



July 24, 2009

Erica M. Hamilton  
Commission Secretary  
British Columbia Utilities Commission  
Sixth Floor, 900 Howe Street  
Vancouver, B.C.  
V6Z 2N3

Dear Madam:

**Re: British Columbia Utilities Commission  
Order G-30-09  
2008 Long-Term Electricity Transmission  
Infrastructure Inquiry (“Section 5 Inquiry”)**

The IPPBC’s submissions, as set below, with respect to the two questions that the British Columbia Utilities Commission (“BCUC”) posed in Exhibit A-16 are relatively brief. The IPPBC has had the opportunity of reviewing BC Hydro’s (“BCH”) submission of July 23, 2009 and does not intend to duplicate many of the detailed points already covered by it.

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

The duty or the Crown to consult with First Nations generally arises when the Crown has knowledge of the potential existence of First Nation right or title and contemplates conduct that might adversely affect it<sup>1</sup>.

Although very unlikely, the BCUC could make determinations within the Section 5 Terms of Reference (“Terms”) that could adversely impact First Nations. However, as set out in Section 2 of these terms:

*“The general purpose of this inquiry is for the Commission to make determinations with respect to British Columbia’s electricity transmission infrastructure and capacity needs for a 30-year period, commencing from the date this inquiry begins (the “Determination Period”).”*

A close read of the Terms reveals that the BCUC will be engaged in a transmission planning exercise and not in a capital expenditure/construction approval process. In the Terms, the BCUC is expressly precluded from making any determinations on the merits of specific generation projects and routing or technological specifications of electricity transmission projects. It is at the practical level of capital expenditures/construction approval which the Crown’s duty to consult for the purposes of determining adverse impacts would most likely be properly undertaken and not at the “theoretical” planning level.

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<sup>1</sup> Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, paragraph 35. See tab 4 of BCH’s Book of Authorities



In the instance of the Section 5 Inquiry, the case law doesn't provide the clarity required to determine if the duty to consult arises. Because the duty to consult has been broadly construed, the possibility exists that the BCUC could make determinations under the Terms that could adversely impact First Nations. The IPPBC's view is that the duty to consult therefore exists. Even if this duty doesn't exist, the IPPBC's preference is to have hear the views of First Nations about transmission planning directly from them, at the earliest opportunity

**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?**

The duty of the Crown to consult must be undertaken by BCH and/or the British Columbia Transmission Corporation ("BCTC"). In this respect, BCH has said it is undertaking a First Nation's consultation process which it describes as "parallel". The IPPBC assumes the results will be filed in due course and become part of the hearing record subject to any issues of confidentiality.

The BCUC, as a quasi-judicial body<sup>2</sup> has no legal obligation to consult First Nations but the review process it has established for the Section 5 Inquiry is tantamount to consultation in order to determine adverse impacts on right or title. This is an additional layer of consultation and is a positive outcome for all concerned. There will be, amongst other things, opportunities for First Nations and other participants to file evidence, attend workshops, to make information requests, engage in cross-examination, call witnesses, file argument and comments on the Section 5 draft report. This would appear to be the most comprehensive form of consultation of any kind and is in addition to the consultation being carried out by BCH.

Technically there may be no "applicant(s)" for the purpose of the Section 5 Inquiry, but practically, i.e. time and expense, the data required to support the transmission planning exercise envisaged in the Terms rests with BCH and BCTC and to a lesser extent FortisBC Inc ("Fortis"). By necessity they are the applicants with only BCH and BCTC being representatives of the Crown. Any absence of an "applicant" does not impose a duty on the BCUC to consult in its own right.

For the purpose of the Section 5 Inquiry, the legal obligation to consult with First Nations resides with BCH and BCTC, with the BCUC being the body to determine whether this consultation has been adequately carried out.

Yours truly,

David Austin on behalf of the IPPBC

Cc: All participants

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<sup>2</sup> Quebec (Attorney General) v. Canada (National Energy Board) [1994] 1 S.C.R. at paragraphs 35-37, See tab 6 of BCH's Book of Authorities

