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24 July 2009

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

Dear Ms. Hamilton:

**Re: British Columbia Utilities Commission  
Project No. 3698545  
Inquiry into British Columbia's Long-Term Transmission Infrastructure  
Written Submission**

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BCTC files a Written Submission in the above noted proceeding pursuant to Exhibit A-16.

Sincerely,

*Original signed by*

Janet L. Fraser  
Director, Regulatory Affairs

**BRITISH COLUMBIA TRANSMISSION CORPORATION (“BCTC”)**

**BRITISH COLUMBIA UTILITIES COMMISSION**

**PROJECT NO. 3698545**

**INQUIRY INTO BRITISH COLUMBIA’S  
LONG TERM TRANSMISSION INFRASTRUCTURE**

**WRITTEN SUBMISSION**

**AND**

**BOOK OF AUTHORITIES**

**24 JULY, 2009**

## **1.0 Introduction**

British Columbia Transmission Corporation (BCTC) files these written submissions with the British Columbia Utilities Commission (Commission) in response to the Commission Inquiry Panel's letter dated June 30, 2009.<sup>1</sup> In the letter, the Inquiry Panel asked BCTC to provide its submissions on the following questions:

- 1) What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry (the Inquiry)?
- 2) If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?

In response to the first question, BCTC submits that the Crown's duty to consult is likely triggered because the determinations of transmission infrastructure needs that the Commission will make are strategic decisions that may lead to future, more specific decisions with respect to transmission projects that may have potential impacts on asserted aboriginal rights and title. The duty is at the low end of the spectrum because of the minimal and non-specific nature of the impact that the Commission's determinations in the Inquiry, at this stage of the overall process of planning and development of the transmission system, will have on asserted aboriginal rights and title.

In response to the second question, BCTC submits that the Commission is a quasi-judicial tribunal and does not have an independent duty to consult. The honour of the Crown requires a meaningful process of consultation. The parallel consultation process in which BCTC and BC Hydro will engage First Nations with respect to the evidence they will provide in the Inquiry, the Commission's process itself, and the Commission's potential review of the adequacy of consultation provide a meaningful process that will satisfy the duty to consult and uphold the honour of the Crown.

## **2.0 What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Inquiry?**

The Supreme Court of Canada in *Haida Nation v. British Columbia (Ministry of Forests)* held that the duty to consult 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

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<sup>1</sup> Ex. A-16

affect it”.<sup>2</sup> BCTC submits that for the purposes of the Inquiry, the focus of this question is whether the Inquiry Panel’s determinations may adversely affect an asserted aboriginal right or title. Answering this question requires a review of the nature of the Inquiry and of the determinations that the Inquiry Panel may make.

## 2.1 *The Nature of the Inquiry*

The Inquiry was established under section 5(4) of the *Utilities Commission Act (UCA)*<sup>3</sup>, which was enacted on May 1, 2008:

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.

Subsection (5) sets the time frame in which the Inquiry must take place.

On December 11, 2008, the Minister of Energy, Mines and Petroleum Resources (the Minister) issued the Terms of Reference (ToR) under which the Inquiry is to be conducted. Section 5(6) of the *UCA* makes the ToR binding on the Commission.

As set out in the Commission’s Reasons for Decision on Scope, the general purpose of the Inquiry is “for the Commission to make determinations with respect to BC’s electrical transmission infrastructure and capacity needs for a 30-year period, commencing from the date the Inquiry begins.”<sup>4</sup> This will require the panel to consider a manageable number of demand scenarios in order to determine “the most cost-effective and probable sequence(s) of development, and therefore the need for transmission infrastructure”<sup>5</sup>. The scope of the Inquiry is generally limited to the bulk transmission system, and a broad examination of transmission infrastructure needs to integrate anticipated generation resources and projected loads at a regional level. In short, the Commission’s determinations in the Inquiry will establish the need for subsequent bulk system transmission infrastructure projects, but will not define the specific nature, or routing of any particular project.

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<sup>2</sup> 2004 SCC 73 at para. 37.

