BC hydro

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31 July 2009

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

Dear Ms. Hamilton:

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

**Reply Submissions of BC Hydro**

Pursuant to the BCUC's letter of 30 June 2009 (Exhibit A-16), BC Hydro attaches its Reply Submissions.

If there are any questions regarding the attached, please contact the undersigned.

Yours truly,

Ken Duke
Solicitor and Counsel

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

# BC HYDRO

# 2008 LONG-TERM ELECTRICITY TRANSMISSION INFRASTRUCTURE INQUIRY

# REPLY SUBMISSION

31 July 2009

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## APPENDICES

Appendix: *R. v Douglas et al,*

British Columbia Hydro and Power Authority (**BC Hydro**) files this reply with the British Columbia Utilities Commission (**Commission**) in accordance with the Transmission Inquiry Panel's letter dated June 30, 2009[1]. BC Hydro replies to the following written submissions:

1. Association for Mineral Exploration of British Columbia (**AMEBC**) [Exhibit C28-3];
2. BC First Nations Energy & Mining Council (**BCFNEMC**) [Exhibit C1-8];
3. British Columbia Old Age Pensioners' Organization et al. (**BCOAPO**) [Exhibit C26-3];
4. British Columbia Transmission Corporation (**BCTC**) [Exhibit B1-6];
5. British Columbia Sustainable Energy Association and the Sierra Club of British Columbia, Forest Ethics, West Coast Environmental Law Association, The Pembina Institute, Dogwood Initiative and Canadian Parks & Wilderness Society – B.C. Chapter (**BCSEA et al.**) [Exhibit C10-4];
6. Commercial Energy Consumers Association of British Columbia (**CECBC**) [Exhibit C44-3];
7. FortisBC [Exhibit B3-4];
8. Hwlitsum First Nation [Exhibit C89-4];
9. Independent Power Producers Association of British Columbia (**IPPBC**) [Exhibit C59-4];
10. Joint Industry Electricity Steering Committee (**JIESC**) [Exhibit C6-3];
11. Ministry of Energy, Mines and Petroleum Resources (**MEMPR**) [Exhibit C60-2];
12. Nisga'a Lisims Government [Exhibit C77-2];
13. Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, shíshálh Nation, and Tahltan Central Council (**Okanagan et al.**) [Exhibit C97-3];
14. Sexqéltkemc: The Lakes Division of the Secwepemc Nation [Exhibit C79-3-1 and C79-3-2];
15. Squamish Nation, Lax Kw'Alaams Indian Band and Carrier Sekani Tribal Council (**Squamish et al**) [Exhibit C98-2];

[1] Exhibit A-16

16. Stó:Lō Tribal Council (**STC**) [Exhibit C72-4];
17. Toquaht Nation [Exhibit C103-2];
18. Treaty 8 Tribal Association [Exhibit C105-2]; and
19. We Wai Kai Nation and the Haisla Nation (**Haisla et al**) [ExhibitC83-3].

This reply is focused on what BC Hydro believes to be the major issues raised in the submissions in the context of the two questions identified by the Commission in its letter of 30 June 2009. If BC Hydro does not comment on a particular position or argument, it does not mean that BC Hydro accepts that position or argument. This reply will reference the relevant portions of BC Hydro's written submission dated 23 July 2009[2] (BCH Submission) to avoid repeating the arguments in this reply.

BC Hydro's reply is focused on three key issues:

1. The quasi-judicial nature of the Section 5 Inquiry and the duty to consult;
2. The nature and scope (or "depth") of the consultation obligation; and
3. How the duty will be fulfilled.

## Part 1: Quasi-Judicial Nature of the Section 5 Inquiry and the Duty to Consult

As noted in section 3.1 of the BCH Submission, the Supreme Court of Canada has confirmed that the existence of a Crown duty does not impose a corresponding duty on a quasi-judicial tribunal and the imposition of such a duty would be inherently inconsistent with the quasi-judicial function[3]. In 2009, the BC Court of Appeal affirmed that the Commission itself does not have a duty to consult.[4]

In section 3.1 of the BCH Submission, BC Hydro expressed the view that the Commission is a quasi-judicial tribunal in the context of this Section 5 Inquiry and does

[2] Exhibit B2-7.
[3] Quebec (Attorney) v. Canada (National Energy Board) Tab 6 of the BC Hydro Book of Authorities (exhibit B2-7).
[4] Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) Tab 7 of the Book of Authorities (exhibit B2-7)

not have a duty to consult. This position is supported by MEMPR, AMEBC, BCTC, FortisBC, JIESC, BCSEA, CECBC[5] and IPPBC.

A number of intervenors, however, take the position that the Commission is not a quasi-judicial tribunal in the context of this Section 5 Inquiry because of, among other things, the fact there is no applicant, the nature of the decisions (which some incorrectly characterize as recommendations or policy advice), and the strategic planning nature of the Section 5 Inquiry.[6] In reply, BC Hydro submits that the characterizations of the Section 5 Inquiry are either incorrect or are not determinative of whether or not the Commission is quasi-judicial in the context of this Section 5 Inquiry. For example, the Commission is not merely giving the Province "policy advice" (BC Hydro Submission, section 3.1.2.2D) or making "recommendations". Rather, the Commission is required, by the Terms of Reference, to make "determinations" which are equivalent to final decisions (BC Hydro Submission, section 2.1.1). The fact that the Section 5 Inquiry may be akin to strategic planning or that a particular project is not being advanced or that there is no formal "applicant"[7] is not determinative of whether or not the Section 5 Inquiry is quasi-judicial.

BC Hydro submits that the Commission is acting in a quasi-judicial capacity in this Section 5 Inquiry because it is making determinations (decisions) and the process itself is quasi-judicial. In this regard, BC Hydro agrees with the following comments by the BCSEA et al.:

> "...these characterizations of the Inquiry Panel's role are not determinative of whether the Inquiry Panel is carrying out a quasi-judicial function. Granted, the role of the Commission in carrying out the Inquiry under s. 5(4) is *different* than the role of the Commission in determining the application for a CPCN under s. 45 or the role of the Commission in reviewing an energy supply contract filed under s. 71. However, the fact that the Inquiry Panel's role is *different* than the Commission's role under s. 45 or s. 71 does not make the Inquiry Panel's role *not* a quasi-judicial

[5] CECBC takes the position that the Commission should not decide the issue but, if the Commission is inclined to decide the issue, CECBC supports BC Hydro's arguments.
[6] For example, Squamish et al., exhibit C98-2, page 5, section 3(d); Stó:Lō exhibit C72-4, page 4; Haisla et al., exhibit C83.3, section 1.2.4.2 page 11; Toquaht exhibit C103-2, page 8; Treaty 8 Tribal Assn., exhibit C105.1, pages 7-11.
[7] BC Hydro is of the view that BCTC, BC Hydro and FortisBC are akin to applicants in the circumstances of the Terms of Reference and this Section 5 Inquiry as it is contemplated that they will be providing the initial scenarios and evidence.

> function....In addition, it is granted that the Inquiry can be accurately described as a *type* of 'planning process,' but not the type of planning process that merely produces a non-binding 'plan' following public consultation. Rather, the Inquiry is a type of planning process that has at its core a statutory requirement that (a) the Inquiry Panel make legally binding determinations and (b) that these determinations result from a proceeding that utilizes, and complies with, a litany of powers and requirements set out in the *Utilities Commission Act* and the *Administrative Tribunals Act* that are the hallmarks of a quasi-judicial proceeding."[8]

Some intervenors suggest that the Supreme Court of Canada's 1994 *NEB* decision may no longer be determinative of the Commission's duty to consult, because it pre-dates the *Haida / Taku River*[9] decisions which are based on the "honour of the Crown" rather than fiduciary duties.[10] BC Hydro respectfully disagrees. Although the Supreme Court of Canada in *NEB* discussed the role of the National Energy Board in the context of the Crown's fiduciary duties, the crux of the concern raised by the Supreme Court of Canada was that imposing the Crown's duties on the Board was inherently inconsistent with the relationship of utmost good faith between the Board (as decision-maker) and the parties that appear before it. BC Hydro submits that this very important principle applies regardless whether the duty arises from a fiduciary obligation or the honour of the Crown, and applies to this Section 5 Inquiry.

