IN THE MATTER OF
the *Utilities Commission Act*, R.S.B.C. 1996, Chapter 473

and

An Inquiry into British Columbia's Electricity Transmission Infrastructure and Capacity Needs for the Next 30 Years

Submitted on behalf of:

Nlaka'pamux Nation Tribal Council,
Okanagan Nation Alliance,
shíshálh Nation, and
Tahltan Central Council

By letter dated June 30, 2009 (Ex. A-16), the Commission invited submissions on two 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?

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 by June 30, 2010?

The Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation, and the Tahltan Central Council (collectively "the Nations") jointly make the following submissions.

Introductory Comment and Summary of Position

The Terms of Reference ("TOR") for this Inquiry engage a broad and complex set of issues, and will have potentially far-reaching implications for the future of energy generation and transmission throughout the Province. In a nutshell, the Commission's determinations will establish a framework and road map for the scope and nature of future energy development throughout the Province of British Columbia well into the foreseeable future. These determinations inevitably require consideration of, amongst other things, the economic future of the Province, social and demographic patterns, interjurisdictional trade, technological developments, self-sufficiency and environmental policy. Similarly, these determinations will have very serious potential impacts on the Title and Rights of the Nations, and how their

respective territories may be used and developed – whether by themselves, by the provincial Crown, or by third parties – into the future.

Given the complexity and the significance of the issues in this Inquiry, the Nations say that the evolving legal and policy context concerning Crown-Aboriginal relationships is relevant for the Commission's consideration of how to proceed. Specifically, the Nations note the following:

- Throughout the Nations' respective territories, there is uncertainty as to the provincial Crown's assertion of unencumbered ownership and jurisdiction over lands and resources. By virtue of s. 91(24) and s. 109 of the *Constitution Act, 1867*, and s. 35 of the *Constitution Act, 1982*, reconciliation of the Crown's title with the Nations' title to the lands and resources in their respective territories is required, whether through Crown-Aboriginal negotiations or by court determination;

- Through the New Relationship Vision,[1] the provincial Crown has committed to relationships based on "recognition, respect, and accommodation of Aboriginal Title and Rights", establishing "processes and institutions for shared decision-making", and recognizing that Aboriginal title includes the "inherent right for [First Nations communities] to make decisions as to the use of the land". The provincial commitment to this Vision is one which seeks to move beyond the historic pattern of Crown denial that Aboriginal Title and Rights exist, to making decisions in a manner that recognizes the existence of Aboriginal Title, Rights, governments, laws, and jurisdictions.

Notwithstanding the law and these commitments, the Province developed and finalized the Commission's Terms of Reference without meaningful engagement with First Nations. This was an error, which the Nations submit must be remedied. The Commission must now take concrete steps to seek to establish a substantive, stable, and constitutionally adequate footing for the Nations' participation in the Inquiry.

[1] http://www.gov.bc.ca/arr/newrelationship/

As developed below, the Nations answer the Commission's questions as follows:

- There is a duty to consult and accommodate the Nations which must be met by the provincial Crown before any determinations can be made;
- The Commission, as a delegate of the provincial Crown, can and must discharge the duty in the context of the Inquiry;
- The consultation that is required is on the end of the spectrum calling for "deep consultation";
- Deep consultation requires, amongst other things, direct engagement with the Nations, a distinct process of engagement, a direct role for the Nations in decision-making, and substantive accommodations that address their concerns;
- Processes that may facilitate fulfilling the duty could include a First Nations Panel, direct meetings with the Nations in a distinct process, a direct role for the Nations in shaping and informing the content of determinations, and sufficient funding for the Nations' to ensure meaningful and timely participation.

Question #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 duty to consult and accommodate is triggered by the Inquiry.

