged reconciliation through treaty, and would diminish incentives to negotiate and reach a final claims resolution.

ii. Does the Haida Nation framework require economic compensation?

62. The First Nations have submitted that they are entitled to be compensated for infrastructure projects that impact on their territory for the benefit of others. The First Nations argue that it was a necessary part of the consultation process to meaningfully engage on the scope, nature and quantum of economic accommodation. (Transcript: page 219, lines 9 to 12; page 226, lines 2 to 7) This overlooks the distinction drawn between consultation and accommodation by the Supreme Court in ***Haida Nation***. Consultation comes before accommodation. It is only where the consultation process suggests amendment of Crown policy that the parties reach the stage of accommodation: ***Haida Nation*** at para. 47. If consultation indicates that accommodation is required in order to preserve asserted rights or title, whether or not accommodation is required to take the form of economic compensation is a separate question.

63. The Province submits that under the framework established in ***Haida Nation*** for consultation and, where appropriate, accommodation, the Supreme Court of Canada has directed that accommodation of impacts on asserted aboriginal rights and title should be "non-compensable". In what follows, the Province will address three points to support this conclusion:[3]

i. The limited circumstances in which the Supreme Court of Canada has recognized a claim of compensation in respect of infringements of proven Aboriginal rights and title;

ii. The policy reasons behind the Supreme Court of Canada's decision in ***Haida Nation***; and

iii. Reaching the stage of accommodation in the face of possible non-compensable damage and taking steps to avoid irreparable harm.

a. Compensation and Aboriginal Rights and Title

64. Discussions at the political level between First Nations and the Province have made reference to shared decision-making and revenue and benefit sharing. Engagement on those issues is ongoing. Political reconciliation initiatives aim to foster reconciliation in a way that is akin to the treaty process, that is, as an alternative to litigation. In terms of the legal landscape, the Supreme Court of Canada has indicated that First Nations may have a claim for economic compensation for infringement of proven s.35 rights or title, where the infringement of the proven property interest has an economic component. Consideration of the policy behind ***Haida Nation***, and of the Court's reasoning regarding the duty to consult and, if appropriate, accommodate, strongly suggests that accommodation was not intended to take the form of economic

[3] This does not mean that the Province is not taking steps to close the socio-economic gaps that separate Aboriginal peoples from other British Columbians, just that this is not a legal obligation under ***Haida Nation***. Examples, to name a few, include the Transformative Change Accord signed by the Province, the Federal Government and the First Nations Leadership Council in November 2005; Forest Revenue sharing agreements; and mining revenue sharing agreements.

compensation for the simple reason that economic compensation does not meet the objective of preserving the asserted rights and title.

65. The Court addressed for the first time in ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, the test for *prima facie* infringement of a proven s.35 aboriginal right and for the justification of such an infringement. In regard to the justification test, the Court reviewed the requirement for a compelling and substantial objective, and then commented as follows:

> 82 Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. **These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.** The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> (emphasis added)

66. In considering the justification for the infringement of proven s.35 Aboriginal title, the Supreme Court of Canada in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, found that the general principles governing justification laid down in ***Sparrow*** continue to operate:

> 169 Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. **The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in Sparrow and which I repeated in Gladstone.** Indeed, compensation for breaches of fiduciary duty are [sic] a well-established part of the landscape of aboriginal rights: Guerin. **In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed.** The amount of compensation payable will vary with the nature of

> the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.
>
> (emphasis added)

67. The Supreme Court of Canada has yet to consider the legal principles that would be relevant to determining the appropriate level of compensation for infringements of Aboriginal title. At this point, however, compensation is only payable in regards to the infringement of Aboriginal title (and perhaps some lesser s.35 property interest with an economic component) which has been proven or agreed by Treaty to exist under s.35(1). Additionally, even in circumstances in which Aboriginal rights or title have been proven to exist and have been infringed, compensation is only payable if the infringement amounts to expropriation (***R. v. Douglas,*** 2008 BCSC 1098, at paragraph 59). (Athough ***Douglas*** dealt with proven fishing rights rather than an assertion of title, the point regarding expropriation is apt.) When the policy behind ***Haida Nation*** is considered, as well as the findings of the Court as to when the stage of accommodation arises and the purpose and scope of the duty to accommodate, it is clear that the Supreme Court did not contemplate economic compensation being a required means of accommodating the impact on the asserted rights and title of First Nations.

b. Policy behind Haida Nation

68. It is important to consider what the Supreme Court of Canada was intending to address in its landmark decision in ***Haida Nation***. This is best explained by reference to some of the introductory paragraphs of the judgment:

> **6** This brings us to the issue before this Court. **The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the**

> **forests in Block 6 of the land. But the Haida people also claim title to the land -- title which they are in the process of trying to prove -- and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39.** In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?
>
> **7** The stakes are huge. **The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced.** The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.
>
> (emphasis added)

69. The Court recognized that the reconciliation of aboriginal and non-aboriginal interests may take years to prove through litigation or to define through treaty negotiations, and depending on the strength of their claims, it would not be fair to First Nations or promote reconciliation to denude or irreparably harm these interests, while the process of proving those rights or negotiating a treaty is ongoing. In the case of the Haida, if cutting rights were granted and the forest decimated, proof of an Aboriginal right to the use of old growth cedar would be academic at the time of judgment.