Further, the honour of the Crown is a long-standing legal principle in the common law. The *Haida* decision confirmed that the honour of the Crown gives rise to different duties in different circumstances and makes it clear that the honour of the Crown may, depending on the circumstances, give rise to either (a) a fiduciary duty or (b) a duty to consult. In *Haida*, the Supreme Court of Canada stated:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems...The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, <u>*the honour of the Crown gives rise to a fiduciary duty*</u>: ... Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour

[8] Exhibit C10-4, page 9.
[9] BC Hydro Book of Authorities, Tab 4 and 11, (exhibit B2-7).
[10] Haisla Nation et al. exhibit C83-3, section 1.2.4, pages 8-17; Nlaka'pamux et al., exhibit C97-3, page 10.

> of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title. (emphasis added)[11]

In short, the "honour of the Crown" principle predated the *NEB* decision; it was not a principle that was developed in 2004 (the date of the *Haida* decision).

As noted earlier, the B.C. Court of Appeal affirmed this year – after the *Haida / Taku River* decisions - that the Commission does not have the duty to consult.[12]

As stated in section 3.1.2.2E of the BCH Submission, BC Hydro respectfully submits that it is necessary for the panel to decide whether or not it is a quasi-judicial tribunal in the context of the Section 5 Inquiry because if the Panel concludes that it is quasi-judicial it follows from the *NEB* and *Carrier Sekani* decisions that the Commission does not have an independent duty to consult with First Nations.

## Part 2: The Nature and Scope of the Duty to Consult

Some First Nations intervenors are of the view that the obligation to consult (regardless who has the obligation) is "deep" consultation in the context of this Section 5 Inquiry.[13]

BC Hydro agrees with the statement made by the Haisla et al that *"(w)e cannot prejudge the outcome of this Inquiry or the type of determinations the Commission may make as a result of this Inquiry*".[14] As noted in section 2.3 of the BCH Submission, it is unnecessary to make an early, preliminary and abstract determination on the scope of the duty to consult that is required in the circumstances of this Section 5 Inquiry. The scope and content of the duty (and whether it has been or will be fulfilled) should be considered in respect of the determinations under consideration by the Commission during the course of the Section 5 Inquiry and may be the subject of final argument in respect of specific determinations.

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[11] Tab 4 of the BC Hydro Book of Authorities, paragraph 17-18, pages 15-16, [Exhibit B2-7]
[12] *Supra,* note 4
[13] Nlaka'pamux et al., exhibit C97-3, pages 3-13; Treaty 8 Tribal Assn. exhibit C105-2, paragraph 69, pages 23-24.
[14] Exhibit C83-3, page 16

Nevertheless, as discussed in section 2.3 of the BCH Submission (page 9), BC Hydro respectfully submits that the determinations made by the Commission in the context of this Section 5 Inquiry are not likely to trigger "deep" consultation.

BC Hydro's view that the obligation to consult in the context of this Section 5 Inquiry is probably at the lower end of the consultation spectrum does *not* mean that BC Hydro is proposing a minimal consultation process (eg. mere notice with some exchange of information). In fact, as detailed in Part 3 of this reply, BC Hydro has developed a First Nations consultation process that is quite extensive given the circumstances of this Section 5 Inquiry and the nature of the determinations.

Perhaps most importantly, consultations with First Nations will not end once the Commission has issued its determinations. In accordance with paragraph 4 of the Terms of Reference, the Commission will not, in the context of this Section 5 Inquiry, be approving specific projects or transmission routes. There will, in all likelihood, be future applications to the Commission and other regulatory or permitting agencies in respect of options and specific projects. Such applications will, in all likelihood, involve further consultation with specifically affected First Nations. In the case of applications to the Commission, for example CPCNS, the Commission would presumably assess the adequacy of consultation at the stage of the Commission decision. Additionally, section 5(5)(b) of the *Utilities Commission Act* states that an inquiry must begin again six years after the conclusion of this Section 5 Inquiry, and every six years thereafter, unless otherwise ordered by the Lieutenant Governor Council.

Finally, a number of intervenors commented about consultation in the context of the development of the Terms of Reference (that is, before the Section 5 Inquiry was initiated) and after the Section 5 Inquiry is complete (that is, what the Province may do after the Commission makes its determinations).[15] BC Hydro respectfully submits that the Commission is bound by the Terms of Reference as written. And, as noted in section 2.2 of the BCH Submission (page 7), a subsequent decision of the Minister is not within the purview of the Commission.

[15] Sexqéltkemc, exhibit 79-3-1, page 1; Toquaht, exhibit C103-2, page 11; Treaty 8 Tribal Assn., exhibit C105-2, page 24; Squamish et al., exhibit C98-2, page 9, paragraph 39(e); Nlaka'pamux et al., exhibit C97-3, pages 2, 8-9, 13.

## Part 3: How the duty will be fulfilled

As stated in section 3.2 of the BCH Submission (page 19), the focus on *who* has the duty to consult and the nature and scope of the duty to consult in the context of this Section 5 Inquiry is asking the wrong question. The proper question is *what* is required to maintain the honour of the Crown in the context of this Section 5 Inquiry and the determinations the Commission may make?

### 3.1 Early Consultation

In their submissions, some intervenors stated that there is a requirement to consult early in the planning process.[16] It is notable that the consultations with First Nations about the development of the transmission system in British Columbia over the next 30 years are occurring at this very early stage in the planning process. First Nations are being provided with an opportunity, via the BC Hydro First Nations consultation process and the Section 5 Inquiry process, to influence the future direction of transmission development at a preliminary stage.

### 3.2 BC Hydro First Nations Consultation Process

As noted in section 3.2 the BCH Submission (page 20), it is the BC Hydro First Nations consultation process, complemented by the Commission's Section 5 Inquiry process that maintains the honour of the Crown. A number of intervenors suggested procedures or process attributes that the Commission should consider adding to the Commission process to facilitate adequate consultation.[17]

It may be useful to the Commission to summarize the BC Hydro First Nations consultation process because, in BC Hydro's view, a number of the process attributes

[16] Toquaht, exhibit C103-2, pages 3-4; Squamish et al., exhibit C98-2, pages 3-4; Nlaka'pamux et al., exhibit C97-3, pages 3-7; Haisla et al., exhibit C83-3, page 18

[17] CECBC, exhibit C44-3, page 2; FNEMC, exhibit C1-8, pages 7-8; BCOAPO, exhibit C26-3, page4; Sexqéltkemc, exhibit C79-3-1, page 5; Treaty 8 Tribal Assn., exhibit C105-2, pages 27-28; Toquaht exhibit C103-2, page 11; Hwlitsum, exhibit C89-4, pages 3-8; Squamish et al., exhibit C98-2, pages 12-13; Nlaka'pamux et al., exhibit C97-3, pages 11-16; Haisla et al., exhibit C83-3, pages 19-22.

requested by intervenors are already incorporated into the BC Hydro First Nations consultation process:

- The BC Hydro First Nations consultation process is a distinct and separate process specifically established for First Nations;

- BC Hydro has retained a neutral facilitator, Mr. Dan George. Mr. George is providing advice to BC Hydro to ensure that processes accurately reflect the interests of First Nations, and Tribal Councils and First Nation Organizations. Mr. George is also available to meet with First Nation participants as requested;

- BC Hydro is providing notice, information and regular updates to all First Nations, Tribal Councils and First Nation organizations in B.C.;

- Throughout the process, BC Hydro is providing regular updates to the Ministry of Energy Mines and Petroleum Resources including bi-weekly reports which will be filed as a matter of course with the Commission;

- BC Hydro is making available participant and travel funding to First Nations, Tribal Councils and First Nation organizations such as the FNEMC to assist with the cost of attending and participating in BC Hydro's regional consultation workshops and meetings. In addition, capacity funding will be made available within an established set of funding principles for study and technical funding for First Nations, Tribal Councils and First Nation organizations. This funding is in addition to participant funding available from the Commission to participate in the Section 5 Inquiry hearing process;

- BC Hydro is developing a comprehensive consultation record including the identification of concerns, issues and interests raised by First Nations;

- BC Hydro and BCTC will provide, to the extent possible and appropriate, meaningful answers to concerns, issues and questions raised by First Nations, either verbally (via workshops or direct discussions) or in writing;

- BC Hydro and BCTC have hosted First Nation workshops during June and July 2009 in nine different regions to introduce First Nations to the Section 5 Inquiry, the consultation process, and technical issues such as the transmission system and scenario development. The nine regions are:

    1. South Mainland West (Surrey)
    2. Mid-Coast and Northern Vancouver Island (Campbell River)
    3. Southern Vancouver Island (Nanaimo)
    4. South Mainland East (Abbotsford)
    5. Southern Interior East (Cranbrook)
    6. Southern Interior West (Kamloops)
    7. Northern Interior (Fort St. John)
    8. Central Interior (Prince George)
    9. North Coast (Prince Rupert).

