In the Matter of the *Utilities Commission Act*

Section 5 Inquiry

Long-Term Electricity Transmission Infrastructure

BCUC Hearing Order G-30-09

Joint Industry Electricity Steering Committee ("JIESC")

Written Response to the

Commission's Questions (dated 30 June 2009)

on

First Nation Consultation Issues

24 July 2009

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1. INTRODUCTION

1.1 This submission sets out JIESC's response to the two questions the Commission posed in its letter dated 30 June 2009[1], which were as follows:

1. What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Section 5 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 fulfil its legal requirements to hold an inquiry and complete its draft report by 30 June 2010?

1.2 This submission first responds to the questions in summary form, and then elaborates on the analysis in support of the responses.

2. SUMMARY OF JIESC'S RESPONSE TO THE QUESTIONS

(a) What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Section 5 Inquiry?

2.1 The Commission's determinations are important and may affect the planning of future CPCN applications, but they do not constitute a trigger for the duty to consult. The duty to consult arises as a result of the Minister's decision to call the inquiry as part of the overarching planning process. The Minister's decision initiates a strategic planning process that involves a Commission inquiry and will eventually lead to further Crown decisions on specific projects that are proposed for development. The Commission's determinations will play a role in the shaping of those decisions, but the determinations are at a high conceptual level at this stage and not specific to any project. Any Crown consultation related to those determinations will of necessity also be at a high conceptual level, but it cannot be undertaken by the Commission.

The Commission is acting in a quasi-judicial capacity in this inquiry and therefore does not owe any duty to consult in relation to the determinations that it will make during the course of this inquiry. While those determinations are important, the Commission must arrive at those determinations through an impartial process that maintains procedural fairness for all parties, consistent with the quasi-judicial nature of the proceeding.

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[1] Exhibit A-16.

(b) 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?

2.2 The Crown will be obliged to consult First Nations as the planning process evolves, and the scope and content of that consultation will evolve in a corresponding fashion. Any consultation at this stage will be preliminary, focussing on: notice of the planning process; preliminary gathering of information on First Nation interests; and establishing procedures to adjust the consultation as the planning evolves. The duty to undertake that consultation, however, does not lie with the Commission. It follows that the Commission need not prescribe the level or manner of Crown consultation. Those decisions are for other Crown entities.

The Crown may tailor the regulatory scheme to fit the consultation requirements of each different stage of the planning, and the Minister has done so by giving the following instructions:

- The Commission must invite and consider submissions, evidence and presentations from First Nations and others, and allow for comment on the draft report before the Commission finalizes it.

- BC Hydro must develop a consultation plan in collaboration with BCTC and FortisBC.

The Commission inquiry may assist the Crown's consultation by providing a well-structured forum to receive and collect information on First Nations interests. Although the Commission does not have a duty to consult, the Commission has a mandate to consider relevant information from First Nations on their interests and how those interests may affect the planning of future transmission infrastructure. The Commission's inquiry record and determinations will inform the Crown's consultation efforts. The current Terms of Reference (**TOR**) and the Commission process are sufficient for the purpose of the Commission's role.

3. ANALYSIS OF THE DUTY TO CONSULT IN RELATION TO THE INQUIRY

(a) When is the duty to consult triggered?

3.1 In the absence of a treaty or proven aboriginal rights or title, the Crown's duty to consult a First Nation arises if:

(a) the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right; and

(b) the Crown contemplates conduct that might adversely affect that right.[2]

3.2 In *Mikisew Cree*[3], the Supreme Court of Canada explained further that the threshold for triggering the duty is low, but the content of the duty is variable:

> The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43).

3.3 Since the Commission's inquiry considers the transmission infrastructure needs for all of the Province, the Commission will consider the needs of geographic areas that are subject to aboriginal rights (claimed or treaty). The question then is whether the Commission's determinations amount to Crown conduct that might adversely affect those rights within the *Haida* test. JIESC submits that the answer is no, for the reasons that follow.

3.4 The Commission is mandated to study the transmission infrastructure issues, receive input from interested parties (including First Nations), and then report to the Minister on what the Commission determines the electricity infrastructure needs are for the next 20 years. The Commission's determinations in this inquiry will inform future decisions on transmission infrastructure projects.

3.5 The Commission's report forms a basis for future action, but it does not constitute an authorization or approval of any kind. In fact, the TOR explicitly require the Commission's

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[2] *Haida v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511. (***Haida***), at para. 35. See also: *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director),* 2004 SCC 74 ("***Taku River***"), at para. 25.

[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, ("***Mikisew Cree***") at para 34.

determinations to remain at a high conceptual level and avoid any consideration of a specific project. For example, paragraph 5 of the TOR state that the Commission may not:

(a) make determinations on the merits of specific generation projects.

(b) make determinations with respect to the specific routing or technological specifications of electricity transmission projects.

3.6 The planning, review and development of transmission infrastructure projects will be for the future. Any consultation at this stage would, of necessity, be at a preliminary level consistent with the preliminary nature of the Crown's planning. Any consultation duty must also lie with a Crown entity other than the Commission.

(b) The Commission is exercising a quasi-judicial function

3.7 The relevant case law is clear that an administrative tribunal exercising a quasi-judicial function does not have a duty to consult. The leading case for this principle is the *NEB* case[4]. That case involved a grant of licences by the National Energy Board (**NEB**) to Hydro-Quebec for the export of electrical power to the United States. The Court held as follows:

> **35** 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.
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> **…**
>
> **37** 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. [underlining added]

[4] *Quebec (Attorney General) v. Canada (National Energy Board),* [1994] 1 S.C.R. 159, (1994), 112 D.L.R. (4th) 129 (***NEB***).

