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**British Columbia Utilities Commission (BCUC)**  
**First Nations Information Filing Guideline**  
**for Crown Filings and Crown Applications<sup>1</sup>**  
**pursuant to the *Utilities Commission Act***  
**September 2009**

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## **1. Background**

On February 18, 2009, the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, (“Carrier”) 2009 BCCA 67 and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 confirmed the Commission has the obligation to assess the adequacy of Crown consultation with First Nations within the scheme of its regulation.

The Commission, as a quasi-judicial tribunal, does not itself have an independent duty to consult, and if necessary, accommodate First Nations (*Carrier*, para. 56). Rather, it is the Crown who has a legal duty to consult with Aboriginal people when making decisions that may affect Aboriginal rights. The Supreme Court of Canada dealt with the obligation to consult and accommodate First Nations in two important decisions: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (“*Haida*”), and *Taku River Tlingit First Nation v. (British Columbia) (Project Assessment Director)*, 2004 SCC 74.

*Haida* directs that the trigger for the duty arises upon the Crown having knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that may adversely affect those rights or title (*Haida*, para. 64). In effect, consultation must be initiated at the preliminary stages of Crown decision-making.

As for the scope of the duty to consult and accommodate, *Haida* instructs the scope of the consultation is proportionate to a preliminary assessment of the strength of the case supporting the existence of the Aboriginal right or title, and the seriousness of the potentially adverse effect upon the right or title claimed (*Haida*, para. 68). In all situations however, the conduct chosen must maintain the honour of the Crown and make efforts to effect reconciliation between the Crown and Aboriginal interests (*Haida*, paras. 16 and 17).

On the lower end of the spectrum where the evidence to demonstrate Aboriginal rights or title is weak or the potential for infringement minor, *Haida* directs that the duty on the Crown may be focused upon providing notice, disclosing all relevant information and discussing any matters raised concerning the notice (*Haida*, para. 43). At the higher end of the spectrum lie those 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 (*Haida*, para. 44). In those cases, the Crown may be required to take steps to avoid irreparable harm or minimize the impact of infringement, including finding interim

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solutions, providing the opportunity to make submissions, formal participation in decision-making processes and providing written reasons to show that Aboriginal concerns were considered (*Haida*, para. 44).

## **2. Purpose and Scope of the Guideline**

The purpose of this guideline is to identify the information that must be filed in support of applications and filings submitted by Crown agents when the Commission's obligation to assess the adequacy of consultation arises. The Commission's assessment is based on the evidence filed prior to the close of the evidentiary portion of a proceeding. The Commission encourages Crown agents to file this information early.

If a Crown agent is of the view that there is no duty to consult with First Nations then the application or filing should provide justification as to why it was not necessary to carry out a consultation program with respect to the application or filing.

In deciding whether the duty to consult has been met, the Commission will consider the following sub-issues, based on the test set out in *Haida*:

- (1) Existence of a duty to consult
- (2) Scope of the duty
  - (2.1) Strength of asserted or assumed claims
  - (2.2) Seriousness of the potential impact
- (3) Whether the Crown fulfilled its duty?

The Commission expects Crown agents to meet the information requirements set out in section 3 of the guideline. The filing of evidence related to First Nations consultation is subject to the Commission's practice directive related to confidentiality filings  
[http://www.bcuc.com/Documents/MiscDocs/Confidential\\_Filings\\_Practice\\_Directive.pdf](http://www.bcuc.com/Documents/MiscDocs/Confidential_Filings_Practice_Directive.pdf)

The Commission is guided by the emerging jurisprudence in this area and will update this guideline and its practices as the law evolves.

## **3. Information Filing Requirements**

Applications and filings should contain the information that is required to meet the Crown's duty to consult and if necessary, accommodate First Nations. The level of information required to meet the Crown's duty to consult will depend on the specific facts relating to the application or filing.

### First Nations setting

- Identify the First Nations potentially affected by the application or filing, including the information considered to identify these First Nations (e.g., Statement of Intent maps)

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filed by First Nations with the BC Treaty Commission, location of asserted or assumed traditional territories, existing treaties, location of Indian reserves etc.).