<sup>3</sup> R.S.B.C. 1996, c. 473

<sup>4</sup> Order G-86-09, Ex. A-18, Reasons for Scoping Decision p. 1.

<sup>5</sup> Order G-86-09, Ex. A-18, Reasons for Scoping Decision p. 3.

The Commission has not previously been directed to make such determinations. Therefore, a review of the *UCA* and ToR is necessary to appreciate what the Commission has been directed to do:

...must conduct an inquiry to make *determinations*...

...purpose is make *determinations* with respect to British Columbia's electricity transmission and capacity needs for a 30-year period...

...must assess ...generation resources in British Columbia that will potentially be developed during the Determination Period...

... must assess ... the most cost-effective most probable sequence(s) of development by geographic area... of the generation resources...

...must make *determinations* respecting the need for, and timing of, additional transmission infrastructure capacity, within the Determination Period, that would allow for:

(a) the supply and delivery of electricity as assessed...; and

(b) improved electricity transmission intertie capacity between British Columbia and the United States or Alberta that can be used effectively.

[emphasis added]

The ToR also set out several factors the Commission must consider and may not consider in making its assessments and determinations.

The Commission must therefore make assessments, and relying on those assessments it must make determinations.

The term determination is not defined in the *UCA*. It is, however, included in the definition of the term "decision" in s. 1 of the *Administrative Tribunals Act*<sup>6</sup> (*ATA*). Pursuant to s. 2 of the *UCA*, ss. 1 to 13, 15, 18 to 21, 28 to 30, 32, 34(3) and (4), 35 to 42, 44, 46.3, 48, 49, 54, 56, 60(a) and (b) and 61 of the *ATA* apply to the Commission. *Black's Law Dictionary* also defines determination as "a final decision by a court or administrative agency."<sup>7</sup>

The Commission makes determinations in other proceedings that it conducts; for example, under s. 44.1 of the *UCA*, the Commission must accept the long-term resource plan, if it

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<sup>6</sup> S.B.C. 2004, c. 45.

<sup>7</sup> Bryan A. Garner ed., *Black's Law Dictionary*, 8<sup>th</sup> ed., (St. Paul, Minn.: West Publishing Co., 2004) s.v. determination.

*determines* that carrying out the plan would be in the public interest; under s. 45(8) the Commission may only grant a certificate of public convenience and necessity if it *determines* that the proposed project is necessary for the public convenience and properly conserves the public interest; under s. 58 the Commission makes *determinations* of the just, reasonable and sufficient rates for utilities; and, under s. 67, under s. 71 the Commission *determines* whether an energy supply contract is in the public interest. These determinations are all of a final nature.

BCTC submits that the Commission's jurisdiction in the Inquiry is no different than the determinations it makes pursuant to the many applications it considers and determines under the *UCA*. The Commission is not offering policy advice, or recommendations to the government. Determinations are final decisions on issues within the Commission's jurisdiction, made within the parameters established by the *UCA*. The final nature of the determinations the Commission will make in the Inquiry is further reinforced by the reference to s. 75 of the *UCA* in s. 5(8):

(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).

5(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.

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

BCTC respectfully submits that the nature of the determinations the Commission will make in the Inquiry are analogous to the determinations the Commission makes in the various applications it has jurisdiction to hear and determine.

## 2.2 *Is the Duty to Consult Triggered?*

BCTC submits that the purpose of the Inquiry is to determine the need for electricity transmission infrastructure in the Province. Section 5(9) of the *UCA* provides that the Commission may compel future applications for Certificates of Public Convenience and Necessity ("CPCN") after making determinations in the Inquiry. In addition, the ToR provides that:

WHEREAS the long lead times associated with electricity transmission system development and the planning of the system to meet near-term needs can result in insufficient capacity, under-sized electricity transmission infrastructure, an

excessive number of transmission corridors and limitations on economic development in an area; and

WHEREAS a planned and rational expansion of the electricity transmission system that considers current requirements, the needs that will likely arise in the future, and the desirability of minimizing impacts in supplying these needs is in the best interest of British Columbians from a social, environmental, and economic perspective; and

.....

