

BRITISH COLUMBIA UTILITIES COMMISSION
IN THE MATTER OF THE UTILITIES COMMISSION ACT
S.B.C. 1996, CHAPTER 473

and

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

Vancouver, B.C.
August 18, 2009

PRE-HEARING CONFERENCE

BEFORE:

L. A, O'Hara,	Chairperson
D.A. Cote,	Commissioner
M. Harle,	Commissioner
R.K. Ravelli,	Commissioner
K. Anderson	Commissioner

VOLUME 3

G.A. FULTON, Q.C. P. MILLER	Commission Counsel
P. FELDBERG	British Columbia Transmission Corporation
C. GODSOE K. DUKE	British Columbia Hydro and Power Authority
R.J. McDONELL	FortisBC Inc.
P. DIMITROV	First Nations Energy and Mining Council
W. J. ANDREWS	B.C. Sustainable Energy Association (BCSEA), Sierra Club of British Columbia Chapter (SCBC), Forest Ethics, West Coast Law Environmental Law Association, Pembina Institute, Dogwood Institute and David Suzuki Foundation
D. BURSEY	Joint Industry Electricity Steering Committee (JIESC)
B. STADFELD B. GAERTNER	Shishalh First Nation, Tahltan Central Council, Nlaka'pamux Nation Tribal Council and Okanagan Nation Alliance
J. QUAIL E. KUNG	B.C. Old Age Pensioners' Organization, Council Of Senior Citizens' Organizations, Tenant Resource Advocacy Centre, B.C. Coalition of People With Disabilities, Active Support Against Poverty, Terrace Anti-Poverty Group and End Legislated Poverty (BCOAPO)
C. WEAVER	Commercial Energy Consumers of British Columbia (CEC)
L. BERTSCH	Energy Solutions for Vancouver Island Society (ESVI), Okanagan Environments Industry Alliance (OEIA), Island Transformation Org (ITO) and rental Owners and Managers Society of BC (ROMS BC)
D. AUSTIN	Independent Power Producers Association of British Columbia (IPPBC)
S. LEBOURDAIS	Splats'In First Nation, Secwepemc Nation, Shuswap Arrow Lakes Division
R. HEASLIP	Sto:lo Tribal Council
J. GRIFFITH	Haisla Nation and Weiweikei Nation (Cape Mudge Indian Band)
M.A.K. MUIR R. WILSON	Hwlitsum First Nation

M. KIRCHNER

Squamish Nation, Carrier Sekani Tribal Council and
Lakwólams Indian Band

D. CHRIST

Tokwat Nation

C. DEVLIN

Treaty 8 Tribal Association

A. RANA

T. THIELMANN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CAARS

VANCOUVER, B.C.

August 18th, 2009

(PROCEEDINGS RESUMED AT 9:00 A.M.)

THE CHAIRPERSON: Please be seated.

Good morning, ladies and gentlemen. My name is Liisa O'Hara. With me as before are Commissioners Keith Anderson, Denis Cote, Michael Harle and Ross Ravelli.

Welcome to this third procedural conference which has been convened to specifically address First Nations issues. The Commission letter dated June 30, 2009 and marked as Exhibit A-16 invited written submissions to the following two questions. Number one, "What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the long-term electricity transmission inquiry?" Number two, "If there is a duty to consult, how would that duty be fulfilled and how can it be best be fulfilled such that the Panel can also fulfill its legal requirements to hold an inquiry and complete its draft report by June 30, 2010?"

We received 19 written submissions from participants on July 24th, 2009. Several of these submissions also included extensive books of authorities and lists of statutory instruments. On

1 July 31st, 2009 the Commission received further 10
2 reply submissions from participants who chose to reply
3 to the submissions of other participants. The Inquiry
4 Panel has reviewed all the submissions and thank you
5 all for the quality of those submissions.

6 By Commission letter dated August 14th,
7 2009, and marked Exhibit A-19, the Inquiry Panel
8 identified eight questions that it wishes the
9 participants to address at this third procedural
10 conference.

11 **Proceeding Time 9:02 a.m. T2**

12 To ensure an orderly day, Mr. Fulton has
13 prepared an order of appearances document which is
14 available at the back of the room. So does everybody
15 have this document? Has it been circulated, Mr.
16 Bemister? Okay, thank you. So if somebody doesn't
17 have it there are more copies at the back there.

18 In terms of our plans for today and
19 tomorrow as I mentioned a few moments ago, the Panel
20 has reviewed all your written submissions and further
21 has stated in the June 30th letter, the Panel plans to
22 conduct this conference in a manner similar to that
23 used for the oral argument phase of proceedings before
24 the Commission. This means that the Panel does not
25 expect participants to repeat written submissions, but
26 rather to respond to the questions that the Panel has

1 arising from your written submissions and that had
2 been identified in Exhibit A-19.

3 The Panel will hear all the submissions on
4 the first question in Exhibit A-19 first, before
5 moving to the second question and so on. The
6 participant whose submission is referenced in the
7 question will go first and will have a final right of
8 reply. During your time at the microphone, you should
9 reply to any comments of those speaking before you at
10 that time as well. You will also be provided with the
11 opportunity to speak to the comments of those who
12 follow you in the speaking order, if you wish to do
13 so. You will not be able to reply to the participant
14 who has the final right of reply, without leave of the
15 Panel, and luckily we have Mr. Fulton here who is
16 going to be the conductor trying to ensure that things
17 unfold according to the plan.

18 Our hearing hours for today and tomorrow
19 will be as follows. This morning we will sit first
20 for one and a half hours and then take a 15-minute
21 break. We will take a lunch break from 12:00 to 1:00
22 and resume 1:00 sharp. We will then take a further
23 15-minute break at approximately 2:45, and today at
24 least finish no later than 4:00. Our hours tomorrow
25 will be the same as today, except if necessary we will
26 sit beyond 4:00 p.m. to finish. If it appears that it

1 will be necessary to sit later than 4:00 tomorrow, we
2 will consider the timing of any additional breaks that
3 may be required tomorrow afternoon.

4 And with that, I'm now going to ask Mr.
5 Fulton to call for appearances, and please remember
6 when you enter your appearance, please advise the
7 Panel which of the eight questions you intend to
8 answer.

9 Mr. Fulton?

10 **Proceeding Time 9:06 a.m. T03**

11 MR. FULTON: Thank you, Madam Chair. Good morning, Madam
12 Chair. Good morning, Panel.

13 I'll begin with the appearances, then.
14 British Columbia Transmission Corporation.

15 MR. FELDBERG: Madam Chair, Commissioners. Peter
16 Feldberg appearing on behalf of British Columbia
17 Transmission Corporation. I probably will have
18 submissions on all eight questions, but won't know
19 until I hear from everybody else.

20 I also understand that my friend, Mr.
21 Godsoe, will have a submission to make with respect to
22 bundling or grouping some of the questions and I've
23 heard what he intends to say and I will support that.