  The nine regions are based on advice received from the FNEMC;

- BC Hydro and BCTC plan to host two additional workshops in each of the nine regions between September 2009 and February 2010. These workshops will focus on the initial and final BC Hydro and BCTC evidence to the Section 5 Inquiry;

- After each workshop, BC Hydro is making available a copy of the notes from the workshop on its website;

- BC Hydro and BCTC will be providing First Nations with an opportunity to provide input on the BC Hydro and BCTC evidence and, as appropriate, will incorporate those comments into the evidence before they are filed with the Commission;

- BC Hydro and BCTC are consulting with First Nations in respect of the development of "scenarios" for the Section 5 Inquiry and areas inappropriate for generation resource option development and will incorporate, as appropriate, the comments and interests of First Nations into the scenarios; and

- BC Hydro will be filing an interim consultation report in or about December 2009 and a final consultation report in or about May 2010 with the Commission which will provide information on the approach to the consultation and the input received from First Nations. The final consultation report will also provide information on how First Nations input informed the BC Hydro and BCTC evidence to the Section 5 Inquiry.

BC Hydro submits that the BC Hydro consultation process is extensive and comprehensive, is specific to First Nations, and provides First Nations with a meaningful opportunity to access information in a timely manner and to engage BC Hydro and BCTC.

Perhaps most importantly, the BC Hydro consultation process provides First Nations with an opportunity to comment on and influence the evidence of both BC Hydro and BCTC before the evidence is filed with the Commission.

Some intervenors noted that BC Hydro is only consulting about the BC Hydro and BCTC evidence and that BC Hydro has not been asked to consult about the determinations to be made by the Commission.[18] In reply, BC Hydro submits that the BC Hydro and BCTC evidence will form the large bulk of the pre-filed evidence in this Section 5 Inquiry. All of the evidence filed in the Section 5 Inquiry by participants will be publicly available and all intervenors, including First Nations who choose to participate in the Section 5 Inquiry, will have the opportunity to review and test the evidence via the Section 5 Inquiry process and to file their own evidence and submissions. In respect of the specific "determinations", BC Hydro submits that there is nothing meaningful to consult about at this point because the Commission has not made any draft determinations. Moreover, paragraph 12 of the Terms of Reference states that the Commission must provide the public – including First Nations – with an opportunity to comment on the *draft* determinations before the Commission finalizes its report and determinations. And while it is true that the Deputy Minister (MEMPR) has not, at this point, asked BC Hydro to

[18] Sexqéltkemc, exhibit C79-3-1, page 5; Squamish et al., exhibit C98-2, pages 4-5; Nlaka'pamux et al., exhibit C97-3, page 9.

consult with First Nations in respect of the determinations, the Deputy Minister has also stated that he may do so.[19]

### 3.3 Regional Focus

BC Hydro acknowledges that the BC Hydro consultation process is largely based on collective, regional meetings with First Nations rather than direct, bi-lateral meetings with individual First Nations. In their submissions, some First Nations have asked for or suggested direct, one-on-one consultations.[20] With respect, it is simply not practical for BC Hydro to meet on an individual basis with more than 200 First Nations and Tribal Councils, in an iterative manner (meaning at least two to three meetings with each First Nation and Tribal Council) over the course of these Section 5 Inquiry proceedings. BC Hydro has established, in good faith, a process based on nine regions in the Province. To the extent that individual First Nations wish to express their individual views to BC Hydro or BCTC they may do so and BC Hydro will, as appropriate, incorporate those comments into scenarios and evidence. Additionally, individual First Nations may always avail themselves of the opportunity to express their views directly to the Commission by way of their own evidence and submissions.

The 2007 BC Court of Appeal decision in *R v. Douglas*[21] is instructive on the issue of consulting with large numbers of First Nations that may have an interest in the subject matter of the consultations. In *Douglas*, Fisheries and Oceans Canada (**DFO**) developed a fishing plan for the Fraser River. There were 93 First Nation groups encompassing 30,000 people who had to be taken into account in developing the fishing plan because Aboriginal fishing rights were at stake. As a result, DFO consulted with First Nation organizations and groups of First Nations, providing some opportunity for individual First Nations to, for example, attend conference calls with other First Nations or groups of First Nations. The adequacy of this form of consultation was challenged.

[19] Exhibit B2-4
[20] Treaty 8 Tribal Assn., exhibit C105-2, page 24; Squamish et al., exhibit C98-2, pages 10-11; Nlaka'pamux et al., exhibit C97-3, pages 15-16; Haisla et al., exhibit C83-3, page 22
[21] R v. Douglas, 2007 BCCA 265, leave to S.C.C. refused, [2007] S.C.C.A. No.352 (QL). [Copy attached to Reply]

The Court of Appeal concluded that "joint" consultations were appropriate in the circumstances. At paragraph 40, the Court of Appeal stated:

> ...Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate. DFO provided the necessary information and technical assistance. DFO provided opportunities for the First Nations to express their concerns and resources to facilitate meetings. DFO adjusted the escapement target and exploitation rate in response to First Nations' concerns.

And at paragraph 46 the Court of Appeal quoted the following passage from *Haida*:

> The content of the duty to consult and accommodate varies with the circumstances...In all cases the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. (emphasis added).

BC Hydro submits that the conclusions by the Court of Appeal apply to this Section 5 Inquiry, particularly given that (a) BC Hydro is proposing to consult with every First Nation in B.C. and (b) in the context of any specific determination likely to be make by the Commission, the identify of specific First Nations or the extent of any potential adverse effects may be indiscernible or diffuse (BCH Submission, section 2.3, page 9).

### 3.4 Additional Process and Forums

As noted earlier, a number of intervenors expressed the view that the Commission itself has a duty to consult and, in the context of that position, have suggested process attributes that would ensure the Commission fulfills its duties. BC Hydro does not agree that the Commission has a duty to consult and, as such, it follows that the additional process attributes requested by First Nations are not necessary for that purpose.

However, even though BC Hydro is of the view that the Commission itself does not have a duty to consult, BC Hydro does not oppose modifications to the Commission process such as the addition of workshops or community hearings if the Commission believes that such forums would be useful in providing it with information that is relevant to the

Section 5 Inquiry. The Commission has a long history of using these kinds of forums and procedures as part of its hearing processes.

Any additions or changes to the Section 5 Inquiry hearing process, however, must be consistent with the legal principles of fairness and natural justice. BC Hydro does not agree that it is appropriate for the Commission to engage in bi-lateral meetings with First Nations, in the absence of other Section 5 Inquiry participants, as Nlaka'pamux et al. suggested,[22] as this would clearly be a breach of the principles of natural justice and could not be cured or remedied by providing some sort of written summary or report of the bi-lateral meetings after the fact. BC Hydro also submits that the Commission's legal obligation to act fairly and in accordance with the principles of natural justice applies equally to *all* Section 5 Inquiry participants. The fact that First Nations intervenors may assert constitutionally protected aboriginal or treaty rights does not mean that other Section 5 Inquiry participants should be treated differently from a procedural perspective. The Commission must be fair to everyone who participates in the Section 5 Inquiry.