WHEREAS following the determinations made in the inquiry, applications for Certificates of Public Convenience and Necessity or other regulatory filings to be filed with the Commission under the *Act*, will be brought forward to pursue specific transmission projects to address the needs determined in the inquiry

The determinations that will be made in this Inquiry are strategic planning decisions. Unlike the strategic decisions made in *Haida*, it may be that no specific geographical area will be attached to a determination, given the “high level” and regional focus of the Inquiry, and it is, at this stage, difficult to assess which, if any, First Nation may be affected by a determination of need. It is also clear that such determinations are only the first step in the process of developing transmission infrastructure. However the Supreme Court of Canada in *Haida* confirmed that the threshold for triggering the duty to consult is low, and that a strategic decision that leads to future Crown decisions with potential adverse impacts on aboriginal rights and title can trigger the duty to consult. Although, few, if any specific impacts on asserted aboriginal rights or title will arise from the determinations made in the Inquiry, the Commission’s determinations of need may well lead to further applications by BCTC for specific transmission projects, relying on the determinations of need made in this Inquiry. BCTC therefore submits that the duty to consult is likely triggered.

### 2.3 *Scope of Consultation*

The scope of the duty to consult “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (emphasis added).<sup>8</sup> BCTC respectfully submits that the impact of the determination of need in the Inquiry is likely small, as it will determine only the need for, and not the specific routing or technological specifications of transmission projects.<sup>9</sup> Given these “high level” determinations, and the lack of geographic specificity that

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<sup>8</sup> *Haida* at para. 39.

<sup>9</sup> Paragraph 5 of the ToR prohibits these determinations, as does Order G-86-09, Ex. A-18, Attachment A, p. 3.

may be associated with a particular determination of need, the effect of the Commission's determinations in the Inquiry on any particular right or title claimed by a First Nation is likely small, and may not be identifiable at this stage of the planning process.

The scope of consultation in the Inquiry is likely therefore at the low end of the spectrum. BCTC respectfully submits that this may require BCTC and BC Hydro to provide notice of the evidence that they intend to file with the Commission, and to address issues that arise, all of which is contemplated through the parallel consultation process. In addition, First Nations must be provided the opportunity to participate in the regulatory process of the Inquiry, as is currently occurring.

It is not necessary for the Commission to make a final and categorical decision at this time with respect to the appropriate scope of consultation. The scope of consultation may change as new information arises, regarding the nature of the determinations to be made, and the potential impacts on asserted aboriginal rights and title. However, at this time given the nature of the Inquiry, it seems likely that the obligation is at the low end of the spectrum, because a determination of need is unlikely to have an identifiable and significant impact on any First Nations aboriginal right or title.

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

In answering the Inquiry Panel's second question, BCTC submits that the Commission itself does not and cannot have an independent duty to consult, and that the duty to consult can be fulfilled by BCTC and BC Hydro consulting with First Nations, the Commission's process itself, and, if required, by the Commission assessing the adequacy of that consultation.

#### *3.1 Does the Commission have an independent duty to consult?*

BCTC respectfully submits that the Commission is a quasi-judicial tribunal, with obligations of impartiality, and it cannot therefore have an independent duty to consult.

In *Quebec (Attorney General) v. Canada (National Energy Board)*<sup>10</sup> the Supreme Court of Canada concluded that the function of the National Energy Board (NEB) is quasi-judicial and therefore it did not owe a duty to consult and accommodate First Nations:

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<sup>10</sup> [1994] 1 S.C.R. 159 at 183.



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. ...

...

[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.

A quasi-judicial tribunal is no more able to carry out an independent duty to consult and, if appropriate, accommodate, than to fulfill the fiduciary duty discussed in the *National Energy Board* decision. To do so would result in some participants being treated preferentially to others, as evidence received through consultation would not be subject to the same procedural and evidentiary safeguards that are applicable to evidence received from others. It is a fundamental principle that a quasi-judicial tribunal must conduct its functions impartially and that its proceedings must be fair to all parties.

