BC hydro

Craig Godsoe
17th floor, Legal Services
Phone: (604) 623-4403
Fax: (604) 623-3606

23 June 2009

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

Dear Ms. Hamilton:

Re: Project No. 3698545
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
Long Term Transmission Infrastructure Inquiry

Enclosed are three authorities - *Quebec (Attorney General) v. Canada (National Energy Board)*; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*; and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* - which I will be relying on for BC Hydro's submission at tomorrow's Procedural Conference that the BCUC, as a quasi-judicial body, does not have its own duty to consult.

Also enclosed are extracts of the *Utilities Commission Act*, and in particular sections 5, 75 and 79, which I will address tomorrow at the request of Commission counsel as part of BC Hydro's submissions regarding "Areas Inappropriate for Generation Development".

Yours truly,

Craig Godsoe

Craig Godsoe
Solicitor and Counsel

c. BCUC Project No. 3698545 Registered Participant Distribution List.

Quebec (Attorney General) *v.* Canada (National Energy Board), [1994] 1 S.C.R. 159

The Grand Council of the Crees (of Quebec) and the Cree Regional Authority *Appellants*

v.

The Attorney General of Canada, the Attorney General of Quebec, Hydro-Québec and the National Energy Board *Respondents*

and

Sierra Legal Defence Fund, Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and Sierra Club of Canada *Interveners*

Indexed as: Quebec (Attorney General) *v.* Canada (National Energy Board)

File No.: 22705.

1993: October 13; 1994: February 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Public utilities -- Electricity -- Licences -- National Energy Board granting licences for export of electrical power to U.S. -- Licences granted subject to environmental assessments of future generating facilities -- Whether Board erred in granting licences -- National Energy Board Act, R.S.C., 1985, c. N-7 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Following lengthy public hearings at which the appellants made numerous submissions, the National Energy Board granted Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. At the time the licence applications were filed, the Board was required to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements and that the price to be charged by the power authority was just and reasonable in relation to the public interest. After the hearings but prior to the Board's ruling, these two explicit criteria were removed from the *National Energy Board Act*, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. In evaluating the environmental impact of the applications, the Board considered itself bound by both its own Act as amended and the *Environmental Assessment and Review Process Guidelines Order*. The licences were granted subject to two conditions relating to the successful completion of environmental assessments of future generating facilities. The Federal Court of Appeal rejected the appellants' argument that the Board erred in several respects in granting the licences, but allowed the appeal by Hydro-Québec and the Attorney General of Quebec, concluding that the Board had exceeded its jurisdiction in imposing the environmental assessment conditions. It severed these two conditions and allowed the licences to stand. This appeal is to

determine (1) whether the Board properly conducted the required social cost-benefit review; (2) whether the Board's failure to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness; (3) whether the Board owed the appellants a fiduciary duty in the exercise of its decision-making power, and, if so, whether the requirements of this duty were fulfilled; (4) whether the Board's decision affects the appellants' aboriginal rights; and (5) whether the Board failed to follow the requirements of its own Act and of the Guidelines Order in conducting its environmental impact assessment.

Held: The appeal should be allowed and the order of the Board restored.

Hydro-Québec provided evidence on which the Board could reasonably conclude that the consideration of cost recoverability was satisfied. The Board did not err in considering relevant to this issue the fact that the export contracts had received the approval of the province. Also, as this was only one of the factors considered, the Board did not improperly delegate its decision-making responsibility. It has not been shown that the Board's discretion to determine what evidence is relevant to its decision was improperly exercised in this case so as to result in inadequate disclosure to the appellants. The Board had sufficient evidence before it to make a valid finding that all costs would be recovered, and the appellants were given access to all the material before the Board. While there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada, the function of the Board

in deciding whether to grant an export licence is quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it. The fiduciary relationship between the Crown and the appellants thus does not impose a duty on the Board to make its decisions in the appellants' best interests, or to change its hearing process so as to impose superadded requirements of disclosure. Moreover, even assuming that the Board should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, the Board's actions in this case would have met the requirements of such a duty. The appellants had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by Hydro-Québec. On the issue of whether the Board's decision will have a negative impact on the appellants' aboriginal rights, it is not possible to evaluate realistically the impact of the Board's decision on the appellants' rights without reference to the James Bay Agreement, on which the appellants disavowed reliance. Moreover, even assuming that the Board's decision is one that has, *prima facie*, an impact on the appellants' aboriginal rights, and that for the Board to justify its interference it must at the very least conduct a rigorous, thorough, and proper cost-benefit review, the review carried out in this case was not wanting in this respect.

The Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of

power by a line of wire across the border. Even though the Board found that the new facilities contemplated would have to be built in any event to supply increasing domestic needs, if the construction of new facilities is required to serve the demands of the export contract, among other needs, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power. In defining the jurisdictional limits of the Board, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern, but the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. The Board met its obligations under the Guidelines Order in attaching to the licence the two impugned conditions. Having concluded that the environmental effects of the construction and operation of the planned facilities were unknown, the Board was required by s. 12(*d*) of the Order to see either that the proposal was subjected to further study and subsequent rescreening, or that it was submitted to a public review. The conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the Guidelines Order, but rather are an attempt to avoid the duplication warned against in the Order, while continuing the Board's jurisdiction over this matter.

Cases Cited

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621; *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Gitludahl v. Minister of Forests*, B.C.S.C., Vancouver A922935, August 13, 1992; *Dick v. The Queen*, F.C.T.D., T-951-89, June 3, 1992; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.); *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229.

Statutes and Regulations Cited

Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof, S.C. 1990, c. 7, s. 32.

Constitution Act, 1867, s. 91(2).

Constitution Act, 1982, s. 35(1).

Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2, 3, 4(1), 5(1), 6, 8, 10(2), 12.

Hydro-Québec Act, R.S.Q., c. H-5, s. 24.

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32.

National Energy Board Act, R.S.C., 1985, c. N-7 [am. 1990, c. 7], ss. 2, 22(1), 24, 118, 119.02, 119.03, 119.06(2), 119.07, 119.08, 119.09, 119.093.

National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056, ss. 6, 15(*m*).

Authors Cited

Canada. Energy, Mines and Resources Canada. *Canadian Electricity Policy*. Ottawa: Energy, Mines and Resources Canada, 1988.

Canada. National Energy Board. *The Regulation of Electricity Exports: Report of an Inquiry By a Panel of the National Energy Board Following a Hearing in November and December 1986*. Ottawa: The Board, 1987.

APPEAL from a judgment of the Federal Court of Appeal, [1991] 3 F.C. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, severing conditions from licences granted by the National Energy Board, [1991] 2 C.N.L.R. 70, and allowing the licences to stand. Appeal allowed.

Robert Mainville, *Peter W. Hutchins* and *Johanne Mainville*, for the appellants.

Jean-Marc Aubry, *Q.C.*, and *René LeBlanc*, for the respondent the Attorney General of Canada.

Pierre Lachance and *Jean Robitaille*, for the respondent the Attorney General of Quebec.

Pierre Bienvenu, *Jean G. Bertrand* and *Bernard Roy*, for the respondent Hydro-Québec.

Judith B. Hanebury, for the respondent the National Energy Board.

Gregory J. McDade and *Stewart A. G. Elgie*, for the interveners.

The judgment of the Court was delivered by

IACOBUCCI J. -- This appeal arises from the decision of the respondent National Energy Board ("the Board") to grant to the respondent Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. This decision followed lengthy public hearings at which the Grand Council of the Crees (of Quebec) and the Cree Regional Authority ("the appellants"), along with other concerned groups, made numerous submissions.

The Attorneys General of Quebec and of Canada appeared as respondents to this appeal, as did the Board. The Court also heard the joint submissions of the Sierra Legal Defence Fund, the Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and the Sierra Club of Canada ("the interveners").

The appellants argued before the Federal Court of Appeal that the Board erred in several respects in granting the licences. The respondents Hydro-Québec and the Attorney General of Quebec claimed that the Board erred in

making the granting of the licences conditional on the successful completion of environmental assessments of the power generation facilities contemplated by Hydro-Québec for future construction. The Federal Court of Appeal rejected the argument of the appellants, and concluded that the Board had erred in imposing the conditions impugned by the respondents. The Court of Appeal severed these conditions, and allowed the licences to stand. The appellants now appeal to this Court.

I. Facts

On July 28, 1989, Hydro-Québec applied to the Board for licences to export blocks of power to New York and Vermont. These applications involved nine blocks of power which were to be provided over periods ranging from five to twenty-two years, pursuant to two agreements signed with the U.S. power companies that covered a total of 1 450 MW of power and were projected to generate nearly $25 billion in income for Hydro-Québec. The purpose of the export was to raise sufficient revenue such that Hydro-Québec would be able to implement its development plan for expansion to meet the constantly rising demand for the provision of electrical services within the province.

The Board held public hearings during the months of February and March of 1990 on the application for licences for export. A number of interested parties, including the appellants, took part. At the time the applications were filed, the Board was required by s. 118 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements

at the relevant times, and that the price to be charged by the power authority was just and reasonable. After the hearings but prior to the Board's ruling, s. 118 was modified by the *Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof*, S.C. 1990, c. 7 ("Bill C-23"). These two explicit criteria were removed from the statute, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. The parties made submissions before the Board on the effect of these amendments.

On September 27, 1990, the Board granted the export licences, subject to a list of conditions. The appellants appealed the Board's decision to grant the licences to the Federal Court of Appeal. The respondents Hydro-Québec and the Attorney General of Quebec also appealed the decision of the Board, challenging the validity of the imposition of two of the conditions to the licences, which related to environmental assessment of future generating facilities. The Federal Court of Appeal unanimously dismissed the appellants' appeal and allowed the appeal of Hydro-Québec and the Attorney General of Quebec. The Court of Appeal severed the two conditions but otherwise allowed the licences to stand.

II. Relevant Statutory Provisions

National Energy Board Act, R.S.C., 1985, c. N-7 (as amended by S.C. 1990, c. 7):

2. In this Act,

. . .

"export" means, with reference to

(*a*) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,

. . .