### 3.5 First Nations Advisory Panel

A number of intervenors suggested that a form of First Nations advisory panel would be helpful to the Section 5 Inquiry process.[23] It is not entirely clear what the role or function of such a panel would be or whether it would be helpful to the Section 5 Inquiry. It would not be consistent with the principles of natural justice for an advisory panel to, for example, provide information or advice to the Commission unless all Section 5 Inquiry participants knew what information was provided to the Commission and had an opportunity to make submissions about, test, and reply to that advice or information. Certainly, the Commission could not delegate or share its decision-making authority with an advisory panel. As noted earlier, BC Hydro has retained an experienced and neutral facilitator who, in part, advises BC Hydro about its consultation process to ensure that the process reflects the interests of First Nations. The neutral facilitator is also available to meet with First Nations, without BC Hydro or BCTC present if that is the wish of the First Nation or Tribal Council.

[22] Exhibit C97-3, pages 15-16.
[23] Nlaka'pamux et al., exhibit C97-3, pages 14-15; Squamish et al., exhibit C98-2, page 12; Treaty 8 Tribal Assn., exhibit C105-2, page 27; Toquaht exhibit C103-2, page 11; Hwlitsum, exhibit C89-4, page 6.

### 3.6 Parallel Process/Phased Hearing

Finally, some intervenors have suggested a parallel or segmented process to address First Nation concerns as part of the Section 5 Inquiry.[24] As noted in section 3.2.1 of the BCH Submission (page 20), a separate process for First Nations is not legally required.[25] BC Hydro would not support an entirely separate hearing for First Nation's matters because it is unnecessary and raises challenging questions about how such a process would integrate with the existing hearing process. However, there is precedent at the Commission for structuring its hearing process so that particular phases or portions of the hearing deal with specific concerns or issues. Squamish et al. have suggested that evidence produced in a "First Nation scenario" should be subject of a specific portion of the hearing where such a model can be tested by First Nation intervenors, the Commission, and other participants. BC Hydro is not opposed to structuring the Section 5 Inquiry hearing process in such a way as to allow the Commission and participants at a particular phase or stage to focus on matters of interest or concern to First Nations, provided such matters are within the scope of the Section 5 Inquiry and the hearing is fair and consistent with the principles of natural justice. (eg. open to all participants, with full procedural rights).

[24] Nlaka'pamux et al., exhibit C97-3, pages 15-16; Squamish et al., exhibit C98-2, pages 7-8, and 12

[25] At paragraph 36 of their Submission (exhibit C98-2) the Squamish et al. refer to the *Mikisew* decision (BC Hydro Book of Authorities, Tab 5) for the proposition that a separate First Nations consultation process may be necessary. In *Mikisew*, the Federal Crown was purporting to exercise certain rights under Treaty 8 to "take up" surrendered lands and argued that it did not need to consult when exercising its treaty rights or, if it did have a duty to consult, that it had in fact consulted by way of, its general public consultation process with park users and subsequent discussions between the Federal Crown and the Mikisew. It is in that context that the Supreme Court of Canada stated that the Crown was required to consult with, and engage, the Mikisew directly and not as part of an *afterthought to a general public discussion with park users*. In the case of this Section 5 Inquiry, consultation with First Nations is clearly not an afterthought. BC Hydro has been asked by the Deputy Minister to consult with First Nations; BC Hydro is providing notice of its consultation process and the Section 5 Inquiry proceedings directly to all First Nations in B.C.; BC Hydro has established a comprehensive First Nations consultation process; and BC Hydro is consulting with First Nations as part of that process. The Commission does not have duty to consult with First Nations (whereas the Federal Crown (the Minister) had a duty to consult in *Mikisew*) and the Commission is not *legally* required to establish a separate process for First Nations (section 3.2.1 of the BCH Submission).

## Part 4: Conclusion

In summary, BC Hydro submits in reply:

1. The Commission is a quasi-judicial tribunal in the context of this Section 5 Inquiry and does not have a duty to consult with First Nations. The Commission's role is to assess the adequacy of consultation as a quasi-judicial decision-maker in the context of the determinations it will ultimately make;

2. BC Hydro submits that the obligation to consult is probably at the lower end of the spectrum in the context of this Section 5 Inquiry. Having said that, it is unnecessary to make an early, preliminary and abstract determination on the scope of the duty to consult required in the circumstances of this Section 5 Inquiry. The scope and content of the duty (and whether it has been or will be fulfilled) should be considered in respect of the determinations under consideration by the Commission during the course of the Section 5 Inquiry and may be the subject of final argument in respect of specific determinations; and

3. First Nations, via the BC Hydro First Nations consultation process and the Section 5 Inquiry, have been provided with the opportunity to influence the development of the transmission system over the next 30 years at a very early stage of the planning process. Many of the procedures and process attributes recommended by First Nations are already incorporated into the BC Hydro First Nations consultation process and the Section 5 Inquiry hearing process. And, in any event, consultations do not begin and end with this Section 5 Inquiry. There will be consultations

with affected First Nations in the context of future applications and projects and future inquiries under section 5 of the *Utilities Commission Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: 31 July 2009

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Per: _____
Ken Duke
Solicitor & Counsel

**COURT OF APPEAL FOR BRITISH COLUMBIA**

Citation: ***R. v. Douglas et al,*** 2007 BCCA 265

Date: 20070503

Docket: CA033869, CA033870, CA033871, CA033872

Between:

**Regina**

Appellant

And

**Kelly Ann Douglas**
**Todd Kenneth Wood**
**Frederick William Quipp**
**Howard Glynn Victor**

Respondents

And

**Sportfishing Defence Alliance**

Intervenor

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Thackray

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|---|---|
| Cheryl J. Tobias and Michelle S. Ball | Counsel for the Appellant |
| Hugh M.G. Braker, Q.C. and Anja Brown | Counsel for the Respondents |
| J. Keith Lowes | Counsel for the Intervenor |
| Place and Date of Hearing: | Vancouver, British Columbia 8 and 9 March 2007 |
| Place and Date of Judgment: | Vancouver, British Columbia 3 May 2007 |

**Written Reasons by**:
The Honourable Chief Justice Finch

**Concurred in by:**
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Thackray

**Reasons for Judgment of the Honourable Chief Justice Finch:**

## I. INTRODUCTION

[1] The Crown appeals from the acquittal of the respondents, all of whom are members of the Cheam First Nation, entered in the British Columbia Supreme Court on 17 February 2006, on summary conviction appeal from convictions in Provincial Court on 8 December 2004, on charges of unlawful fishing without the authority of a licence.

[2] At their trial the respondents' defence was that the regulatory requirement for a licence infringed their aboriginal right to fish for food, social and ceremonial purposes guaranteed by s. 35(1) of the ***Constitution Act, 1982***. The Crown admitted an infringement of the respondents' aboriginal rights, but contended that the infringement was justified under the test laid down by the Supreme Court of Canada in ***R. v. Sparrow***, [1990] 1 S.C.R. 1075.

[3] In setting aside their convictions, the learned summary conviction appeal judge (the "appeal judge") held that the Crown had not met the requirements for justification, in that it had failed to give priority to the Cheam's fishery, and had breached its duty to consult with the Cheam.

[4] The respondents Kelly Ann Douglas ("Douglas"), Todd Kenneth Wood ("Wood"), Howard Glynn Victor ("Victor") and Frederick William Quipp Jr. ("Quipp") were each convicted on one or more counts under s. 78 of the ***Fisheries Act***, R.S.C. 1985, c. F-14 for unlawful fishing without the authority of a licence, contrary to s. 26(1) of the ***Pacific Fishery Regulations, 1993***, SOR/93-54. Wood was also convicted on one count of unlawful possession of fish (salmon), contrary to s. 33 of the ***Act***. The charges arose from events in July 2000 and were set out in a single Information, sworn 21 December 2001.