24 THE CHAIRPERSON: Thank you, Mr. Feldberg.

25 MR. FULTON: British Columbia Hydro and Power Authority.

26 MR. GODSOE: Good morning, Madam Chair, Commissioners.

1 Craig Godsoe, G-O-D-S-O-E, of and for B.C. Hydro. And
2 with me today is Mr. Ken Duke, D-U-K-E, also of and
3 for B.C. Hydro.

4 It's nice of Mr. Feldberg to endorse
5 everything that's about to come out of my mouth in
6 advance.

7 I have one process-related question for
8 discussion, and I make this submission for two
9 reasons, but first I think the questions should be
10 clustered as follows. It might be helpful for
11 participants to address questions 1 and 2 together,
12 questions 3 and 4 together, questions 5 and 6
13 together, and questions 7 and 8 together. And as I
14 say, I say this for two reasons. First, I think it
15 makes for a more effective and efficient process. I
16 think particularly questions 3 and 4 and questions 5
17 and 6 are so interlinked that there is the potential
18 for overlap and duplication.

19 I think, more importantly, B.C. Hydro sees
20 questions 7 and 8 as very important. I think
21 particularly question 8 will serve to show how much
22 common ground there is amongst First Nation
23 participants, the utilities and other participants,
24 leaving aside the quasi-judicial issue. And I am
25 concerned that we have ample time to address both
26 question 7 and question 8 in a fulsome manner.

1 So, those are my suggestions for process,
2 and I'm happy to hear what others have to say about
3 that.

4 THE CHAIRPERSON: Can you perhaps still repeat for
5 everybody's benefit your plan?

6 MR. GODSOE: Absolutely. So I would have participants
7 address questions 1 and 2 at the same time.

8 THE CHAIRPERSON: Okay.

9 MR. GODSOE: Questions 3 and 4 at the same time.

10 THE CHAIRPERSON: Okay.

11 MR. GODSOE: Questions 5 and 6 at the same time, and
12 questions 7 and 8 at the same time.

13 THE CHAIRPERSON: Okay. Thank you, Mr. Godsoe.

14 MR. GODSOE: Thank you.

15 MR. FULTON: So then, Madam Chair, as the parties come
16 forward to enter their appearance, if they could
17 comment on Mr. Godsoe's proposal.

18 FortisBC Inc.?

19 MR. McDONELL: Good morning. Robert McDonell for
20 FortisBC. Mr. Godsoe's plan is fine with me.
21 Commissioners, I don't anticipate having much to add
22 by way of submissions today, other than as is found in
23 my filing, which is Exhibit B3-4. I would understand
24 that the order of appearances will be called in the
25 reverse order. I reserve some right of reply. I might
26 have some reply to what comes before me on that.

1 Thank you.

2 **Proceeding Time 9:09 a.m. T4**

3 THE CHAIRPERSON: Thanks, Mr. McDonell.

4 MR. FULTON: First Nations Energy and Mining Council.

5 MR. DIMITROV: Good morning, Peter Dimitrov for the B.C.
6 First Nations Energy and Mining Council. I'm going to
7 reply to all of the questions but not grouped the way
8 that counsel for legal -- counsel for B.C. Hydro
9 proposes. My reply, except for question 7 and 8,
10 takes in question 1 to 6 altogether. So my reply will
11 take them in as a group. And 7 is one I can address
12 separately, and 8 I guess is probably linked to 1 to 6
13 as well.

14 All right, thank you.

15 THE CHAIRPERSON: Thanks, Mr. Dimitrov.

16 MR. FULTON: Ducks Unlimited? No response.

17 David Suzuki Foundation, British Columbia
18 Sustainable Energy Association, the Sierra Club of
19 British Columbia, West Coast Environmental Law
20 Association, the Pembina Institute, Dogwood
21 Initiative, Canadian Parks and Wilderness Society, and
22 Forest Ethics?

23 MR. ANDREWS: Thank you. William Andrews representing
24 BCSEA *et al.* I support the suggestion regarding
25 clustering of the questions, and we did file written
26 submissions.

1 THE CHAIRPERSON: Are you supporting Mr. Godsoe's --

2 MR. ANDREWS: Mr. Godsoe's proposal.

3 THE CHAIRPERSON: Thank you.

4 MR. FULTON: Ocean Renewable Energy Group? No response.
5 Catalyst Paper? No response.

6 Joint Industry Electricity Steering
7 Committee?

8 MR. BURSEY: Good morning. My name is David Bursey
9 appearing for the Joint Industry Electricity Steering
10 Committee. We support the suggestion from Mr. Godsoe
11 to cluster the questions, and expect we would have
12 comment on all eight of the questions, although 7 and
13 8 they're fairly open-ended. We don't really know
14 what the parties will say in response to those
15 questions, so we'd like to reserve the right to speak
16 to those questions.

17 MR. FULTON: Thanks, Mr. Bursey.

18 MR. FULTON: Line Contractors Association of B.C.? No
19 response. NaiKun Wind Energy Group Inc.? No
20 response. Cloudworks Energy Inc.? No response. The
21 Progressive Group? No response. The Cascadia
22 Institute? No response. David Shipway? No response.
23 MarkUs Resource Consulting? No response. Columbia
24 Power Corporation? No response.

25 **Proceeding Time 9:12 a.m. T05**

26 Enmax Corporation? No response. Andre

1 Soboleski? No response. Barbara Buchanon? No
2 response. Canadian Wind Energy Association? No
3 response. Richard McClaren? No response. Saulteau
4 First Nations? No response.

5 Shishalh Nation?

6 MS. GAERTNER: Good morning, Commissioners. Brenda
7 Gaertner, and with me Dr. Bruce Stadfeld, and we're
8 representing Shishalh Nation, which is number 26 on
9 the list of appearances, and also all of the nations
10 listed at number 97. Nlaka'pamux, Okanagan and the
11 Tahltan Nations.

12 And we actually support what B.C. Hydro has
13 suggested and BCTC has suggested on the clustering. I
14 think it would make sense to hear in the order that
15 they did the answers to the questions as suggested.

16 THE CHAIRPERSON: Thank you, Ms. Gaertner.

17 MR. FULTON: British Columbia Old Age Pensioners'
18 Organization?

19 MR. QUAIL: Good morning. Jim Quail appearing on behalf
20 of the B.C. Old Age Pensioners' Organization, the
21 Council of Senior Citizens' Organizations, the Tenant
22 Resource Advocacy Centre, the B.C. Coalition of People
23 With Disabilities, Active Support Against Poverty, the
24 Terrace Anti-Poverty Group and End Legislated Poverty,
25 which are collectively known as BCOAPO *et al.* It
26 saves a lot of syllables in just reducing it to that

1 acronym. With me is Mr. Eugene Kung, my associate,
2 who will also be participating in this process.

3 We support the clustering of answers and,
4 in fact, the more clustering that could be done, the
5 better, to avoid a situation where people get up one
6 at a time and plough through the whole list of
7 questions because the answers, we expect, that people
8 -- and the comments people have will have a lot of
9 commonality between the questions, at least
10 analytically, and it will avoid a lot of repetition to
11 cluster as much as possible. At a minimum, to the
12 extent that my friend Mr. Godsoe has suggested.

