PROJECT NO. 3698545/ORDER G-30-09

BRITISH COLUMBIA UTILITIES COMMISSION
INQUIRY INTO BRITISH COLUMBIA'S LONG-TERM TRANSMISSION INFRASTRUCTURE

SUBMISSIONS OF THE TREATY 8 TRIBAL ASSOCIATION WITH RESPECT TO THE THIRD PROCEDURAL CONFERENCE SET FOR AUGUST 18-19, 2009

DATED JULY 24, 2009

SUBMITTED BY:

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

INTRODUCTION

1. These are the written submissions of the Treaty 8 Tribal Association (the "Treaty 8 First Nations") with respect to the August 18 and 19, 2009 Procedural Conference in relation to the Inquiry into BC's Long-Term Transmission Infrastructure (the "Transmission Inquiry").

2. The Treaty 8 Tribal Association has the authority to and does represent the following Treaty 8 First Nations with respect to the upcoming Procedural Conference: the Doig River First Nation; the Fort Nelson First Nation; the Halfway River First Nation; the Prophet River First Nation; the Saulteau First Nations; and the West Moberly First Nations.

3. The Treaty 8 First Nations submit that, in the context of this Inquiry, the BC Utilities Commission (the "BCUC" or the "Commission") has a duty to consult and accommodate First Nations with respect to its determinations on the issues set out by the Terms of Reference, and that this duty can and must be met over the course of the Inquiry prior to the issuance of the Inquiry's Draft Report, and certainly prior to the issuance of its Final Report to the Minister of Energy, Mines and Petroleum Resources (the "Minister").

4. The Commission's Report will shape the nature, location, and pace of development of both electrical generation projects and transmission infrastructure into the next 30 years and beyond and, as a result, is very likely to have adverse impacts upon the Treaty 8 First Nations' rights to hunt, fish and trap throughout the Treaty 8 area. Therefore, a relatively high level of consultation, allowing for meaningful input by the Treaty 8 First Nations, will be required over the course of the Inquiry proceedings. The precise nature of the consultation obligation will become clearer as the Inquiry proceeds.

BACKGROUND

Treaty 8 and the Treaty 8 First Nations

1. The Treaty 8 First Nations represented herein are located within Treaty 8 territory, in the Province of British Columbia. The Treaty 8 First Nations are the only Treaty First Nation participants and, as such, have a unique and important contribution to make to these proceedings.

2. Each of these First Nations is either a signatory or adherent to Treaty No. 8, a solemn agreement made between the Crown and First Nations in 1899, and, as such, entitled to the rights set out by the Treaty.

3. Treaty No. 8 describes the territory encompassed by Treaty 8 as:

> Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central Range of the Rocky Mountains, thence North Westerly along said Range to the point where it intersects the 60th parallel of North Latitude.

Text of Treaty No. 8, Book of Authorities, TAB 1

4. The map attached to the December 1900 Report of the Treaty Commissioners for Treaty No. 8 is attached as Appendix "A" to these submissions.

Map of Treaty 8 territory, attached to Report of Treaty Commissioners for Treaty No. 8, Appendix "A".

5. Treaty No. 8 provides the signatory First Nations with certain rights, including the right to pursue their usual vocations of hunting, trapping and fishing. These rights are now protected by section 35(1) of the *Constitution Act, 1982*. As such, these rights are not only "treaty rights"; they are constitutional rights.

Text of Treaty No. 8, Book of Authorities, TAB 1

***Constitution Act, 1982*, s. 35, Book of Authorities, TAB 2**

The Transmission Inquiry

6. The Transmission Inquiry is initiated pursuant to section 5 of the *Utilities Commission Act*, which provides, in part, that, on request, the Commission must advise the Lieutenant Governor in Council on any matter, and that the Commission:

> Must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.

***Utilities Commission Act*, RSBC 1996, c. 473, s. 5, Book of Authorities, TAB 3**

7. On December 11, 2008, the British Columbia Ministry of Energy, Mines, and Petroleum Resources issued Terms of Reference outlining the general scope of the Transmission Inquiry. The general purpose of the Inquiry is for the BCUC to "make determinations with respect to BC's electrical transmission infrastructure and capacity needs for a 30-year period, commencing from the date this inquiry begins."

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, section 2, Appendix "B"

8. Pursuant to section 3 of its Terms of Reference, the Commission is mandated to assess the generation resources in BC that potentially will be developed over the course of the next 30 years. These are to be grouped by geographic location. In making its assessment, the Commission is to consider various factors, including that certain areas "will be inappropriate for the development of generation resources". In this respect, the Panel has determined that it will rely primarily on Exclusion Areas (such as Provincial Class A, B, and C Parks, Conservancies, Biodiversity Areas, Ecological Reserves, National Parks and Historic Sites, National Wildlife Areas, National Marine Protected Areas and Regional District Parks).

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, sub-section 3(iii), Appendix "B".

BCUC Reasons for Decision on Scope, Appendix A to Order G-86-09, at p. 13, Appendix"B".

Commission Staff Discussion Draft on Scope, dated May 21, 2009, Appendix "B".

9. The Commission has stated that it "will also consider presentations, evidence and submissions from First Nations with respect to broad-based concerns or issues with respect to generation in their territories."

BCUC Reasons for Decision on Scope, Appendix A to Order G-86-09, at p. 13, Appendix "B".

10. The Terms of Reference do not permit the Commission to make determinations on the merits of specific generation projects or with respect to the specific routing or technological specifications of electricity transmission projects.

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, sub-sections 5(a) & (b), Appendix "B".

11. The Commission has a broad mandate to consult potentially affected parties, including First Nations. Sub-section 10(a) of the Commission's Terms of Reference provides that the Commission:

> Must invite and consider submissions, evidence and presentations from any interested person, including, without limitation, First Nations, communities, municipal and regional governments, other utilities, power producers, ratepayer groups and environmental non-governmental organizations;

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, section 10(a), Appendix "B".

12. Notably, the Commission has wide discretion to "make use of procedures to resolve specific issues within these Terms of Reference", including workshops, mediations, dispute resolution mechanisms, pre-hearing conferences, working groups and oral and written public hearings.