[5] Convictions were entered on 8 December 2004 by the Honourable Judge Jardine in the Provincial Court of British Columbia. On 16 March 2005 Douglas, Wood and Victor were sentenced to pay fines. Quipp was sentenced to 30 days imprisonment.

[6] On appeal before Johnston J., all four successfully appealed from conviction and Quipp also appealed his 30-day sentence.

[7] Each of the respondents was found, on the basis of their admissions or, in the case of Douglas, as a result of findings of fact made at trial which are not now disputed, to have engaged in either the act of fishing, being in possession of the fruits of that endeavour, or both, without holding the required licences.

[8] The Crown agrees that the respondents have an aboriginal right to fish for food, social and ceremonial purposes. The Crown also admits that the ***Fisheries Act*** and the ***Regulations*** under which each was charged constitute an infringement of that right. The contentious issue is whether the Crown has justified the infringement pursuant to the test set out in ***Sparrow***, supra. Specifically, the issues on this appeal are:

> (1) Did the learned appeal judge misapply the test for justification by finding that the Crown did not give priority to the Cheam First Nation's fishery?
>
> (2) Did the learned appeal judge misapply the test for justification by finding that the Crown did not adequately consult with the Cheam First Nation?

[9] For the reasons that follow, I am respectfully of the opinion that the learned appeal judge erred on both issues, that convictions were properly entered by the trial judge in Provincial Court, that the Crown's appeal against acquittals should therefore be allowed, and that the appeal of Quipp's sentence should be remitted to the British Columbia Supreme Court.

## II. BACKGROUND

[10] In late June and early July each year, sockeye salmon migrate from the Pacific Ocean through the Fraser River watershed to their spawning grounds. This appeal concerns a discrete group of migrating sockeye, called the "Early Stuart run", and the measures taken by the Department of Fisheries and Oceans ("DFO") to manage those and other salmon stocks. In particular, the dispute relates to DFO's decision to open a marine sport fishery permitting retention by non-aboriginal fishers of Early Stuart sockeye from 4-9 July 2000, when there were restrictions on the aboriginal fishery.

[11] Jardine P.C.J. set out the background as follows:

> [24] The case at Bar involves the Early Stuart run of Sockeye salmon. This run is significant to the Cheam people, as it is to the other people along the river, as the salmon migrate to spawn in North-Central British Columbia. First, it is the first run of Sockeye. Second, the Early Stuarts are highly desired and sought after by all First Nations' people due to its fat content and high quality.
>
> [25] Each year the Department of Fisheries and Oceans ("DFO") develops a fishing plan for salmon returning to the Fraser River. The fishing plan must take into account the history and escapement anticipated in the cycle of fish. The Fraser River planning commences in October of the previous year and Aboriginal groups are accorded a priority to ensure their needs are met.
>
> [26] The planning is very detailed and quite complex. At the international level there is a treaty between Canada and the United States. The Pacific Salmon Treaty signed in 1985 made provisions for salmon enhancement programs and addressed concerns about Aboriginal priority.
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> [27] There are 93 Aboriginal groups or bands encompassing approximately 30,000 people who must be taken into account in developing the fishing plan. They are all to be considered and consulted. Infringements on their Aboriginal right to fish must be justified by government.
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> [28] On March 13, 2000, after a March 3, 2000 meeting with Cheam did not occur, DFO sent a letter to the Cheam Band, under cover of a letter to all Fraser River First Nations, to initiate discussion and consideration of four main elements for the fishing plan for Sockeye in the year 2000. The four elements were:
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> 1. Development of a pre-season forecast.
> 2. Development of an escapement strategy.
> 3. Consideration of other factors which must be taken (i.e. buffers).
> 4. Allocation of the catch amongst sectors.
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> [29] Further correspondence was faxed on March 22, 2000, March 24, 2000, March 27, 2000, and April 13, 2000. The accompanying materials included escapement goals and the fishing plan being developed by DFO. Consultation and discussion was sought from all the First Nations.
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> [30] The biological evidence is that the Early Stuart run arrives in the lower river in late June to late July. The stocks are intermingled with Chinook in the early times and with Early Summer Sockeye as the Early Stuarts start to dwindle. The initial forecast for 2000 was 291,000 Early Stuarts.
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> [31] On May 3, 2000 DFO faxed a letter to the Cheam First Nation addressed to Chief Quipp. The Department sought discussions on Sockeye escapement goals and sought communication with the Cheam of the result of discussions with other First Nations on escapement goals and strategies and the development of a plan. It was made clear the

> Department wanted to work toward a resolution. There was disagreement as to what the floor figure of return should be. First Nations in the terminal areas wanted more fish on the spawning grounds. A figure of 90,000 had been suggested. The Department proposed a floor figure of 66,000. Some in the lower river wanted the number to be as low as 35,000. Following all the consultations DFO settled on a floor of 75,000.

[12] The appeal judge noted that the goal of 75,000 (the "escapement goal" or conservation target) was set with the objective of increasing the Early Stuart run stock in future years. One of the goals behind increasing the run was so that others, meaning non-aboriginals, might in the future have some opportunity to share in the resource (at para. 46).

[13] Jardine P.C.J. continued:

> [32] In the year 2000 the planners were concerned about the uncertainty of forecasts of returning Sockeye and about the high discharge levels of water in the river. Debris generated by high water levels leads to high numbers of en route and pre-spawning mortality. On July 3, 2000 the Fraser River panel approved an estimated run size up-grade to 300,000. By July 11, 2000 the panel up-graded the estimate to 350,000. Notwithstanding the increase in the estimate of numbers, only 90,000 Early Stuarts Sockeye reached their natal areas.
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> [33] In 2000, the DFO continued to apply a policy where the fish would be shared in the following order:
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> 1. Reaching the escapement goal.
> 2. Fish for ceremonial purposes.
> 3. Sharing amongst the Fraser River Basin Aboriginal groups.
> 4. Other groups including commercial and sports fishers.
>
> [34] Pursuant to this policy the DFO provided the Cheam First Nation with a communal licence to fish from 1800 hours June 30, 2000 to 1800 hours July 2, 2000. Another licence ran from 1800 hours July 7 to 1800 hours July 8, 2000. They also authorized a fishery from 0800 hours to 1800 hours on July 8, 2000 from the Port Mann Bridge to Mission. A fishery was also authorized from 1200 hours July 15, 2000 to 1800 hours July 15, 2000. The DFO also permitted dry-rack fisheries from Sawmill Creek to Hope, seven days per week from June 29, 2000 to July 16, 2000.
>
> [35] The Cheam First Nation communicated their disagreement with the policies of DFO. They took the position the DFO had to give them priority and if there was an opening to any other group, the Cheam were entitled to fish. It was also their stated position they did not agree with the DFO policy on escapement goals and targets. Kelly Ann Douglas expressed her view clearly to the fisheries officer on July 5 when she said, "We are Cheam, we don't need a licence". Frederick William Quipp takes direction from the Cheam Council Fishery Committee through conversation with his mother Chief June Quipp. His view was clearly expressed. He said he fishes when there are fish in the water. Todd Kenneth Wood reports to the Band council and is a fishing partner of Mr. Quipp. They do not consider themselves accountable to DFO or to the licencing provisions set down by DFO as to fishing gear or equipment. Howard Victor relied on word of mouth and conversation with band members. He ignored DFO.

[14] The trial judge heard testimony from DFO that: as the Early Stuart run of sockeye salmon progressed, estimates of its size or strength increased, and it was determined by DFO that there would be some opportunity for sport or recreational fishers, fishing on the ocean, to retain Early Stuart sockeye that were caught while these fishers were fishing for chinook during an opening for that latter fishery; DFO decided to open the marine sport fishery to permit retention of sockeye salmon between

4-9 July 2000; DFO expected that less than 400 to 500 Early Stuart sockeye would be retained by the recreational or sport fishers; DFO estimated the ultimate catch to be 200; no commercial fishery was permitted; and the in-river sport fishery was left open but there was a non-retention policy with respect to Early Stuart.