BCTC respectfully submits the law is settled that the Commission is a quasi-judicial tribunal, and that it does not therefore have an independent duty to consult. However, during the Second Procedural Conference on June 24, 2009, several First Nation participants asserted that in the context of the Inquiry, the Commission is not engaged in a quasi-judicial function because there is no applicant, and it is acting as agent of the Crown in a policy-making function.<sup>12</sup> BCTC submits that the Commission is not a Crown agent. Nor does it cease to be a quasi-judicial tribunal simply because it is not determining an application. The case law demonstrates that whether a tribunal is acting in a quasi-judicial function depends on several factors, which are examined below.

The Supreme Court of Canada in *Canada (M.N.R.) v. Coopers and Lybrand Ltd.*<sup>13</sup> set out several factors to consider when determining if an administrative tribunal is quasi-judicial:

It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?

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<sup>12</sup> T22, T 33, T 51,

<sup>13</sup> [1979] 1 S.C.R. 495 at 504-5.

- (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (3) Is the adversary process involved?
- (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These are all factors to be weighed and evaluated, no one of which is necessarily determinative.

... One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis.

In *Apsassin et al v. BC Oil and Gas et al*,<sup>14</sup> Mr. Justice Cohen considered whether the British Columbia Oil and Gas Commission was quasi-judicial as part of the analysis to determine whether it had an independent duty to consult. Cohen J. compared the Oil and Gas Commission to the NEB, and found that the dissimilarities of the workings of the NEB and the Oil and Gas Commission were so great that they led to the conclusion that the Oil and Gas Commission did not perform a quasi-judicial role. In reaching this conclusion, Mr. Justice Cohen considered the process and procedure employed by the Oil and Gas Commission, as well as the independence and security of tenure of the commissioners. Unlike the NEB and the Commission, the Oil and Gas Commission was designated an agent of the Crown by statute, the commissioners were appointed at pleasure, and no hearing was required for the decision to be made.

As the Supreme Court of Canada indicated in *Coopers and Lybrand, supra*, the criteria that must be weighed to determine whether a tribunal must make its decisions on a quasi-judicial basis are neither exhaustively defined nor individually determinative. However, BCTC submits that the factors considered in the case law are generally tied to the nature of the final product of the exercise of the tribunal's functions (for example – whether a decision is contemplated and whether that decision will affect rights) and the nature of the procedures that are contemplated to fulfill the exercise of those functions (for example – whether evidence will be called, whether a hearing will be held) and that, accordingly, the analysis of the relevant criteria can be reduced to two key questions:

- (1) Is the Commission required to exercise an independent decision making function?

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<sup>14</sup> 2004 BCSC 92

(2) What are the procedural trappings by which it is to exercise its function?

BCTC respectfully submits that on a proper analysis of these questions it is clear that the Commission, in its conduct of the Inquiry, is acting quasi-judicially.

3.1.1 Is the Commission required to exercise an independent decision making function?

The Commission is acting as an independent statutory decision maker.

The Commission is exercising a statutory decision-making power in accordance with the provisions of the *UCA*. As discussed in section 2.1 above, the Commission must make determinations that are final in nature, similar to the determinations that it makes when it considers applications by public utilities. BCTC respectfully submits that s. 5 of the *UCA* and the ToR require the Commission to undertake an adjudicative function, as opposed to making recommendations, or taking on a policy-advising role. The *UCA* specifically provides that the Commission must make determinations:

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

[emphasis added]

The ToR specifies those determinations with more detail:

4. The Commission must make determinations respecting the need for, and timing of, additional transmission infrastructure and capacity, within the Determination Period, that would allow for:

- (a) the supply and delivery of electricity as assessed under paragraph 3; and
- (b) improved electricity transmission intertie capacity between British Columbia and the United States or Alberta that can be used effectively to permit continued optimization of the electricity system in British Columbia, and to support the export of surplus electricity as assessed under paragraph 3.

