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

and

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

Submitted on behalf of:

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

The Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Tahltan Nation, and shíshálh Nation (the "Nations") provide the following reply comments to submissions filed in response to the Commission letter of June 30, 2009 (Ex. A-16). While the Nations' comments are primarily in reply to the specific submissions of BC Hydro and BCTC,[1] the Nations note that similar positions are advanced in some of the other submissions filed.

Both BC Hydro and BCTC accept that the determinations of this Inquiry gives rise to a duty to consult with First Nations. However, they each make three submissions to which the Nations will reply. First, they assert that the scope and content of the duty to consult is at the low end of the spectrum. Second, they argue that the Commission cannot have a duty to consult because it is a quasi-judicial tribunal, with obligations of impartiality. (This particular position is made by a number of other participants.) Third, they argue that the duty to consult can be discharged by a combination of BCTC and BC Hydro consulting with First Nations and the Commission's regulatory process.

[1] The Nations note that the Deputy Minister has filed a letter with the Commission, stating that the Ministry of Energy, Mines and Petroleum Resources agrees with the submissions of BC Hydro and BCTC in response to the Commission's two questions. (Greg Reimer to BCUC, received by BCUC July 27, 2009)

The Scope and Content of the Duty to Consult

BC Hydro asserts that "for most if not all of the determinations", the duty to consult is at the low end of the spectrum because "the Commission's determinations may be so diffuse and 'high level' that it will be challenging to identify which, if any, specific First Nations or aboriginal rights may be affected by the determination" and that "in many cases the identity of the First Nations or extent of any potential adverse effect may be indiscernible". (p. 7) Further, BC Hydro says that "in all cases there is no certainty that any particular project will proceed - but there is certainty that there will be other regulatory process(es) required before any particular project could proceed". (p. 7) BCTC similarly asserts that the "impact of the determination of need in the Inquiry is likely small" and their effect on First Nations Title and Rights "may not be identifiable at this stage of the planning process".

In reply, the Nations say that it is wholly inappropriate to assume that the required consultation will be at only a minimal level simply because the specific impacts have not yet been identified. The Commission is tasked with, among other things, assessing the generation resources to be developed over the next thirty years, the most cost-effective and most probable sequence of development by geographic area, and the required transmission systems. There can be no doubt that these are matters which will have significant impacts on First Nations throughout the Province. The honour of the Crown will not be preserved by assuming a lack of identifiable impact. Rather, as set out in the Nations' initial submissions, given the importance of the issues and the wide ranging nature of the potential impacts, the Commission should proceed on the basis that "deep consultation" is required, since that is the only way to ensure that its legal obligations have been met.

The submission made by BC Hydro and BCTC invites a dishonourable process that is inconsistent with the established law, and will result in outcomes for the Inquiry that will inevitably be uncertain, and unable to meet the Terms of Reference ("TOR") ordered by the Province. Specifically, the Nations make the following points:

- The courts have provided explicit guidance on the steps that should be taken in order to determine the scope of consultation. The first step is to complete a preliminary

assessment of the strength of each of the Nation's Title and Rights. In *Wii'litswx v. British Columbia*,[2] the British Columbia Supreme Court stated:

> The duty to engage in meaningful consultation arises when the Crown has knowledge, real or constructive, of the potential existence of aboriginal rights or aboriginal title, and contemplates conduct that may adversely affect them. The scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case for the existence of the rights or title, and the seriousness of the potentially adverse effect upon those rights or title. Exactly what the honour of the Crown may require falls within a spectrum defined by that assessment. Where the potential claims to aboriginal rights and title have not yet been proven, the honour of the Crown nevertheless requires it to respect these interests and, depending on the circumstances, to consult and reasonably accommodate them pending resolution of the claim. Each case must be approached individually and flexibly, with the focal question being what is required to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake. (para. 8)
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> The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. (para. 147)

- Given the Province-wide scope of the Inquiry and that one of the Commission's questions is how the consultation duty may be met within the ordered timelines of the Inquiry, the Nations acknowledge the complexity that would be involved in the Commission conducting a preliminary assessment for each individual First Nation in British Columbia at the outset for the purposes of informing the scope and extent of the consultation process in the Inquiry.