13 THE CHAIRPERSON: Thanks, Mr. Quail.

14 MR. QUAIL: Oh, yes. We will be commenting on all except
15 number 7, unless the other measures engages things
16 that we wish to comment on.

17 THE CHAIRPERSON: All right, thank you.

18 **Proceeding Time 9:15 a.m. T6**

19 MR. FULTON: Alta Energy? No response. Association for
20 Mineral Exploration of British Columbia? No response.
21 Greenwing Energy Management Limited? No response.
22 Hard Creek Nickel Corporation? No response. Canadian
23 Hydro Developers Inc.? No response. TransCanada
24 Energy? No response. Syntaris Power? No response.
25 Sunshine Coast Regional District? No response. Terry
26 Brown? No response. Warren Brazier? No response.

1 Premier Renewable Energy? No response. Plutonic
2 Power Corporation/ No response. Kerr Wood Leidal
3 Consulting Engineers? No response. EnCana Power and
4 Processing? No response. Energetic Concepts? No
5 response. Willis Energy Services? No response.

6 Commercial Energy Consumers Association of
7 British Columbia?

8 MR. WEAFFER: Good morning, Madam Chair and members of the
9 Panel. Chris Weafer, W-E-A-F-E-R, appearing for the
10 Commercial Energy Consumers Association of British
11 Columbia in the proceeding. We anticipate having
12 comments on each of the questions, some questions more
13 than comment. Likely number 7 we will not have a lot
14 to say, subject to what is said by others. And we
15 support the grouping proposal as put forward by B.C.
16 Hydro. Thank you.

17 THE CHAIRPERSON: Thank you, Mr. Weafer.

18 MR. FULTON: Run of River Power Inc.? No response. Ron
19 Zeilstra? No response. Western Biomass Power
20 Corporation? No response. B.C. Bioenergy Work
21 Network? No response. Andritz Automation? No
22 response. City of New Westminster Electric Utility
23 Commission? No response. Corporation of City of
24 Nelson? No response. Jetson Consulting Engineers
25 Limited? No response. Sea Breeze Energy Inc.? No
26 response. Sea Breeze Pacific Regional Transmission

1 System Inc.? No response. Terry Vulcano? I
2 understand from the Hearing Officer that Mr. Vulcano
3 was following the proceedings on the webcast, Madam
4 Chair.

5 THE CHAIRPERSON: Thank you.

6 MR. FULTON: Eric Graham? No response. Terasen Gas
7 Distribution Companies? No response.

8 Energy Solutions for Vancouver Island
9 Society, Okanagan Environments Industry Alliance,
10 Island Transformation Org and Rent Owners and Managers
11 Society of British Columbia.

12 MR. BERTSCH: Ludo Bertsch appearing for ESVI *et al.* We
13 do support B.C. Hydro's clustering, if that so seems
14 to be the appropriate approach to go. At this point
15 we may not have a lot of comments but would like to
16 reserve the right to comment on each of the questions,
17 and we may have some points on particular question
18 number 4. Thank you.

19 THE CHAIRPERSON: Thanks, Mr. Bertsch.

20 MR. FULTON: Independent Power Producers Association of
21 British Columbia?

22 MR. AUSTIN: Good morning, Panel. David Austin
23 representing the Independent Power Producers of B.C.
24 We support B.C. Hydro's clustering approach. Because
25 we'll probably be quite far down in the order, we may
26 have comments on some of the questions, but I expect a

1 lot of what we might have to say is going to be said
2 by others by the time we get up to the mike.

3 I am concerned about the proposal of the
4 First Nations Energy and Mining Council, they group
5 five for the questions together. I don't think that's
6 going to work very well because it'll be a very
7 voluminous submission in the sense it's going to cover
8 a lot of issues and it's going to be very difficult
9 for people to respond to that.

10 I think in some instances where questions
11 that the Panel has are short, you can group seven or
12 eight together. But when you have detailed questions
13 such as these, if you group too many together it's
14 going to be too difficult for people to respond. And
15 those are my submissions.

16 MR. FULTON: Before Mr. Austin leaves the mike, Madam
17 Chair, the proposal today is that we do a reverse
18 order in terms of submissions, so he may be on in
19 terms of the first round sooner rather than later.
20 And going forward we will be reversing the order of
21 the submissions from the order of appearances at every
22 other procedural conference, and the reason for that
23 is because we don't have an applicant and it's in my
24 view not fair to have the same party starting at every
25 conference in terms of their submissions. In this one
26 it makes good sense to reverse it in any event. And

1 we will be hearing from the named parties and the
2 questions first, so --

3 **Proceeding Time 9:20 a.m. T07**

4 THE CHAIRPERSON: Thanks. So, you are put on notice, so
5 you may have more to say than you first anticipated.

6 MR. AUSTIN: That's fine. Whether I've got more to say
7 or less to say, I don't think it makes any difference
8 in terms of how much I get compensated.

9 THE CHAIRPERSON: Thank you, Mr. Austin.

10 MR. FULTON: Ministry of Energy, Mines and Petroleum
11 Resources? No response. West Moberly First Nations?
12 No response. Fred Olsen Renewables Canada Limited?
13 No response. Sierra Geothermal Power Corp.? No
14 response. CST Consulting? No response.

15 Splats'In First Nation.

16 MS. LEBOURDAIS: Wej kukqai. Just a request. The
17 Splats'In First Nation is also a part of the Shuswap
18 Arrow Lakes Division and therefore would like to be
19 included, their participant name, within the Secwepemc
20 -- the Lakes Division of the Splats'In Nation. Thank
21 you.

22 THE CHAIRPERSON: Thanks. Can you still spell your name
23 for the record, please?

24 MS. LEBOURDAIS: Oh, okay. Sunny Lebourdais, S-U-N-N-Y
25 L-E-B-O-U-R-D-A-I-S.

26 THE CHAIRPERSON: Thank you, Ms. Lebourdais.

1 MR. FULTON: So, Ms. Lebourdais, before you leave the
2 mike, then, I can enter an appearance for you on
3 behalf of the Shuswap Arrow Lakes Division as well?
4 Or is there someone else here for them?

5 MS. LEBOURDAIS: I will.

6 MR. FULTON: Okay. Thank you.

7 COMMISSIONER HARLE: What questions?

8 MR. FULTON: Pardon me?

9 COMMISSIONER HARLE: What questions will you be
10 responding to?

11 MS. LEBOURDAIS: Oh, okay. I was going to get up later
12 and speak to that, but I can speak to it now.

13 We support having the questions grouped as
14 requested, or recommended, by B.C. Hydro's
15 representation and we also expect answering all
16 questions except number 7. Thank you.

17 THE CHAIRPERSON: Thank you.

18 MR. FULTON: North Columbia Environmental Society? No
19 response. SkyPower Corporation? No response.
20 Alberta Electric System Operator? No response. Coast
21 Forest Products Association? No response. Regional
22 District Central Kootenay? No response. Powerup
23 Canada? No response.