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

24. (1). . . hearings before the Board with respect to the issuance, revocation or suspension of certificates or of licences for the exportation of gas or electricity or the importation of gas or for leave to abandon the operation of a pipeline shall be public.

119.02 No person shall export any electricity except under and in accordance with a permit issued under section 119.03 or a licence issued under section 119.08.

119.03 (1) Except in the case of an application designated by order of the Governor in Council under section 119.07, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the exportation of electricity.

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

119.06 (1) The Board may make a recommendation to the Minister, which it shall make public, that an application for exportation of electricity be designated by order of the Governor in Council under section 119.07, and may delay issuing a permit during such period as is necessary for the purpose of making such an order.

(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

. . .

(*b*) the impact of the exportation on the environment;

. . .

(*d*) such considerations as may be specified in the regulations.

119.07 (1) The Governor in Council may make orders

(*a*) designating an application for exportation of electricity as an application in respect of which section 119.08 applies; and

(*b*) revoking any permit issued in respect of the exportation.

. . .

(3) Where an order is made under subsection (1),

(*a*) no permit shall be issued in respect of the application; and

(*b*) any application in respect of the exportation shall be dealt with as an application for a licence.

119.08 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a licence for the exportation of electricity in relation to which an order made under section 119.07 is in force.

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

119.09 (1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.

(2) The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.

119.093 (1) The Board may revoke or suspend a permit or licence issued in respect of the exportation of electricity

. . .

(*b*) where a holder of the permit or licence has contravened or failed to comply with a term or condition of the permit or licence.

National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056:

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

. . .

(*y*) evidence that the applicant has obtained any licence, permit or other form of approval required under any law of Canada or a province respecting the electric power proposed to be exported;

(*z*) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas, and

(iii) would not result in prices in the country to which the power is exported being materially less than the least cost alternative for power and energy at the same location within that country; and

(*aa*) evidence on any environmental impact that would result from the generation of the power for export.

15. Every licence for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the generality of the foregoing, is subject to every statement set out by the Board in the licence respecting

. . .

(*m*) the requirements for environmental protection.

Environmental Assessment and Review Process Guidelines Order, SOR/84-467:

2. In these Guidelines,

. . .

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

4. (1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(*a*) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and

(*b*) the concerns of the public regarding the proposal and its potential environmental effects.

5. (1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

. . .

(*b*) that may have an environmental effect on an area of federal responsibility;

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether,

and the extent to which, there may be any potentially adverse environmental effects from the proposal.

(2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

(*a*) the proposal is of a type identified by the list described under paragraph 11(*a*) [one that would not produce any adverse environmental effects], in which case the proposal may automatically proceed;

(*b*) the proposal is of a type identified by the list under paragraph 11(*b*) [one that would produce significant adverse environmental effects], in which case the proposal shall be referred to the Minister for public review by a Panel;

(*c*) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

(*d*) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(*e*) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or

(*f*) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

III. Judgments Below

A. *National Energy Board*, Decision No. EH-3-89, August 1990 (Fredette, Gilmour and Bélanger, members)

The Board wrote lengthy reasons for its decision, which set out in some detail the status of the applicant, Hydro-Québec, the nature of the licences for which Hydro-Québec was applying, and the evidence of the applicant as it related to surplus, price, and fair market access, the three criteria expressly set out in the former provisions of the *National Energy Board Act*. The Board also considered the nature of the export markets, the reliability of the system proposed for implementing the export contracts, and the environmental impact of the exports for which the applications were made.

The Board noted that, were the licences to be granted, sufficient power could be generated to service the contracts by the combined use of the existing facilities of Hydro-Québec as well as those contemplated by its development plan. In other words, the exports did not require the use of facilities other than those existing, or already planned. However, the Board found that some of the facilities contemplated by the development plan for future construction would need to be built earlier than if no power were to be exported. The Board then examined the submissions of the various interveners, along with those of the appellants, as to the advisability of granting the licences.

In its disposition of the application, the Board noted that the amendments to the *National Energy Board Act* had removed the express requirement that the Board satisfy itself that the power to be exported was surplus to reasonably foreseeable Canadian requirements, and that the price to be charged was just and reasonable in the public interest. Nonetheless, there was nothing in the amended Act which would preclude the Board from taking these factors into account. The Board therefore explicitly considered the issues of cost recovery and whether pricing was

competitive to rates charged within Canada. On the issue of cost recovery, the Board concluded (at p. 30):

> The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than $24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable.

The Board was accordingly persuaded that the export price charged would provide for recovery of the applicable costs incurred in Canada.

In evaluating the environmental impact of the application, the Board considered itself bound by both its own Act and by the *Environmental Assessment and Review Process Guidelines Order,* SOR/84-467 ("the *EARP Guidelines Order*"). The Board held (at pp. 37-38):

> The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

The Board granted the applications subject to several conditions. In particular, in order to satisfy itself that the electricity to be exported would originate from

facilities that had been subjected to the appropriate environmental reviews, the Board attached to the licence the following two conditions:

> 10. This licence remains valid to the extent that
>
> (a) any production facility required by Hydro-Québec to supply the exports authorized herein, for which construction had not yet been authorized pursuant to the evidence presented to the Board at the EH-3-89 hearing that ended on 5 March 1990, will have been subjected, prior to its construction, to the appropriate environmental assessment and review procedures as well as to the applicable environmental standards and guidelines in accordance with federal government laws and regulations.
>
> (b) Hydro-Québec, following any of the environmental assessment and review procedures mentioned in subcondition (a), will have filed with the Board
>
> i) a summary of all environmental impact assessments and reports on the conclusions and recommendations arising from the said assessment and review procedures;
>
> ii) governmental authorizations received; and
>
> iii) a statement of the measures that Hydro-Québec intends to take to minimize the negative environmental impacts.
>
> 11. The generation of thermal energy to be exported hereunder shall not contravene relevant federal environmental standards or guidelines.

B. *Federal Court of Appeal*, [1991] 3 F.C. 443 (Pratte, Marceau and Desjardins JJ.A.)

Writing for the Federal Court of Appeal, Marceau J.A. dealt first with the validity of conditions 10 and 11 to the licence. He noted that the Board had imposed those conditions so as to meet its perceived mandate under the *EARP Guidelines Order*. In his view, this raised the questions of the application of this

Order to the Board, and to Hydro-Québec as an agent of the Crown in right of the Province, as well as the question of the constitutional validity of the Order itself.

However, Marceau J.A. held that he did not have to deal with these concerns, since it was clear that, in this case, the imposition by the Board of the conditions to the licence emanated from its concerns as to the potential effects of the eventual construction of the production facilities planned to meet the increased demand for electrical power. Marceau J.A. held that the Board had no jurisdiction to make the granting of a licence to export certain goods subject to conditions which pertained to their production. He stated (at pp. 450-51):

> The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. Section 2 of the Act defines what is meant by export (in French "*exportation*") in the case of electricity:
>
> 2. ...
>
> "export" means, with reference to
>
> (a) power, to send from Canada by a line of wire or other conductor power produced in Canada...
>
> It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.
>
> I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. . . . However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

Marceau J.A. held that the Board had therefore exceeded its jurisdiction in affixing to the licence conditions 10 and 11. That did not mean, however, that the entire decision was vitiated. Marceau J.A. found the two sections to be severable from the remainder of the licence.

Marceau J.A. then considered the contention of the appellants that the Board erred in its decision to grant the licences. The appellants argued that the Board erred in taking into account the amendments to the *National Energy Board Act* which came into force while its decision was reserved. In the version of the Act in force at the time of the application, and at the time of the subsequent hearing, applicants for licences were required to satisfy the Board that the export price charged would recover the appropriate share of the costs incurred in Canada. This condition was deleted from the version of the Act in force at the time that the decision was rendered. The appellants argued that, in following the new provisions, the Board applied the requirement of cost recovery incorrectly.

Marceau J.A. noted that the new Act was designed to deregulate and simplify the licence application process. The express requirement of cost recovery had been deleted. The new provisions simply required the Board to take into consideration all factors which appeared to it to be relevant. Marceau J.A. held that the Board was correct in considering itself bound by the new provisions of the Act. Nonetheless, he found that, even if he was incorrect in so concluding, the argument of the appellants did not lead anywhere. The Board chose, despite the amendments, to analyze the application in light of the former price criteria.

The appellants argued in the alternative that, if the Board did consider the issue of cost recovery, it could not have concluded that this requirement was met, since there was no direct evidence before the Board on this point. Marceau J.A. agreed that the evidence on this point was not direct in all respects. In particular, the financial data relating to proposed production facilities was reviewed by an accountant, who then testified as to its veracity. He held, however, that nothing required the Board to decide this point on direct evidence. There was persuasive indirect evidence before it. To reevaluate the weight of this evidence was not a task for the courts, since appeals from decisions of the Board were limited by s. 22 of the *National Energy Board Act* to questions of law or jurisdiction.

IV. Issues on Appeal

Although the parties to this appeal have made numerous specific allegations of error on the part of the Board and of the Court of Appeal, discussed individually below, the issues in this appeal can be reduced to the following three questions:

1. Did the Federal Court of Appeal err in holding that the National Energy Board acted within its jurisdiction in granting the export licences to the respondent Hydro-Québec?

2. Did the Federal Court of Appeal err in holding that the National Energy Board erred in the exercise of its jurisdiction in its imposition of conditions 10 and 11 of the licences?

3. If the Federal Court of Appeal was not in error with respect to these two findings, did it nonetheless err in holding that conditions 10 and 11 were severable from the rest of the licences?

V. Analysis

The appellants challenge on a number of grounds the validity of the decision of the Board to grant the export licences. First, the appellants argue that the Board did not properly conduct the required social cost-benefit review. Second, they argue that the failure of the Board to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness by depriving the appellants of the opportunity for full participation in the review process. Third, the appellants argue that the Board owed them a fiduciary duty in the exercise of its decision-making power, and that the requirements of this duty were not fulfilled. Fourth, the appellants assert that the decision of the Board affects their aboriginal rights, and that the Board is therefore required to meet the justification test set out by this Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Finally, the appellants submit that the Board failed to follow the requirements of its own Act and of the *EARP Guidelines Order* in conducting its environmental impact assessment. I will consider each of these arguments in turn.

