
BRITISH COLUMBIA UTILITIES COMMISSION HEARING

**BRITISH COLUMBIA TRANSMISSION CORPORATION:
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY APPLICATION
FOR THE VANCOUVER ISLAND TRANSMISSION REINFORCEMENT
PROJECT NO. 3698395**

**REPLY SUBMISSIONS OF THE INTERVENOR
HUL'QUMI'NUM TREATY GROUP (to B.C. HYDRO)**

1. The Commission invited additional submissions from the Hul'qumi'num Treaty Group (HTG) in relation to the orders sought and other requests set out in the HTG's original submissions dated October 19, 2005. In a letter dated November 22, 2005 (C27-11), HTG provided a reply to the responses from the Applicant (B-31) and Commission Counsel (A-31). HTG is now replying to the response of B.C. Hydro (C6-5).

Summary

2. Many of the points raised by B.C. Hydro have already been addressed by HTG in its earlier reply (C27-11).
3. The Crown cannot avoid or minimize the duty to consult by incorporating corporations or subsidiaries and selectively allocating consultation responsibilities.
4. Orders regarding the duty to consult are both helpful and necessary.
5. The recent Supreme Court of Canada ruling in the *Mikisew* supports HTG's request for a separate consultation process.
6. The Commission should take into account aboriginal perspectives and should not accept efforts to force all consultation to take place in proceedings that do not fit well with traditional laws and protocols of the First Nations.
7. HTG appreciates the offer of 50% advance funding by BC Hydro but questions the percentage and the conditions.

Whose Duty is it Anyway?

8. B.C. Hydro characterizes advance order as "ambiguous" because "it does not identify 'by whom' the duty is owed". B.C. Hydro argues BCTC is a third party and cannot

owe a duty to consult.

9. BCTC's own web-site describes it as a Crown Corporation:

“BCTC is a provincial Crown corporation, incorporated May 2, 2003. The Minister for the Crown holds 100 per cent of the shares of the Corporation, as required by the *Transmission Corporation Act* of May 29, 2003. BC Hydro continues to own the core transmission assets. The people of BC continue to be the sole owners of the existing core transmission, generation and distribution assets.” (http://www.bctc.com/about_bctc)

10. HTG submits that it is neither helpful nor consistent with the honour of the Crown for B.C. Hydro to engage in technical hair-splitting about the duty to consult.

11. The honour of the Crown is always at stake in dealings with aboriginal people.¹ The Crown may wish to incorporate all manner of corporations and subsidiaries to carry out Crown business. However, it is not consistent with the honour of the Crown to expect First Nations with limited resources to sort through the various corporate and contractual arrangements to determine who is representing the Crown for any particular project. The Crown owes a positive duty to consult. The Crown cannot hide behind a corporate veil or contractual arrangement to avoid or limit this duty.

12. One can easily conceive of a situation where BCTC is appearing before the Commission on a project that does not require any additional environmental assessments. In such a case, BCTC would clearly not be able to avoid the Crown's duty to consult by throwing up its hands and saying that, despite the fact it is a Crown corporation, it does not represent the Crown and does not owe any duty to consult with First Nations.

13. The fact of the matter is that BCTC is a Crown Corporation appearing before the Commission. Any CPCN or authorization granted by the Commission will be granted to BCTC, not B.C. Hydro. HTG submits that the Commission should either ensure that BCTC carries out the duty to consult or, in the alternative, ensure that a separate consultation is established with whatever Crown entities need to be present to carry out full consultation and, if necessary, accommodation.

Is this Really Necessary?

14. HTG is requesting the Commission to rule that the First Nations are owed a duty to consult and to declare that ensuring compliance with the Crown's legal duty to consult is in the public interest.

15. BC Hydro submits that “it would not be helpful for the Commission to declare only that HTG is owed a duty to consult in respect of VITR and that it would be premature

¹ *R. v. Badger*, (1996), 133 D.L.R. (4th) 324 (S.C.C.), para. 41

to make and declaration regarding the scope and content of the duty”.