In *Haida Nation*,[2] the Supreme Court of Canada ("SCC") confirmed that the duty to consult and accommodate is triggered when the Crown is aware of existing or asserted Aboriginal Title and Rights and contemplates a decision which has the potential to adversely affect those rights. This duty is based on the principle of the honour of the Crown:

> ... The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending

[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73

> on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (para. 27)

The SCC also confirmed that consultation and accommodation must take place at the strategic level because incremental strategic planning decisions have the potential to seriously affect Aboriginal Title and Rights. The SCC in *Haida Nation* explained this principle in relation to the Tree Farm Licence ("TFL") at issue in that case:

> I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a '20-Year Plan' setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ('A.A.C.') for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.
>
> The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims. (paras. 76 – 77, emphasis added)

In *Dene Tha'*,[3] the Federal Court found that "strategic planning" can be a process within which Aboriginal Title and Rights may be affected, even where such strategic planning "by itself ...confers no rights" with respect to a particular project. (para 108)

In *Squamish Nation*,[4] Konigsberg J. of the British Columbia Supreme Court explained the importance of having consultation begin at the "earliest stages of planning":

> The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions, Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project. This case illustrates the importance of early consultations being an essential part of meaningful consultation. (para. 74)

Pursuant to the TOR and the Scoping Decision,[5] the Commission's determinations can be summarized as providing a long-term "road map" for energy generation and transmission in British Columbia. This road map will establish the parameters for appropriate energy generation and transmission development within the various regions of the Province, and will address, amongst other things, the following:

(a) the need for and timing of additional transmission infrastructure and capacity that will allow for the supply and delivery of electricity based on the generation resources that will potentially be developed until 2039 and for improved electricity transmission intertie capacity with the United States and Alberta (TOR, s. 4)

(b) the consideration of, and presumably determinations with respect to, bulk transmission reinforcements based on general (not specific) path locations and developed in response to various scenarios (Scoping Document, p. 6)

(c) Defining the approximate cost of recommended transmission and the nature of the key drivers behind the needs for those facilities (Scoping Document, p. 6)

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[3] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354
[4] *Squamish Nation et al. v. The Minister of Sustainable Resource Management*, 34 B.C.L.R. (4th) 280
[5] Reasons for Decision on Scope, Appendix A to Order G-86-09

Such determinations clearly have the potential to seriously, adversely affect Aboriginal Title and Rights. In effect, the determinations will set the scope and nature of allowable energy infrastructure development within each of the Nations' Territories, and in so doing be a clear and important first step in the development of specific energy generation and transmission projects. At the same time, by setting out the parameters for energy infrastructure development, there will be a clear impact on the future of resource and other economic development in the Territories of each of the Nations. The determinations of this Inquiry are a form of Crown strategic planning and policy development which could have significant impacts on the Nations and their respective Territories for generations to come. The following examples – which are not exhaustive – illustrate how the interests and concerns of the Nations, including their Title and Rights, are engaged by the Inquiry:

- The Tahltan Nation's Territory is located in the north-west area of the Province, an area where there currently is extremely limited energy infrastructure. At the same time, there are at least eight major mine developments which third party proponents are exploring for development in Tahltan Territory, all of which require significant energy infrastructure, and which have the potential to radically change the landscape and impact Tahltan Title, Rights, culture, and way of life. The parameters set through the determinations in this Inquiry could shape and directly inform the scope of possible mining and other economic development by determining what modes and size of energy infrastructure may be available.

- The Okanagan Nation and Nlaka'pamux Nation are Nations whose respective Territories lie within the Interior of the Province where there are significant existing energy works and infrastructure. This existing infrastructure is a source of existing and ongoing impacts and infringements of Okanagan and Nlaka'pamux Title and Rights. These impacts and infringements have never been the subject of consultation or accommodation, a fact recently noted by the B.C. Court of Appeal in *Kwikwetlem*.[6] A clear pattern in energy planning to date by BC Hydro and the Province has been to seek to exploit existing energy infrastructure, and the impacts and infringements that

[6] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at para. 50

have resulted from that infrastructure. For example, BC Hydro is seeking to construct the Interior to Lower Mainland transmission line on the existing hydro right of way without addressing the existing and ongoing impacts and infringements, or measuring the cumulative impacts of either the existing transmission works or the proposed new works on Okanagan or Nlaka'pamux Title and Rights. The outcomes of this Inquiry will provide a framework for future energy infrastructure within the Territories of the Okanagan and the Nlaka'pamux that will necessarily involve consideration of the existing works as part of setting parameters for possible new works.