[emphasis added]

The ToR limit the Commission's jurisdiction to consider or not consider certain factors, as do ss. 45 and 71 of the *UCA* for applications regarding long-term purchase agreements and CPCNs.

The determinations the Commission will make in the Inquiry will indirectly, and possibly directly, affect the rights of parties. BCTC, BC Hydro and Fortis BC will be affected by the determination of need as it will impact the development of future generation and transmission projects.

### 3.1.2 Procedural Trappings

BCTC submits that the Inquiry procedures that are contemplated by the legislation, the ToR, and by the Commission and participants alike, all contemplate that the Inquiry will be conducted on a quasi-judicial basis.

#### (a) Public Hearing:

Section 86 of the *UCA* requires the Commission to conduct a public hearing whenever it is in the public interest. Paragraph 10(c) of the ToR allows the Commission to conduct “oral and written public hearings”. The Commission has decided that an oral hearing is required, which is scheduled for early March 2010.<sup>15</sup> The Commission will also make use of pre-hearing conferences and workshops in order to narrow the scope of the Inquiry, however, the hearing itself will be conducted in order for the Commission to receive evidence and submissions from participants. The Commission must also provide a written report at the end of the Inquiry setting out its determinations and reasons. Although participants have an opportunity to submit comments on the draft written report, the Commission is not obliged to accept the comments or modify the draft report. It is important to recognize that the Commission’s final product – a written report including determinations and reasons – is a decision, and not a recommendation or suggestions of policy considerations to the Minister.

#### (b) Evidence:

The Commission’s determinations will be based on the evidence that it receives and considers. The ToR instructs the Commission to hear evidence on issues that are relevant to the Inquiry from interested parties, and requires the Commission to consider specific evidence. In particular, paragraphs 7 to 10 of the ToR set out several forms of evidence the Commission must consider in the Inquiry:

- Paragraph 7 requires the Commission to have regard for the load-serving utilities’ (BC Hydro and FortisBC) most recently filed long-term resource plans, and consider “evidence regarding the load-serving utilities’ energy and capacity requirements under

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<sup>15</sup> Order No. G-47-09, Ex. A-7.

scenarios that in the Commission's opinion are reasonable, and reflect considerations detailed in paragraph 6, which may not be adequately addressed within the load-serving utilities' most recently filed long-term resource plan.”

- Paragraph 8 sets out the evidence the Commission must allow from the load-serving utilities, which is in addition to any evidence and submissions relevant to the Inquiry that the load-serving utilities may wish to provide. If the evidence is not adequately addressed in the most recently approved long-term resource plans, then the Commission must allow evidence from the load-serving utilities, regarding (a) “their electrical energy and capacity requirements during the Determination period;” (b) “the facilities they intend to construct, extend or expand, and the volume of purchases of electricity from other persons they would intend to make, in order to meet these requirements...”; and (c) “the most cost-effective sequence and most probable sequence of development, by geographic area, of the facilities and energy sources allowing for purchases referred to in paragraph 8(b)”.
- Paragraph 9 provides that the Commission must also “invite and have regard for evidence and submissions from the transmission service provider” with respect to the Commission’s determinations regarding the “need for, and timing of, additional transmission infrastructure and capacity”, and the Commission “must allow for transmission service providers to provide evidence and submissions on any other matter relevant to this inquiry” (emphasis added).
- Paragraph 10 provides that the Commission must “invite and consider submissions, evidence and presentations from any interested persons, including, without limitation, First Nations, communities, municipal and regional governments, other utilities, power producers, ratepayer groups and environmental non-governmental organizations”.

(c) The Commission’s Powers

Pursuant to s. 82 of the *UCA*, the Commission has the same powers in the Inquiry as it does in an application or complaint. This is reiterated in 10(b) of the ToR. The *UCA* provides the Commission with the powers to:

- (i) compel public utilities to provide the information the commission requires (s. 43);

- (i) make orders requiring any person to do or prohibiting a person from doing something the Commission has the jurisdiction to order (s. 73);
- (ii) require the taking of depositions (s. 74); and
- (iii) make orders, rules or regulations that may apply to a particular case or person, or generally (s. 88).