- Acknowledging the complexity, however, is not an invitation for the Commission to prejudge and predetermine, without any preliminary assessment, that potential impacts are "likely small". It is not open to the Commission to simply decide that that the duty is at the low-end of the spectrum because it will be "challenging" to determine how the Title and Rights of the respective Nations are potentially affected. The scope of

[2] 2008 BCSC 1139

constitutional imperatives are not measured by the extent of effort that may be required to comply with them.

- Rather, when faced with such complexity, the Commission should pursue a process having the greatest likelihood of discharging the consultation duty wherever on the spectrum the duty may rest. Rather than making assumptions about the possible effects of the Commission's determinations on Title and Rights, as BC Hydro and BCTC suggest, the Commission should structure an Inquiry that has the ability to ensure that information on potential affects can actually be gathered, that it have procedural flexibility and expertise to be responsive to specific issues that may arise, and provide for meaningful opportunities and support for the Commission to be able to, in its determinations, achieve the required reconciliation. As the Nations have submitted, a process with a First Nation Panel to assist the Commission as well as opportunities for direct engagement, is one model for so structuring this Inquiry.

- BCTC suggests that "the scope of consultation may change as new information arises, regarding the nature of the determinations to be made, and the potential impacts on asserted aboriginal rights and title". This is wholly unresponsive to the tasks given to the Inquiry and the timelines. If the Commission proceeds on the basis that the consultation obligation is on the low end of the spectrum there is the very real likelihood that as information comes forward that clarifies the determinations the Commission will be considering and the types of potential impacts, confirming the scope of the duty is at the higher end of the spectrum (as the Nations are of the view that it is) there will be significant procedural and timing obstacles to the Commission taking steps to correct course and find a process and structure that will meet those obligations. The Commission can anticipate that at that time, new procedural hearings, with submissions, would be required, so that the Commission can make new decisions about how to proceed. It may also require repeating earlier steps as those steps may have proceeded on a faulty premise with respect to the scope of consultation, and as such failed to include the proper information or failed to meaningfully include the First Nations. This can be anticipated

because when the scope of the consultation has not been adequately understood, most typically the court's remedy is an order to re-do the consultation.[3]

The Nations also take issue with BC Hydro's and BCTC's assertions about the geographical uncertainty related to this Inquiry. Specifically, the Nations note the following:

- The Nations each have their own Territories within defined geographical areas in the Province. It is within these Territories that their respective Title and Rights may be potentially affected. There is no impediment or challenge to understanding how the Commission's determinations may relate to the Territories of each of the Nations -- to the degree any determination of the Commission relates to a geographic area in the Province this can be mapped in relation to the respective Territories of the Nations.

- In the case of the Tahltan Nation, represented here by the Tahltan Tribal Council, the specific geographic detail of the Northwest Transmission Line ("NTL") is delineated, and is a consideration in this Inquiry. The NTL is a matter of utmost concern and interest to the Tahltan Nation with potentially massive impacts on their Title, Rights, and way of life. Deep consultation at the highest level is required with the Tahltan Nation with respect to all matters related to the NTL, including the matters assigned to this Commission in the TOR.

- In addition, even determinations that are not geographically bound, but may be, for example, general or Province-wide, can have significant impacts on each of the Nation's Title and Rights. This was clearly established and discussed by the British Columbia Supreme Court in *Huu-Ay-Aht First Nation v. Minister of Forests*,[4] where one of the issues was the use by the Province of a predetermined and set economic formula for negotiating forestry accommodation agreements with First Nations. The Province applied the formula universally, without any consideration of the specific interests and

[3] See, for example, *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128; *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763; *Ke-Kin-Is-Uqs v. British Columbia (Ministry of Forests)*, 2008 BCSC 1505; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642.
[4] 2005 BCSC 697

circumstances of First Nations or their lands. In rejecting the formula and this practice, the Court stated:

> To substantially address First Nation concerns, communication must be unique to the group addressed and not the same as with all stakeholders (*Gitxsan Houses* at para. 88). The individual nature of the consultation is apparent from the requirement to consult and seek accommodation that is "proportional to the potential soundness of the claim for Aboriginal title and rights" (*Haida Nation* (2002) at para. 51). The requirement to approach each case individually is key here when the government has attempted to impose an overall policy upon all Aboriginal groups based upon population and seeks to justify this imposition by an assertion that this policy promotes equality and fairness to each Aboriginal person. This is not the criteria established by the courts and does not afford the individual consideration required to fulfill the duty as described by McLachlin C.J.C. without more. (para. 116)

- Applying this ruling to the Inquiry, it is clear that Province-wide or non-geographic specific determinations may potentially affect the Nations' Title and Rights, and if such determinations are to have validity then they should be arrived at through a process where the Nations have the opportunity to directly and meaningfully participate and have their individual circumstances considered in the shaping of those determinations. In other words, contrary to the suggestion of BC Hydro and BCTC that the possibility of such determinations argues in favour of a process that would lie only at the "low-end" of the spectrum, the possibility of a lack of geographic specificity is support for a process such as the one the Nations submit should take place, where the possibility for direct input is provided.

Finally in response to the suggestion that the duty may be at the low end of the spectrum because there is no certainty of a particular project proceeding, it need only be observed that this is always the case, even after all regulatory approvals for a project have been granted. The duty to consult and accommodate attaches to the decision contemplated by the Crown that may potentially infringe Title and Rights, not to whether construction of a project may ultimately begin, something which is subject to the vagaries of economic, social, and political factors irrelevant to the constitutional obligations that must be met.

Is the Commission engaged in a quasi-judicial function?

It is clear in law that a single statutory body may act in a quasi-judicial capacity in carrying out some activities, but not others.[5] The question is whether the specific function in which the entity is engaged is a quasi-judicial function. The Nations say that in carrying out its obligations under s. 5(4) of the *Utilities Commission Act*, the Commission is not acting in a quasi-judicial capacity.

Both BC Hydro and BCTC rely on the Supreme Court of Canada's decision in *Canada (Minister of National Revenue) v. Coopers &. Lybrand.*[6] In their submissions, they set out some of the factors which Justice Dickson (as he then was) indicated may be relevant to a determination of whether an order is to be made on a quasi-judicial basis. However, they do not include the very next passage, where Justice Dickson stated:

> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah v. Fernando*[1]. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.

The Nations say that having regard to the "subject matter of the power" and the "nature of the issue to be decided" here, it is clear that the obligation to conduct an inquiry under s. 5(4) of the *Act* does not require the Commission make its "determinations" on a quasi-judicial basis. The nature of the issue - long term planning for British Columbia's transmission infrastructure and capacity needs - is not one which is analogous to something which a court would decide. Indeed, it is not one which a judicial or quasi-judicial process would be particularly well-suited to addressing. Both BC Hydro and BCTC agree that the Inquiry is in the nature of a "long term strategic planning exercise." The Nations say that it cannot be seriously contended that such an activity is a quasi-judicial function.

The nature of the issue to be decided is very different here than in the cases relied upon by BC Hydro and BCTC to suggest that a Commission of Inquiry may be required to act in a quasi-judicial manner. In *British Columbia (Attorney General) v. British Columbia (Information and*

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[5] *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919
[6] [1979] 1 S.C.R. 495

Privacy Commissioner),[7] the question was whether the draft report of a commission was subject to disclosure under the *Freedom of Information and Protection of Privacy Act*. The background to that commission is set out in the decision of Justice Paris thus:

> The Smith Commission was created by provincial Order-in-Council on April 24, 1996. It came about as a result of information that had come to the attention of provincial government authorities that a society called the Nanaimo Commonwealth Holding Society had over the course of many years diverted proceeds from bingo games which it conducted to legally non-permitted uses. By the combination of the provisions of the Criminal Code related to gaming and provincial government regulations in British Columbia, 25 percent of the gross proceeds of such gaming had to be paid out for charitable purposes. A forensic audit conducted at the instance of the provincial government by Mr. Ron Parks disclosed that, during the 1980s in particular, over 80 percent of the funds that should have been paid out to charities were diverted back to NCHS and used mainly to pay off debts arising from two real estate ventures, as well as for some other non-legitimate purposes.