[15] The fishing activities described in the Information occurred on 5 July 2000 (Douglas), 7 July (Quipp and Victor), and 13 July (Wood and Victor).

[16] It is not disputed that the respondents have an aboriginal right to fish for food, social and ceremonial purposes and that the conservation measures imposed by DFO constitute a *prima facie* infringement of that right, as protected by s. 35(1) of the ***Constitution Act, 1982***. The respondents contended at trial and on appeal before Johnston J. that the Crown has failed to justify the infringement of their aboriginal fishing rights under the second step of the ***Sparrow*** test, namely that DFO's decision to open the marine sport fishery at a time when there were restrictions on the aboriginal fisheries was not in accordance with the honour of the Crown because (1) it failed to give priority to the aboriginal right and (2) DFO made that decision without consulting the Cheam First Nation.

## III. THE TRIAL JUDGMENT

[17] Having found, on the basis of the Crown concessions, that there had been a *prima facie* infringement of the respondents' aboriginal rights, Jardine P.C.J. moved to the question of whether the infringement was justified under the ***Sparrow*** test.

[18] He concluded that the first part of the test was satisfied in that there was a valid legislative objective, namely conservation.

[19] The judge also held that the second part was satisfied; that is, he found that the honour of the Crown was upheld in the government's interpretation and application of its objective.

[20] On the question of priorities, Jardine P.C.J. accepted DFO's position that it did not believe it necessary to close the marine sport fishery to Early Stuarts because historically it has had very little impact on the stock and very few are caught (para. 45). He concluded that:

> [46] I am also satisfied that the allocation of the Early Stuart fishery by DFO was appropriate in the circumstances and was in keeping with the special trust relationship which must exist between the Government and Aboriginal Peoples. The Cheam hold the view that if anybody is allowed to fish, the Cheam Band is allowed to fish. It is the Court's view that those beliefs are untenable. The Cheam are a part of the people of the whole of the river and they do not have rights exclusive of the needs of others. Their rights must be balanced with the rights of others. They cannot claim a right to an abundance of the fish which happen to swim by the traditional Aboriginal territory of any particular Band.
>
> [47] With respect to those fish, the Cheam have no more than a constitutionally protected Aboriginal right to fish, and that same right extends to all other Aboriginal bands on the Fraser River, and in fact to Aboriginal bands on Vancouver Island, who may have some access to the same fish. The Crown, and their managing body, the DFO, have a fiduciary duty to all Aboriginal peoples.
>
> [48] It was therefore fair and appropriate for the DFO to allocate the resource of Early Stuarts as they did. They were entitled to take into account the importance of the Early Stuart for ceremonial purposes, such as funerals and weddings, as well as the importance of the Early Stuarts for the dry-rack fishery in the lower part of the Fraser River. They were also entitled to take in account the fact that the bands in the Stuart River area have access to very few runs of salmon, whereas the Early Stuarts comprise

only a small percentage of the salmon available each year to the Cheam Band.

> [49] ... In my view the approach taken by DFO was reasonable given the number of persons they have to consider and the variables which they had to take into account. The measures taken were reasonable in my view.

[21] Nor did the trial judge accept the respondents' submission that the Cheam's consent was required as part of the duty to consult in this case. He held that DFO's failure to consult or even inform the First Nations of the marine fishery opening was a breach of the Crown's fiduciary duty. However, "in the context of the whole fishery, [it was not] a serious breach such that the limits on the Aboriginal right to fish are not justified" (at para. 72). On the whole, he concluded that DFO had adequately consulted the Cheam in 2000, and that the Cheam had been deliberately non-responsive to DFO's efforts. He summarized the evidence as follows:

> [63] The Cheam First Nation has withdrawn from the Sto:lo Nation in relation to fishing matters. The Cheam First Nation is not a part of the Fraser Watershed Aboriginal Fisheries Forum of the BC Aboriginal Fisheries Commission. Following the termination of the pilot sales program for sale of Aboriginal caught fish, the Cheam have taken the view they must be consulted separately. The Cheam have consistently asked to be consulted directly and for any meetings between DFO and the Cheam to be held at the Cheam Band Office.
>
> [64] Mr. Braker argued the DFO did not provide the Cheam First Nation with a fisheries management plan of Early Stuarts. He submitted the Cheam were provided with the Chinook Management Plan within which was a section on Early Stuarts. He said the Cheam were not consulted at all about the decision by DFO to open marine recreational fishing for Early Stuarts in early July.
>
> [65] DFO did not meet directly with the Cheam in 2000. A meeting was set for March 3, 2000 but did not take place, although DFO went to the Cheam Band Office. The Cheam had been sent information on the Fraser River Sockeye Outlook 2000 in advance of the scheduled meeting. Further attempts were made by DFO but no meetings took place despite efforts by DFO requesting direct consultation. In 2000 DFO provided First Nations, including the Cheam, with information regarding escapement goals, the Chinook Fisheries Management Plan, the Integrated Fisheries Management Plan, and on May 3, 2000 made a request for Chief June Quipp to engage in direct consultation on the fishing options being considered and the positions taken by other First Nations during discussions. He heard nothing further from Chief Quipp.
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> [66] In a letter dated May 16, 2000 to Chiefs and fishing representatives of First Nations, including the Cheam, DFO reported on consultations regarding the draft escapement goals and to provide notice of the escapement goals adopted by DFO.
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> [67] The process of consultation between the DFO and First Nations on the Fraser River is part of a continuum which has been in place since at least 1992. In 1992 DFO, in consultation with Aboriginal bands, entered into a Watershed Agreement. The Cheam were part of that agreement until 1997. Ernie Crey was the last Cheam fishing representative with whom DFO could say they met and consulted. Since 1997 Cheam have made it clear to DFO they are not part of the allocation agreements and that they do not consider notice to the Sto:lo, the Fraser River Watershed Forum, or the B.C. Aboriginal Fishery Commission, notice to them.
>
> [68] In the year 2000 the DFO gave notice to the Cheam of their meetings with other First Nations groups. DFO also receives input from the Fraser River Sockeye Panel, the Pacific Salmon Commission, and groups of First Nations, The DFO gave notice to the Cheam of the information received from those groups. The Cheam were invited to take part in conference calls with other First Nations, or with groups of First Nations. Cheam

did not attend or take part in the general discussions.

[69] The Cheam Band, despite those efforts, chose not to consult or discuss their issues with the DFO. They informed the DFO they did not agree with the limits placed on the Cheam and they would fish according to the decision of their band. They refused to accept the licensing and regulatory limits placed on them by the DFO.

[70] I agree with Mr. Braker the Cheam Band was not consulted or informed directly of the opening of the Marine fishery to retention of Sockeye in early July. Nor was any other of the affected Aboriginal bands. This was a breach of the fiduciary duty of DFO.

[71] Following the termination of the pilot sales agreements the Cheam and DFO have been at odds. The relations between them have been strained and reflect apparent conflicts. There is no common ground as to conservation, consultation, communication means, escapement goals, or Cheam needs. The Cheam have not communicated their needs to DFO in concrete terms. They did not respond to requests to do so in 2000.

The trial judge concluded as follows:

[72] I find on the whole of the evidence, and having regard to the tests articulated in the case law, that adequate and comprehensive consultation did take place in 2000 with the Cheam. The failure to inform about the marine opening for Sockeye retention was not, in the context of the whole fishery, a serious breach such that the limits on the Aboriginal right to fish are not justified.

[73] It is my view that the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed. Their failure to respond to repeated entreaties to meet, or consult, or respond, leads to the inescapable conclusion they simply want to frustrate the consultation process. In my view, while not perfect, the DFO has made reasonable and good-faith efforts to consult.

[22] Jardine P.C.J. was satisfied that the Crown had justified the infringement of s. 35(1) of the ***Constitution Act, 1982*** and convicted the respondents.

## IV. SUMMARY CONVICTION APPEAL

[23] The respondents appealed on numerous grounds, only two of which were given effect by Johnston J. A review of the unsuccessful grounds is unnecessary to the disposition of this appeal.