24 Sto:lo Tribal Council.

25 MS. HEASLIP: Good morning. Robin Heaslip, H-E-A-S-L-I-
26 P, Sto:lo Tribal Council.

1 I would just like to make a written
2 submission in response to the questions prepared by
3 STC's lawyer, who was not able to attend today. I'm
4 not sure if that's something I would do now or just
5 the first time that I got up in response.

6 THE CHAIRPERSON: Mr. Fulton?

7 MR. FULTON: The purpose of the oral phase is that the
8 submissions be of an oral nature. So, I think what we
9 need to do is, if the copy of the statement can be
10 circulated to see if anybody has any issues with it.
11 If they do have issues with it then the -- I think the
12 result would be that either Ms. Heaslip can just read
13 the statement in, or I can read it in, so that it gets
14 on the record in any event.

15 THE CHAIRPERSON: Thanks. So I'll leave it with you to
16 sort out, Mr. Fulton. Thank you.

17 MS. HEASLIP: Okay. The idea --

18 THE CHAIRPERSON: And they are answers to --

19 MS. HEASLIP: To the questions.

20 THE CHAIRPERSON: All questions.

21 MS. HEASLIP: Questions 1 to 6, no comments on questions
22 7 and 8.

23 THE CHAIRPERSON: All right, thank you.

24 MR. FULTON: Ms. Heaslip said that she'll read the
25 answers out.

26 THE CHAIRPERSON: Thanks.

1 **Proceeding Time 9:25 a.m. T08**

2 MR. FULTON: Canadian Geothermal Energy Association? No
3 response. City of Abbotsford? No response.
4 Cheslatta Carrier Nation? No response. Burns Lake
5 Chamber of Commerce? The Nisga's Lisims Government?
6 No response. Regional District of Mount Waddington?
7 No response. WESTPAC LNG Corporation? No response.
8 Ziad Shawwash? No response.

9 Haisla Nation.

10 MS. GRIFFITH: Good morning, Madam Chair and Panel.
11 Jennifer Griffith, G-R-I-F-F-I-T-H, on behalf of the
12 Haisla Nation and the Weiweikei Nation. And I support
13 B.C. Hydro's submissions on clustering the questions,
14 and I will respond to all the questions -- possibly
15 not question 7, although I reserve the right to reply
16 to that one. Thank you.

17 THE CHAIRPERSON: Thank you, Ms. Griffith.

18 MR. FULTON: DJF Consulting? No response. Burke
19 Mountain Naturalists? No response. British Columbia
20 Wildlife Federation? No response. Institute for the
21 History of Science? No response.

22 Hwlitsum First Nation.

23 MS. MUIR: Good morning, Madam Chair, members of the
24 panel. My name is Magdalena Muir on behalf of
25 Hwlitsum First Nation. M-A-G-D-A-L-E-N-A, last name
26 M-U-I-R. I'm appearing here today with Chief Raven

1 Wilson and also Allen Grove, two other members of a
2 Hwlitsum team. We are -- accept the grouping proposed
3 by B.C. Hydro is acceptable, though our -- we would
4 reserve the right to comment on all questions, though
5 our focus will be on questions 5 to 8.

6 THE CHAIRPERSON: Thank you, Ms. Muir.

7 MR. FULTON: Finavera Renewables? No response. Terrace
8 Economic Development Authority? No response.
9 Wilderness Committee? No response. Union of B.C.
10 Municipalities? No response. Rio Tinto Alcan? No
11 response.

12 Squamish Nation and the Carrier Sekani
13 Tribal Council.

14 MR. KIRCHNER: Commission, I'm Matthew Kirchner, K-I-R-C-
15 H-N-E-R. Just for the Panel's information, Mr.
16 McDade, who's appeared last time and who's filed the
17 submissions, was unable to attend today, so I will be
18 stepping in for him. We are also for the Carrier
19 Sekani Tribal Council, which is number 99 here, and I
20 don't see it on the list, but I understand also the
21 Lakwolams Indian Band, who's referred to in the
22 submission. It's not clear to me why that's not on
23 the list, but I'll sort that out at the break.

24 We propose to deal with -- firstly I agree
25 with the grouping of the questions as proposed. I
26 expect to deal with questions 1 to 6 and possibly 7

1 and 8 in reply only.

2 MR. FULTON: As proposed by B.C. Hydro or --

3 MR. KIRCHNER: As proposed by B.C. Hydro, yes.

4 MR. FULTON: Thank you.

5 THE CHAIRPERSON: Thanks for that clarification. Thank
6 you, Mr. Kirchner.

7 MR. FULTON: District of Kitimat? No response. Powell
8 River Regional District? No response.

9 Toquaht Nation.

10 MR. CHRIST: Good morning, Madam Chair, panel members.
11 My name -- let me introduce myself -- is Derek Christ,
12 spelled D-E-R-E-K, last name Christ, C-H-R-I-S-T. I'm
13 an article student with Woodward and Company in
14 Victoria, and I'm appearing in the absence of Leah Mak
15 and Jay Nelson, on behalf of the Toquaht Nation.

16 In response to the issue of clustering, we
17 have no position, and we will be addressing
18 specifically question number 5, but we'd like to
19 reserve the right to speak to other questions if we
20 could.

21 **Proceeding Time 9:30 a.m. T9**

22 I have a small issue of process. I don't
23 know when it would be appropriate to deal with this,
24 but a number of First Nations in British Columbia are,
25 let me say, dimly aware of this inquiry and the
26 process that it's happening, and we're currently in

1 conversation with a number of them who have expressed
2 interest in being here today. They've necessarily
3 missed the registration deadline, but would like to
4 intervene, or potentially would like to intervene.

5 So I'd like to know whether the Panel has
6 issued any decisions on that kind of an issue going
7 forward?

8 THE CHAIRPERSON: Well, perhaps, Mr. Fulton, you can
9 first speak to our normal practice.

10 MR. FULTON: Yes, the normal practice in terms of late
11 interventions has been a flexible practice, and the
12 only constraints on that have been that the late
13 intervention party or participant in this proceeding
14 needs to take what has happened before as that
15 participant finds them.

16 So if parties have made submissions
17 pursuant to the schedule that was established by A-16
18 that has brought us to today, then that ability is
19 lost. Going forward, if participants wish to
20 intervene, then they would be decided on a case-by-
21 case basis, but generally the practice of the
22 Commission is to allow late interventions subject to
23 any issues of prejudice.

24 THE CHAIRPERSON: Perhaps by way of additional
25 clarification, so this Panel is planning to hold some
26 regional hearings in late October and somewhere around

1 mid-November. We are looking at perhaps somewhere
2 between eight to nine sessions throughout the
3 province. So that may provide another opportunity for
4 some First Nations who are further away, for instance,
5 from here as well, you know, to participate at that
6 time. But still it would be helpful if they can
7 certainly register the intervention.

8 MR. CHRIST: Okay, thank you for that answer. We'd like
9 to do it as soon as possible. Is there a final
10 deadline for an application for --

11 THE CHAIRPERSON: No, because the official deadline for
12 intervention is long past.

13 MR. CHRIST: Okay, thank you very much.

14 COMMISSIONER ANDERSON: Excuse me. Are you suggesting
15 that the people you're talking to, the different
16 nations you're talking to, would just join with your
17 existing clients?