The Commissioner issued Rules of Procedure which stated:

> On the basis of oral and documentary evidence tendered during the hearings, the Commissioner will make findings of fact and may draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it.

The Court held that, in making findings of misconduct, the Commissioner intended to act in a quasi-judicial capacity:

> From the passages from his various rulings which I have cited above it is obvious that the Commissioner intended to act in a judicial-like capacity. Presumably acting pursuant to the third and fourth terms of reference he explicitly set out to pass judgments on the conduct of individuals and in fact proceeded to weigh evidence, make findings of credibility and to pass such judgment on a good number of people. Twenty-two Notices of Adverse Interest Finding were sent out drawing conclusions and making statements—sometimes in forceful language—as to unlawful and unethical conduct. Undoubtedly alive to the consequences of such proposed findings to those concerned, he very fairly established extensive procedural safeguards—the right to cross-examine, to respond, to legal representation and publication bans. Some procedures he adopted and rulings he made were similar to those in court proceedings, including various rulings of law. Under the *Inquiry Act* he had most of the powers and legal privileges of a Supreme Court judge.
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> In a word, with respect to the issue of findings of misconduct, the Commissioner certainly acted and proposed to act "like" or "similarly" to a judge.

[7] 2004 BCSC 1597

Unlike the Smith Commission, the Commission's process under s. 5(4) is not aimed at making findings with respect to individuals, or even specific projects.

The specific factors listed in *Coopers & Lybrand* do not suggest, on the whole, that the Commission is required to act in a quasi-judicial capacity with respect to the Inquiry. While the Commission has decided to hold public hearings, the TOR specifically provide that it can resolve specific issues within the TOR using a variety of procedures, including, as the Commission considers appropriate, workshops, mediations, working groups and others. The Nations say that these procedural options are inconsistent with any assertion that the Commission must act in a quasi-judicial manner in carrying out its mandate.

While the determinations of the Commission may indeed affect the rights of persons, the process is not an adversarial one. BC Hydro, in its submissions, states that:

> ...the Commission is to adjudicate the issue of whether there is a need for additional transmission during the 30 year Determination Period. BC Hydro uses the term 'adjudicate" to mean the legal process of resolving a dispute. The ToR Mandates that the Commission hear [*sic*] and make findings of fact to resolve the case before it. (pp. 15-16)

The Nations say that the actual task before the Commission is much more complex and polycentric than suggested by these submissions. The Commission is not mandated to simply resolve a single issue, or to determine which party's view of the case should prevail. The Commission will address a wide range of matters, as evidenced by the Reasons for Decision on Scope.

The last criterion from *Coopers & Lybrand* is:

> Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

A review of the TOR, especially with respect to the introductory paragraphs and paragraphs 5 and 6(b), can leave no doubt that the Commission has been directed to implement government policy, rather than adjudicate individual cases.

The fact that the Commission, has an obligation to act impartially, does not preclude it from having an obligation to consult with First Nations. The obligation to consult arises from the honour of the Crown, and may attach to many entities which also have an obligation, in some circumstances, to act impartially between Aboriginal people and others. In other words, the duty to consult with Aboriginal people and to make a decision on an impartial basis are not mutually exclusive.

Can the duty be discharged by a combination of BC Hydro & BCTC consulting with First Nations and the Commission's regulatory process?

The consultation to be undertaken by BC Hydro and BCTC concerning their own submissions to the Commission cannot discharge the Commission's obligation to First Nations. Only the Commission will be able to ensure that First Nations are provided with an opportunity to provide their views on the full range of issues to be addressed by the Commission which might affect First Nations' interests, and only the Commission can ensure that it has consulted in an adequate manner once potential infringements are identified. Finally, the Commission must be responsible for ensuring that the substance of First Nations concerns are addressed and their interests accommodated.

