

In the Matter of the *Utilities Commission Act*

Section 5 Inquiry

Long-Term Electricity Transmission Infrastructure

BCUC Hearing Order G-30-09

Joint Industry Electricity Steering Committee (“JIESC”)

Reply to the Intervenor Responses to the

Commission’s Questions (dated 30 June 2009)

on

First Nation Consultation Issues

31 July 2009

TABLE OF CONTENTS

1. Introduction	1
2. Summary of JIESC's Reply to the Intervenor Arguments	1
(a) What is the relevant trigger in this case for the duty to consult?	1
(b) Is the Commission acting in a quasi-judicial manner during the Section 5 Inquiry?.....	2
(c) What is the Commission's role in discharging the Crown's duty to consult?.....	5
Appendix A – List of Authorities	7

1. INTRODUCTION

1.1 In this reply submission, JIESC addresses arguments raised in the submissions from other Intervenor in relation to the following three issues:

1. What is the relevant trigger in this case for the duty to consult?
2. Is the Commission acting in a quasi-judicial manner during the Section 5 Inquiry?
3. What is the Commission's role in discharging the Crown's duty to consult?

2. SUMMARY OF JIESC'S REPLY TO THE INTERVENOR ARGUMENTS

(a) What is the relevant trigger in this case for the duty to consult?

2.1 The duty to consult arises as a result of the Minister's decision to embark on a transmission planning process. Issuing the Terms of Reference (**TOR**) for the Commission inquiry is one of the initial steps in a planning process that will have many steps. The Commission Inquiry is one tool that the Crown will use to formulate the plans. The Commission inquiry and the resulting determinations are not the relevant trigger for the duty to consult in this context; they are only one component of the planning. It is the broader planning process that is the relevant trigger, and the consultation effort should reflect this perspective.

2.2 Focussing on the Commission determinations as the trigger for the duty to consult loses sight of the broader planning process. It also leads to an effort to shoehorn the Commission into a consultation role that is inappropriate given the Commission's mandate for the inquiry and its quasi-judicial function. The Commission may receive submissions from interested First Nations as part of the inquiry process, but it cannot engage in bilateral consultations outside that formal structured process. Any Crown consultation should be built into the broader planning process, which is in fact what the Crown has done in this case.

2.3 The distinction between the Commission's role and the Crown's role in consultation is important because it helps set the right conceptual framework to resolve the uncertainties that are arising in this debate. The Commission inquiry will inform the Crown's consultation, but other Crown entities will undertake the consultation. Since the consultation duty arises as a result of the broader planning process, it is not necessary for the Commission to try to anticipate

whether its determinations will affect a particular First Nations aboriginal rights. At this point, all that can be said is that the Commission determinations may affect aboriginal rights in B.C.

2.4 With that possibility in mind, the Minister laid the foundation for a consultation approach that will make use of the Commission inquiry record, but will also engage BC Hydro and BCTC in direct consultation with First Nations. This consultation process will evolve as the planning process evolves, but the Commission should not try to anticipate that evolution.

(b) Is the Commission acting in a quasi-judicial manner during the Section 5 Inquiry?

2.5 The *NEB* case¹ is clear that a tribunal acting in a quasi-judicial capacity does not owe a duty to consult First Nations. The more recent *Carrier Sekani*² case reaffirms this principle specifically for the Commission. The question arising in this debate is whether the Commission is acting in a quasi-judicial manner. JIESC submits the answer is yes.

2.6 To answer this question, one must keep in mind that the principle flows from the larger principle of ensuring the independence of the tribunal and procedural fairness for all participants. A tribunal acting in a quasi-judicial manner will compromise its impartiality and procedural fairness if it assumes a special duty to a subset of participants appearing before it.

2.7 The Commission inquiry is set up for the Commission to act independently. The Commission has established comprehensive formal procedures to preserve procedural fairness. It follows that the Commission is acting in a quasi-judicial capacity in this inquiry and therefore does not owe any duty to consult in relation to the determinations that it will make during the course of this inquiry.

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

² *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, para. 56.

2.8 Several Intervenors suggest the Commission is not acting in a quasi-judicial capacity in this inquiry, relying on arguments that have similar themes.³ In reply, JIESC submits the following:

- ***No application or applicants:*** It does not matter whether there is an application or applicants. What matters is the nature of the Commission's function and the nature of the proceeding. This inquiry will result in important binding determinations. The inquiry procedure is formal and quasi-judicial to protect the interests of all parties. Judicial inquires or references to court may not have an applicant, but they are nonetheless quasi-judicial in nature. The Commission inquiry is no different.