18 MR. CHRIST: Yes, I think that --

19 COMMISSIONER ANDERSON: As part of that?

20 MR. CHRIST: Yes.

21 COMMISSIONER ANDERSON: It was in addition to one
22 representation in your file, for example, rather than
23 a number of additional representations.

24 MR. CHRIST: Yeah, I think the basic format would be they
25 would subscribe to the position we put forward today,
26 yes.

1 COMMISSIONER ANDERSON: To join in with --

2 THE CHAIRPERSON: Yes.

3 MR. CHRIST: Yes.

4 COMMISSIONER ANDERSON: Thank you.

5 MR. CHRIST: Okay, thanks.

6 MR. FULTON: Gord Lechner?

7 Treaty 8 Tribal Association.

8 MR. DEVLIN: Good morning. My name is Christopher

9 Devlin. I'm appearing on behalf of the Treaty 8

10 Tribal Association. The last name is D-E-V-L-I-N.

11 With me is my co-counsel, Ms. Alison Rana, R-A-N-A.

12 Also my articulated student, Tim Thielmann, T-H-I-E-L-M-

13 A-N-N.

14 Just a note. Our number is C-105.

15 However, the Treaty 8 Tribal Association is a group of

16 six First Nations from northeast B.C., which includes

17 the Saulneau First Nation and the and the West Moberly

18 First Nations which are numbers 25 and 61.

19 We intend to comment on all eight

20 questions, and we are fine with the clustering as

21 proposed by B.C. Hydro.

22 MR. FULTON: Is there any participant present this

23 morning who's intervened whose name I have not called

24 and wishes to enter an appearance this morning for the

25 purposes of the proceedings today and tomorrow?

26 No response, Madam Chair. That then

1 concludes the appearances.

2 **Proceeding Time 9:34 a.m. T10**

3 So that the one issue for the Commission
4 panel is whether to proceed on the basis of the
5 questions being answered on a question-by-question
6 basis, whether they'd be answered on the clustered
7 basis as proposed by B.C. Hydro, and supported by most
8 of the -- if not -- most of the parties who have
9 spoken, or the third alternative was the alternative
10 that was presented by the First Nations Energy and
11 Mining Council.

12 THE CHAIRPERSON: The Panel finds that there was such an
13 overwhelming support for the proposal put forward by
14 B.C. Hydro that I think that is the most
15 straightforward way to proceed. I'm just asking Mr.
16 Dimitrov, then, that you will do your best to
17 accommodate this process.

18 And with that, Mr. Fulton, if you then call
19 for submissions, please.

20 MR. FULTON: Thank you, Madam Chair. I did have
21 discussions with a number of the parties' counsel who
22 were named in the questions yesterday evening and also
23 this morning. And with respect to question 1, the
24 Treaty 8 Tribal Association was going to go first,
25 with the clustering of questions 1 and 2. I
26 understand that there was a different order for

1 question 2, so I just need a moment to determine who
2 -- which of the First Nations is to go first on the
3 question 1/2 cluster.

4 MR. DEVLIN: (inaudible) first.

5 MR. FULTON: Okay. So, Mr. Devlin will then be first on
6 questions 1 and 2, Madam Chair.

7 THE CHAIRPERSON: Thank you.

8 MR. FULTON: And I also understand that the reference to
9 105-6 in question 1 and again in question 3 should be
10 to 105-5.

11 THE CHAIRPERSON: Thanks for that correction.

12 MR. FULTON: Okay.

13 **SUBMISSIONS BY MR. DEVLIN:**

14 MR. DEVLIN: Again, good morning. Because this is our
15 first appearance in front of the Panel, I thought I
16 would just take a few moments to give you a brief
17 introduction to the Treaty 8 Tribal Association. As I
18 said in my roll call, it's a group of six First
19 Nations located in northeastern British Columbia.
20 They are all beneficiaries of Treaty Number 8, which
21 is a historic treaty signed in 1899 between Canada and
22 a large group of First Nations in northeastern B.C.,
23 northern Alberta, Saskatchewan and parts of Northwest
24 Territories.

25 Six of the eight Treaty 8 First Nations are
26 represented by the Treaty 8 Tribal Association.

1 Treaty 8 itself, within British Columbia, covers about
2 272,000 square kilometres, roughly 35 percent of the
3 area of the province.

4 The Treaty guarantees several different
5 kinds of rights, including rights for hunting, fishing
6 and trapping. There is also agricultural benefits,
7 there's a variety of other rights.

8 Specifically with the harvesting rights,
9 the hunting, fishing and trapping rights, these are
10 not just for subsistence purposes. These are also
11 commercial harvesting rights, and the courts have held
12 that these commercial harvesting rights have not been
13 extinguished insofar as Treaty 8 applies within
14 British Columbia. And the Treaty 8 First Nations take
15 the position that they require a sufficient amount of
16 habitat to sustain wildlife for the purposes of
17 commercial harvesting.

18 There is also another aspect of Treaty 8
19 which is important to note and that is that there are
20 -- the Treaty provides for land entitlement. It's
21 based on a population figure, and historically most of
22 the First Nations were not provided with sufficient
23 land, which was turned into reserve land, and there
24 are four of the six nations that we represent have
25 outstanding land entitlement, which means that they
26 actually have a legal entitlement to reserve land

1 I can.

2 Now, question 1 really takes us to the test
3 in *Coopers & Lybrand*, which is the Supreme Court of
4 Canada decision, and how to determine whether or not
5 an administrative tribunal is functioning in a quasi-
6 judicial manner or not. And the question targets one
7 of the criteria enumerated by the Supreme Court, which
8 is whether there is an adversarial process as part of
9 the function of the tribunal in a particular
10 situation. And we've provided written submissions on
11 this point and you have those before you.

12 So I think what -- for the purposes of the
13 oral submissions, what we want to emphasize is that
14 the lack of an applicant or an application or an
15 adversarial hearing process per se suggests that this
16 process, that the inquiry, Section 5 Inquiry, is not
17 adversarial, that individual rights are not impacted
18 in that traditional adversarial sense in the way
19 envisioned by the Supreme Court in *Coopers & Lybrand*,
20 and leads to the conclusion that this inquiry process
21 is not quasi-judicial.

22 We included *Coopers & Lybrand* in our book
23 of authorities which was submitted, and I actually
24 propose to go to that case because it is, in our
25 submission, the governing case for this first
26 question. It can be found -- sorry. It's not in our

1 book of authorities. It is in B.C. Hydro's book of
2 authorities at tab 9. And I would direct the Panel's
3 attention to page 501 in the Supreme Court Report
4 version of the case. And it's the paragraph beginning
5 with the words, "Accordingly administrative
6 decisions". So my first point, and this -- so I'll
7 just read you the paragraph:

8 "Accordingly administrative decisions must
9 be divided between those which are
10 reviewable by *certiorari* or by Section 20 of
11 the application or otherwise, and those
12 which are non-reviewable."