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, section 10(c), Appendix "B".

Inquiry Proceedings To-Date

13. On April 27, 2009, the Commission held its first Procedural Conference with respect to this Inquiry. At that time, the Commission took submissions regarding the scope of the Inquiry. On June 24, 2009, a second Procedural Conference was held to address the scoping issues. At this second Conference, several interveners made submissions seeking a third Procedural Conference on the issue of the Commission's duty to consult First Nations in the context of the Inquiry.

14. On June 30, 2009, the Commission agreed to hold a third Procedural Conference on August 18 and 19, 2009 to specifically address issues of the Commission's duty, if any, to consult and accommodate First Nations. Written submissions for the third Procedural Conference are due on July 24, 2009.

June 30, 2009 correspondence from the Commission Panel to the Long-Term Transmission Inquiry Participants RE: Procedural Conference, Appendix "B".

BC Hydro/BCTC Consultation Process

15. BC Hydro and the BC Transmission Corporation ("BCTC") are conducting their own consultation regarding their submissions to the Inquiry. These consultations are expected to include three phases, addressing:
    - Introduction to the Inquiry and information sharing and dialogue (June & July 2009);
    - Sharing information and feedback from First Nations on BC Hydro and BCTC information filings (September & October 2009); and,
    - Review of BC Hydro/BCTC's formal submissions (January & February 2010).

BC Hydro Overview and Planning Process presentation, June/July 2009.

ISSUES

16. The Panel has asked for submissions on the following two issues:

    i. What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?

        - The Treaty 8 First Nations submit that the Commission does have a duty to consult them in the context of this Inquiry and that it has a duty to provide meaningful opportunities for input by the Treaty 8 First Nations throughout the Inquiry process. The Treaty 8 First Nations will also address two preliminary issues concerning whether the Commission's role in this Inquiry is consistent with its owing a duty to consult First Nations and the impact, if any, of the BC Hydro/BCTC consultation process on any duty to consult owed by the Commission.

    ii. If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an inquiry and complete its draft report by June 30, 2010?

        - At the outset, the Treaty 8 First Nations will address the Commission's constitutional obligation to consult affected First Nations vis-à-vis its other legal obligations, as well as the unique role, as constitutional rights holders, that First Nations should play in this Inquiry. The First Nations will then provide submissions as to how the Commission may meet its constitutional obligation to consult and accommodate affected First Nations within the context of the Inquiry.

17. In response to the Panel's offer to consider such suggestions, the Treaty 8 First Nations will very briefly address the question of making a presentation at the August 18-19, 2009 Procedural Conference concerning "how the duty to consult, if any, can be best fulfilled in the context of the inquiry."

June 30, 2009 correspondence from the Commission Panel to the Long-Term Transmission Inquiry Participants RE: Procedural Conference, Appendix "B".

LAW & ARGUMENT

ISSUE 1: ***What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?***

18. Prior to addressing the substantive question concerning the Commission's duty to consult, the Treaty 8 First Nations will address two preliminary issues:

    i. Is the Commission's role in this Inquiry consistent with it being obliged to consult affected First Nations on behalf of the Crown in right of British Columbia? and

    ii. What, if any, is the impact of the BCTC/BC Hydro Consultation Process on the Commission's duty to consult and accommodate First Nations?

1(a) Preliminary issues

1(a)(i) Is the Commission's role in this Inquiry consistent with it being obliged to consult affected First Nations on behalf of the Crown in right of British Columbia?

19. In light of the recent decision of the BC Court of Appeal in the *Carrier Sekani* and *Kwikwetlem* cases, it is clear that, in its quasi-judicial role, the Commission has the authority to decide questions of law, including whether the Crown has a duty to consult First Nations and whether the Crown has fulfilled that duty. What is at issue here is whether the Commission itself owes a duty to consult First Nations in the context of the Section 5 Transmission Inquiry.

***Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, 2009 CarswellBC 340 (BCCA) ("Carrier Sekani"), Book of Authorities, TAB 4.**

***Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, 2009 CarswellBC 341 (BCCA) ("Kwikwetlem"), Book of Authorities, TAB 5.**

20. The Supreme Court of Canada has ruled that when a Crown agency is acting in a quasi-judicial role, it cannot owe a fiduciary obligation to one or more of the parties appearing before it. It must maintain fairness as between all parties, and therefore, like a court, cannot owe any one of the parties appearing before it a super-added duty:

> 38 It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. R.*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. **The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.**
>
> 39 Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 385. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, **it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.** [Emphasis added]

Quebec (Attorney General) v. Canada (National Energy Board), **[1994] 1 SCR 159, 1994 CarswellNat 8 (SCC), Book of Authorities, TAB 6.**

21. However, as will be set out more fully below, the Crown has a duty to consult and, where necessary, accommodate First Nations when conducting strategic planning initiatives that have the potential to adversely affect Treaty or Aboriginal rights. The question, therefore, is whether, in the context of this Inquiry, the Commission is acting in a quasi-judicial role, or whether its role is more properly characterized as that of a strategic planning agency of the Crown.

22. The Inquiry in this matter is convened pursuant to section 5 of the *Utilities Commission Act*, which provides the Commission with the duty and authority to advise the Lieutenant Governor in Council (Cabinet) with respect to "any matter". This section provides that a matter referred to the Commission may specify terms of reference empowering the

Commission to hold an inquiry, and further, to hold an inquiry to make determinations with respect to BC's infrastructure and capacity needs for electricity transmission for a 20-year period, or such other period as set out in the terms of reference for the Inquiry. Clearly, the *Utilities Commission Act* casts the Commission's role in the Inquiry as that of an advisor to the Cabinet, as opposed to a quasi-judicial decision-maker adjudicating the rights of private parties.

***Utilities Commission Act*, RSBC 1996, c. 473, s. 5, Book of Authorities, TAB 3**

23. The Terms of Reference for the Inquiry establish that the Commission's mandate in the Inquiry is to help develop a strategic planning framework to guide the future development of BC's electrical generation and transmission system over the next 30 years. This is not the type of role that a court would fulfill; rather, it is a role that would normally be played by a government planning agency. Thus, in the context of this Inquiry, the Commission does not have a court-like role; it is not adjudicating a decision between two (or more) parties disputing a point of law or an application for a project approval.