16. BC Hydro acknowledges that “compliance with the law is always in the public interest” but characterizes the primary issue as one of determining the content of the duty to consult.
17. Since BC Hydro agrees that compliance with the law is always in the public interest, HTG submits that there is no reason for the Commission not to grant HTG’s requested Order #2 (Rule that ensuring compliance with the common law requirements of consultation and accommodation with First Nations is in the public interest).
18. BC Hydro may feel it is trite and unnecessary for the Commission to confirm this point but the history of dealings between First Nations and the Government of British Columbia is typified by a consistent failure of the provincial Crown to follow the legal requirements set out by the courts. It is important for the First Nations and the public to know whether the Commission will declare that compliance is in the public interest and whether or not the Commission will hold the Crown to its legal duties.
19. HTG agrees in part with BC Hydro’s submissions that the content of the duty to consult for the project in question requires further elaboration. However, the need to further determine the exact content of the duty does not negate the duty itself. If BC Hydro is attempting to argue that there is no duty to consult at all, it should clearly state this and provide additional arguments on this point.
20. As HTG has already detailed in its submissions, the threshold for triggering the duty to consult is a low one (C27-7, paras. 22-27). Commission Counsel concurs that the threshold to trigger the duty to consult is a low one (A-31, para. 29). Unless BC Hydro is attempting to argue that there is no duty to consult at all, HTG submits that the Commission is in a position—based on the evidence submitted to date—to determine that the HTG First Nations are owed a duty to consult.
21. Once the Commission confirms whether or not it believes there is a duty to consult and whether or not there should be a separate process, the parties can begin the process of setting out the scope and content of the duty and assisting the Commission to assess what the scope and content should be and whether or not accommodation is required.

A Separate, Distinct, or Additional Process is Required

22. BC Hydro relies heavily on the *Taku* case for the proposition that a separate, distinct or additional process is not required. For the reasons detailed in HTG’s reply submission dated November 22, 2005, the *Taku* case is not determinative of this issue (C27-11, paras. 15-24).

23. HTG appreciates that Commission Counsel has brought to the attention of the Commission and all participants (A-37) the recent ruling by the Supreme Court of Canada in the *Mikisew* case².
24. However, HTG respectfully disagrees with Commission Counsel on whether the *Mikisew* case has any bearing on HTG's request for a separate, distinct or additional consultation process.
25. Commission Counsel dismisses the relevance of *Mikisew* by stating that "The Court does not discuss the issues of the need for a separate process in the context of proceedings before a quasi-judicial panel" (A-37, cover letter).
26. In fact, HTG submits that the Supreme Court of Canada decision in *Mikisew* is highly relevant to the issues before the Commission. *Mikisew* was about a Crown project to build a road, much in the way that the VITR hearing is about a Crown project to upgrade a transmission line. The Crown argued that the impact of the road on the First Nation would be low, much in the way that the Crown will argue that the impact of the transmission line on First Nations will be low.
27. Most relevant is the fact that the Crown in *Mikisew* argued that existing consultation processes, including the environmental assessment process, were good enough and that no separate consultation process was required for First Nations:

"According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the *Mikisew*'s being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the *Mikisew* with the Terms of Reference for the environmental assessment on January 19, 2000. The *Mikisew* were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the *Mikisew* did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the *Mikisew* did not formally participate in the open houses, because "... an open house is not a forum for us to be consulted adequately"...

The Minister now says the *Mikisew* ought not to be heard to complain, about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the *Mikisew* to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty"³.

² *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69.

³ *Mikisew* (SCC) at paras. 9 and 13, emphasis added.

28. The Court flatly rejected the arguments by the Crown that the public consultation process was good enough to discharge the duty to consult. Even though the Supreme Court of Canada described the project as “a fairly minor winter road” and noted that it would be built on lands already surrendered by the First Nation in Treaty 8, the Crown failed to meet its legal duty so the Court over-turned the road authorization and sent the Crown back to engage in consultation with the First Nation.

“The duty [to consult] here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up” limitation, I believe the Crown’s duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in Halfway River First Nation at paras. 159-160.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met. The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added by the Supreme Court of Canada]

It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government’s attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.⁴

29. The Mikisew Cree declined to participate in the public processes on offer, including an environmental assessment process, because the First Nation felt that these public processes were “not a forum for us to be consulted adequately”. The Court stated that the First Nations have some responsibility to engage consultation but that the consultation for the road in the *Mikisew* case “never got off the ground” because the

⁴ *Mikisew* (SCC) at paras. 64-65, emphasis added.