13 So we have reviewable decisions and non-reviewable
14 decisions.

15 "The former, the reviewable decisions, are
16 conveniently labelled decisions or orders of
17 an administrative nature required by law to
18 be made on a judicial or quasi-judicial
19 basis."

20 So the reviewable decisions are quasi-judicial.

21 **Proceeding Time 9:45 a.m. T12**

22 "The latter decisions are orders not
23 required by law to be made on a judicial or
24 quasi-judicial basis. It is not only the
25 decision to which attention must be
26 directed, but also the process by which the

1 decision is reached.

2 So, our first point is that the
3 determinations that this Panel is going to be making
4 throughout the inquiry are non-reviewable
5 determinations. And we have, under the *Utilities*
6 *Commission Act*, there is Section 105, which is
7 essentially the privative clause for the Commission,
8 and in that clause decisions and orders of the Panel
9 are not reviewable -- not subject to judicial review.

10 So, for our -- then we go up to -- back to
11 page 500 with -- beginning with the paragraph
12 "Traditionally, decisions of a judicial nature ...".
13 And decisions of an administrative nature have been
14 seen as empathetic. Judicial decisions being made by
15 -- being those made by courts and administrative
16 decisions being made by -- being those made by other
17 than courts, such as government departments and
18 officials.

19 So, our first submission is that this is
20 not what you -- the exercise in which you are engaged
21 is not a judicial decision the way that a court would
22 be making it. And again, flipping the page to page
23 501, the next paragraph, the court really, I think,
24 emphasizes this here, that

25 "...government ministries and agencies carry
26 out a different form of work than that done

1 by the courts. They do not simply take on
2 closely analogous functions. Their primary
3 concern is with policy objectives, rather
4 than adjudication *inter partes*, in
5 regulating relations between individuals and
6 government in the distribution of benefits."

7 So, there isn't an adjudication between
8 parties before you. You've been given terms of
9 reference and you're going to be making determinations
10 on the long-term transmission needs of the province
11 for the next 30 years.

12 So, we say that Section 105 does not, in
13 fact, prove that you're quasi-judicial in this
14 context. We say in this context, in fact, it goes to
15 the point that your decisions are non-reviewable and
16 these determinations that you're making are not
17 reviewable.

18 In fact, the only -- these determinations
19 will be reviewable. It's only questions of law and
20 jurisdiction that are appealable to the Court of
21 Appeal, and that's under Section 101(2) of the *Utility*
22 *Commission Act*. So, very much we say you're in the
23 position of a government administrative body, not a
24 quasi-judicial tribunal.

25 Another key factor can be found on page 504
26 of the decision. So, it appears after the four

1 criteria are set out in the judgment, beginning with
2 the -- in the paragraph beginning with the words "In
3 more general terms". So,

4 "In more general terms, one must have regard
5 to the subject matter of the power, the
6 nature of the issue to be decided and the
7 importance of the determination upon those
8 directly or indirectly affected thereby.
9 The more important the issue and the more
10 serious the sanctions, the stronger the
11 claim that the power be subject in its
12 exercise to judicial or quasi-judicial
13 process."

14 There are no sanctions at play in this
15 inquiry, and we say that's an important aspect of this
16 first question. You are not sitting here in judgment
17 of anybody or any particular process. This is a
18 forward-looking process, and not one that is going to
19 be levying sanctions or even questioning the conduct
20 of any particular party or individual.

21 Now, your question talks about, well, what
22 weight should be given to this particular factor? I
23 think that, at least from our reading of all the
24 submissions, just about everybody agreed that the --
25 that you have to look at all of the factors in total,
26 that no one factor weighs more than the other. Now,

1 that being said, and I think that here in this case
2 the Supreme Court did note, on page 505, and this is
3 the next paragraph:

4 "The existence of something in the nature of
5 a *lis inter partes*, and the presence of
6 procedures, functions and happenings
7 approximating those of a court add weight."

8 And then to the third criteria, which is the criteria
9 where there's an adversarial process.

10 So, the court here added weight to that
11 factor, whether there's an adversarial process or not.
12 And our submission is, likewise the absence of an
13 adversarial process, the absence of an application
14 before you, the absence of sanctions being at play,
15 again leads to the conclusion that this is not a
16 quasi-judicial process.

17 **Proceeding Time 9:50 a.m. T13**

18 The next paragraph:

19 "Administrative decisions..."

20 This is still on page 505,

21 "Administrative decisions does not lend
22 itself to rigid classification of function.
23 Instead one finds realistically a continuum.
24 As paradigms at one end of the spectrum are
25 rent tribunals, labour boards and the like,
26 the decisions of which are eligible for

1 judicial review. At the other end are such
2 matters as the appointment of a head of a
3 Crown corporation or the decision to
4 purchase a battleship, determinations
5 inappropriate to judicial intervention."

6 And again the court says two sentences later:

7 "One must weight the factors for and against
8 the conclusion that the decision must be
9 made on a judicial basis."

10 So interestingly though, one of the things
11 that they weighed was the absence, or the existence or
12 absence thereof, of an adversarial process.

13 On page 507, the court then engages in the
14 balancing exercise of these criteria. And there's a
15 list of -- they go through each of the criteria in
16 turn, and the third criteria is the adversarial
17 process. And again the court's comments, I think,
18 here are applicable to this Panel's inquiry:

19 "The decision of the Minister does not
20 involve the adversary process. It is not
21 the triangular case of A being called upon
22 to resolve a dispute between B and C. There
23 is a dispute but not in the adversarial
24 sense. So the analogy of a court is
25 entirely inappropriate."

26 And then the court concludes at the end of that

1 paragraph:

2 "When one places in the balance the
3 responses to the four questions, the result
4 is a modified yes to question 2, and a nil
5 return for each of the other three criteria,
6 leading to the conclusion that the
7 Minister's administrative and executive
8 decision is not required to be made on a
9 judicial or quasi-judicial basis."

10 So our point is that, well, here there may
11 well be, and I think you're going to hear them today,
12 disagreements on a variety of points. But those
13 disagreements do not constitute a dispute in the
14 nature of an adversarial process and that the parties
15 can -- the parties can -- we can use the verb "to
16 dispute", can dispute all kinds of things. But just
17 because they dispute it doesn't make it an adversarial
18 process. There is no dispute in the sense of a noun.

19 I'd like to refer to two other cases while
20 we're on this point. The first is *Regault v. British*
21 *Columbia (Commission of Inquiry into the Death of*
22 *Vaudreuil)*. That's found in the Transmission
23 Corporation's book of authorities at tab 9. And the
24 reason I want to refer to this case is this is one of
25 the cases that has been referred to you to say, well,
26 you know, just like these other commissions of

1 inquiry, you too are quasi-judicial.