24. Instead, the Commission is essentially representing the Minister, and its actions are those of the Minister, acting through his subordinates, to make recommendations to the Minister and, ultimately, to Cabinet. In sum, the Commission is essentially an agent or subordinate of the Minister, his representative, and is imbued with all of the duties incumbent upon him with respect to decisions that may adversely affect Aboriginal and Treaty rights, including the duty to consult First Nations.

1(a)(ii) What, if any, is the impact of the BCTC/BC Hydro Consultation Process on the BCUC's duty to consult and accommodate First Nations?

25. BCTC and BC Hydro are undertaking a joint consultation process with First Nations. In their May 11, 2009 letter to the Treaty 8 Tribal Association, they state that they will conduct consultation with BC First Nations "regarding the information that BC Hydro and the BC Transmission Corporation will be submitting to the Inquiry." In this same letter, they state that "[t]he consultation by BC Hydro is not intended to preclude or

replace First Nations' participation in the BCUC's process. First Nations are encouraged to participate directly in the BCUC proceeding." A workshop was held by BC Hydro in Fort St. John on July 8, 2009.

May 11, 2009 Letter from the BC Transmission Commission/BC Hydro to the Treaty 8 Tribal Association, Appendix "C" [BCHydro/BCTC Process Documents]

26. The question is, what impact (if any) does this consultation process have on the Commission's own duty to consult First Nations in the context of the Inquiry? For the following reasons, it is our opinion that the BC Hydro/BCTC process should be seen as complementary to, rather than as a replacement for, a separately required process of consultation by the Commission itself.

27. It is the Crown's obligation to coordinate consultation between different Crown agencies. In *Dene Tha' First Nation*, the Federal Court of Canada held that the Crown owed and had breached its duty to consult and accommodate the Dene Tha' First Nation in relation to a decision regarding the construction of the Mackenzie gas pipeline. The Court held that the Crown should have taken care to appoint an agency to lead the consultation efforts, and ordered that a remedy hearing take place, in which the parties were to make submissions on the appointment of a Chief Consultation Officer.

***Dene Tha' First Nation v. Canada*, 2006 FC 1354, 2006 CarswellNat 3642 (FC) at para. 134, Book of Authorities, TAB 7.**

28. In *Carrier Sekani, supra,* and *Kwikwetlem, supra,* the BC Court of Appeal held that the Commission's duty to consult was limited to ensuring that BCTC and BC Hydro fulfilled their respective duties to consult First Nations in the context of regulatory approvals before the BCUC. But as argued above, the Commission functions in a different capacity in the Inquiry than under other regulatory applications brought before the Commission; namely, the Commission functions as the Crown agency responsible for coordinating the strategic planning initiative of the Inquiry.

29. The decisions BCTC/BC Hydro makes with respect to its position before the Inquiry, and the determinations of the Commission as a result of these and other representations before it, are distinct Crown actions, either or both of which could potentially impact Treaty rights. As stated above, Justice Vickers of the BC Supreme Court acknowledged that the infringement of Aboriginal title "can occur at each stage of any land use process and so, at each stage, the Crown must justify its proposed actions." Similarly, each stage of the Inquiry has the potential to infringe Treaty 8 rights, and the Crown must consult the Treaty 8 First Nations at each stage of the Inquiry. This means that BC Hydro and BCTC must consult with respect to their submissions before the Inquiry, and that the Commission must consult with respect to its role in the Inquiry.

***Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, 2007 CarswellBC 2741 (BCSC) at para. 1067 ("Tsilhqot'in Nation"), Book of Authorities, TAB 8.**

1(b) Substantive Issues

1(b)(i) When is the Crown's duty to consult a Treaty First Nation triggered?

30. The duty to consult the Treaty 8 First Nations arises whenever the Crown *contemplates conduct that might adversely affect a Treaty 8 right.* In the case of a First Nation that is a signatory to a Treaty with the Crown, the Supreme Court of Canada has held that the Crown "will always have notice" of the contents of the Treaty, so the question as to whether a duty to consult is triggered depends on determining "the degree to which conduct contemplated by the Crown would adversely affect those rights". The threshold to trigger the duty to consult is a low one.

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 2005 CarswellNat 3756 (SCC) ("Mikisew") at para. 34, Book of Authorities, TAB 9.**

31. Once triggered, the content of the duty to consult is flexible, and will vary in the circumstances. In *Haida,* Chief Justice McLachlin characterized the content of the duty to consult as lying along a spectrum. On the low end of the spectrum, where the potential infringement is minor, the Crown may only have a duty to give notice, disclose

information and discuss issues raised with the First Nation. On the high end, where the right and the potential adverse impact are significant, "deep consultation" may be required.

***Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 2004 CarswellBC 2656 (SCC), ("Haida") at paras. 43-44, Book of Authorities, TAB 10.**

32. Each case must be approached with flexibility, as "the level of consultation may change as the process goes on and new information comes to light". The "controlling question in all situations" must be "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal Peoples with respect to the interests at stake."

***Haida, supra* at paras. 39, 43-45, Book of Authorities, TAB 10.**

33. In regards to proven Treaty rights, such as the rights under Treaty No. 8, the content of the duty depends on:

    i. the specific promises in the Treaty itself; and,
    ii. the seriousness of the impact of the proposed government action on the aboriginal people.

***Mikisew, supra* at paras. 33-34, 63-64, Book of Authorities, TAB 9.**

34. Therefore, the question to be determined here is whether or not the Commission has, or ought to have, knowledge of Treaty 8 rights and the potential for adverse impacts on Treaty 8 rights. If the answer to that question is "yes", then next question becomes "What level of consultation and accommodation does the Commission owe the Treaty 8 First Nations?"

1(b)(ii) Does the Commission have real or constructive knowledge of Treaty 8 rights and the potential for adverse impacts on these rights?