- shíshálh's Territory is coastal, including the Sunshine Coast, near the lower mainland, where there is significant and ongoing demand for energy and close proximity to export markets. Since the Province adopted its 2007 Energy Plan, and approved the expansion of Independent Power Production ("IPP"), almost every river of shíshálh Territory is subject to IPP proposals. Since that time shíshálh has consistently demanded that the Province and BC Hydro engage in a meaningful strategic level planning process regarding such IPP development, to help ensure a long term sustainable use of their resources, including appropriate land use planning regarding the transmission lines which would be necessary to enable IPP's. To date there was no provincial mechanism or commitment to such planning. This Inquiry, including its assessment of the potential for export, is clearly a significant step in such strategic level planning.

The Aboriginal Title and Rights of the Nations includes the right to make decisions regarding how the lands and resources of their respective Territories are used.

The duty must be discharged before any determinations are made.

It is established law since the decision of the SCC in *Haida Nation* that the duty to consult and accommodate must be fulfilled before a Crown decision-maker can make any determination that has the potential to adversely affect Aboriginal Title and Rights. Most recently, this principle was applied to decisions made by the Commission, when the B.C. Court of Appeal ruled in *Kwikwetlem* and *Carrier Sekani*[7] that the duty to consult and accommodate

[7] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67

cannot be deferred and that the Commission has to ensure that the duty to consult and accommodate is fulfilled before making any determination that has the potential to adversely affect Aboriginal Title and Rights. In the context of *Kwikwetlem,* where the Commission had sought to rely in its Certificate of Public Convenience and Necessity ("CPCN") decision on consultation that might take place in relation to a subsequent decision of the provincial Crown, the Court of Appeal stated:

> 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. (para. 65)

In other words, concomitant with a Crown mandate to decide is a mandate to ensure that the honour of the Crown has been upheld for the purposes of that decision.

It is also important to note that pursuant to the *Utilities Commission Act* (the "*Act*"), the determinations of the Commission may become enacted as regulations, and thus become a legislated framework for the long-term electricity generation and transmission future of the Province. Section 5(7) of the *Act* states that:

> 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 Section 4.

Consequently, it may be that the Commission's determinations under s. 5(4) (i.e., the determinations made as part of the Inquiry) will be 'locked in' by subsequent provincial regulation and may not be reconsidered, varied or rescinded by the Commission for an undetermined period of time. Such a possibility elevates the importance and necessity of ensuring that the Crown's duties owed to the Nations are fully discharged prior to the determinations being made. Simply stated, if s. 5(7) regulations were enacted, the Commission

would be rendered legislatively unable in the future to ensure that the duties of consultation and accommodation with respect to the determinations were met.

The Commission can and must discharge the duty to consult and accommodate.

In the circumstances of this Inquiry, it is clear that the Commission can, and indeed must, discharge the duty to consult and accommodate.

First, other than the Commission, BC Hydro is the only entity that has indicated it may have any role to play with respect to First Nations consultation and accommodation, it is established that BC Hydro currently has no mandate or intent to fully discharge the Crown's duty, and will not do so. In its letter of March 25, 2009 (Exhibit B2), the Government of British Columbia, makes clear that while it has directed BC Hydro to undertake a consultation process, this consultation is not in relation to Commission's determinations. As the government states, it "is not requesting B.C. Hydro to undertake consultation on the impact of the BCUC's determination at this time" (Exhibit 24). Rather, the letter clearly states that the Government has directed BC Hydro to consult on the narrow issue of "consultation with First Nations on the evidence and submissions presented to the BCUC by BCTC and B.C. Hydro". This consultation is directed at a potential Ministerial decision to enact regulations under s. 5(7) that may occur after the Commission concludes its Inquiry.