A. *Social Cost-Benefit Review*

The appellants argue that the Board was required to carry out a social cost-benefit review which would consider all direct and indirect costs, including

economic and social costs, arising from the exports for which the licences were sought. The appellants claim that, in relying on solely the indirect evidence of Hydro-Québec and the fact that the proposal had been approved by the government of Quebec, the Board failed to carry out this review properly. The duty to carry out such a review is ostensibly found in the *National Energy Board Part VI Regulations*, s. 6(2)(*z*)(i), which states:

> 6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.
>
> (2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include
>
> . . .
>
> (*z*) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price
>
> (i) would recover its appropriate share of the costs incurred in Canada,

It appears that both the *Canadian Electricity Policy*, September 1988, and the Board's own internal report, entitled *The Regulation of Electricity Exports*, June 1987, interpret this requirement to mean that all direct and indirect costs, including environmental, land use, and economic costs ("social costs"), should be considered. However, I need express no opinion on the correctness of these interpretations or on whether the requirement in the regulations that the applicant for a licence furnish such evidence also means that the Board is required to consider it, especially in light of s. 119.08(2) of the Act, which gives the Board the

discretion to determine which considerations are relevant to its decision, and of the terms of s. 6(2) itself, which gives the Board the authority to dispense with proof of any of the items specifically enumerated thereafter. In this case, it is clear that the Board considered that evidence of the nature and recoverability of such costs was relevant to its decision (reasons of the Board, at p. 29).

While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission),* [1989] 1 S.C.R. 1722.

However, in this appeal, it cannot be said that the Board was without evidence on which it could reasonably have concluded that the consideration of cost recoverability was satisfied. The Board, in its decision, summarized the evidence given by Hydro-Québec on this point as follows (at p. 13):

> Hydro-Québec did not supply the Board with copies of the cost-benefit analyses for the advancement of facilities required to meet its obligations under the two contracts. Nevertheless it did provide information on the methodology, assumptions and the revenues used in the private and social cost-benefit analyses. It also underlined that the costs and benefits associated with the environmental impacts of the advancement of production facilities had been considered, including the funds necessary to compensate, if required, the economic losses

> resulting from impacts on forests, trapping regions or even agricultural lands.
>
> The Applicant provided additional proof to demonstrate that the export price would allow recovery of the appropriate costs in Canada while maintaining the confidentiality of certain of its financial information. To that end, Hydro-Québec hired a chartered accountant whose mandate was to undertake verification of the accuracy of the assessment. . . .

The accountant testified before the Board and was cross-examined by the appellants.

It is, of course, insufficient for Hydro-Québec to ask the Board simply to accept a bare assertion that all costs will be recovered. However, that is not what happened in this case. Hydro-Québec provided evidence on which the Board could reasonably conclude that the requirement in s. 6(2)(*z*)(i) was met. This is evident from the conclusions of the Board, which state (at pp. 30-31):

> The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than $24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable. . . .The fact that the provincial government has concurred with Hydro-Québec by approving the export contracts. . . suggests to the Board that the exports are projected to yield net benefits to Québec.
>
> Interveners raised concerns with regard to potential adverse environmental impacts outside of Québec but any specific costs that might be associated with such impacts were not identified. There were no other identified costs. . . .
>
> Finally, the Board is convinced that the parties to these contracts have negotiated at arm's length and under free market conditions. The Board

> thus has no reason to believe that there would not be net benefits accruing from the proposed exports.

The interveners argued that the final sentence in this passage shows that the Board made its decision in the absence of positive evidence on cost recovery. When the sentence is read in context, however, it indicates rather that the Board was satisfied on the evidence before it that the relevant costs would be recovered. The Board cannot simply rely on the conclusions of the respondent as to cost recovery without evaluating their validity, but that does not appear to have been the situation here. Moreover, a prohibition on the reliance on the unsubstantiated affirmations of the applicant should not be transformed into a duty on the Board to conduct its own independent analysis where such an undertaking is unnecessary.

The Board did consider relevant to the issue of cost recovery, in addition to the evidence presented by Hydro-Québec, the fact that the export contracts had received the approval of the province. Evidence of such approval is expressly referred to in s. 6(2)(*y*) of the *Part VI Regulations* as a factor which the Board may wish to consider. The appellants contend, however, that this approval is irrelevant to the s. 6(2)(*z*)(i) cost-benefit analysis, as the orders-in-council pursuant to the *Hydro-Québec Act*, R.S.Q., c. H-5, under which provincial approval was given, require only that the contracts be consistent with sound financial management, not that they be in the public interest. Section 24 of the *Hydro-Québec Act* requires Hydro-Québec to maintain the rates charged for power at a sufficient level to defray operating expenditures and interest on its debt. In my view, sound financial management of a public utility is part of the public interest. While such a factor is obviously only one of the many relevant considerations in such a determination,

it cannot be said that evidence of governmental approval is wholly irrelevant in the context of cost recovery, such that the Board committed a jurisdictional error in considering it.

I also reject the appellants' argument that the mere fact that all contracts in Quebec require such approval renders consideration of this factor by the Board an improper delegation of its decision-making power. The Board must, of course, make its own decision as to whether the cost-benefit requirement is satisfied. It cannot delegate that responsibility to the Government of Quebec or to any other body. In this case, for such a delegation to have occurred, the Board would have had to treat the mere existence of government approval as sufficient in and of itself to satisfy the cost-benefit requirement, without any independent consideration of the issue. But that was not the case here. Therefore, it cannot be said that there was any jurisdictional error committed by the Board in this aspect of its decision.

B. *Opportunity for Fair Participation in the Review Process*

Given my conclusions on the nature and scope of the cost-benefit review undertaken by the Board, the appellants' arguments relating to procedural fairness can be dispensed with rather simply. The appellants argue that the Board breached the requirements of procedural fairness in failing to require disclosure to the appellants by Hydro-Québec of all information pertinent to the issue of cost recovery. In particular, they point to the failure of the Board to require Hydro-Québec to reveal in full the assumptions and methodologies on which its cost-benefit analysis was based.

In general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision-maker of sufficient information to permit meaningful participation in the hearing process: *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.,* [1976] 2 F.C. 621 (C.A.), at pp. 624-25. The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular with the type of decision to be made, and the nature of the hearing to which the affected parties are entitled.

The issue in this case, then, is not the sufficiency of the disclosure made by Hydro-Québec. That relates to the question, discussed above, of whether there was evidence before the decision-maker on which it could reasonably have reached the decision which it did: *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.,* [1959] S.C.R. 219, at p. 223, *per* Rand J. Rather, the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation in the hearing, such that they were treated fairly in all the circumstances: *Martineau v. Matsqui Institution Disciplinary Board,* [1980] 1 S.C.R. 602, at pp. 630-31; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 654; *Lakeside Colony of Hutterian Brethren v. Hofer,* [1992] 3 S.C.R. 165, at p. 226, *per* McLachlin J. (dissenting on another ground).

In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure to the appellants. As noted above, the Board had sufficient evidence before it to make a valid finding that all costs would be recovered. The appellants were given access to all the material that was before the Board. The Board

specifically found that the appellants themselves presented no evidence of added social costs, and did not call into question the veracity of Hydro-Québec's report. Therefore, it cannot be said that, on this basis, the Board erred in its decision to grant the licences.

C. *Fiduciary Duty*

The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making process used in considering applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this Court in *R. v. Sparrow*, *supra*, extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen,* [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: *Lac Minerals Ltd. v. International Corona Resources 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.

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 and Liberty v. 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.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver A922935, unreported, and *Dick v. The*

Queen, F.C.T.D., June 3, 1992, Ottawa T-951-89, unreported. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec. This argument must therefore

fail for the same reasons as the arguments relating to the nature of the review conducted by the Board.

D. *Aboriginal Rights*

This Court, in *R. v. Sparrow, supra,* recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow.*

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982.* Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).

The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement,

incorporated in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 ("the *James Bay Act*"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no *prima facie* infringement results from the decision of the Board.

The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

Moreover, even assuming that the decision of the Board is one that has, *prima facie*, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a

minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

E. *Environmental Impact Assessment*

Given that the social cost-benefit analysis appears to have been reasonable, the sole remaining ground on which the decision of the Board can be impugned relates to the environmental impact assessment carried out by the Board. It must be determined both whether the Board followed the procedures for such an assessment set out in the *National Energy Board Act* and in the *EARP Guidelines Order*, and whether the imposition of conditions 10 and 11 was a valid mechanism for fulfilling these requirements. If it is found that the conditions imposed by the Board caused it to exceed, or alternately to fail to exercise, its jurisdiction, it must also be determined whether the conditions are severable, and the order of the Board nonetheless remains valid.

(a) The *National Energy Board Act*

It is clear, and indeed it does not appear to have been seriously contested by the parties that, while the Board in making its decision was bound by the Act as amended, it was nonetheless entitled to require evidence of the factors listed in the former Act, since s. 119.08(2) of the amended Act gives to the Board the mandate to consider any matters which it deems relevant in the circumstances.

The proper interpretation of the scope of the Board's inquiry is found by looking at the procedural framework created by the Act as a whole. The procedure for the issuing of permits for the export of electricity is set out in Division II of Part VI of the Act. In the version of the Act in force at the time that the initial application was made by Hydro-Québec, each applicant was required to apply for a licence, and the factors which the Board was to consider in its determination whether to grant the licence were explicitly listed.

By the terms of the Act as amended by Bill C-23, the Board is in general now required, on application and without a public hearing, to issue permits for export (s. 119.03). However, the Board may recommend to the Minister that the granting be delayed and that an inquiry be held. Section 119.06(2) provides that, in determining whether to make such a recommendation:

> . . . the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including
>
> . . .
>
> (*b*) the impact of the exportation on the environment:
>
> . . .
>
> (*d*) such considerations as may be specified in the regulations.

If the Minister accepts this recommendation, the application is designated as one to which s. 119.08 applies, and a licence is required rather than a permit. The enumerated factors which the Board was required to take into account at this stage, in considering whether a licence should be granted, were eliminated by the amendments to the Act. Now, the section simply provides:

119.08 . . .