3.8 In reaching its decision, the Court cautioned that "[t]he 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."[5]

3.9 The recent decision by the B.C. Court of Appeal in the *Carrier Sekani* case, also reaffirms this principle in relation to the Commission specifically:

> [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.

3.10 This inquiry is unquestionably quasi-judicial in nature. The Commission has received a formal mandate and TOR to convene an inquiry and receive evidence on the specified issues. The process by which the inquiry is being conducted is formal and judicial, and incorporates the following attributes: rules of procedure; written evidence; pre-hearing discovery through information requests; a public hearing; *viva voce* testimony from witness under oath at the hearing; rights of cross-examination; an evidentiary record; and final argument. These attributes are judicial in nature and are designed to ensure procedural fairness in an adversarial process.

3.11 Any reasonable analysis of these attributes leads inescapably to the conclusion that the Commission is exercising a quasi-judicial function during this inquiry. Thus, the Commission does not have a duty to consult on First Nations' interests any more than a court does. To impose such a duty would compromise the Commission's impartiality and its ability to carry out this inquiry in a fair and reasonable manner. The Commission cannot grant special rights to any subset of participants.

3.12 This principle is not altered by the fact that there is no applicant because this process is an inquiry. The Commission's function is nonetheless quasi-judicial and is akin in nature to a reference to a court for a judicial ruling. While the determinations are important, any consultation in relation to the impact of the determinations can be undertaken by the Crown agents outside the inquiry process, but in parallel with the inquiry. Moreover, First Nations

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[5] *NEB* case at para. 34.

have an opportunity to express their interests and participate in the Commission determinations directly, as intervenors.

(c) How can the duty to consult be fulfilled?

3.13 In the *Haida* case, the Court explained the scope and content of the duty to consult will vary with the strength of the claim and the circumstances in which the duty is triggered.[6]

> At one end of the consultation 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.[7]
>
> At the other end of the consultation spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the relevant First Nation and the risk of non-compensable damage is high. In such cases, deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that First Nations' concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive nor mandatory for every case.[8]
>
> Other situations will lie between the two extremes of the consultation spectrum just described and every case must be approached individually. The Crown's duty to consult must be discharged with flexibility as the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the First Nations with respect to the interests at stake.[9]

3.14 Applying these principles to the current inquiry, the scope and content of the consultation should be at the low end of the consultation spectrum. The primary reason being that the potential for adverse impact at this early stage of the planning is negligible since only high level

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[6] *Haida*, at para. 37.
[7] *Haida*, at para. 43.
[8] *Haida*, at para. 44.
[9] *Haida*, at para. 45.

concepts are being considered. Accordingly, any consultation at this stage would be preliminary, focussing on: notice of the planning process and the inquiry; preliminary gathering of information on First Nations' interests; and establishing procedures to adjust the consultation as the planning evolves and more information is developed. Again, however, it is not the Commission's role to prescribe these details for other Crown entities.

3.15 In *Haida*, the Court explained that the Crown may tailor the regulatory scheme to fit the consultation requirements of different stages:

> 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.[10]

3.16 The Crown, through the Minister, has tailored a consultation process in relation to this inquiry and the over-arching planning process:

- The Commission has been instructed in the TOR (para. 10) to invite and consider submissions, evidence and presentations from First Nations and others. The TOR (para. 12) also allow for comment on the draft report before the Commission finalizes it; and

- BC Hydro has been instructed to develop a consultation plan in collaboration with BCTC and FortisBC.[11]

3.17 Together, these two approaches offer interested First Nations a reasonable opportunity to participate in a timely and meaningful way, and will assist the Crown in fulfilling its duty to consult even at this early stage of strategic planning:

- Although the Commission will not engage in bilateral consultations, the Commission inquiry provides a well-structured forum to receive and collect information on First Nation interests. The Commission has a mandate to consider relevant information from First

[10] *Haida*, at para. 51.
[11] Exhibit B2.4

Nations on their interests and how those interests may affect the planning of future transmission infrastructure.

- BC Hydro will engage in direct consultations with First Nations who would prefer to express their interests in bilateral discussions with BC Hydro. BC Hydro may then collect this information and reflect it as appropriate in its planning and submissions to the Commission.

4. CONCLUDING REMARKS

4.1 The Commission cannot engage in consultation because of the quasi-judicial nature of the inquiry. The Commission inquiry will fulfill an important role in collecting information on First Nations interests in the Provincial transmission infrastructure. Providing First Nations with a fair and reasonable opportunity to be heard in the inquiry will assist in fulfilling any duty to consult that may have been triggered by the initiation of this planning effort.

4.2 Since the planning is in the early stages and the Commission's determinations have yet to be made, the Commission procedures compensate the initial uncertainty by allowing First Nations the opportunity to be heard before the determinations are made and then again once again on the draft determinations before they are finalized.

4.3 Direct consultation may also be undertaken by BC Hydro and other Crown entities at any time throughout this process.

4.4 Finally, these early efforts by the Crown to inform itself on First Nation interests are the beginning, not the end. Since we do not yet know how and when First Nation interests may be affected, this preliminary consultation framework matches the nascent nature of the planning.

All of which is respectfully submitted on behalf of JIESC by its counsel this 24th day of July 2009.

Brian Wallace, Bull, Housser & Tupper LLP

APPENDIX A – LIST OF AUTHORITIES

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

Haida Nation v. British Columbia (Ministry of Forests) (2004), 3 S.C.R. 511.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388.

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159, (1994), 112 D.L.R. (4th) 129.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.