Second, pursuant to section 5(4) of the *Act* the Commission has been ordered to "conduct an inquiry to make determinations". This planning power and role was specifically given to the Commission through the *Utilities Commission Amendment Act*, 2008, Bill 15. In conducting such an inquiry the Commission is not playing an adjudicative or quasi-judicial role. The TOR make clear that the task is to conduct a long-term, strategic-planning exercise and make determinations regarding the need for and timing of additional transmission infrastructure and capacity, which will be recorded in a report that considers the input received from interested groups.

The Commission's function under s. 5(4) of the *Act* is very different from its functions under either s. 45 (CPCN) or s. 71 (approval of energy purchase agreements) of the *Act*. In these sections, the Commission is, through a quasi-judicial process, responsible for making decisions. In *Kwikwetlem*, at para. 65, the Court noted that, in making a CPCN decision, the Commission

functioning as "a decision-maker is called upon to approve a Crown activity", i.e., BC Hydro's application for a CPCN. This is not the case in the Inquiry, where there is no applicant or proponent, and the outcome of the proceeding is a strategic long term plan to inform specific energy project decision-making over the long term.

This clearly distinguishes this Inquiry from the circumstances in *NEB*.[8] *NEB*, which was decided 10 years before the SCC established the law on the duty to consult and accommodate in *Haida Nation*, stands for the proposition that a quasi-judicial body fulfilling an adjudicative function cannot also discharge the Crown's fiduciary obligation to Aboriginal people under s. 35 of the *Constitution Act, 1982*. The *NEB* decision, however, does not address the issue of whether an administrative tribunal acting in a non-adjudicative capacity may fulfill the Crown's duty to consult and accommodate.[9] In the Inquiry, the Commission is not acting in a quasi-judicial capacity and the Court's decision in *NEB* does not preclude the Commission from consulting and accommodating First Nations directly.

Question #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 by June 30, 2010?

Scope of Consultation

In *Haida Nation* the SCC confirmed that the scope and content of the Crown's duty to consult and accommodate falls along a spectrum, based on an assessment of two factors:

(a) the strength of the *prima facie* case for Aboriginal Title and/or Rights; and

(b) the severity of the potential infringement to Aboriginal Title and Rights.

Based on an assessment of these factors, the scope and content of the duty may fall on the "deep" end of the spectrum, or on a more moderate or low end.

Given the purpose, nature, and structure of the Inquiry and the potential long-term infringements resulting from the determinations, the Commission must proceed to develop a process that meets the requirements of deep consultation. There are both legal and practical

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

[9] The recent B.C. Court of Appeal decisions in *Kwikwetlem* and *Carrier Sekani* do not address the issue of the Commission's obligations under s. 35 of the Constitution because it was not raised by the parties.

reasons for taking this approach. The determinations potentially affect the Title and Rights of the Nations, and are being made in relation to the entire geographic extent of the Province. It is simply not feasible for the Commission to assess the strength of claim of every First Nation in British Columbia in this context. As such, the only sensible approach is for the Commission to proceed on the basis that "deep consultation" is required, so that the Commission, the Crown, and the general public may have confidence and certainty that a process is in place that may discharge the legal obligations. Failure to do so would set up the Inquiry to be undermined by uncertainty about whether the honour of the Crown has been met and whether the determinations are legally valid. This will result in further uncertainty for future Crown decisions that seek to rely on determinations that are legally vulnerable if the duty to consult and accommodate has not been discharged.