Treaty 8 Rights

35. In contrast to situations where Aboriginal rights or title may be asserted but unproven, the Supreme Court of Canada has held that the Crown, as a signatory to historic Treaties, always has notice of the existence of historic Treaty rights. The rights under Treaty No. 8 are therefore proven and enjoy constitutional protection under s. 35(1) of the *Constitution Act, 1982.*

***Mikisew, supra* at para. 34, Book of Authorities, TAB 9.**

36. Most significantly, Treaty No. 8 provides its signatory First Nations with the ongoing right to be consulted with respect to proposed changes to land use anticipated to occur over time. As the Supreme Court of Canada acknowledged in the *Mikisew* decision, the Crown recognized and anticipated that land use changes affecting Treaty 8 territory would occur into the future, and the Treaty itself set up a framework for ongoing consultation between the Crown and Treaty 8 First Nations in this regard:

> The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

***Mikisew, supra* at para. 63, Book of Authorities, TAB 9.**

37. The Crown, and its agents, including the Commission, therefore has knowledge of this right to be consulted as to proposed changes in land use that may affect Treaty 8 territory.

38. The Supreme Court of Canada has also held that Treaty No. 8 protects the rights of Treaty 8 First Nations to continue to hunt, trap, and fish. The rights specifically allow for access to convenient hunting grounds:

> ... a large element of the Treaty 8 negotiations were the assurances of ***continuity*** in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines. [Emphasis added]

***Mikisew,supra* at para. 47, Book of Authorities, TAB 9.**

39. The Supreme Court of Canada has also held that hunting rights reserved by Treaty No. 8 included hunting for commercial purposes and has observed that the Treaty 8 First Nations developed an economy that centred on wildlife resources. The Supreme Court of Canada specifically endorsed Professor Ray's Commentary on Economic History of Treaty 8 Area (unpublished; 13 June 1985) at pp. 8-9:

> Conversely, moose, caribou, and wood buffalo were killed in order to obtain meat for consumption and for trade. Similarly, the hides of these animals were used by Indians and traded. For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the Indian economy following contact.

***R. v. Horseman*, [1990] 1 SCR 901, 1990 CarswellAlta 47 (SCC) ("Horseman") at paras. 8, 9, 29, & 53, Book of Authorities, TAB 11.**

40. The BC Supreme Court has recognized that there must be a harvestable surplus of a species to be able to meaningfully exercise a section 35(1) right to hunt or trap that species:

> I consider that right to be one to trap a harvestable surplus of marten (that is, an ability to trap marten in the territory without the risk of removing the species from the territory) which is consistent with the Aboriginal, traditional use of that species before sovereignty.

***Westbank First Nation v. British Columbia*, [1997] 2 CNLR 221 (BCSC), 1996 CarswellBC 301 (BCSC) at paras. 14 and 16, Book of Authorities, TAB 12.**

41. We submit, therefore, that the Crown has actual knowledge of the Treaty 8 First Nations' rights to be consulted as to Crown activities that may affect land use in the Treaty 8 territory, as well as the Treaty 8 First Nations' rights to hunt, trap, and fish within Treaty 8 territory. Furthermore, the Crown is obliged to protect a harvestable surplus of animals such that the Treaty 8 First Nations may continue to meaningfully exercise these rights within their traditional territories as they did prior to signing the Treaty.

Potential Adverse Impacts on Treaty 8 Rights

42. There is little doubt that the Inquiry is the single most significant strategic planning initiative by the Province with respect to the long-term development of the electricity generation and transmission industry throughout British Columbia. Given the breadth of its mandate, it is unlikely that any other single Crown agent, advisor or decision-maker will provide the Minister or the Provincial Government with a more comprehensive and influential basis on the ongoing regulation and development of electricity resources within the Province. As such, the Inquiry determinations will shape the development of policy and legislation for many years to come. Indeed, that is its intent and purpose.

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, Appendix "B".

43. The Commission has been given the authority to make determinations with respect to BC's electricity transmission infrastructure and capacity needs for a 30-year period. The Inquiry Terms of Reference state that the Commission is to assess the generation resources of BC, grouped by geographic location, and make determinations respecting "the need for, and timing of, additional transmission infrastructure and capacity". The Terms of Reference state that the Commission "must prepare a report containing its determinations and reasons for the determination and must provide the report to the Minister of Energy, Mines and Petroleum Resources". Before finalizing its report, the Commission must publish a draft report (by June 30, 2010), permit public comment on the report for a period of 30 days (or more, if it considers it appropriate), and incorporate these comments into the final report, as it considers appropriate.

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, sections 2, 3, 4, 11 & 12, Appendix "B".

44. The determinations made in this Inquiry will directly impact future regulatory decisions made by the Commission. The link between the Commission's determinations in this Inquiry and future regulatory decisions is partially elucidated by the following statement taken from the Preamble to the Terms of Reference:

> WHEREAS following the determinations made in the inquiry, applications for Certificates of Public Convenience and Necessity or other regulatory filings to be filed with the Commission under the Act, will be brought forward to pursue specific transmission projects to address the needs determined in the inquiry;
>
> **Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, Preamble, Appendix "B".**

45. The Inquiry determinations may in fact gain the force of law, become legally binding precedents to direct future regulatory applications and decisions:

> WHEREAS subsection 5(7) of the Act provides that the Minister responsible for the administration of the Hydro and Power Authority Act (Minister) may declare, by regulation, that the Commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection 5(4) of the Act;
>
> **Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, Preamble, Appendix "B".**

46. The Terms of Reference for the Inquiry direct the Commission to provide region-specific scenarios of provincial electricity generation capacity and demand to guide future regulation and development, without weighing the merits of any particular generation or transmission project or route. But the determinations that the Commission makes with respect to the generation capability and demand will provide the regulatory framework for future site-specific permitting, assessment, and other decisions to be made further down the regulatory line. As such, the Inquiry is essentially a strategic planning project; i.e. a project which sets high-level determinations to guide (without directly deciding) lower levels of regulation and future operational resource activities. The Commission's

role in the Inquiry is that of the Crown agency responsible for coordinating and overseeing this strategic planning initiative.

47. The courts have held that strategic planning decisions may have serious impacts upon Aboriginal and Treaty rights. In *Haida, supra*, the issue was whether the duty to consult arose in the context of a decision to issue a Tree Farm Licence. The Licence did not in itself authorize the harvesting of timber, and therefore did not directly impact upon the Aboriginal rights and title asserted by the Haida Nation. However, the Supreme Court of Canada held that the decision reflected "strategic planning for utilization of a resource" and determined that "decisions made during strategic planning may have potentially serious impacts on Aboriginal right[s] and title".