In the *Bell Canada* case⁴, the Court explained one must examine all aspects of the tribunal's structure as laid out in the statute to determine the appropriate procedural protections:

22 To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals — those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as “quasi-judicial” on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal — such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law — as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the

³ Haisla Nation Submission, (Ex. C83-3), pages 3, 8, 11, and 13; Nlaka'pamux Nation Tribal Council et al. Submission, (Ex C97-3), pages 9, 10 and 14; Squamish Nation et al. Submission, (Ex. C98-2), pages 1, 2 and 6; Toquaht Nation Submission, (Ex. C103-2) page 8; and Treaty 8 Submission, (Ex. C105-2), page 9

⁴ *Bell Canada v. Canadian Telephone Employee Association*, [2003] 1 S.C.R. 884, 2003 SCC 36, at para. 22.

legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions. [emphasis added]

The Minister has given the Commission the mandate for the inquiry so it may be conducted in an independent, transparent and public manner. Quasi-judicial procedural fairness is essential to the process.

Courts will not lightly depart from the inference that “Parliament or the legislature intended for the tribunal’s process to comport with the principles of natural justice”.⁵

- ***No lis inter partes or adjudication of rights between parties:*** A *lis inter partes* is not the defining element of a quasi-judicial function. Even the NEB case did not involve a *lis inter partes*. In that case, the NEB was deciding whether to grant licences to Hydro-Quebec for the export of electrical power to the United States. The grant of an electricity export licence does not involve a *lis inter partes*, nor does the granting of a CPCN or the approval of rate tariff.
- ***Inquiry role rather than neutral adjudicative role:*** The Commission must remain impartial in its function, but it is not a passive adjudicator in *any* of its functions under the *Utilities Commission Act*. In the *Kwikwetlem* decision, the Court explains that the Commission does more than merely adjudicate disputes between parties:

[9] The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities “to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition”, subject to the government’s direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)⁶

⁵ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52. at para 22.

⁶ *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, para. 9.

The Commission is constituted as an expert tribunal to represent the public interest – a surrogate for competition in the regulation of public utilities. The Commission members are selected for their expertise in energy and public utility matters. The Commission has an expert staff to assist the Commission in its proceedings. The Commission itself has an active inquisitorial role when adjudicating proceedings before it, even if no person intervenes on an application. The Commission must render a decision and must be satisfied that the application meets the relevant test under the Act.

- ***Policy advice from an agent of the Crown:*** Many of the Commission decisions shape energy policy. The role in shaping policy is more explicit in this inquiry, but that role does not change the quasi-judicial nature of the function and the process. The Commission is not functioning as an agent of the Crown. The Commission's function is independent.

2.9 The Commission must arrive at its determinations through an impartial process that maintains procedural fairness for all parties, consistent with the quasi-judicial nature of the proceeding.

(c) What is the Commission's role in discharging the Crown's duty to consult?

2.10 The Commission's inquiry will provide First Nations with a fair and reasonable opportunity to be heard before determinations are made. First Nations will also have an opportunity to comment on the draft report. The Commission's final report will incorporate this information. The report and the inquiry record will play an important role in informing the Crown on the First Nation interests in the transmission planning infrastructure. The Commission's role in consultation goes no further in this inquiry.

2.11 The individual steps in the planning may each shape the final decisions on a specific project so the consultation effort should be flexible and adaptive so that relevant First Nation input is received and incorporated at the right times. The Commission is not in a position to anticipate the subsequent steps in the planning process. Nor is the Commission in a position to undertake comprehensive consultation on the issues that may be involved.

2.12 The Commission must discharge its inquiry mandate in accordance with the TOR and the Act. It is not for the Commission to try to adjust for or remedy any perceived deficiencies in the Crown consultation process outside of the inquiry as some suggest⁷.

All of which is respectfully submitted on behalf of JIESC by its counsel this 31th day of July 2009.



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⁷ Nlaka'pamux Nation Tribal Council et al. Submission, (Ex C97-3), page 14.

APPENDIX A – LIST OF AUTHORITIES

Bell Canada v. Canadian Telephone Employee Association, [2003] 1 S.C.R. 884, 2003 SCC 36.

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

Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 BCCA 68.

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch), [2001] 2 S.C.R. 781, 2001 SCC 52.

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