Crown was only offering the public consultation process.

30. In the hearing before the Commission, HTG is trying to participate to the best of its abilities and resources. Ultimately, the HTG First Nations may not be able to fully participate in the BCUC process or the Environmental Assessment process due to lack of resources and due to the narrowness of the scope of both reviews.
31. The Supreme Court of Canada ruling in *Mikisew* confirms HTG's submission that the mere ability to participate in a public process is not sufficient. A separate, distinct or additional First Nations consultation process is required.

The Commission Should Make Efforts to Accommodate Aboriginal Perspectives

32. The Supreme Court of Canada has consistently emphasized the importance of reconciliation in dealings between the Crown and First Nations. The Court has stated that:

"...the only fair and just reconciliation is ... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each."⁵

33. HTG would like to observe that neither the BCUC process nor the EA process is consistent with traditional law and protocol regarding intrusions into First Nations territory. Both processes are foreign and artificial. It does not fit comfortably with HTG First Nation laws and protocols to prepare formal submissions in legalese. First Nation laws require that anyone wanting to carry out activities in the Territory should come and speak with the First Nation in person, attend cultural ceremonies, respectfully explain who they are, who their family is, what they want, and what they are proposing to offer in exchange for being granted permission to be in the Territory.
34. There is a whole system of traditional laws and protocols that must be followed. Reconciliation requires proponents, decision-makers, courts and quasi-judicial entities to give equal weight to the First Nations' laws and protocols and not just try to force the First Nations to fit into processes that are foreign to them and are not designed to deal with aboriginal rights, title and laws.

Costs

35. HTG has already presented arguments relating to its request for an order of advance costs (C27-11 paras. 38-47).
36. BC Hydro states that the Commission does not have jurisdiction to order BCTC to pay HTG's costs because BC Hydro has a contractual agreement with BCTC which states that BC Hydro is responsible for costs relating to consultation with First Nations (C6-5 p. 10). HTG does not have a preference for who pays the costs as long

⁵ *R. v. Van Der Peet* [1996] 2 SCR 507 at para. 50.

as somebody does. However, HTG notes that BC Hydro's position could leave the Commission with no party against whom to assess costs if BC Hydro ceased being an intervenor in the hearing process.

37. HTG respectfully suggests that the Commission ought to be cautious about allowing applicants to enter into contractual arrangements which purport to eliminate any responsibility for paying costs, since in some circumstances the party required to pay the costs may not be a party to Commission proceedings. HTG suggests that the better procedural approach is to assess costs against the applicant and to leave the applicant to seek indemnification or reimbursement through whatever contractual arrangements it may have.
38. HTG appreciates BC Hydro's offer to pay 50% of HTG's costs in advance but questions the amount and the conditions.
39. The proposed percentage is arbitrary and does not deal with the primary issue. HTG has no funding to participate in the hearing. An offer of 50% funding is helpful but means that HTG will only be able to participate in the hearing at a 50% level. The other 50% will not magically materialize from somewhere. If HTG cannot count on receiving full reimbursement in a timely manner, HTG will have to scale back its participation to the amount that can be recovered in a timely manner.
40. The amount required by HTG is relatively small in comparison to the value of the project. BC Hydro is clearly not proposing a 50% funding offer due to financial constraints or lack of funds on the part of BC Hydro. If there is some political motivation for only proposing 50% or some attempt to gain an advantage over the First Nations by only partially funding them, HTG questions whether the offer of 50% is consistent with the honour of the Crown.
41. BC Hydro is also requesting compliance with the conditions set out in the *Okanagan Indian Band* case (C6-5 at p. 11). HTG has already addressed why the Commission should not consider these conditions to be determinative and should not require strict compliance with them (C27-11, paras. 38-47).

All of which is respectfully submitted this 22nd day of November, 2005.

Murray Browne and Renee Racette
Counsel for the Intervenor
Hul'qumi'num Treaty Group

**SCHEDULE “A”
TABLE OF AUTHORITIES**

1. *R. v. Badger*, (1996), 133 D.L.R. (4th) 324 (S.C.C.).
2. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69.
3. *R. v. Van Der Peet* [1996] 2 SCR 507.