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

Section 6 of the *Part VI Regulations* governs the information that must be furnished to the Board in an application for a licence. The section gives the Board the power both to request any information that it might require, and to dispense with the provision of any evidence that it deems unnecessary. However, s. 6(2) nonetheless sets out a long list of factors that must be furnished by the applicant unless the Board otherwise authorizes. The subsections relevant to this appeal are ss. 6(2)(*z*) and 6(2)(*aa*), which require:

> (*z*) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price
>
> (i) would recover its appropriate share of the costs incurred in Canada,
>
> (ii) would not be less than the price to Canadians for equivalent service in related areas...
>
> (*aa*) evidence on any environmental impact that would result from the generation of the power for export.

In this case, the Board considered the environmental effects of the actual transmission of the electricity to the United States, and the resulting effects on the U.S. environment, and found them to be either neutral or beneficial. The real area of concern for negative environmental impact, as raised by the appellants and other parties appearing at the public hearing, was the future construction of production facilities, as contemplated by the development plan, to meet increased needs for power. The Board specifically found that these planned facilities would have to

be built to meet the projected increase in the domestic demand for electrical power even if the licences were not approved. The Board also found that, if the licences were granted, the construction of some of these contemplated facilities would take place earlier than would otherwise be necessary. Finally, the Board held that the additional environmental effects occurring solely as a result of the acceleration of construction would be negligible.

However, the Board found that the potential environmental effects of the actual construction of these future facilities were not known with certainty. It therefore imposed conditions 10 and 11 to the licences, which require compliance with federal standards, and successful completion of existing review processes. In this appeal, the prime dispute in the area of environmental impact is whether the Board was entitled to consider, as relevant to its decision to grant the licences sought, the environmental impact of the construction by Hydro-Québec of these future facilities.

The Court of Appeal in this case found that, in deciding whether to grant a licence, the Board was limited solely to the consideration of the environmental effects of export as that term is defined in the *National Energy Board Act*. As noted above, s. 2 of the Act provides:

> "export" means, with reference to
>
> (*a*) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,....

As mentioned above, the Court of Appeal (at pp. 450-51) interpreted the section to mean that

> . . . the Board's jurisdiction still is and has always been the granting of leave to export electricity. The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. . . .
>
> It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.
>
> I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. The Board's function in this respect is in any case confirmed in several enactments. However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

The Board is specifically permitted by s. 119.06(2) of the *National Energy Board Act* to take into consideration, in its decision whether to recommend to the Minister that the matter proceed by way of a licence application with a public review rather than by the issuance of a permit, both the environmental effects of the exportation of the electricity, and, as specified in the Regulations, the effects on the environment of the generation of the power for export. Once a licence application review process is instituted, s. 119.08(2) of the Act gives to the Board the power to consider all factors which appear to it to be relevant. In my opinion, given that the Board is permitted at the earlier stage to take such factors into

account, it would be inconsistent to prohibit the Board from having regard to such factors at this later stage, although such concerns continue to be relevant.

I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought.

However, such a task is particularly difficult in this case, given the Board's finding that, although existing facilities were not sufficient to service the contracts, the new facilities contemplated would have to be built in any event to supply increasing domestic needs. The approval of the application for the licences would therefore simply have the effect of accelerating construction of these facilities, and the environmental effects of the acceleration alone were found not to be significant. Nevertheless, in my opinion, the Board did not err in giving some weight to the environmental effects of the construction of the planned facilities. To say that such effects cannot be considered unless the Board finds that, but for

the export contracts, the facilities would not be constructed, is to create a situation in which the construction of a generating facility may be contemplated solely for the purpose of fulfilling the demands of a number of export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

The respondents expressed concern that giving such a scope to the inquiry of the Board might then bring into its contemplation areas which are more properly the subject of provincial regulation and control. I hasten to add that no constitutional question was raised in this appeal, and I expressly refrain from making any determinations relating to the interpretation of the provisions of the *Constitution Act, 1867*. However, it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these concerns. Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the *Constitution Act, 1867*, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. In this regard, I find helpful the reasons of this Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, a decision released after the Federal Court of Appeal had rendered judgment in this case.

In *Oldman River* this Court considered, among other issues, the constitutional validity of the *EARP Guidelines Order*. La Forest J., for the majority, concluded, in words I find apposite to this appeal (at p. 64):

> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

Therefore (at p. 65):

> . . . the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.

As noted earlier, the *vires* of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially

regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.

It is also worth noting that the Board is the forum in which the environmental impact attributable solely to the export, that is, to the impact of the increase in power output needed to service the export contracts, will be considered. A focused assessment of these effects may be lost if subsumed in a comprehensive evaluation by the province of the environmental effects of the projects in their totality. In this way, both levels of government have a unique sphere in which to contribute to environmental impact assessment.

I conclude, therefore, that the Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Board is permitted by s. 15 of the Regulations to the Act to attach conditions to the licences which it grants, including conditions relating to environmental protection: s. 15(*m*). The only issue that remains, then, is whether in imposing conditions 10 and 11, the Board failed to meet its obligations under the *EARP Guidelines Order*.

(b) The *EARP Guidelines Order* and the Validity of Conditions 10 and 11

That the *EARP Guidelines Order* applied to the Board in its decision whether to grant the export licences does not appear to be in serious dispute. The *EARP Guidelines Order* applies to all "initiating department[s]", defined in s. 2 as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal". "Proposal" is also defined in s. 2, as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility".

The key feature to be extracted from these somewhat circular definitions is that the application of the *EARP Guidelines Order* to the Board relates to the aspect of Hydro-Québec's undertakings for which it has decision-making authority, that is, the decision to grant a licence permitting export. That does not artificially limit the scope of the inquiry to the environmental ramifications of the transmission of power by a line of wire, but it equally does not permit a wholesale review of the entire operational plan of Hydro-Québec. Section 6(*b*) of the *EARP Guidelines Order* makes it clear that "[t]hese Guidelines shall apply to any proposal . . . that may have an environmental effect on an area of federal responsibility". As will be evident from the reasons which follow, I am of the view that the Board in its decision struck an appropriate balance between these two extremes.

The main goal of the Process created by the *EARP Guidelines Order* is that "the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel" (s. 3). The overarching purpose of the *EARP Guidelines Order*

is to avoid, in situations in which multiple regulatory steps impinge on an undertaking or proposal, disregard for the fundamentally important matter of the protection of the environment.

The *EARP Guidelines Order* also notes explicitly, as mentioned above, that duplication in review is to be avoided (ss. 5(1) and 8), although the initiating department is prohibited from delegating its task of environmental screening or initial assessment to any other body: s. 10(2). The Board in this case was therefore required by s. 12 of the *EARP Guidelines Order* to determine whether the export proposal would not produce any adverse environmental effects, would produce significant adverse environmental effects, would produce effects which were insignificant or mitigable with known technology, or would produce effects which were unknown. In the words of the Board (at pp. 34-35):

> In conducting a screening of electricity export proposals, the Board examines the potential environmental and corresponding social effects in and outside of Canada, of the production, transmission, and end use of the electricity proposed to be exported. The purpose of such a screening is to enable the Board to reach one of the conclusions required in section 12 of the *EARP Guidelines Order*.

The Board noted that Hydro-Québec had provided information that approval of the export arrangements would mean that the facilities contemplated by its general development plan would be built two to six years earlier than anticipated. Hydro-Québec took the position that the effect of permitting the exports on the environmental impact of the implementation of the plan would be insignificant. As a result, it did not provide information on the overall impact of the construction and operation of the planned facilities. The Board noted (at pp. 37-38):

> Hydro-Québec argued only that the early construction and operation of facilities to serve the exports would not result in significant environmental impacts and consequently it provided no evidence on this point. Specifically, Hydro-Québec did not provide a comprehensive environmental assessment of the impact of the construction and operation of facilities required to support the proposed exports. In this regard, the Board is of the view that the issue of environmental impact does not hinge on whether or not it should consider the impact of the construction and operation of facilities or only the impact of their advancement. Sufficient evidence was provided indicating that major hydro-electric facilities such as those required to meet the proposed exports do have environmental effects. Hydro-Québec itself did not deny this. The issue rather is whether, on balance, the environmental consequences are acceptable or mitigable. This, the Board does not know at this time.
>
> The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

However, it was apparent that all the facilities in issue would be subject at later dates either to provincial review under the James Bay Agreement or to review by other federal departments under the *EARP Guidelines Order* or other enactments. Therefore, the Board held (at pp. 39-40):

> The Board is also of the view that, to the extent that Hydro-Québec's future facilities are subjected to the *EARP Guidelines Order* review process, or any equivalent review process, and are subsequently accepted for construction, the environmental and social impacts of these projects, as well as the related public concerns, will have been adequately addressed. . . .The Board is therefore satisfied that to the extent that such reviews take place and the facilities are accepted for construction, then the environmental impact of the construction and operation of the facilities required to support the proposed exports will be known and mitigable with known technology.

In order to satisfy itself that these reviews would be carried out, the Board attached conditions 10 and 11 to the licences.

The respondents challenge the validity of conditions 10 and 11 on the grounds that the jurisdiction of the Board in considering an application for an export licence does not extend to the environmental effects of the construction and operation of facilities which will generate the power to be exported. As noted above, I am of the view that the jurisdiction of the Board can properly encompass such a review. The appellants, however, also challenge the validity of these conditions. They argue that to approve the Board's transfer of the responsibility for environmental review to these future processes is to permit the Board to avoid its responsibilities under the *EARP Guidelines Order*.

The conclusion of the Board in this case appears to have been, not surprisingly, that the environmental effects of the construction and operation of the planned facilities were unknown. The Board is therefore required by s. 12(*d*) of the *EARP Guidelines Order* to see either that the proposal is subjected to further study and subsequent rescreening, or that it is submitted to a public review. In my view, the conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the *EARP Guidelines Order*. Rather, they are an attempt to avoid the duplication warned against in the Order, while continuing the jurisdiction of the Board over this matter.