[24] Johnston J. concluded that the honour of the Crown was offended with respect to the priority of the aboriginal right in either the allocation by the DFO of the fish resource or the consultation by the DFO, both in relation to the marine sport fishery.

[25] Johnston J. disagreed with the trial judge as to whether DFO had afforded priority to the aboriginal right to fish for food, social and ceremonial purposes. He held:

[87] The appellants are quite correct when they argue that, where the Aboriginal right in issue is the right to fish for food, social or ceremonial purposes, there is a clear priority given to that right over non-Aboriginal recreational fisheries. This priority was first stated by Dickson J. in *Jack v. The Queen*, [1980] 1 S.CR. 294, and repeated by the court in *Sparrow*. Any possible doubt about the nature of the priority was removed by the court in *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 59:

> 59 Furthermore, the scheme does not meet the second leg of the test for justification, because it fails to provide the requisite priority to the aboriginal right

> to fish for food, a requirement laid down by this Court in *Sparrow*. As we explained in *Gladstone*, the precise meaning of priority for aboriginal fishing rights is in part a function of the nature of the right claimed. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met.

[88] There was other evidence given by Mr. Ionson that First Nations generally and the Cheam in particular had never agreed with the DFO as to what number of fish were necessary to satisfy the food, social and ceremonial needs of Aboriginal peoples in the Fraser River watershed.

[89] There was evidence that the DFO had no definition of food, social or ceremonial needs, although Mr. MacDonald thought there was some definition of that phrase in the *Fisheries Act*.

[90] The impression left from the evidence as a whole was that the DFO determined in early July 2000 that recreational sport fishers, fishing on the ocean, could catch and keep early Stuart sockeye because, in the opinion of the relevant DFO employee or employees, the food, social and ceremonial needs of the First Nations in the Fraser River watershed would be met, although there was no agreement nor any clearly articulated assessment of what those needs were.

[91] Given that the learned trial judge found that the failure to consult the Aboriginal peoples on the question of opening the marine sport fishery was a breach of the fiduciary duty of the Crown through the DFO, it is difficult to see how the opening of that fishery to non-Aboriginals at a time when the Aboriginal fishery was subject to closures could satisfy the honour of the Crown and could be found to have recognized the priority given to the Aboriginal food, social and ceremonial fishery in the authorities cited above.

[92] It is my view that the learned trial judge erred in finding that the priority accorded to the Aboriginal food, social and ceremonial fishery was met in this case.

[Emphasis added.]

[26] Johnston J. agreed that, generally speaking, the Crown made reasonable efforts to consult with the Cheam on the fishery conservation measures to be taken in 2000. He also pointed to the Cheam's non-responsiveness to these efforts.

[27] However, on the specific issue of the marine sport fishery, he held that the Crown's failure to at least inform the Cheam was fatal to its justification argument:

> [127] With respect to the DFO's failure to inform Aboriginal people, including the Cheam, of the marine sport fishing opening, I agree with the trial judge that was a breach by the DFO of its duty to consult. This is not a matter the seriousness of which should be measured by the number of fish caught by non-Aboriginal sport fishers. Because the honour of the Crown is at stake, this may be one of the rare occasions where indeed "the principle of the thing" may properly apply.
>
> [128] Where the Crown through the DFO has restricted the legal ability of Aboriginal people to fish for sockeye salmon, knowing that they are prized by Aboriginal people, the Crown through the DFO cannot permit non-Aboriginals to catch and keep some of those same fish without full and proper consultation. That was not done here, and it offends the honour of the Crown.

## V. THE PARTIES' POSITIONS

[28] The Crown emphasizes that the elements of the test for justification are to be assessed in each case according to what is reasonable in the circumstances. The Crown argues that the marine sport fishery opening was compatible with the overall fishing strategy, and therefore did not require specific

additional consultation. Nor, the Crown says, did it dilute the priority of the aboriginal food, social and ceremonial fishery. In support of its position that DFO acted reasonably in the circumstances the Crown points to the Cheam's refusal to participate in consultation despite repeated efforts by DFO, to the small number of Early Stuarts it anticipated would be caught by recreational fishers, and to the "insignificant" number actually retained by the sport fishery as compared to the ultimate harvest by the First Nations.

[29] The respondents say that this case is not about numbers but principles. They agree that the standard of reasonableness applies, but say that it was unreasonable for DFO not to consult with the Cheam on the opening of the sport fishery to retention of Early Stuarts where DFO knew that the Early Stuarts are highly prized by the Cheam. Similarly, the respondents take the position that DFO's decision to allow retention of Early Stuarts by the marine sport fishery was contrary to the legal principle of aboriginal priority vis-à-vis all other users.

[30] The intervenor is a coalition of associations "representing and advancing the interests of British Columbia recreational fishers." It supports generally the Crown's position but does so from the perspective of a user of the resource. It argues that the priority to be given to aboriginal fisheries must be interpreted and applied in a manner which accounts for and accommodates the realities of the British Columbia fishery and the rights and interests of all of its users.

## VI. DISCUSSION

A. How the issues developed:

[31] In ***R. v. Sparrow***, *supra*, the Supreme Court of Canada provided the analytical framework for determining whether aboriginal fishing rights had been interfered with in a way that infringed the right protected by s. 35(1), and if so whether the Crown can justify the infringement.

[32] Here infringement is conceded by the Crown.

[33] The elements of the justification analysis in ***Sparrow*** are as follows:

1. Was the government acting pursuant to a valid legislative objective?
2. Given the Crown's trust relationship and responsibility towards Aboriginals, has the honour of the Crown been upheld?

[34] Factors relevant in answering the second question include: whether the Crown's allocation of the right to fish gives priority to aboriginal food fishing rights, after valid conservation measures have been implemented; whether there has been as little infringement to the aboriginal right as possible in effecting the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

[35] The trial judge held that the honour of the Crown was upheld in DFO's management of the 2000 Early Stuart stock. He found that the aboriginal fishery was accorded priority and that DFO had made reasonable and good faith efforts to consult with the First Nations, including the Cheam. Although he was of the view that the Crown breached its fiduciary duty in failing to consult specifically on the marine sport fishery, he concluded that the breach was not so serious as to defeat the Crown's claim to justification.

[36] On appeal, Johnston J. found that DFO had not accorded priority to the Cheam's food, social and ceremonial fishery. He agreed with the trial judge that there had been a breach of the duty to consult and concluded that because the honour of the Crown was at stake, the 'principle of the thing' must apply to defeat the claim to justification (paras. 127 and 128).

[37] For reasons which follow, I agree with the Crown's submission that the learned appeal judge fell into error on both conclusions by applying a standard for justification that was too rigid and did not take into account the relevant context. The Supreme Court of Canada has repeatedly emphasized the need to consider the specific factual context of a given case in applying the justification test, including the requirements for consultation and priority: see ***Sparrow***, *supra*, at 1111. The standard to be applied is reasonableness: ***R. v. Nikal***, [1996] 1 S.C.R. 1013 at para. 110.

[38] It may be convenient to consider the two issues in the reverse order:

1. was the Crown in breach of its duty to consult;
2. did the Crown give priority to the aboriginal food, social and ceremonial fishery.

B. Consultation

[39] On the consultation issue the trial judge began by referring to the following passages from ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, 1999 BCCA 470, 178 D.L.R. 4th 220 at paras 160-161:

> The Crown's duty to consult imposes on it a positive obligation to reasonably insure that Aboriginal Peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action...
>
> ...There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions...

[40] In this case, DFO conducted extensive and detailed consultations with Fraser River First Nations as to its conservation objectives. Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate. DFO provided the necessary information and technical assistance. DFO provided opportunities for the First Nations to express their concerns and resources to facilitate the meetings. DFO adjusted the escapement target and exploitation rate in response to First Nations' concerns. In this way, DFO complied with the standard set out in ***Halfway River***, *supra*, and in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 64. Because the Cheam refused to participate in the joint consultations, DFO attempted to consult them separately. The trial judge found, and the appeal judge agreed, that DFO's efforts to engage the Cheam in consultation were reasonable and in good faith.