***Haida, supra* at para. 76, Book of Authorities, TAB 10.**

48. In *Taku River Tlingit,* the Supreme Court of Canada held that the duty to consult and accommodate potentially affected First Nations applies not only to lower levels of government regulations, such as permitting, licensing, or environmental assessment, but to the development of land use strategies.

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74, 2004 CarswellBC 2654 (SCC) ("Taku River") at para. 46, Book of Authorities, TAB 13.**

49. In *Dene Tha' First Nation v. Canada*, it was alleged that the Crown breached its duty to consult during a high-level planning initiative for the Mackenzie Valley Gas Pipeline, a complex project proposed to run from the northwest corner of the Northwest Territories ("NWT") to just south of the Alberta border. The Federal Court held that the Ministers had breached their duty to consult the Dene Tha' First Nation with respect to high level decision-making concerning the creation of the regulatory and environmental review processes by failing to adequately include the Dene Tha' First Nation from the early stages of the planning process.

***Dene Tha', supra,* Book of Authorities, TAB 7.**

50. The Dene Tha' First Nation shares the same constitutional Treaty rights held by the Treaty 8 First Nations on whose behalf these submissions are made, including the rights to hunt, trap and fish. However, for the purposes of that case, the Dene Tha' First Nation's Treaty 8 rights were held to exist within the Province of Alberta. Although the proposed Pipeline route terminated just south of the NWT-Alberta border, the southern terminus was proposed to run through the Dene Tha' First Nation's territory, as "defined by Treaty 8". The proposed connecting facilities were to pass through a trapline owned by a member of the Dene Tha' First Nation. The Dene Tha' First Nation's Treaty 8 rights were "sufficient to trigger a duty to consult" the Dene Tha' with respect to the high-level planning processes undertaken by the Ministers, including consultation with respect to the design of the regulatory and environmental review processes that would manage the ongoing consultation in relation to the Pipeline.

***Dene Tha', supra* at paras. 2, 3, 10, 14, Book of Authorities, TAB 7.**

51. In the Dene Tha' case, the Court specifically held that the Ministers owed the Dene Tha' a duty to consult with respect to the formulation of what was called the "Cooperation Plan", a plan that was not written in mandatory language, but nevertheless served as a "blue print" for the entire regulatory framework of the Pipeline project. While the creation of the Cooperation Plan conferred no rights, "it set[] up the means by which a whole process will be managed" and was an "integral step" in the Pipeline project, which itself had the potential to adversely affect the Dene Tha's Treaty rights.

52. Similarly, with respect to this Inquiry, the Commission will produce a Final Report that may or may not become legally binding, or "mandatory". Even if it does not become "mandatory", this Report will be "an integral step" in the regulatory planning process for electricity generation and transmission in British Columbia, and will function as a "blue print" for the development of generation projects and transmission corridors in each region of the Province, including the traditional territories of the Treaty 8 First Nations.

53. Notably, in *Kwikwetlem First Nation v. B.C. (Utilities Commission)*, the BC Court of Appeal rejected the proponent's argument that the adequate Crown consultation could be postponed from the application for Certificate of Public Convenience and Necessity

("CPCN") to the subsequent stage of ministerial review. Madam Justice Huddart stated that, even if that were the case, "practically speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest". What Huddart J.A. was saying, in essence, was that the Commission's approval of a CPCN would increase the probability that the Minister would also approve the project, thus stacking the deck against the First Nation alleging insufficient consultation.

***Kwikwetlem, supra* at para. 69, Book of Authorities, TAB 5.**

54. Although different consultation requirements on the part of the Commission will apply in the context of this Inquiry (because of the different role the Commission fulfills in the Inquiry than in a quasi-judicial regulatory application), the Court's reasons concerning the weight of the Commission's Report should be heeded. Just as the Commission's decision on a CPCN will greatly influence whether an approval is granted by the Minister, so too will the Commission's Inquiry Report have a great influence on Provincial policy, and the BCUC's own future decisions, in respect of the development of generation and transmission projects.

55. The position of the Treaty 8 First Nations is further supported by the BC Supreme Court's decision in *Tsilhqot'in Nation v. British Columbia.* In that case, the Court held that the Ministry of Forests had unjustifiably infringed s. 35 rights by failing to consult the First Nation at early stages of strategic planning:

> The application of the provincial forestry scheme to Aboriginal title lands amounts to a clear denial of Aboriginal title. Planning to use the land and resources of an Aboriginal group without acknowledging the constitutionally entrenched interests of the Aboriginal group requires justification. Infringement or denial of title can occur at each stage of any land use process and so, at each stage, the Crown must justify its proposed actions with respect to Aboriginal title land. [Emphasis added]

***Tsilhqot'in Nation, supra* at para. 1067, Book of Authorities, TAB 8.**

56. The court held further that the Ministry of Forests unjustifiably infringed Tsilhqot'in rights by not obtaining "sufficient credible information" to assess the potential impacts of planned forest harvesting on wildlife populations essential to the meaningful right of the Tsilhqot'in to hunt within their traditional territory.

***Tsilhqot'in Nation, supra* at para. 1294, Book of Authorities, TAB 8.**

57. The court in *Tsilhqot'in Nation* also held that the strategic land use planning overseen by the BC Commission on Resources and Environment ("CORE"), a neutral government agency, infringed the Aboriginal rights and title of the Tsilhqot'in Nation:

> ...the [Cariboo-Chilcotin Land Use Plan] makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title. Title encompasses the right to determine how land will be used and how forests will be managed in the Claim Area. In effect, the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot'in people without any attempt to acknowledge or address Aboriginal title or rights in the Claim Area.

***Tsilhqot'in Nation, supra* at paras. 1135 & 1293, Book of Authorities, TAB 8.**

58. In *Wii'litswx,* the BC Supreme Court held that meaningful consultation and accommodation at the strategic planning level has an important role to play in achieving the ultimate constitutional goal of reconciliation, and should not be supplanted by delegation to operational levels. It was held that the Crown breached its duty to consult and accommodate when it approved the replacement of several forest licences in the Gitanyow First Nation's traditional territories.

***Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139, 2008 CarswellBC 1764 (BCSC) ("Wii'litswx") at para. 186, Book of Authorities, TAB 14.**

59. In her reasons for decision, Justice Neilson held that the replacement of the forest licences was a "strategic first step in permitting the continuing removal of a claimed resource in limited supply from Gitanyow traditional territory", a step which was "superimposed on a troubled history of over-logging and unfulfilled silviculture obligations". Justice Neilson stated that subsequent opportunities for consultation respecting operational-level decisions did not significantly reduce the potential impacts of the high-level strategic decision to replace the forest licences. In part, this is because the

measures to protect Aboriginal interests at the operational level are largely discretionary or may be supplanted by competing interests.

***Wii'litswx, supra* at paras. 157, 159-161, Book of Authorities, TAB 14.**

60. The strategic level decision and the associated likelihood of ongoing extraction of limited resources from the First Nation's traditional territory represented a potential significant infringement on those Aboriginal interests. Justice Neilson's reasons support the proposition that high-level strategic plans are potentially significant infringements of Treaty rights and that the cumulative effects of historical resource development on the landscape must be taken into account during strategic planning initiatives.

***Wii'litswx, supra* at paras. 169, 186, Book of Authorities, TAB 14.**

61. In *Brown v. Sunshine Coast Forest District*, the BC Supreme Court held that the Crown had breached its duty to consult and accommodate in the context of the approval of amendments to a landscape-level strategic plan (called a Forest Stewardship Plan, or "FSP") covering an area within the Klahoose First Nation's traditional territories.

***Brown v. Sunshine Coast Forest District*, 2008 BCSC 1642, 2008 CarswellBC 2587 (BCSC) ("Klahoose") Book of Authorities, TAB 15.**

62. The position of the Crown was that the approval of an FSP in and of itself had little on-the-ground impact on the exercise of Aboriginal rights. The Court, however, held that approval of an FSP for an area in the heartland of the Klahoose First Nation had very serious potential adverse effects upon the Klahoose Aboriginal title and rights. It was irrelevant that the FSP was but one step in the process of obtaining the right to harvest timber (granted by the Tree Farm Licence) to exercising that right – *any* step in that process carried the potential of adversely affecting the Klahoose interests to a serious degree. Furthermore, the Court once again held that the Crown cannot delay consultation to the operational stage of development or regulatory approval.

***Klahoose, supra* at paras. 64, 68, 128-129, Book of Authorities, TAB 15.**

63. In sum, although the Commission's determinations in its Final Report may not have immediate on-the-ground impacts upon the rights of Treaty 8 First Nations to hunt, trap and fish within their traditional territories, it is clear that these determinations will set the course for the regulation and development of electricity generation and transmission projects within and adjacent to Treaty 8 territory, the very land on which the Treaty 8 First Nations exercise their constitutionally-protected rights. The Inquiry's Report will shape the nature, location and size of projects that are likely to adversely impact, for example, the habitat and migration patterns of the wildlife upon which the Treaty 8 First Nations rely in order to meaningfully exercise their Treaty rights. As such, although the Commission will not be making decisions on specific projects or routing, at the very least, its strategic planning decisions may adversely affect the established Treaty rights of the Treaty 8 First Nations.

64. In light of these submissions, the Commission therefore has both actual and constructive knowledge of the rights of the Treaty 8 First Nations to hunt, trap, and fish within their traditional territories, as well as the fact that its contemplated activities (i.e. the determinations it proposes to make in the Inquiry) give rise to potential adverse affects on Treaty 8 rights. As such, the Commission's duty to consult the Treaty 8 First Nations with respect to the Inquiry has been triggered.

1(b)(iii) What level of consultation and accommodation does the Commission owe the Treaty 8 First Nations?

65. As noted above, the duty to consult arises whenever the Crown contemplates an activity that "might adversely affect" an Aboriginal or Treaty right. Once triggered, the content of the duty to consult is flexible, and contextual, and has been conceived as lying along a spectrum.

66. As noted recently in *Hupacasath First Nation*, the law in the area of duty to consult and accommodate is not "an exact science, or a science at all" and the common law must find

remedies to fit new situations. Although many cases since *Haida* have examined the adequacy of consultation, only a few cases have dealt with the adequacy of accommodation, in either the Aboriginal or Treaty rights context.

***Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, 2008 CarswellBC 2330 (BCSC), Book of Authorities, TAB 16.**

67. It is clear, however, that *responsiveness* is a key requirement of both consultation and accommodation.

***Taku River, supra* at para. 25, cited with approval in *Wii'litswx v. British Columbia (Minister of Forests)* [2008] B.C.J. No. 1599 (S.C.) at para 10, Book of Authorities, TAB 13.**

68. There is no one-size-fits-all approach to measuring consultation and accommodation. To be adequate, the Crown must balance competing Aboriginal and societal interests.

***Haida, supra,* per McLachlin C.J.C. at para, 50, Book of Authorities, TAB 10.**

69. The Treaty 8 First Nations submit that the level of consultation owed to them pursuant to the Inquiry is "deep". This is due to several factors, including but not limited to the following:

i. The potential impact of the Inquiry on the hunting, fishing, and trapping rights of the Treaty 8 First Nations is extremely serious. As argued above, the Commission's Inquiry will frame subsequent regulation and development and ultimately shape the nature, location, and size of future electricity generation projects within British Columbia and Treaty 8 territory specifically.
ii. The hunting, fishing, and trapping rights under Treaty No. 8 are of "high significance" to Treaty 8 First Nations. Treaty No. 8 does not merely protect a set of harvesting practices, but a way of life and vocations that are inextricably tied to the landscape and the many species of fish and animals that live within the Treaty 8 territory.

iii. In many cases, impacts upon the Treaty 8 rights will not be "compensable". Many of the species within the traditional territories of Treaty No. 8 have already been driven to the point of extinction due to prior "takings up" of the Crown. Species such as the woodland caribou, for example, are now listed under the *Species at Risk Act.* In addition, the spiritual value of particular hunting, fishing, or trapping sites may make their loss in compensable. *The Commission must therefore conduct extensive and "deep" consultations with the Treaty 8 First Nations during the Inquiry in order to ensure that its determinations account for these matters.*

ISSUE 2: ***If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an inquiry and complete its draft report by June 30, 2010?***

2(a) What is the relationship between the Commission's constitutional duty to consult and accommodate affected First Nations and its other, possibly contradictory, legal duties?