In the same way that the *EARP Guidelines Order* does not require an initiating department to wait for the results of a public review before proceeding with a

proposal (see *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.)), it does not require the Board to suspend its decision-making until the environmental assessment of all future generating facilities is completed. In this appeal, it is presently unclear exactly when and to what extent these contemplated facilities will be used to fulfil the requirements of the export contracts. This will not be known with certainty until those portions of the contract arise for completion. It is not unreasonable for the Board to exert some control over the timing of this process, while at the same time waiting for the results of environmental reviews which will be tailored to the specifications of the facilities as they are actually constructed.

This case appears to me to be just such a situation where the nature of the proposal means that the flexibility of the process set out in the *EARP Guidelines Order* is helpful. In this regard, I adopt the words of Reed J. of the Trial Division of the Federal Court in *Friends of the Island Inc. v. Canada (Minister of Public Works),* [1993] 2 F.C. 229, where she stated (at p. 264):

> It is not disputed that it is preferable to identify potential environmental concerns relating to a project before private sector developers (or public sector developers for that matter) proceed to a final design. It is also desirable to use the process as a planning tool and to avoid duplication. I am not convinced however that it is useful to consider whether the Guidelines Order requires the assessment of [a] proposal at the concept stage or at a more specific design stage. What is required may very well depend on the type of project being reviewed. What does seem clear is that the assessment is required to take place at a stage when the environmental implications can be fully considered (s. 3) and when it can be determined whether there may be any potentially adverse environmental effects (s. 10(1)). [Emphasis in original.]

The Board retains the power, through s. 119.093(1) of the *National Energy Board Act,* to revoke the licences if the conditions are not fulfilled. The conditions relate to contemplated environmental review and regulation in the federal sphere. By proceeding in this way, the full environmental effects of the proposals are known to the Board before the construction is to proceed, and before the decision to grant the licences is irrevocable. At the same time, duplication is minimized and Hydro-Québec is not required to provide concrete evidence of the effects of proposals for future construction still some years away. The Board has thus fulfilled its mandate under the *EARP Guidelines Order* in a manner which, I would add, is not unreasonable in the circumstances.

VI. Conclusion and Disposition

At issue in this appeal are jurisdictional facts. While it is the proper function of this Court to determine whether the Board erred in the exercise of its jurisdiction, this Court will not interfere with the factual findings of the Board on which it bases that exercise, where there is some evidence to support its findings. I conclude that the appellants were given a full and fair opportunity to be heard before the Board, and that the Board had sufficient evidence to reach the conclusions which it did. In particular, I find that the order as set out by the Board neither exceeded nor avoided the scope of the Board's review in the area of the environmental impact of the proposed exports.

The reinstatement of the order as made by the Board is not the result sought by either the appellants or the respondents Hydro-Québec and the Attorney General of Quebec. This does not mean, however, that such a result is beyond the

jurisdiction of this Court. Both the appellants and the respondents appealed the decision of the Board to the Federal Court of Appeal. These appeals were consolidated, and the court ruled that the appeal of the present appellants should be dismissed, and the appeal of the respondents allowed. It is this decision, *in toto*, that the appellants appeal to this Court.

I am of the view that the Court of Appeal erred in allowing the appeal of the respondents, and that it should have dismissed both appeals. This Court has jurisdiction to make the order that the court below should have made. Accordingly, the appeal is allowed, the judgment of the Federal Court of Appeal is set aside, and the order of the Board restored. Given the nature of the result, each party will bear its own costs here and in the court below.

Appeal allowed.

Solicitors for the appellants: Robert Mainville & Associés, Montréal.

Solicitor for the respondent the Attorney General of Canada: Jean-Marc Aubry, Ottawa.

Solicitors for the respondent the Attorney General of Quebec: Pierre Lachance and Jean Bouchard, Ste-Foy.

Solicitors for the respondent Hydro-Québec: Ogilvy Renault, Montréal.

Solicitor for the respondent the National Energy Board: Judith B. Hanebury, Calgary.

Solicitor for the interveners: Gregory J. McDade, Vancouver.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),*** 2009 BCCA 67

Date: 20090218
Docket: CA035715; CA035791

Between:

The Carrier Sekani Tribal Council

Appellant
(Applicant/Intervenor)

And

The British Columbia Utilities Commission and British Columbia Hydro and Power Authority and Alcan Inc. and The Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

G. J. McDade, Q.C.	Counsel for the Appellant
C. W. Sanderson, Q.C. and K. B. Bergner	Counsel for the Respondent, British Columbia Hydro and Power Authority
D. W. Bursey and R. D. W. Dalziel	Counsel for the Respondent, Rio Tinto Alcan Inc.
P. E. Yearwood and J. J. Oliphant	Counsel for the Respondent, Attorney General of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia November 24 and 25, 2008
Place and Date of Judgment:	Vancouver, British Columbia February 18, 2009

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This is one of those cases foreseen by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, where the broad general principles of the Crown's duty to consult and, if necessary, accommodate Aboriginal interests are to be applied to a concrete set of circumstances.

[2] Consultation arises here in relation to the decision of British Columbia Hydro and Power Authority (B.C. Hydro) to buy electricity from Rio Tinto Alcan Inc. (Alcan) which is surplus to its smelter requirements, in accordance with an Energy Purchase Agreement (EPA) made in 2007.

[3] For the EPA to be enforceable, B.C. Hydro needs the approval of the British Columbia Utilities Commission (Commission) under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

[4] The Carrier Sekani Tribal Council (the appellant) sought to be heard in the s. 71 proceeding before the Commission on the issue of whether the Crown fulfilled its duty to consult before B.C. Hydro entered into the EPA.

[5] The appellant's interest (asserted both in a pending action for Aboriginal title and within the treaty process) is in the water and related resources east of the discharge of the Nechako Reservoir created by Alcan in the early 1950s to drive its generators in Kemano for use at the Kitimat aluminum smelter.

[6] The appellant claims that the diversion of water for Alcan's use is an infringement of its rights and title and that no consultation has ever taken place.

[7] The Commission considered the appellant's request as a reconsideration of its decision, made prior to the appellant's involvement, that consultation was not relevant and, thus, not within the scope of its proceeding and oral hearing (the Scoping Order). It was held not to be relevant then because the only First Nations groups involved at that point were the Haisla First Nation and the Haisla Hereditary Chiefs, who did not press the issue of consultation.

[8] The Commission addressed the reconsideration in two phases. At Phase I, the Commission "concluded that the CSTC [Carrier Sekani Tribal Council] established a prima facie case sufficient to warrant a reconsideration of the Scoping Order", and that the ground for reconsideration was "the impacts on the water flows arising from the 2007 EPA": Reasons for Decision, "Impacts on Water Flows", 29 November 2007 (Letter No. L-95-07). Within Phase I, the Commission conducted a fact-finding hearing into water flow impacts and concluded as follows:

> The Commission Panel accepts the submissions of counsel for BC Hydro regarding the determinations that should be made at this time in the proceeding. The Commission Panel concludes as a matter of fact that:
>
> a) the 2007 EPA will have no impact on the volume, timing or source of water flows into the Nechako River;
>
> b) the 2007 EPA will not change the volume of water to be released into the Kemano River; and
>
> c) the 2007 EPA may cause reservoir elevations to vary approximately one or two inches which will be an imperceptible change in the water levels of the Nechako Reservoir. This

> change to reservoir levels will not affect water flows other than the timing of releases to the Kemano River.

[9] Then, in Phase II, the Commission received argument based on, *inter alia*, the facts found as described above and on certain assumptions built into the question framed by the Commission as follows:

> Assuming there has been a historical, continuing infringement of aboriginal title and rights and assuming there has been no consultation or accommodation with CSTC on either the historical, continuing infringement or the 2007 EPA, would it be a jurisdictional error for the Commission to accept the 2007 EPA?

[10] On December 17, 2007, the Commission dismissed the appellant's reconsideration motion for reasons given in the overall s. 71 decision, January 29, 2008.

[11] In brief, the Commission rejected the appellant's motion because it found as a fact that since there were no "new physical impacts" created by the EPA, the duty to consult was not triggered:

> ... assuming a failure of the duty of consultation for the historical, continuing infringement and no consultation on the 2007 EPA, the Commission Panel concludes that acceptance of the 2007 EPA is not a jurisdictional error because a duty to consult does not arise by acceptance of the 2007 EPA and because a failure of the duty of consultation on the historical, continuing infringement cannot be relevant to acceptance of the 2007 EPA where there are no new physical impacts.

[12] Among other points taken in the appeal, the appellant says that the Commission was wrong in narrowing the inquiry to "new physical impacts" and ignoring other "non-physical impacts" affecting the appellant's interests.

[13] But of greater importance from my viewpoint as a reviewing judge is the Commission's decision not to decide whether B.C. Hydro had a duty to consult. It decided that it did not need to address that question because of its conclusion on the triggering issue. As I will explain later, I consider that to be an unreasonable disposition for, amongst other reasons, the fact that B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation. In my view, that is sufficient to put the Commission on inquiry whether the honour of the Crown was upheld in the making of the EPA.

[14] There is an institutional dimension to this error. The Commission has demonstrated in several cases an aversion to assessing the adequacy of consultation. In three other decisions, the Commission deferred the consultation question to the environmental assessment process: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06; *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07; *Re British Columbia Transmission Corporation*

Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project, First Nations Scoping Issue, B.C.U.C. Letter Decision No. L-6-08, 5 March 2008. (The appeal from the last decision (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, CA035864) was heard together with the appeal in the present case.)

[15] The Commission is a quasi-judicial tribunal with authority to decide questions of law. As such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585. That obligation is not met by deciding, as a preliminary question, an adverse impact issue that properly belongs within an inquiry whether a duty is owed and has been fulfilled.

[16] B.C. Hydro may be able to defend the Crown's honour on a number of powerful grounds, including the impact question, but this should happen in a setting where the tribunal accepts the jurisdiction to make a decision on the duty to consult.