[41] The appeal judge held that the requirement to consult triggered by the conservation measures included a requirement to consult specifically on the opening of the marine recreational fishery, and that failure to do so undermined DFO's justification of the restrictions of the Cheam's aboriginal right.

[42] In my respectful opinion, that conclusion was in error. Having conducted appropriate consultations in developing and implementing its fishing strategy, DFO is not required to consult each First Nation on all openings and closures throughout the salmon fishing season, where those actions were consistent with the overall strategy. Because the number of Early Stuarts that would be taken was insignificant, the brief opening of the marine recreational fishery to retention of Early Stuarts was in keeping with the strategy developed in 2000. If DFO was required to consult on the opening of the marine recreational fishery, it would have had to consult all the Fraser River First Nations on each and

every opening, including all of the First Nations fisheries.

[43] Each First Nation had a separate and equal aboriginal right to fish and their interests were not always the same. This was evident from their different positions on the escapement goal, and from their inability to agree on allocations amongst themselves.

[44] In addition, even if the marine recreational opening was not consistent with the strategy developed through consultation, it did not call for any further specific consultation because it had no appreciable adverse effect on the First Nations' ability to exercise their aboriginal right to fish for food, social and ceremonial purposes. As the Supreme Court of Canada has held, the trigger for a duty to consult is twofold: not only does it require knowledge of the existence of an aboriginal right, but also contemplated conduct that might adversely affect it: see ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 64 and ***Mikisew***, *supra*, at para. 33.

[45] Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. The DFO's duty as described by the Supreme Court of Canada in ***Sparrow*** was to uphold the honour of the Crown and conform to the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, "the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed" (at para. 73).

[46] The appeal judge concluded that DFO breached its duty to consult, noting "because the honour of the Crown is at stake, this may be one of the rare occasions where indeed 'principle of the thing' may properly apply." In my respectful view, he erroneously interpreted the consultation requirement as one that was invariable regardless of the circumstances. As Chief Justice McLachlin said at para. 39 in ***Haida***, however, what the honour of the Crown requires varies with the circumstances:

> The content of the duty to consult and accommodate varies with the circumstances... In all cases the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.

[47] I am therefore of the view that the trial judge erred in holding that DFO was required to consult the Cheam about the opening of the marine recreational fishery. However, despite that error he correctly concluded that their efforts to consult, while not perfect, were reasonable and in good faith. DFO amply discharged its obligation to consult Fraser River First Nations and the Cheam in particular about its intentions to pursue conservation objectives in ways that would restrict the exercise of their aboriginal right to fish for food, social and ceremonial purposes. DFO provided meaningful consultation, in good faith, appropriate to the circumstances.

C. Priority

[48] In ***R. v. Gladstone***, [1996] 2 S.C.R. 723 Lamer C.J. held at para. 63:

> The content of this priority -- something less than exclusivity but which nonetheless gives priority to the aboriginal right -- must remain somewhat vague pending consideration of the government's actions in specific cases. Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard "least drastic means" requirement on the

> government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis (citations omitted), priority under *Sparrow*'s justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights.
>
> [Emphasis added.]

[49] The trial judge properly applied the standard of priority in the context of this case. He found the DFO applied its allocation policy first to conservation, second to aboriginal fishing for ceremonial purposes, followed by allocations between the Fraser River Basin First Nations, and finally to the commercial and sports sectors. In all, the First Nations took about 206,000 Early Stuarts which constituted all of the harvest, except for the 200 fish retained by the recreational fishery, and the portion taken by the test fisheries. The commercial fisheries took nothing at all.

[50] DFO had to impose significant restrictions, not only to ensure adequate escapement, but also so that the resource was shared equitably among First Nations. One six-hour set net and drift fishery between the Port Mann Bridge and Sawmill Creek on July 15, along with that week's dry rack fishery, produced 23,706 sockeye. On an initial run forecast of 291,000 fish, fishing by the Cheam and other lower Fraser First Nations had to be restricted if the First Nations in the upper reaches of the river to the terminal areas were to receive a fair share. The trial judge correctly held that DFO properly took account of all of the First Nations' interests.

[51] The learned trial judge, citing ***Nikal***, *supra*, correctly applied the standard of reasonableness in the context of the specific circumstances.

[52] The appeal judge found it relevant that there was no agreement between DFO and the First Nations as to how many fish were needed to satisfy their food, social and ceremonial purposes (at paras. 88-90). However, as the Crown points out, regardless of how much they needed, the First Nations took what was essentially the entire available harvest of Early Stuarts, some 206,000 fish according to DFO. Moreover, any complaint by the Cheam now that their needs were not met must be considered in light of their refusal to articulate those needs to DFO when asked to do so.

[53] The respondents say that upon upgrading the estimate for the Early Stuart run, DFO should have opened the fishery first to aboriginals, and then to other users if appropriate. They say that in opening the marine sport fishery to retention of Early Stuarts on 4 July, when the aboriginal communal fishery did not open until 7 July, DFO violated the priority requirement set out in ***Sparrow***. With respect, this argument mischaracterizes the events as found by the trial judge. The aboriginal fisheries of the Cheam and the other Lower Fraser First Nations both preceded and occurred simultaneously with the marine sport fishery. By 2 July, set net, drift net and dry rack fisheries had all taken place in the lower Fraser River, and the dry rack fishery was open continuously from 29 June to 16 July. This is not a situation where the non-aboriginal fishery was opened in the absence of, or to the exclusion of, the aboriginal fishery. In fact, the evidence shows that by the time the sport fishery was opened, the lower Fraser First Nations, including the Cheam, were approaching their allocated 40% share of the anticipated harvest of 110,000 Early Stuarts.

[54] This is not to say that the priority required by ***Sparrow*** means that the food, social and ceremonial fisheries must always precede or occur contemporaneously with the non-aboriginal fisheries. As part of the contextual analysis into priority, it will sometimes be necessary to consider the practical difficulties occasioned by the movement of the fish themselves: ***Sparrow***, *supra*, at 1116, citing ***R. v. Jack***, [1980] 1 S.C.R. 294 at 313. The Fraser River sockeye encounter numerous fisheries, including aboriginal, recreational and commercial, as they migrate from the Pacific to their spawning grounds. If a non-aboriginal fishery could never precede any of the aboriginal fisheries, the result would be an exclusive food, social and ceremonial fishery, regardless of need and abundance of stock.

That cannot be the intended result of ***Sparrow***, where the Court stated that the objective of the priority requirement is to guarantee that fisheries conservation and management plans "treat aboriginal peoples in a way ensuring that their rights are taken seriously" (at 1119). DFO's actions in this case were consistent with that purpose.

[55] The respondents say that it was the Cheam, and not the other users of the resource, who bore the brunt of conservation measures because they were not permitted to fish while the marine sport fishery was open between 4-9 July 2000. With respect, there is simply no merit to this position. The aboriginal fisheries – including that of the Cheam – both preceded and occurred simultaneously with the sport fishery. Looking at the whole of the 2000 season, including the time both before and after the marine fishery opening, the trial judge had no difficulty concluding that "[t]he brunt of the conservation measures was obviously borne by the sports and commercial fisheries which, combined, caught a total of 16 Early Stuarts in the in-river recreational fishery. The DFO estimated a catch of 200 for the marine fishery from July 4 to July 9, 2000" (at para. 50).

## VII. CONCLUSION

[56] In my respectful opinion, the learned appeal judge erred in holding that the Crown breached its duty to consult and failed to accord priority to the aboriginal food, social and ceremonial fisheries on the Fraser River in July 2000. DFO acted reasonably in the circumstances and upheld the honour of the Crown. It met the onus of showing that the infringement of the respondents' aboriginal fishing rights was justified.

[57] I would allow the appeal, set aside the acquittals of the respondents, restore the fines imposed by the trial judge and remit Quipp's sentence appeal to the Supreme Court of British Columbia.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Mr. Justice Thackray"