70. The Court noted that if the requirements for obtaining an interlocutory injunction can be proven (which includes the First Nation proving irreparable harm if the injunction is not granted), it remains open to the Haida to seek that remedy. However, because an interlocutory injunction represents an all or nothing solution (the project either goes ahead or it halts) which First Nations have usually been unsuccessful in obtaining, there is diminished incentive to compromise and as result this remedy may fail to adequately take account of Aboriginal interests prior to their final determination. (Haida, para.14)

71. If, however, the Crown has a duty to consult and, if appropriate, accommodate, when it contemplates conduct that might adversely affect potentially existing Aboriginal rights or title, then the Crown may be able to address Aboriginal concerns pending claims resolution, while continuing to manage the land and resources within the Province. The intent, however, is not to require economic compensation from the Crown pre-proof, but rather to foster reconciliation by making changes, if appropriate, to contemplated Crown conduct so as to preserve the Aboriginal interest pending claims resolution. The Quebec Superior Court in ***Betsiamites Band v. Canada,*** [2008] 2 C.N.L.R. 1, commented that the objectives of the duty to consult (to prevent non-compensable damage) are similar to those of an interlocutory injunction, without the requirement to meet the test for an injunction:

> 44 The objective of the Supreme Court in approving the duty of the Crown to consult and accommodate the Aboriginal peoples even before a claim is proven is similar to a provisional measure once a serious claim is proven. Ultimately, it is a matter of preventing a fact that is difficult to remedy, without requiring the Aboriginal peoples to bear the heavy burden incumbent on plaintiffs seeking an injunction in public law, particularly in light of *Manitoba (A.G.)* v. *Metropolitan Stores Ltd.* and *RJR -- MacDonald Inc.* v. *Canada (Attorney General)*.

72. Economic compensation offers no means of preserving the Aboriginal interest pending claims resolution and as further discussed below, has no place in the framework established in ***Haida Nation.***

c. What is Accommodation under Haida Nation?

73. The Court in ***Haida Nation*** used the concept of a spectrum to indicate what the honour of the Crown may require in particular circumstances. In regard to when accommodation may be required, the Court states:

> 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. ...
>
> 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. ...
>
> (emphasis added)

74. The test for accommodation as established by the Court is clearly directed at modifying the Crown's contemplated conduct to avoid or minimize non-compensable harm to asserted Aboriginal interests pending proof or treaty settlement of these claims. Implicitly, compensable harm is expected to be compensated either as part of a treaty settlement or in the form of damages after an unjustified infringement has been proven. In regard to non-compensable harm, if a Crown decision is made before consultations are complete, but opportunities still exist for a First Nation to identify significant impacts and seek accommodation before the shovel hits the ground, then the Crown decision need not be set aside. There are number of examples in the case law of the Court retaining jurisdiction over the parties and leaving it open for the First Nation to return if they are still not satisfied with the efforts of the Crown to address their interests. In a sense, the Crown decision is conditional on the Crown meeting its consultation and accommodation obligations before carrying out the activity which the First Nation asserts will significantly impact upon their claimed Aboriginal rights or title. This may be an alternative for the Commission if it concludes it is faced with such a situation (reference: **Commission Question 7(a) and 7(b)**).

75. On the other hand, if the nature of the potential impact from the Crown's contemplated conduct to the asserted Aboriginal interests is compensable (i.e. not "irreparable"), then if and when those interests are proven or defined in

Treaty, the First Nation can seek compensation for that impact. There is no obligation under Haida Nation to provide economic compensation in advance of proof or treaty settlement. This conclusion, from a policy perspective, is appropriate because the fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal and non-Aboriginal interests, and there would be little incentive for First Nations to engage in treaty negotiations or prove their claims if the Crown was legally obligated to accommodate asserted but yet unproven aboriginal rights and title claims by means of ongoing economic compensation.