Factual Background

[17] I have said that the infringement, if such it is, associated with the Alcan/Kemano Power Project is on a massive scale. The project involved reversing the flow of a river and the creation of a watershed that discharges west into a long tunnel through a mountain down to sea level at Kemano where it drives the generators at the power station and then flows into the Kemano River. To the east

the watershed discharges into the Nechako River which eventually joins the Fraser River at Prince George. The westerly diversion is manmade. The natural water flows into the Nechako River system were altered by the project with implications for fish and wildlife, especially salmon. Alcan holds a water licence in perpetuity for the reservoir. It is obliged by the licence and an agreement made in 1987 settling litigation involving the Provincial and Federal Governments to maintain water flows that meet specifications for migratory fish.

[18] At the outset of the project in the late 1940s, Alcan envisioned a smelter at Kitimat and power station at Kemano roughly twice their present size. The water licence and related permits for the Nechako Reservoir were issued provisionally with the idea that when the plants were enlarged as planned, the licence would be made permanent.

[19] In the course of an expansion project, sometimes referred to as Kemano II, the Government of British Columbia changed its mind about allowing the full utilization of the reservoir. This shut down the project and prompted a law suit by Alcan. The parties settled the dispute in 1997 on terms which included a power deal whereby the Province would supply Alcan should it enlarge the smelter and need more electricity. The settlement also granted Alcan the water licence on a permanent basis.

[20] Alcan has been selling its excess power since the beginning of its operations, at first directly to neighbouring industries and communities, and later to those

customers through the B.C. Hydro grid and to B.C. Hydro for general distribution, and to Powerex Corporation (B.C. Hydro's exporting affiliate).

[21] The Commission found as a fact in the decision under appeal that (1) Alcan can sell its electricity to anyone – B.C. Hydro is not the only potential customer; and (2) water flows will not be influenced by the EPA.

[22] In written submissions on the motion for reconsideration, the appellant articulated a number of ways in addition to "new physical impacts" where the EPA might affect their interests:

> 18. There are many aspects of the EPA which demonstrate that it is an important decision in relation to the infringements of the Intervenor's rights and title, within the context set out by recent caselaw. This decision:
>
> (a) Approves an EPA that will confirm and mandate extended electricity sales for a very long time – to 2034;
>
> (b) Approves the sale to BC Hydro of all electricity which is surplus to Alcan's power needs – and therefore authorizes the sale of power resulting from diversions of water that are causing existing impacts and infringements;
>
> (c) Removes or affects the flexibility to release additional water, because that power is now the subject of an agreement with BC Hydro;
>
> (d) Changes the 'operator' – by creating a "Joint Operating Committee" (s.4.13), by authorizing B.C. Hydro to 'jointly develop' the reservoir operating model (s.4.17), and by requiring B.C. Hydro approval for any amendments to operating agreements "which constrain the availability of Kemano to generate electricity" (App.1, 70 "Operating Constraints");
>
> (e) Changes in objective – this agreement confirms that power will now be devoted to long-term 'capacity' for B.C. Hydro (Even if there had been a 'compelling social

objective' to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new 'objective' requires further consultation.);

(f) Creates added incentives to maximize power sales (rather than release water for conservation);

(g) Provides incentives to Alcan to 'optimize' efficiency of their operations (meaning additional power sales);

(h) Encourages sales (i.e. diversion of water) through financial incentives in the most significant low water months (January to March);

(i) Affects the complexity required for proper environmental management – e.g. temperature, variable flows, timing, over-spills etc. – in order to accommodate BC Hydro sales;

(j) Approves an agreement that contains no positive conditions protecting fish and First Nations rights and which will preclude (by financial disincentives) those conditions from being added later;

(k) Fails to include First Nations in any way in management decisions.

19. If, despite the jurisprudence pointing to the contrary, the BC Utilities Commission is not prepared to examine the impacts of existing operations, and instead views the EPA solely as a financial model, there are nevertheless clear impacts on the Intervenor's interests arising from this agreement:

(a) Increases the cost of compensation to Alcan;

(b) Any change to the 1987 Settlement Agreement flows will be more difficult to achieve;

(c) Additional sales (and therefore diversions) may well occur (evidence of other purchasers – under all conditions and at all times of the year – is speculative).

[Emphasis in original.]

[23] To the extent that the Commission addressed those points, it did so broadly by distinguishing between issues relating to the use of power and the production of power and by noting that its authority under s. 71 is limited:

There may be steps contemplated by the Crown that have no new impacts that would nevertheless trigger the duty to consult because of a historical, continuing infringement. However, a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing would not be a jurisdictional error. That is, it is the combination of no new physical impacts together with the limited scope of a section 71 review that answers the principal question – there is no jurisdictional error in this Decision. Alcan states: "The Crown's fiduciary duty arises in specific situations, in particular, when the Crown assumes discretionary control over specific Aboriginal interests" (Alcan Submission, para. 5.3). The decision to accept or declare unenforceable the 2007 EPA under section 71 of the Act does not affect underlying water resources or any CSTC aboriginal interests there may be in that resource (Alcan Submissions, para. 5.5).

The CSTC submits:

> "The 2007 EPA will also constitute a significant change in use (from power produced for aluminum smelting purposes to power for general provincial consumption) which, if approved by the BCUC, will amount to approval by the Crown of that change in use – without consultation" (CSTC Submission, para. A6).

The 2007 EPA may change the use of power in the sense suggested by the CSTC. However, such change in the use of the power could be effected by Alcan without the 2007 EPA and by means that are beyond the authority of the Commission. Nevertheless, the important question is whether or not there is a change in water flows, not whether or not there is a change in use of power. And, as found by the Commission in Letter No. L-95-07, water flows will not change.

Relevant Enactments

[24] The Commission's authority regarding energy supply contracts comes from s. 71 of the *Utilities Commission Act*, which, including amendments effective May 1, 2008, now reads:

> 71. (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

(a) file a copy of the contract with the commission under rules and within the time it specifies, and

(b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

(2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,

(c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,

(d) the interests of persons in British Columbia who receive or may receive service from the public utility,

(e) the quantity of the energy to be supplied under the contract,

(f) the availability of supplies of the energy referred to in paragraph (e),

(g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and

(h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

(2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

(2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.

(2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.

(2.5) In considering the public interest under subsection (2.4), the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1,

(c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and

(d) the interests of persons in British Columbia who receive or may receive service from the public utility.

(2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract

(a) entered into exclusively on the terms and conditions, and

(b) as a result of the process

referred to in subsection (2.3).

(3) If subsection (2) applies, the commission may

(a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those

rights may then be enforced as fully as if no proceedings had been taken under this section.

(5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

[25] Provisions of that Act bearing on the relationship between the British Columbia Government and the Commission include:

3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.

(2) The commission must comply with a direction issued under subsection (1), despite

(a) any other provision of

(i) this Act, except subsection (3) of this section, or
(ii) the regulations, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

* * *

5 (0.1) In this section, **"minister"** means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

(3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.

(4) The commission, in accordance with subsection (5), 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.

(5) An inquiry under subsection (4) must begin

(a) by March 31, 2009, and

(b) at least once every 6 years after the conclusion of the previous inquiry,

unless otherwise ordered by the Lieutenant Governor in Council.

(6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).

(7) The 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 (4).

(8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.

(9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

* * *

71 ...

(2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider

(a) the government's energy objectives, ...

[26] The provisions of the *Utilities Commission Act* dealing with the Commission's jurisdiction and appeals are:

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

* * *

99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

* * *

101 (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

(2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.

(3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

(4) The commission and the Attorney General may be heard by counsel on the appeal.

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

* * *

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

[27] B.C. Hydro's relationship with government is defined in the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, as follows:

3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

(2) The Minister of Finance is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

4 (1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.

(2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.

(3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.

5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may

(a) exercise the powers conferred on them under this Act,

(b) exercise the powers of the authority on behalf of the authority, and

(c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

[28] The authority to purchase power is found in s. 12(1)(m) of the *Hydro and Power Authority Act*:

> 12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:
>
> * * *
>
> (m) purchase power from or sell power to a firm or person;

[29] Section 35 of the *Constitution Act, 1982* reads:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" 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.

Issues

[30] The appellant frames the grounds for appeal in its factum as follows:

> 22. The appellant submits that the Commission committed errors of law and jurisdiction in determining:
>
> a) That the failure of the Crown to consult and, if necessary, accommodate the member tribes of the CSTC was not relevant to the proceeding;
>
> b) to refuse to allow evidence or cross-examination on the on-going existing impacts of the operations of the Nechako reservoir and the Kemano Project on the

aboriginal rights and title of the member tribes of the CSTC; and

c) that the acceptance of the EPA between BC Hydro and Alcan does not trigger a duty to consult and, if necessary accommodate the member tribes of the CSTC.

[31] The Attorney General's factum identifies the question of law in the appeal as follows:

> 23. The Attorney General says that the question of law in this appeal is whether the Commission correctly refused to amend the Scoping Order to consider the adequacy of Crown consultation with First Nations regarding the impact of the Kemano System upon their asserted Aboriginal rights. In particular:
>
> > Is the duty to consult triggered by the Crown contemplating conduct which does not adversely impact claimed Aboriginal rights, but is nonetheless related to historical Crown conduct which does impact claimed Aboriginal rights?

[32] Alcan poses a threshold question about the Commission's jurisdiction and a further question on the merits:

> 35. This proposition [the appellant's contention that the Commission had a duty to ensure consultation took place] raises a threshold question about the jurisdiction of the Commission:
>
> > In a s. 71 review of an energy supply contract, does the Commission have the jurisdiction to decide whether the Crown's duty to consult under s. 35 of the *Constitution Act, 1982* arises and has been met in relation to that contract?
>
> 36. If the answer is "no", the appeal must be dismissed, because the CSTC's complaint about consultation will have been taken to the wrong forum. If the answer is "yes", then this Court must address a second question:
>
> > Did the 2007 EPA or the Commission's review of the 2007 EPA give rise to a duty to consult under s. 35 of the *Constitution Act, 1982*?