70. At the outset, the Treaty 8 First Nations note that they have not been consulted or accommodated with respect to the contents of the Terms of Reference for the Inquiry, including the proposed timeline for the completion of the Inquiry and the submission of the Inquiry's draft or final reports. In and of itself, this constitutes a clear breach of the Crown's duty to consult with serious implications; the scope of the Inquiry, and the time limits placed on it, may frustrate the ability of the Commission to meet its highest obligation – being its constitutional duty to consult any First Nation whose Treaty or Aboriginal rights might be adversely affected by the determinations to be made by the Commission as a result of this Inquiry.

71. While the Treaty 8 First Nations recognize that the Commission will face significant challenges in fulfilling its duty to consult each affected First Nation within the mandate and timeframes set out in the Terms of Reference, these challenges were not of the First Nations' making.

72. The first and highest duty of the Commission is to ensure that its constitutional obligations are met, including the duty to consult and accommodate in accordance with the requirements of section 35 of the *Constitution Act* and the principle of the honour of the Crown. Of course, the Commission's actions are governed by numerous other legal obligations, including its statutory mandate as provided in the *Utilities Commission Act,* and elaborated by the Minister in the Terms of Reference for the Inquiry. The constitution is the highest law in Canada's legal hierarchy. When the constitutional and other duties of the Commission are in conflict, the Commission, as an agent of the Crown, is obligated to fulfill its constitutional duties—other obligations notwithstanding.

73. The principle that the Commission's statutory obligations must not detract from its fulfillment of constitutional duties is supported by recent decisions in the context of Crown consultation. In the *Klahoose* case, the BC Supreme Court held that the Ministry of Forests' consideration of an application to amend a landscape level forest plan ("Forest Stewardship Plan") would be expected to involve an appropriate sharing of information including information that may not be statutorily required, such as operational and access information.

***Klahoose, supra* at para. 152, Book of Authorities, TAB 15.**

74. In *Wii'litswx, supra,* the refusal of the Crown to modify its position in an established consultation framework in relation to the concerns expressed by the Gitanyow First Nation was held to be unreasonable and a violation of the duty to meaningfully consult. Meaningful consultation is characterized by good faith and an attempt by both parties to understand each other's concerns and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the section 35(1) rights at issue.

***Wii'litswx, supra* at para. 178, Book of Authorities, TAB 14.**

75. The Commission's duty to consult derives from the Constitution of Canada, and to the extent that any other legal mandates fetter the ability of the Commission to meet its constitutional obligations, these mandates are of no force or effect.

2(b) What is the role of the affected First Nations in this Inquiry?

76. First Nations that are potentially adversely affected by the Commission's determinations are not simply just another class of intervener; these First Nations have constitutionally protected rights and interests, as opposed to statutory or common law rights or interests that may be held by other interested parties. Indeed, that is the reason that consultation and accommodation requirements have been elaborated by the Canadian Courts.

77. As such, the general public consultation processes set up to address general public or societal interests will not enable the Commission to meet its duty to provide "deep" First Nations consultation. In *Mikisew, supra*, where the duty to consult owed by the Crown was on the low end of the spectrum (i.e. "deep" consultation was not required), the court held that a series of public notices and open houses were not a substitute for a formal and distinct process of consultation for the Mikisew Cree:

> 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.

***Mikisew, supra* at para. 64, Book of Authorities, TAB 9.**

78. It should be noted that the Mikisew Cree decision is a Treaty 8 case and concerns the unique rights of Treaty 8 First Nations. In this decision, the Supreme Court of Canada recognized that Treaty 8 provided a framework within which the Crown and the Treaty 8 First Nations agreed that they would be involved in ongoing government-to-government consultations with respect to anticipated land use decisions affecting Treaty 8 territory.

This highlights the need for, and the expectation that, the Treaty 8 First Nations will be accorded government-to-government level consultation within the context of this Inquiry.

79. Clearly, then, the Commission must recognize that potentially adversely affected First Nations play a unique role as distinct from that played by general public interest interveners; should it fail to do so, the Commission risks breaching its own duty to ensure that meaningful consultation occurs within the context of this Inquiry.

2(c) How can the Commission meet its obligation to consult and accommodate the Treaty 8 First Nations within the context of the Inquiry?

80. As noted in the Terms of Reference, the Commission may use its powers provided by the *Utilities Commission Act*, and a wide range of procedural tools, to assist in meeting its consultation obligations, including those specifically set out at s. 10(b) of the Terms of Reference. The Treaty 8 First Nations suggest that these powers and procedures may be utilized to assist in providing meaningful, two-way consultation between the affected First Nations and the Commission, as the need arises. It is anticipated that, as the Inquiry progresses, and different issues with varying levels of potential impacts on Treaty or Aboriginal rights arise, processes will need to be put in place to permit whatever level of consultation is required in the context of the issue at hand.

Terms of Reference issued by the Hon. R. Neufeld, Minister of Energy, Mines and Petroleum Resources, dated December 11, 2008, ss. 10(b) & (c), Appendix "B".