- Provide an overview of the ethnographic placement of each of the First Nations.
- Identify any group or body that has been representing the First Nation for consultation purposes.

Key issues and concerns raised by those First Nations that have asserted or proven Aboriginal rights (including title)

- Identify any specific issues or concerns raised by First Nations in respect to the application or filing, irrespective of whether those issues or concerns are based on the Aboriginal rights in section 35 of the Constitution Act, 1982.
- Describe the measures taken or that will be taken to address issues or concerns raised by First Nations or provide an explanation of why no further action is required to address these issues or concerns

Assessment of the scope of the consultation duty

- Identify the Aboriginal rights, within the meaning of section 35 of the Constitution Act<sup>2</sup>, 1982 that each potentially affected First Nation has asserted in relation to the application or filing (e.g., the Aboriginal right to harvest wood for domestic purposes within the traditional territory of the First Nation or the right to fish for food, social and ceremonial purposes within the rivers traditionally used by the First Nation for those purposes; or Aboriginal title<sup>3</sup> over the claimed traditional territory).
- Identify any judicially recognized Aboriginal rights, rights that the Province of British Columbia has admitted or treaty rights that may be potentially affected by the application or filing.

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<sup>2</sup> Section 35 of the *Constitution Act*, 1982 states: (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" includes the Indian, Inuit and Métis 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. (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

<sup>3</sup> The Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 143 states: "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."

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- Identify the prima facie strength of the asserted or assumed Aboriginal rights.<sup>4</sup> Discuss the potential of the application or filing to adversely affect the asserted or assumed Aboriginal rights.
  - Assess where the approval(s) being sought falls on the Haida spectrum. Indicate whether any advice was sought from another Crown agency with respect to making an assessment of the strength of a First Nation claim.

#### Consultation process

- Describe the consultation efforts undertaken with potentially affected First Nations, including efforts by private sector proponents where procedural aspects have been delegated to them.
- Indicate when contact was first initiated and the individuals within the Aboriginal group who were contacted and their position in or representative role for the group.
- Identify the method(s) and timelines for consulting First Nations about the application and the actions taken, if any, to facilitate First Nations understanding of the information.
- Provide any relevant, non-confidential written documentation regarding consultations, such as notes or minutes that have been taken at meetings or from phone calls, or letters received from First Nations or sent to First Nations.
- Indicate whether funding was provided to potentially affected First Nations and the purpose of the funding.
- Indicate whether other Crown agencies have consulted First Nations in respect of the application or filing, and if applicable, the issues raised by First Nations in these consultations and how these issues were addressed.
- Describe how potential effects on asserted or assumed Aboriginal rights were accommodated.
- Provide copies of any documents which confirm that an affected First Nation is satisfied with the consultation and accommodation of its rights or interests.

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<sup>4</sup> The British Columbia Court of Appeal decision in *Carrier* at paragraph 66 states: "In reviewing the history of the duty to consult, the Court in *Haida* said at para. 24: The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] Aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims."

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- Provide evidence that First Nations have been notified of the filing or the filing of the application with the BCUC, including how they can raise outstanding concerns with the BCUC before the BCUC makes its decision on the application or filing.

### Conclusion

- Provide overall conclusion as to the reasonableness of the consultation process with respect to the application or filing and whether the consultation duty has been adequately fulfilled to the date of filing. To reach a conclusion, consider the following questions along with evidence to support the response:
  - Has the consultation process been carried out in good faith, and was it appropriate and reasonable in the circumstances?
  - Is final approval being sought on the application or filing from the BCUC?
  - Are further approvals in respect of the application or filing required from the BCUC?
  - Have approvals been obtained from provincial and federal agencies? If so, identify any issues raised by First Nations during consultations related to these approvals.
  - Are there further provincial government and/or federal government approvals required where there would be opportunities for further Crown-First Nation engagement?
  - Where there are unmitigated potential effects on asserted or assumed Aboriginal rights, what is the broader societal value of the project? This responds to the Supreme Court's observation in *Haida* (para. 50) that "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 decisions on the asserted right or title and with other societal interests."