[33] B.C. Hydro's breakdown of the issues is this:

> BC Hydro submits that the primary issue on appeal is as follows:
>
> 1. Did the review conducted by the BCUC in respect of the 2007 EPA pursuant to s. 71 of the UCA amount to the Crown contemplating conduct that might adversely affect the CSTC's aboriginal interests so as to give rise to the duty to consult with the CSTC?
>
> 2. If and only if the primary question is answered in the affirmative, then BC Hydro submits that there is a secondary issue on appeal as follows:
>
> > If the answer to question 1 is yes, does the UCA empower and require the Commission to adjudicate a dispute between the Crown and the CSTC regarding the sufficiency of consultation to discharge the Crown's obligation in respect of the original authorization, construction and operation of the Nechako Reservoir before the BCUC can exercise its jurisdiction under s. 71?
>
> 3. If and only if the secondary question is answered in the affirmative, then BC Hydro submits that there is a third issue on appeal as follows:
>
> > If the answer to both questions 1 and 2 is yes, what remedy is appropriate?

[34] I will analyze the issues according to this framework:

A. Was the Commission, in reviewing the enforceability of the EPA under s. 71 of the *Utilities Commission Act*, obliged to decide whether the Crown had a duty to consult and whether it fulfilled the duty?

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question defined too strictly and in terms which did not include all of the interests asserted by the appellant?

C. What is the appropriate remedy if the appellant establishes a reviewable error?

Discussion

A. The Power and Duty to Decide

1. The Power

[35] Under the heading of power to decide, I will discuss three propositions:

(a) As a quasi-judicial tribunal with authority to decide questions of law, the Commission is competent to decide relevant constitutional questions, including whether the Crown has discharged a duty to consult.

(b) Section 71 of the *Utilities Commission Act* mandates review of the enforceability of an energy purchase agreement according to factors which include the public interest. This agreement engages the honour of the Crown in its dealings with Aboriginal peoples.

(c) The Commission has the capacity to address the adequacy of consultation.

(a) Competency

[36] The Commission has not explicitly declared that it has no jurisdiction to decide a consultation issue. But since the Commission has shown a disinclination to grapple with the issue, and the proponents of the EPA have questioned whether it

lies within the Commission's statutory mandate, I think the court should settle the point.

[37] In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court of Canada decided, at para. 38, "there is no principled basis for distinguishing s. 35 rights from other constitutional questions."

[38] Moving on to whether administrative tribunals have the power to decide constitutional law questions, the Court in *Paul* stated, at para. 39:

> The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

[39] I take those statements to be of broad application and not limited to the facts particular to *Paul*. In my opinion, they apply to the instant case, notwithstanding that the determination for the Forest Appeals Commission would have had a more direct effect on Mr. Paul's use of the forest resource than would the effects of B.C. Hydro's involvement in the EPA on the appellant's interests in the water resource.

[40] It can be inferred from the *Utilities Commission Act* that the Commission has the authority to decide relevant questions of law. Section 79, "findings of fact conclusive", implies that the right to appeal under s. 101 is restricted to questions of law or jurisdiction. Further, consideration of the exclusive jurisdiction clause in s. 105 indicates that the Legislature must have empowered the Commission to decide questions of law, otherwise the appellate review would be meaningless.

[41] The Commission is therefore presumed to have the jurisdiction to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled the duty. These are issues of law arising from Part II of the *Constitution Act, 1982*, ss. 35 and 35.1 that the Commission is competent to decide.

(b) Construction of Section 71

[42] Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner. As I will develop later, the rationale for the duty to consult, explained in *Haida Nation v. British Columbia (Minister of Forests)*, discourages resort to the ordinary courts for injunctive relief and encourages less contentious measures while reconciliation is pursued. It would seem to follow that the appropriate forum for enforcement of the duty to consult is in the first instance the

tribunal with jurisdiction over the subject-matter – here the Commission in relation to the EPA.

[43] B.C. Hydro cites this Court's decision in *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, as support for the argument that s. 71 should not be interpreted to include the power to assess adequacy of consultation. It was held in that case that the governing statute, then the *Utilities Commission Act*, S.B.C. 1980, c. 60, did not confer jurisdiction on the Commission to enforce as mandatory the guidelines it developed on resource planning. One of the guidelines required public consultation, the inadequacy of which, as perceived by the Commission, led it to issue directions to B.C. Hydro in connection with an application for a certificate of public convenience and necessity. The Court examined the contested power to enforce guidelines against the language of the *Act*, its purpose and object, and found that no explicit provision enabled the Commission to promulgate mandatory guidelines which intruded on the management of the utility and none should be implied.

[44] On the strength of that case, B.C. Hydro turns to *Dunsmuir v. New Brunswick*, 2008 SCC 9, 291 D.L.R. (4th) 577, for the following general proposition that it says applies to the present matter:

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial

review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.

[Emphasis added.]

[45] I do not accept B.C. Hydro's argument. The rule in question sought to be enforced through proceedings before the Commission arises not as an internal prescription, as in the *B.C. Hydro v. British Columbia (Utilities Commission)* decision just discussed, but from the *Constitution* itself. *Haida*, at paras. 60-63, contemplates review of consultation by administrative tribunals. It is not necessary to find an explicit grant of power in the statute to consider constitutional questions; so long as the Legislature intended that the tribunal decide questions of law, that is sufficient.

[46] It is necessary to address a case cited by all the respondents as standing for the proposition that a tribunal's power to decide the adequacy of consultation requires an explicit provision in the constituent statute. In *Dene Tha' First Nation v. Energy and Utilities Board (Alta.)*, 2005 ABCA 68, 363 A.R. 234, the Alberta Court of Appeal held that the Board's refusal to accept an intervention in the matter of

licences for well drilling and access roads was not reviewable as it was based on a factual finding that the First Nation seeking to intervene had not demonstrated an adverse impact. The court said it had no jurisdiction to review findings of fact. Therein lies the *ratio decidendi* of the judgment. The court noted at para. 24 that it was common ground that neither the Utility nor the Board had a duty to consult. As to the duty on the Crown, the court said, *obiter dicta*:

> [28] A suggestion made to us in argument, but not made to the Board, was that the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

[47] The court went on to record that consultation was not addressed at the Board level. I regard the above quoted remarks as having been made *en passant* in an oral judgment rather than a definitive judicial opinion made with the benefit of full argument. With respect, I do not find it persuasive authority for the proposition advanced by the respondents in the present case.

(c) Capacity to decide

[48] I turn to consider the Commission's capacity to decide. As I understand Alcan's submission, the issues surrounding the consultation duty are so remote from the Commission's usual terms of reference that the Commission should not be expected to decide them. Alcan argues that the appellant should go to court for redress. I quote from paras. 88 and 89 of Alcan's factum:

> 88. ... to accept the CSTC's invitation [to entertain the consultation issue] would mire the Commission in complex questions of fact and law to which its mandate, statutory powers and remedies are ill-suited.
>
> 89. In the end, the argument comes full circle: the CSTC are seeking redress for their grievances in the wrong forum.

[49] *Paul* rejected the argument that Aboriginal law issues may be too complex and burdensome for an administrative tribunal, at para. 36:

> To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

[50] I heard nothing in the appeal which causes me to doubt the capacity of the Commission to hear and decide the consultation issue. Expressed in more positive terms, I am confident that the Commission has the skill, expertise and resources to carry out the task.

2. The Duty to Decide

[51] Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[52] The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 35:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

As to timing, see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 3:

> ... the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples.

[53] If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation. Otherwise, the First Nations are driven to seek an interlocutory injunction, which, according to *Haida* at para. 14, is often an unsatisfactory route:

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para.

> 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

[54] While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. It is useful to remember the relationship between government and administrative tribunals generally.

[55] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, the issue was the independence of members of the Liquor Appeal Board given their terms of appointment. The Court contrasted the ordinary courts with administrative tribunals in the following analysis at para. 24:

> Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of

> that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[56] No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.

[57] The honour of the Crown as a basis for the duty to decide is compelling on the facts here: one Crown entity, the responsible Ministry, granted the water licence, allegedly infringing Aboriginal interests without prior consultation; another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement on a long-term contract; and a third, the tribunal, dismisses the appellant's claim for consultation on a preliminary point.

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question?

[58] In this part, I identify the appropriate standard of review and apply the standard to the decision under appeal. I conclude that (1) the standard is reasonableness; (2) the Commission set an unreasonably high threshold for the

appellant to meet; and (3) it took too narrow a view of the Aboriginal interests asserted.

1. Standard of Review

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

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

> On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

2. Reasoning Error

[61] In my respectful judgment, the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the appellant would win the point as a precondition for a hearing into the very same point.

[62] I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. I refer to the assumed facts, namely, that there is an infringement without consultation and on the unquestioned fact that B.C. Hydro, a Crown agent, takes advantage of the power produced by the infringement by signing the EPA. In my opinion, this is enough to clear any reasonable hurdle. As stated in *Mikisew*, at para. 55:

> The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty.
>
> [Emphasis added.]

Whether the EPA triggered a duty is for a hearing on the merits.

[63] Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The process deprived the appellant the opportunity to develop a case for the non-physical impacts listed in

their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least participate in the infringement.

[64] Again, these points may not carry the day for the appellant, but the appellant should have had the opportunity to develop them.

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

[66] 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.

[67] According to *Haida*, at para. 38, the consultation may advance the goal of reconciliation by improving the relationship between the Crown and First Nations:

> I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.
>
> [Emphasis added.]

[68] In summary, I would allow the appeal on the ground that the Commission unreasonably refused to include the consultation issue in the scope of the proceeding and oral hearing.