In addition, the *ATA* confers the following powers on the Commission, many of which resemble powers of the court:

- (iv) to create its own procedure and rules (s. 11);
- (v) to dismiss an application if a party does not follow the Commission's rules or procedures (s. 18);
- (vi) to compel witnesses to attend a hearing and give evidence, and to compel document production (s. 34);
- (vii) to call and examine witnesses, present evidence and submissions and conduct cross examination of witnesses, or to limit the examination or cross examination of witnesses (s. 38); and
- (viii) to find a witness liable for contempt, on an application to the Court (s. 49).

The Commission has exclusive jurisdiction in all cases for all matters in which jurisdiction is conferred on it, and its decisions are not subject to judicial review.<sup>16</sup> Section 79 of the *UCA* makes the Commission's findings of fact within its jurisdiction binding on other courts, and s. 101 provides that the Commission's decisions may be appealed to the BC Court of Appeal, with leave. As a result, the Court of Appeal may only review appeals of the Commission's decisions for errors of jurisdiction or law.<sup>17</sup>

(d) The Commission's Independence

The Commission is a statutory tribunal, independent of government or any participant. Members of the Commission are appointed on a merits based system for 2 to 4 year terms initially, and they may be reappointed for additional terms of up to 5 years. The Chair is appointed for an initial term of 3 to 5 years, with additional terms of up to 5 years. Members may only be terminated for cause by the Lieutenant Governor in Council.<sup>18</sup>

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<sup>16</sup> S. 105 of the *UCA*

<sup>17</sup> *Sierra Club of Canada (British Columbia) v. British Columbia Utilities Commission*, 2008 BCCA 98 at paras. 14-15.

<sup>18</sup> S. 2, 3, 8 of the *ATA*.

The commissioners and the employees of the Commission are prohibited from having an interest in a public utility.<sup>19</sup> They must also “faithfully, honestly and impartially perform their duties.”<sup>20</sup>

### 3.1.4 Quasi-Judicial Inquiries

The fact that the Commission is making determinations through an inquiry process, rather than through an application process, does not alter its quasi-judicial nature. The case law demonstrates that a tribunal conducting an inquiry is acting in a quasi-judicial capacity where the relevant criteria are present. In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al.*<sup>21</sup> Mr. Justice Paris applied the factors from *Cooper and Lybrand* in considering whether the Smith Commission Inquiry, which was constituted to review gaming policy in the Province, among other things, was acting in a quasi-judicial capacity. Paris J. held the Commissioner was acting in a quasi-judicial capacity: he held public hearings wherein witnesses testified under oath; rights were affected, and the adversarial process was employed.

In *Rigaux v. Gove*,<sup>22</sup> Madam Justice Allan considered whether the inquiry into the policies and practices of the Ministry of Social Services, arising from the death of Michael Vaudreuil, was quasi-judicial. Allan J. found that witnesses testifying under oath and in public, documents being filed as exhibits and the Commissioner’s own belief that he was conducting a quasi-judicial proceeding gave the inquiry a quasi-judicial nature.

In the Inquiry before the Commission, it is clear that participants will have different views and opinions as to how the Commission should make its determinations. A hearing will be held. Evidence will be submitted under oath. All participants are entitled to lead evidence, to make submissions, to cross-examine, to respond to submissions made by others, and to have that evidence and those submissions heard by a tribunal that is fair, impartial, and independent of any party.

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<sup>19</sup> S. 11 of the *UCA*.

<sup>20</sup> S. 30 of the *ATA*.

<sup>21</sup> 2004 BCSC 1597

<sup>22</sup> (1998), 155 D.L.R (4th) 716.