Elements of Consultation

Deep consultation was described in *Haida Nation* in the following terms:

> 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 Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases. (para. 44)

Some of the specific elements and indicia of meaningful consultation that have been identified by the courts include the following:

- Consultation is not just information gathering. "Consultation that excludes from the outset any form of accommodation would be meaningless." (*Mikisew)*[10] An aspect of this is that it must be shown that Aboriginal concerns can be "demonstrably integrated into the proposed plan of action". (*Halfway River)*[11]

[10] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69
[11] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470

- Consultation with First Nations may require a unique and separate process, not the same as the public or stakeholders process, which includes direct engagement with First Nations. (*Mikisew*)

- Consultation and accommodation must take place on an ongoing and interactive basis between First Nations and the Crown decision-maker and it cannot be deferred to a later point in the decision-making process. (*Kwikwetlem*)

- Consultation must take place in a timely and effective manner. The Crown decision-maker cannot avoid its obligation to ensure that the duty to consult and accommodate was fulfilled by relying on the possibility of other forums for resolution of the issue such as the courts or treaty processes. (*Carrier Sekani*; *Kwikwetlem*)

- The core objective is to advance reconciliation. (*Haida Nation*)

- Decision makers must show how First Nation concerns and interests have been considered. (*Haida Nation*)

- There must be adequate resources for First Nations to fully participate in the consultation process. (*Cook*)[12]

In the context of this Inquiry, and in particular any decisions which the Commission will now make regarding the content and process for consultation with First Nations, the Commission must take into consideration the law, including the principle of honour of the Crown. The provincial Crown made commitments to First Nations in the New Relationship Vision (2005) that are to guide the relationship between the Crown and First Nations. The New Relationship Vision states:

> We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title "in its full form", including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed

[12] *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722

> by Section 35. These inherent rights flow from First Nations' historical and sacred relationship with their territories.

The Vision outlines a number of principles including the following:

- integrated intergovernmental structures and policies to promote co-operation, including practical and workable arrangements for land and resource decision-making and sustainable development;
- efficiencies in decision-making and institutional change;
- recognition of the need to preserve each First Nation's decision-making authority;
- financial capacity for First Nations and resourcing for the Province to develop new frameworks for shared land and resource decision-making and to engage in negotiations;
- mutually acceptable arrangements for sharing benefits, including resource revenue sharing; and
- dispute resolution processes which are mutually determined for resolving conflicts rather than adversarial approaches to resolving conflicts.

Process for Consultation

The question here is how the Commission should best conduct the Inquiry so that the consultation duty can be fulfilled.

It should be noted at the outset that proper engagement with First Nations is already late. First Nations should have been directly and meaningfully engaged in the development of the TOR, and the structuring of the process of the Inquiry. As such, the Crown has to date foreclosed the opportunity to pursue a process of consultation with the greatest chance of fully discharging the Crown's obligations and reflecting the principles of the New Relationship Vision – namely, a model of Inquiry where there was a TOR designed jointly with First Nations, and with First Nations' appointees within the Inquiry process playing a direct role in the making of determinations. This could have been achieved through a range of models, including having the

Commission working jointly with a parallel and equal First Nations panel of inquiry, or through exploring models of a joint commission of inquiry. Such models would have allowed for harmonization of First Nations and Crown decision-making processes, while ensuring that a comprehensive common information base was gathered that could help facilitate a collaborative and successful outcome.

Given the lack of early engagement and the apparent lost opportunities that result, the Commission must now make every effort to structure a process of consultation that will remedy this and lead to a positive and collaborative outcome consistent with the law.

In this respect, we note that the TOR provide the Commission with significant latitude to establish the necessary procedures and expertise to resolve specific issues. Section 10 provides that:

> For the purposes of conducting this inquiry,
>
> (a) must invite and consider submissions, evidence and presentations from any interested persons, including without limitation, First Nations, communities....; and
>
> (b) may use all the powers provided to it under the *Act;*
>
> (c) may make use of procedures to resolve specific issues within these Terms of Reference, including as it considers appropriate, workshops, mediations, dispute resolution mechanisms, pre-hearing conferences, working groups and oral and written public hearings; and....