Remedy

[69] As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for

consideration. The order I would make is in terms similar to those suggested by B.C. Hydro in the event the appeal is allowed:

> THAT the proceeding identified as "Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electricity Purchase Agreement with RTA as an Energy Supply Contract Pursuant to section 71" be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Bauman"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Kwikwetlem First Nation v. British Columbia (Utilities Commission),*** 2009 BCCA 68

Date: 20090218
Docket: CA035864; CA035928

Docket: CA035864

In the Matter of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Project

Between:

The Kwikwetlem First Nation

Appellant
(Applicant/Intervenor)

And

British Columbia Transmission Corporation, British Columbia Hydro and Power Authority, and British Columbia Utilities Commission

Respondents

- and -

Docket: CA035928

In the Matter of the *Utilities Commission Act,* R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior To Lower Mainland Project

Between:

Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band

Appellants
(Applicants/Intervenors)

And

British Columbia Utilities Commission, British Columbia Transmission Corporation, and British Columbia Hydro and Power Authority

Respondents

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

G. J. McDade, Q.C.	Counsel for the Appellant, The Kwikwetlem First Nation
T. Howard B. C. Stadfeld	Counsel for the Appellants, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band
K. B. Bergner A. Bespflug	Counsel for the Respondent, British Columbia Hydro and Power Authority
A. W. Carpenter	Counsel for the Respondent, British Columbia Transmission Corporation
Place and Date of Hearing:	Vancouver, British Columbia November 26 and 27, 2008
Place and Date of Judgment:	Vancouver, British Columbia February 18, 2009

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

[2] The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

[3] The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title,

requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

[4] The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

[5] The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

[6] The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C Letter Decision No. L-6-08, 5 March 2008 (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

[7] The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("*VITR*") and *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07 ("*Revelstoke*"). It is the reasoning in *VITR*, amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

[8] As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and

capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

[9] The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)

[10] BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for

operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

[11] It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

[12] In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208. It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

> Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

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

[14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the

EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

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

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

> 45. (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
>
> ...
>
> (3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
>
> ...

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46. (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

...

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and

> (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.
>
> (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
>
> ...
>
> 99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.
>
> ...
>
> 101. (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
>
> ...
>
> (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

[16] The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

> The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.
>
> CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project

> justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

> 2. Project Description:
>
> ...
>
> (iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;
>
> ...
>
> 3. Project Justification
>
> ...
>
> (ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;
>
> (iii) a statement identifying any significant risks to successful completion of the project;
>
> ...
>
> 4. Public Consultation
>
> (i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.
>
> ...

6. Other Applications and Approvals

(i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and

(ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

Environmental Assessment Act

8. (1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project,

...

unless

(c) the person first obtains an environmental assessment certificate for the project, or

...

9. (1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project,

...

unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

...

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10. (1) The executive director by order

...

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

...

11. (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

...

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

...

16. (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

...

17. (1) On completion of an assessment of a reviewable project ... the executive director ... must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director ...,

(b) the recommendations, if any, of the executive director, ..., and

(c) reasons for the recommendations, if any, of the executive director, ...

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

...

30. (1) At any time during the assessment of a reviewable project under this Act , and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate ..., the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

(a) is being or will be conducted by any of the following or any combination of the following:

(i) the government of British Columbia, including any agency, board or commission of British Columbia;

(ii) the government of Canada;

(iii) a municipality or regional district in British Columbia;

(iv) a jurisdiction bordering on British Columbia;

(v) another organization, and

(b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.

(2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

[17] The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18,

"Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

[18] The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

[19] The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

[20] The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

[21] This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

[22] BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

[23] Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

[24] In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

[25] In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

> 4.1 The scope of assessment for the Project will include consideration of the potential for:
>
> > 4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,
> >
> > 4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

[26] In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

[27] The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

[28] The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In

para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

[29] On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

> In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

[30] In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the

EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

[31] On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

[32] At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

[33] Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

[34] On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of

consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

The Scoping Decision

[35] The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

[36] The Commission Secretary explained (at p. 2-3):

> In both the VITR Decision and the Revelstoke Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the VITR Decision:
>
> > The government has legislated regulatory approvals that must be obtained before VITR proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for VITR. Given the Section 11 Procedural Order and the Terms of Reference for VITR, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of VITR, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).
>
> In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

> The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).
>
> In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order ... and the draft Terms of Reference ... the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.
>
> Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

[37] In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 51 (also quoted at p. 47 of the *VITR* decision):

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

[38] To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and

therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

> The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. ... [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

[39] The Commission summarized its analysis (at p. 5):

> ... The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

[40] The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis

and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

[41] After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *In the Matter of British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, B.C.U.C. Decision, 5 August 2008, Commission Order No. C-4-08 (the "CPCN decision"). At page 96 of those reasons, it concluded:

> The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

[42] The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

> ... although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

[43] From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

[44] On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

Discussion

[45] The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation

efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

[46] The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *VITR, In the Matter of BC Gas Utility Ltd. Southern Crossing Pipeline Project Application for a Certificate of Public Convenience and Necessity*, B.C.U.C. Decision, 21 May 1999, Commission Order No. G-51-99). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

[47] At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking,

BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

[48] BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

[49] On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified

project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

[50] The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

[51] Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

[52] BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

[53] The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC,

and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

[54] It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers

before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[56] Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

[57] The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects

on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act.*

[58] Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

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

[60] In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified

BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

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

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

[63] The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade

an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

[64] If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

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

Summary

[66] BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro

acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

[67] When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices – accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

[68] Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing

interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida,* at paras. 46-47.

[69] The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

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

[71] For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Bauman"

This Act is Current to June 10, 2009
This Act has "Not in Force" sections. *See* the Table of Legislative Changes.

UTILITIES COMMISSION ACT

[RSBC 1996] CHAPTER 473

Contents

Definitions

1 In this Act:

"appraisal" means appraisal by the commission;

"authority" means the British Columbia Hydro and Power Authority;

"commission" means the British Columbia Utilities Commission continued under this Act;

"compensation" means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it;

"costs" includes fees, counsel fees and expenses;

"demand-side measure" means a rate, measure, action or program undertaken

(a) to conserve energy or promote energy efficiency,

(b) to reduce the energy demand a public utility must serve, or

(c) to shift the use of energy to periods of lower demand;

"distribution equipment" means posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers;

"expenses" includes expenses of the commission;

"government's energy objectives"

(b) as a division of the commission.

(4) If commissioners sit as a division

(a) 2 or more divisions may sit at the same time,

(b) the division has all the jurisdiction of and may exercise and perform the powers and duties of the commission, and

(c) a decision or action of the division is a decision or action of the commission.

(5) At a sitting of the commission or of a division of the commission, one commissioner is a quorum.

(6) The chair may designate a commissioner to serve as chair at any sitting of the commission or a division of it.

(7) If a proceeding is being held by the commission or by a division and a sitting commissioner is absent or unable to attend,

(a) that commissioner is thereafter disqualified from continuing to sit on the proceeding, and

(b) despite subsection (5), the commissioner or commissioners remaining present and sitting must exercise and perform all the jurisdiction, powers and duties of the commission.

(8) and (9) [Repealed 2003-46-2.]

(10) In the case of a tie vote at a sitting of the commission or a division of the commission, the decision of the chair of the commission or the division governs.

(11) If a division is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the commission, with the consent of all parties to the application, may organize a new division to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

Commission's duties

5 (0.1) In this section, **"minister"** means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

(3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.

(4) The commission, in accordance with subsection (5), 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.

(5) An inquiry under subsection (4) must begin

(a) by March 31, 2009, and

(b) at least once every 6 years after the conclusion of the previous inquiry,

unless otherwise ordered by the Lieutenant Governor in Council.

(6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).

(7) The 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 (4).

(8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.

(9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

Repealed

6 [Repealed 2004-45-165.]

Employees

7 Despite the *Public Service Act*, the commission may employ a secretary and other officers and other employees it considers necessary and may determine their duties, conditions of employment and remuneration.

Technical consultants

8 The commission may appoint or engage persons having special or technical knowledge necessary to assist the commission in carrying out its functions.

Pensions

9 The Lieutenant Governor in Council may, by order, direct that the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to commissioners, officers and other employees of the commission, but the commission may, alone or in cooperation with other corporations, departments, commissions or other agencies of the Crown, establish, support or participate in any one or more of

(a) a pension or superannuation plan, or

(b) a group insurance plan

for the benefit of commissioners, officers and other employees of the commission and their

(f) respecting the circumstances in which and the persons to whom disbursement of some or all of the security required under paragraph (d) is to be made.

Part 6 — Commission Jurisdiction

Jurisdiction of commission to deal with applications

72 (1) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating or controlling a public utility service or charged with a duty or power relating to that service, has done, is doing or has failed to do anything required by this Act or another general or special Act, or by a regulation, order, bylaw or direction made under any of them.

(2) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, requesting the commission to

(a) give a direction or approval which by law it may give, or

(b) approve, prohibit or require anything to which by any general or special Act, the commission's jurisdiction extends.

Mandatory and restraining orders

73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.

(2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, to which the commission's jurisdiction extends.

Inspections and depositions

74 For the purposes of this Act, the commission may

(a) enter on and inspect property, and

(b) require the taking of depositions inside or outside of British Columbia.

Commission not bound by precedent

75 The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

Jurisdiction as to liquidators and receivers

76 (1) The fact that a liquidator, receiver, manager or other official of a public utility, or other person engaged in the petroleum industry, or a person seizing a public utility's property has been appointed by a court in British Columbia, or is acting under the authority of a court, does not prevent the exercise by the commission of any jurisdiction conferred by this Act.

(2) A liquidator, receiver, manager, official or person seizing must act in accordance with this Act and the orders and directions of the commission, whether the orders are general or particular.

(3) The liquidator or other person referred to in subsection (1), and any person acting under that person, must obey the orders of the commission, within its jurisdiction, and the commission may enforce its orders against the person even though the person is appointed by or acts under the authority of a court.

Power to extend time

77 If a work, act, matter or thing is, by order or decision of the commission, required to be performed or completed within a specified time, the commission may, if the circumstances of the case in its opinion so require, extend the time so specified

(a) on notice and hearing, or

(b) in its discretion, on application, without notice to any person.

Evidence

78 (1) [Repealed 2004-45-169.]

(2) An inquiry that the commission considers necessary may be made by a member or officer or by a person appointed by the commission to make the inquiry, and the commission may act on that person's report.

(3) Each member, officer and person appointed has, for the purpose of the inquiry, the powers conferred on the commission by section 74 of this Act and section 34 (3) and (4) of the *Administrative Tribunals Act*.

(4) If a person is appointed to inquire and report on a matter, the commission may order by whom, and in what proportion, the costs incurred must be paid, and may set the amount of the costs.

Findings of fact conclusive

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

Commission not bound by judicial acts

80 In determining a question of fact, the commission is not bound by the finding or order of a court in a proceeding involving the determination of that fact, and the finding or order is, before the commission, evidence only.

Pending litigation

81 The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending does not deprive the commission of jurisdiction to hear and determine the same questions of fact.