### 3.1.5 Conclusion

BCTC respectfully submits that the Commission's status as a quasi-judicial tribunal does not change because it is conducting an Inquiry as opposed to hearing an application. It is clear that the Commission is acting in a quasi-judicial capacity in conducting the Inquiry: the Commission's determinations have the potential to impact the load-serving utilities' and transmission utilities' obligations; the adversarial process is engaged by the procedures set for the Inquiry, which includes the presentation of evidence, cross examination and submissions; the Inquiry will be conducted by an oral hearing; the Commissioners are independent, and must act impartially; and, the Inquiry is conducted in accordance with the powers and procedures the Commission has for all proceedings.

### *3.2 Discharging duty to consult*

The Court in *Haida* explained that the honour of the Crown requires "the commitment... to a reasonable process of consultation."<sup>23</sup> As discussed in section 2.3 above, it is BCTC's submission that the scope of consultation in this instance is low. The Court in *Haida* describes what is necessary to discharge the duty at the low end of the spectrum:<sup>24</sup>

43 ...At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.

[emphasis added]

BCTC respectfully submits that the parallel consultation process that it will undertake with BC Hydro is a commitment to a reasonable process of consultation, exceeding the level of consultation that is required at the low end of the spectrum. As part of the Inquiry, BCTC and BC Hydro will be primarily responsible for much of the evidence that the Commission will hear, including evidence of future domestic demand scenarios, generation resource potential and the corresponding transmission requirements. The parallel consultation process will ensure that BCTC provides its Initial Evidence, which it is filing in September 2009, to First Nations so that it can discuss any concerns raised in response to the Evidence. The Final Evidence, to be filed in

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<sup>23</sup> *Haida* at para. 42.

<sup>24</sup> *Haida* at para. 43.

November 2009, and submissions made to the Commission will therefore be informed by and reflective of the consultation process.

Nor is the parallel consultation process the only means by which First Nations can make their interests, concerns and views available to the Commission. The Commission's process itself provides the opportunity for First Nations to receive, question, and provide evidence and to provide their views directly to the Commission.

BCTC also submits that the Crown has provided for a reasonable consultation process by expressing the Minister's expectations with respect to the consultation process by letter to BC Hydro and BCTC, and through the issuance of ToR that specifically require the Commission to invite and consider submissions, evidence and presentations from any interested person, including First Nations.<sup>25</sup> The Minister's expectations include supervision over the consultation process carried out by BC Hydro and BCTC, having instructed BC Hydro to: (1) develop a First Nations consultation plan for the Ministry of Energy, Mines and Petroleum Resources to review; and (2) submit a final First Nations consultation report to the Ministry, which must identify the First Nations that have been contacted and consulted, the information that was provided, the efforts made to consult, a list of concerns identified, and how those concerns were addressed. In addition, although the Minister has not asked BC Hydro to undertake consultations regarding the impact of the Commission's determinations at this time, he has asked that BC Hydro undertake these consultations should they be required for the purposes of any decision the Minister may make regarding a regulation under s. 5(7) of the *UCA*.

In conclusion, this is not a case where no consultation will occur, or where consultation is being deferred to a separate process or decision-maker. The parallel consultation process, coupled with the Commission's process and its obligation, if necessary, to decide consultation disputes, is a meaningful process of consultation for the Inquiry. This process will provide First Nations with: (a) adequate notice; (b) all the information necessary for meaningful consultation in a timely manner; (c) the opportunity to express concerns and interests to BCTC and BC Hydro, and have those concerns addressed by BCTC and BC Hydro; (d) the opportunity to make submissions and provide evidence to the Commission; and (e) assurance that the Commission will consider their submissions, and the consultation process and determine if the Crown's honour has been upheld. BCTC respectfully submits that this process maintains the honour of the Crown and fulfills the duty to consult.

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<sup>25</sup> ToR 10(a), and Exhibit B2-4.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF BRITISH COLUMBIA  
TRANSMISSION CORPORATION THIS 24<sup>th</sup> DAY OF JULY, 2009

by its Counsel Fasken Martineau Dumoulin LLP

*[Original signed by Peter D. Feldberg]*

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Peter D. Feldberg

*[Original signed by A.W. (Sandy) Carpenter]*

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A.W. (Sandy) Carpenter