76. In ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management),*** 2005 BCCA 128, Justice Lowry, having considered the decision of the Supreme Court of Canada in ***Haida Nation*** which had recently been pronounced, stated the following in regards to appropriate accommodation for the sale of some of the last remaining Provincial Crown land in the asserted traditional territory of the Musqueam:

> **105** There is little in the decided cases from which assistance can be drawn with respect to the measure of interim accommodation that may be required in the circumstances that prevail in this case. **Where, as here, no aboriginal title has been finally established, there may well be questions about whether and to what extent economic compensation or other forms of what might be said to be non-reversible accommodation are necessary or appropriate.** Given the disposition of the appeal, I consider these and other related questions that were not directly addressed in argument before us are now best left entirely to the parties unfettered by judicial commentary.[4]
>
> (emphasis added)

77. This issue was also considered by the Federal Court in ***Tzeachten First Nation v. Canada (Attorney General),*** 2008 FC 929, appeal dismissed 2009 FCA 337.[5] In that case, the First Nation sought judicial review of a Treasury

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[4] While Justice Hall, in his reasons, did suggest that economic compensation may be appropriate, as noted by Justice Lowry this was not an not issue directly addressed in argument.
[5] Leave to Appeal to the SCC pending.

Board decision to transfer land from the former Canadian Forces Base at Chilliwack to Canada Lands Corporation. The First Nation alleged a strong prima facie case for Aboriginal title to some of the lands. The Chambers Judge, upon a preliminary assessment, qualified the strength of the First Nation's claim of Aboriginal title over the lands in question as one of moderate strength, but noted that there was evidence that cast doubt upon the unique importance of the land beyond a proprietary interest to the First Nation. Accordingly, Justice Tremblay-Lamer concluded that, "given that the nature of the applicants' interest in the land does not appear to be based on its unique importance, any present infringement may be compensated, monetarily or otherwise, over the course of treaty negotiations." There was no requirement to compensate the First Nation pre-proof.

78. On appeal, the First Nation argued that the Federal Court erred by applying the tests of "uniqueness" and "compensability" in determining the extent of the duty to consult under ***Haida Nation***. The Federal Court of Appeal disagreed and found as follows:

> 30 This ground of appeal is focussed on Justice Tremblay-Lamer's conclusion that the Tzeachten's loss of the Rifle Range and Promontory Heights would be compensable (see paragraphs 41 to 50 of her reasons). In my view, there is no merit to this ground of appeal.
>
> 31 As I understand Justice Tremblay-Lamer's reasons, she was not applying the law of injunctions when she considered the question of compensability. **She was applying the principle from *Haida Nation* (at paragraph 44) that it is relevant, when assessing the seriousness of the potentially adverse effect of a decision on an Aboriginal title claim, to consider whether the adverse effect is compensable in money, or whether it is not compensable in money because the subject of the claim is unique in some substantial way relating to an unrecognized Aboriginal claim. I see no error in her analysis of that issue.**
>
> 32 The Tzeachten are understandably concerned that, despite the conclusion of Justice Tremblay-Lamer that the transfer of the Rifle Range and Promontory Heights is a compensable loss, the Crown will take the contrary position in the context of treaty

> negotiations or in proceedings relating to the unresolved specific claim to IR 13 and 14. **However, the Crown conceded in argument, correctly in my view, that the decision in this case does not dispose of any claim the Tzeachten may assert for compensation based on its claim to IR 13 and 14 or its claim to Aboriginal title. Therefore, the matter of compensation remains open to negotiation or litigation in relation to either of those claims.**
>
> (emphasis added)

79. Similarly, the Federal Court of Appeal in ***Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)***, 2008 FCA 212, held that the Crown's duty to consult was located at the lower end of the spectrum in regards to a fish pilot plan because the implementation of the plan did not result in either an alteration of the fisheries or create a high risk of non-compensable damages. (paragraph 45). The Minister took sufficient and appropriate steps to discharge the Crown's duty to consult, and any compensation owing remained open for negotiation or litigation of the aboriginal rights claim.

80. In short, accommodation is an alternative to the more draconian prospect of injunctive relief. These two equitable remedies (accommodation and interlocutory injunction) share a concern with avoiding irreparable harm. They also share a concern with providing remedies for claims that have not yet been proven or resolved by negotiation. Where harm that may in future be proven to be unjustified can be compensated by treaty settlement or by damages, that is how it should be compensated.

2. CONCLUSION

81. In conclusion, the Province submits that the Commission in approaching the task of assessing the adequacy of Crown consultation should utilize the "two-stage" process to ensure that inconsistencies between its public law duties and the Crown's duty of consultation are minimized. Secondly, the framework for the duty to consult and accommodate established in ***Haida Nation*** does not include a duty to consult and seek to accommodate historical impacts, nor does it include

economic compensation. There are other reconciliation processes available to First Nations which are intended to address those interests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of March 2010.

P. Yearwood

Paul E. Yearwood
Solicitor for Her Majesty the Queen
in right of British Columbia