81. Without proposing a comprehensive process at this time, the Treaty 8 First Nations suggest that some of the following measures would assist the Commission in meeting its obligation to consult and accommodate:

i. Consultation Advisory Panel: The Commission should create an Inquiry Advisory Panel of First Nations representatives, with appropriate representation from Treaty 8 First Nations in BC, to assist in the Commission's deliberations;

ii. Community Hearings: A series of community engagement hearings should be held on various issues before the panel in each affected First Nation community;

iii. Consultation Sub-Hearings: The Commission should provide, where necessary, separate sub-hearings on an issue with respect to First Nations concerns. For example, with respect to hearings concerning demand scenarios, a special hearing should be held on the issue of First Nations interests and concerns with respect to provision of electricity to their respective communities;

iv. First Nation Scenario Submissions: The Commission should provide the opportunity and the capacity to First Nations to allow them to put forward their own scenarios, possibly in collaboration with each other, with respect to determinations concerning generation and transmission, similar to the role that it is currently anticipated that BC Hydro/BCTC will play in generating scenarios for consideration;

v. First Nations Comment Periods: The Commission should provide ongoing opportunities for First Nations to make submissions with respect to matters such as technical scenarios put forward by other participants;

vi. Capacity Funding: The Commission should make available, either through itself or the Minister, capacity funding to allow for the hiring of experts and gathering of technical data on various issues before the Commission. For example, given the special role accorded to BC Hydro/ BCTC, it is important that the First Nations not only have adequate opportunity to provide submissions on the scenarios generated by BC Hydro/BCTC, but that the First Nations be provided with sufficient capacity funding to allow for the hiring of technical experts to generate appropriate critiques and alternative scenarios.

82. These are only a few general suggestions. More work will need to be done, in cooperation with all affected and interested First Nations and the Commission itself, in order to design processes to ensure meaningful consultation occurs on issues that might potentially adversely affect Aboriginal or Treaty rights. It is anticipated that, as the Inquiry process proceeds, issues will arise that will clearly call for the use of various procedures to ensure that meaningful input is gathered from affected First

Nations and given due consideration by the Panel, in accordance with the Commission's ongoing constitutional obligation to meaningfully consult and accommodate affected First Nations.

ISSUE 3: ***What does the Treaty 8 Tribal Association propose in terms of a presentation at the Procedural Conference on the duty to consult and how can it be fulfilled in the context of the Inquiry?***

83. The Treaty 8 First Nations propose that, at the Procedural Conference, legal counsel will make oral submissions focussing on the key points of these written submissions and will answer Commission questions respecting the written and oral submissions.

SUMMARY AND CONCLUSION

84. The Treaty 8 First Nations are signatories to Treaty 8, a solemn agreement between the Crown and the First Nations signatories. Treaty 8 provides the signatory First Nations with the right to hunt, trap and fish throughout Treaty 8 territory. The Crown has a corresponding duty to ensure a harvestable surplus of wildlife and fish throughout the territory in order to protect the right and the ability of members of the Treaty 8 First Nations to exercise these rights.

85. Importantly, as noted by the Supreme Court of Canada in the Mikisew decision, Treaty 8 also provides a framework by which the Crown and the Treaty 8 First Nations agreed to hold ongoing consultation with respect to anticipated future changes to land use within and affecting Treaty 8 territory.

86. At the conclusion of this Inquiry, the Commission will make determinations in a final report to be submitted to the Minister. This report will include determinations on planning issues, including general scenarios for the development of generation sources in particular geographic locations, as well as anticipated demand from various markets. The framework for planning generation and transmission development into the future will be shaped by this report. The decisions made by way of this Inquiry are very likely to adversely affect the rights of the Treaty 8 First Nations by leading to project

developments within or affecting Treaty 8 territory, and the wildlife and habitats within that territory.

87. Although the Commission's determinations in its Final Report may not have immediate on-the-ground impacts upon the rights of Treaty 8 First Nations to hunt, trap and fish within their traditional territories, it is clear that these determinations will set the course for the regulation and development of electricity generation and transmission projects within and adjacent to Treaty 8 land, the very land on which the Treaty 8 First Nations exercise their constitutionally-protected rights. The Inquiry's Report will shape the nature, location and size of projects that are likely to adversely impact, for example, the habitat and migration patterns of the wildlife upon which the Treaty 8 First Nations rely in order to meaningfully exercise their Treaty rights.

88. The Treaty 8 First Nations therefore submit that the Commission owes a duty to provide "deep" consultation with respect to various determinations that it will make throughout this Inquiry. This duty is triggered because these determinations constitute high-level strategic planning decisions that will potentially adversely affect the constitutionally-protected Treaty 8 rights of the Treaty 8 First Nations.

89. The Commission, of course, seeks suggestions for how to meet its obligation to consult and accommodate First Nations, and expresses its concern that it be able to meet this obligation within the time lines mandated by the Terms of Reference, under the authority of the Utilities Commission Act. It is important to note that the duty to consult is a constitutional duty specifically required in order to protect constitutional Aboriginal and Treaty rights. The Commission's highest duty is to meet its constitutional obligations, including the duty to consult and accommodate. This duty supercedes all other, possibly conflicting, legal duties. To the extent that any other law prevents or fetters the Commission's ability to meet its constitutional obligations, that law is of no force or effect.

90. Notably, the Commission has been granted broad discretion to employ its powers under the Utilities Commission Act, as well as various other procedures, in order to meet its

obligations. The Treaty 8 First Nations suggest that these powers and procedures may be utilized to assist the Commission in meeting is consultation obligations in the context of this Inquiry. While it is difficult to anticipate precisely what powers or procedures will need to utilized over the course of the Inquiry, the First Nations suggest that the Commission consider creating a Consultation Advisory Panel, holding community hearings, setting consultation sub-hearings on certain issues, permitting First Nations to generate and provide scenarios with respect to determinations concerning electricity generation and transmission, allowing First Nations to provide comments, critiques and alternatives to scenarios proposed by participants such as BC Hydro/BCTC, and work with other Crown agencies or the Minister responsible to ensure that capacity funding is provided where First Nations will need to hire technical experts or conduct technical studies in order to provide meaningful input on issues the determination of which might potentially adversely affect their Aboriginal and Treaty rights.

91. It is anticipated that, as the Inquiry proceeds, the Commission can work together with the affected First Nations in order to design processes or put in place measures to ensure that meaningful consultation occurs with respect to issues affecting the First Nations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF JULY, 2009.

Counsel for the Treaty 8 Tribal Association

faq **Christopher G. Devlin**

Allison T. Rana for:

LIST OF AUTHORITIES

Text of Treaty No. 8

Constitution Act, 1982, s. 35

Utilities Commission Act, RSBC 1996, c. 473, s. 5

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission), 2009 BCCA 67, 2009 CarswellBC 340 (BCCA)

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