2 I would make two observations. First of
3 all, paragraph 19 of *Regault*, the court observes that
4 the procedures adopted by Justice Grove gave the
5 inquiry a quasi-judicial flavour. However, the court
6 -- the fact is that the court ended up finding that
7 the Commissioner exceeded his jurisdiction and so
8 really didn't decide the quasi-judicial point. But
9 what is of interest, I think, for today's conference
10 is that at the end of the decision at paragraph 36,
11 the court observed that the part of *Inquiry Act* which
12 governed the Gove inquiry actually did not contemplate
13 findings of misconduct and provided no procedural
14 protections in the event that such findings were made.
15 And so there was some -- unlike other inquiries under
16 Part 1 of the *Inquiry Act*, the Gove inquiry was
17 actually under Part 2 of the *Act*.

18 The last case that I wish to refer to in
19 this part of my submissions is the *Information and*
20 *Privacy Commissioner* case. That's at B.C. Hydro's
21 book of authorities, page 10.

22 THE CHAIRPERSON: That's tab 10.

23 MR. DEVLIN: Yes, sorry, tab 10, yes. Sorry, tab 10 and
24 paragraph 60.

25 THE CHAIRPERSON: What was the paragraph?

26 MR. DEVLIN: Paragraph 60, six zero.

1 THE CHAIRPERSON: Six zero, thank you.

2 **Proceeding Time 9:56 a.m. T14**

3 MR. DEVLIN: So again this is a case involving whether
4 the Commission inquiry at that time was a quasi-
5 judicial one, and again the court went through the
6 test from *Coopers and Lybrand*. Paragraph 60
7 considered the factor that is part of question 1 for
8 today's procedural conference, and the court wrote as
9 follows:

10 "Certainly the procedure of the Commission
11 as a whole was not of the traditional common
12 law model where opposing parties present
13 their versions of the truth to an arbiter,
14 who then decides accordingly. But when it
15 arrived at the stage at which we are
16 concerned, of specific allegations of
17 misconduct being delivered by the Commission
18 counsel to persons who were then invited to
19 respond, it did develop an adversarial
20 character or, if I may be forgiven, a quasi-
21 adversarial character."

22 I think that -- and then down on paragraph 65:

23 "From the passages from his various rulings
24 which I have cited above, it is obvious that
25 the Commissioner intended to act in a
26 judicial-like capacity."

1 So, one of the -- this goes to my earlier
2 point that certainly the process of this inquiry has
3 -- is not sort of that traditional model of A settling
4 a dispute between B and C, but further, I think, this
5 case shows us that -- to my other point, that there
6 are no sanctions involved. You're not going to be
7 making findings of misconduct of anyone. That this is
8 not the purpose of the inquiry. This inquiry is a
9 forward-looking process, a forward-looking strategic
10 planning process.

11 And when you look at the -- this factor,
12 the lack of an adversarial process, in the context
13 with the other three factors listed in *Coopers and*
14 *Lybrand*, I think it becomes very clear that it does
15 carry weight in the -- towards the conclusion that
16 this is not a quasi-judicial inquiry. And you have
17 written -- extensive written submissions by everybody
18 on the other three factors, but because *Coopers and*
19 *Lybrand* is very clear that you need to weigh all the
20 factors together, I just want to recap that hearings
21 are not necessarily contemplated in this inquiry, and
22 the procedures of the Commission need to be evaluated
23 in the context of all of the procedures available for
24 this inquiry. So there is -- you know, there are
25 workshops, there are a wide range of dispute
26 resolution mechanisms, and there are working groups

1 that are available. There are procedural conferences
2 that are available.

3 There is a lot of different mechanisms that
4 the inquiry has at its disposal to gather information
5 as part of its -- to make the determinations that
6 you've been charged to make.

7 The second point is that decisions affect
8 rights, but by way of strategic planning, not
9 sanctions, and this goes back to the point I just made
10 about the *Information and Privacy Commissioner* case.
11 Yes, your determinations will affect rights most of
12 the First Nations have asserted in front of you,
13 including the Tribal Association, that these
14 determinations at a strategic high level will in fact
15 have impacts on their either existing rights, such as
16 the treaty rights that are held by the Treaty 8 First
17 Nations, or asserted rights, aboriginal title and
18 aboriginal rights.

19 And then the last factor, the obligation to
20 implement social and economic policy, not to apply
21 rules to many individual cases. The Commission has
22 been given the mandate to undertake a broad
23 investigative and information gathering task in aid,
24 fundamentally, of setting transmission policy for the
25 next 30 years. Ultimately, you have to have regard
26 for all four of these, and the factor that's been

1 identified in question 1 is one of those factors. We
2 say it's a significant factor. We also say that when
3 you look at the criteria from *Coopers and Lybrand*,
4 three out of the four factors suggest -- so the
5 balance of the factors suggest that this is not a
6 quasi-judicial exercise.

7 So those are my submissions on question 1.

8 **Proceeding Time 10:00 a.m. T15**

9 Now, question 2 is a multi-headed question,
10 and I propose to deal with it generally. I will
11 identify the sub-questions that I am addressing as I
12 work through my submissions. I just have some general
13 comments to make to begin with.

14 So the question is basically, if the
15 Commission is not acting in a quasi-judicial manner in
16 the context of this Section 5 Inquiry, does that
17 necessarily result in the Commission owing an
18 independent duty to consult?

19 Clearly, as you know from our written
20 submissions, we say the answer to that is yes, you do
21 have an independent duty for the purposes of the
22 Section 5 Inquiry. And we say that the duty to
23 consult is triggered by the Commission's mandate to
24 produce high-level strategic determinations about
25 long-term transmission.

26 With respect to the law, the duty to

1 consult is triggered by the Crown's knowledge of
2 asserted aboriginal or existing treaty rights, and (2)
3 potential adverse effects on this rights. That's
4 found in the *Haida* case of the Supreme Court of
5 Canada. We have that in our book of authorities, tab
6 10, paragraph 35. I'm going to cite the law as I go
7 through it, but I'll only take you to certain passages
8 in this part of my submissions.

9 Now, the Supreme Court of Canada has also
10 said that with respect to Treaty 8, the Crown is
11 always on notice of Treaty 8 rights, and that's from
12 the *Mikisew Cree* decision of the Supreme Court of
13 Canada. That's our book of authorities, tab 9,
14 paragraph 34. So the first part of the trigger is
15 that the Crown is always on notice of Treaty 8. And I
16 think it's very important to understand that Treaty 8
17 provides a procedural right to consultation respecting
18 proposed changes in land use. And again, that's in
19 *Mikisew*, paragraph 63.

20 So in my opening comments I describe some
21 of the substantive rights that Treaty 8 has, the
22 subsistence rights, hunting, fishing, trapping, that
23 also can be exercised in a commercial manner. But the
24 Supreme Court has found that in addition to the
25 substantive rights on the face of the treaty, the
26 treaty also contains within it a procedural right to

1 be consulted about changes in land use. Again
2 *Mikisew*, paragraph 63.

3 And so we say that this inquiry and the
4 determinations that are going to come out of it
5 potentially could have adverse impacts on the Treaty 8
6 rights. The inquiry is -- and I will go through this
7 in terms of -- I will bring in -- take you through the
8 law on this, but just as my opening comment. The
9 inquiry is a high-level strategic planning process,
10 and the courts have held that such processes trigger
11 the duty to consult. It will affect future regularly
12 approvals and development, which may directly impact
13 rights. There are serious long-term impacts of the
14 determinations, and that these determinations are
15 potentially legally binding.