Using this wide discretion, these Nations submit that the Commission can adopt a process comprised of the following elements.

First, the creation of a First Nations Panel that assists the Commission to develop necessary expertise on First Nation issues, including the consultation and accommodation requirements, oversees the development and implementation of the engagement of First Nations in this Inquiry, and based on the interests brought forward by First Nations to the Commission,

directly works with the Commission to shape the Commission's determinations as they relate to matters of concern to First Nations. Some specific elements of the Panel could be as follows:

- The First Nations Panel is not itself a holder of any Aboriginal Title and Rights, and as such it is not a body with which consultation and accommodation may take place. It would assist and help the Commission on First Nation specific issues which are identified, scoped and developed within this Inquiry, and to help facilitate the discharge of obligations owed directly by the Crown to First Nations.

- The First Nations Panel members would be appointed through a process involving recommendations provided by First Nations, and perhaps participation by regional Aboriginal organizations, and in accordance with a clear terms of reference for the work of the Panel members.

- The terms of reference for the First Nations Panel would specifically outline how the Panel will interact with the Commission, including how the Panel will play a role in the Commission ensuring honourable engagement by the Commission and formal first nation participation in the decision making process.

- The First Nations Panel may also be charged with assisting the Commission in developing a collaborative approach amongst the First Nation intervenors to minimize duplication of efforts and thereby increasing human and financial efficiencies.

- The work of the First Nations Panel would be fully funded by the Crown.

Second, the development of a transparent model for directly engaging First Nations at a community, nation and provincial level. The model could have the following elements, and the First Nations Panel could play a constructive role in each element:

- The Commission would schedule direct meetings with the Nations in their respective Territories to ensure that the scope of the Commission's potential assessments and potential determinations are understood, and that the Commission become informed of the issues of concern to the Nations, including on the potential

impacts and infringements resulting from such assessments and determinations. These direct engagement meetings need not be open to all Inquiry participants, but the information gathered would form part of the subsequent reports and decision-making.

- Once the potential impacts and infringements are identified through information gathering and scenario analysis, the First Nation intervenors, working collaboratively wherever possible, would be provided with the opportunity to develop evidence, including expert input on options for strategic level accommodations.

- A parallel process for First Nation scenario development would take place, in order to ensure that scenarios are developed which fully consider the options which First Nations have identified for their Territories, the potential impacts and benefits to their Aboriginal Title and Rights, and help to ensure that the Aboriginal perspective is properly explored and fully considered.

- Once all of the information is before the Commission it would engage directly with First Nation intervenors to exchange information regarding potential assessments and determinations which the Commission is considering. This might be done through another round of distinct First Nation meetings, or through a separate hearing process.

- The Commission would prepare draft assessments and determinations (with reasons), including those specifically related to the necessary consultation and accommodation related to the scenarios selected by the Commission, and provide the opportunity for First Nations to respond, including by specifically inviting alternative or amended determinations that may better address Title and Rights issues.

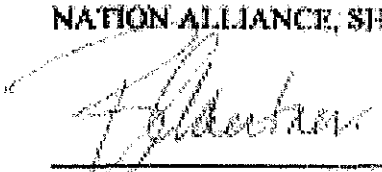
- The Commission in making its final assessments and determinations would clearly identify the First Nation concerns and interests and explain how these have been addressed and accommodated.

Timing for Inquiry

The threshold issue for the Commission is to decide on the scope and nature of the constitutional obligations in this Inquiry, and the process for discharging those obligations. Neither the obligations nor the process can be defined by reference to the June 30, 2010 deadline imposed by the Minister. Having said that, the Nations are committed to fully engage in a process of consultation, such as the one outlined above. Funding for the Nations' participation is an essential component of meaningful and timely engagement.

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

ON BEHALF OF THE NLAKA'PAMUX NATION TRIBAL COUNCIL, OKANAGAN NATION ALLIANCE, SHÍSHÁLH NATION, AND TAHLTAN CENTRAL COUNCIL



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