BCTC and BC Hydro argue that the duty to consult will be discharged through the BC Hydro parallel process and through the Nations' ability to participate in the Commission's hearing process. BCTC further states that "the parallel consultation process that it will undertake with BC Hydro is a commitment to a reasonable process of consultation, exceeding the level of consultation that is required at the low end of the spectrum".

The Nations note at the outset that there is a fundamental contradiction within BC Hydro's position that renders it legally flawed. As cited above, BC Hydro states that the Commission is adjudicating in the sense of resolving a dispute. However, the Nations are not aware of and have not been provided with notice of the "dispute" alleged by BC Hydro, or of any other dispute. No participant, or the Commission, has in any way identified such a "dispute".

Further, if the Inquiry is an adjudication of a dispute that arises in relation to a particular case (a dispute which the Nations have no notice of), then the Nations say that basic principles of natural justice have not been respected. For example, BCTC's *Service Plan for Fiscal Years 2009/10 to*

2011/12 states that "BCTC has worked closely with the Ministry of Energy, Mines and Petroleum Resources (Ministry) to implement the policy objectives introduced in *The BC Energy Plan: A Vision for Clean Energy Leadership.* In particular, BCTC provided expert advice to Ministry staff in the development of the TOR, released on December 15, 2008 for the upcoming BC Utilities Commission-led inquiry to determine British Columbia's long-term electricity transmission infrastructure and capacity needs." (p. ii)[8] The Nations wholly reject the notion that one party to a dispute can play such a direct role in defining the "dispute" and the parameters for the decision-maker (in the case the Commission) as to what they are to adjudicate on, to the exclusion of the other parties to the dispute. The Nations have already submitted that the development of the TOR to their exclusion was an error.

More importantly, BC Hydro's position further undermines the submissions of BC Hydro and BCTC concerning the appropriateness and adequacy of BC Hydro's parallel process of consultation. It is completely inappropriate that in the context of the adjudication of a dispute in a particular case that a central process for the views and positions of one party would be brought to the decision-maker through discussions with another party, who is then responsible for integrating and reflecting those views in their evidence and positions. The Nations wholly reject the idea that it is either constitutionally or administratively permissible for an adjudication of a dispute to proceed through such a process.

In addition, the Nations say that the BC Hydro process of parallel consultation is wholly insufficient, and BC Hydro and BCTC are not accurately representing the letter dated 25 March 2009 from the Deputy Minister of Energy, Mines, and Petroleum Resources. Specifically, the letter states BC Hydro is only undertaking consultation with respect to the evidence and submissions it will make in the hearing, and not on "the impact of BCUC's determination". The consultation is for the purposes of "any decision of the Minister" subsequent to the Inquiry. As such, the consultation of BC Hydro is explicitly <u>not</u> consultation on the potential impacts of the determinations to be made by the Commission, and as such not meeting the constitutional duty of consultation with respect to those determinations. To the degree such consultation informs the evidence and submissions of BC Hydro, this is simply the effort by one of the many participants

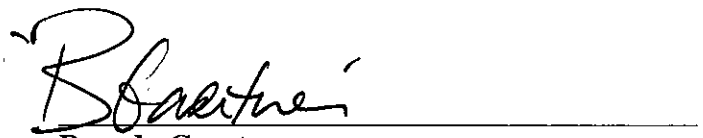
[8] http://www.bctc.com/NR/rdonlyres/BEB30A1A-9030-48B1-80F4-6719F2E7A8AB/0/ServicePlan0910to1112.pdf

in the Inquiry to reflect the views of some of the other participants in the Inquiry. They are welcome to make that effort, but it should not be confused with what is constitutionally required.

At the same time, the Nations wish to also be clear that based on substantial previous experience with BC Hydro and BCTC, they have no confidence whatsoever in BC Hydro's capacity or ability to accurately, comprehensively, and substantively record, communicate, understand or analyze the perspectives and positions of the Nations. BC Hydro cannot be relied upon for such a role. The Nations will speak for themselves, directly to those who have been tasked with making decisions which will impact their Territories and people for this and future generations..

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31ST DAY OF JULY, 2009

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



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