16 And I think our last point, again this goes
17 back to my opening comments, given the numerous energy
18 projects in Treaty 8 territory, our clients believe
19 it's highly probable that the inquiry's outcomes will
20 affect and potentially adversely affect their existing
21 treaty rights.

22 Most of the participants have agreed -- I'm
23 sorry, I haven't agreed. Most of the participants,
24 First Nation participants, have argued that the
25 inquiry's strategic high-level planning decision
26 process triggers a duty to consult. The cases that

1 back that up are obviously the *Haida* and the *Mikisew*
2 case which I've already discussed, but more
3 specifically, more recently in our court of appeal,
4 the *Carrier Sekani* case at paragraph 52, and the
5 *Kwikitlem* case at paragraph 62.

6 In the context of Treaty 8 specifically,
7 the courts have held that high-level strategic
8 planning triggers a duty to consult, and that's the
9 *Dene Tha* case at our book of authorities, tab 7,
10 paragraphs 101 and then 108 and 109.

11 **Proceeding Time 10:05 a.m. T16**

12 So there was -- in that case there was a
13 considerable planning with respect to the Mackenzie
14 Valley Pipeline, and the *Dene Tha* were excluded from
15 that planning process, and the court held that that
16 high-level strategic planning did trigger the Treaty 8
17 right to be consulted, that procedural right.

18 THE CHAIRPERSON: Just to clarify again, Mr. Devlin, when
19 you are talking about the duty to consult, you are
20 talking about this Commission's independent duty to
21 consult?

22 MR. DEVLIN: Yes. Now what I'm doing is, I'm saying that
23 -- I'm going through why we say you have this
24 independent duty. So, the -- I mean, we are -- today
25 we are in uncharted waters, to some degree, because
26 this question has not been asked before in the courts,

1 or answered before by the courts. But -- so I'm
2 taking you through the case law where we say, "Okay,
3 if you look at this case, this case, this case, this
4 case, we say that you have an independent duty in this
5 context, in the Section 5 Inquiry context."

6 THE CHAIRPERSON: Thank you.

7 MR. DEVLIN: Now, site-specific consultation is sort of
8 the other kind of consultation that happens, and it's
9 the one that happens more frequently. This Commission
10 is engaged in strategic high-level planning, but more
11 often than not the Crown is engaged in site-specific
12 consultation. So, someone wants to chop a tree down
13 or dig a hole, or put up a pole, and the First Nation
14 is asked, "What do you think about it? What are your
15 concerns?" That's usually at the end-point, after a
16 significant amount of strategic planning has happened
17 prior to that, and very often tenures have been leased
18 out, and legal interests have been vested to third
19 parties. So, that site-specific consultation tends to
20 be highly problematic.

21 And for that reason, the courts have
22 increasingly been saying, "Hmm, it's really important
23 to bring in First Nations at as early as possible at
24 high-level strategic planning, for resource
25 development of -- or that potentially affects
26 aboriginal and treaty rights." Again, I will refer to

1 -- for that point to the *Dene Tha* case. That's in our
2 book of authorities, tab 7, at paragraphs 2, 3, 10 and
3 14.

4 Now, this is -- my next point on this issue
5 -- why site-specific consultation tends to be
6 inadequate, and why it's so important that First
7 Nations are brought in at the strategic planning
8 level. And I will take you to this. In the *Mikisew*
9 *Cree* case, which is in our book of authorities at tab
10 9, the Supreme Court of Canada refers to a decision of
11 the B.C. Court of Appeal called the *Halfway River*
12 *First Nation*. Halfway River being one of the
13 participant First Nations in the treaty tribal
14 association.

15 And at paragraph 64 of the *Mikisew Cree*
16 decision, the Supreme Court agrees with what the B.C.
17 Court of Appeal said in *Halfway*.

18 "The Crown's duty to consult imposes on it a
19 positive obligation to reasonably ensure
20 that aboriginal peoples are provided with
21 all necessary information in a timely way so
22 that they have an opportunity to express
23 their interests and concerns and to ensure
24 that their representations are seriously
25 considered and, wherever possible,
26 demonstrably integrated into the proposed

1 plan of action."

2 I would add that the Supreme Court of
3 Canada actually underlined that last clause,
4 "...to ensure that their representations are
5 seriously considered and, wherever possibly,
6 demonstrably integrated into the proposed
7 plan of action."

8 So it's that demonstrable integration into
9 the plan that is a key outcome of a consultation
10 process. And I want to -- the reason -- I don't think
11 that can be emphasized enough in the context of
12 today's procedural conference, because our submissions
13 -- and I will get to them -- but to cut to the chase
14 on this particular point, our submissions are that
15 only you, the Panel, are in a position to demonstrably
16 integrate the concerns raised by First Nations with
17 respect to the impacts of the determinations that
18 you're going to make. That the utility companies do
19 not have that power. They don't have that mandate
20 from the Minister. You have that mandate, and you
21 will be able to do it.

22 **Proceeding Time 10:10 a.m. T17**

23 And that is a key part of the duty to
24 consult that's been recognized by the Supreme Court of
25 Canada and particularly recognized in the context of
26 Treaty 8, because both the *Mikisew Cree* case and the

1 *Halfway River* case involve Treaty 8 First Nations.

2 And our court of appeal has recently
3 reaffirmed my earlier point that the earlier the
4 better in terms of consultations, and that was in the
5 *Carrier Sekani* case, which is in our book of
6 authorities at tab 4, paragraph 52. The Crown is
7 obliged to meaningfully consult at every stage of
8 planning, beginning at the earliest stages before
9 matters crystallize. Again, this inquiry is -- it is
10 fundamentally what are the next 30 years going to look
11 like, or potentially going to look like? What
12 direction are we going to go? And that is a very
13 early stage, very high-level stage, and the First
14 Nations are entitled to consultation at this level by
15 the body that is engaged in that planning process.

16 For consultation to be meaningful,
17 government's strategic planning must be able to be
18 changed in order to accommodate the concerns of First
19 Nations. And this is a case which I'm afraid I've not
20 been able to say properly and I'm sure one of my
21 friends in the room will be able to correct me, but
22 the *Wii, litsxw* case, which is a B.C. Supreme Court
23 case from last year, 2008, that's in our book of
24 authorities at tab 14. And that case was about a
25 consultation protocol under a forest and range
26 agreement entered into between the First Nation and

1 the Crown. And although the court said the protocol
2 was adequate, that nonetheless the consultation and
3 accommodation measures that were reached by the
4 statutory decision maker in that case were inadequate
5 because the Crown had not modified its position in
6 response to concerns raised by the First Nations.

7 Our submission is that you have the mandate
8 to meaningfully address to modify the determinations
9 to -- not before you make them, but to incorporate the
10 concerns of the First Nations in your determinations.
11 That is your mandate. And B.C. Hydro and the
12 Transmission Corporation don't have the ability to do
13 that to the same degree that you do.

14 Now, just in summary on this first point
15 then, it's the Commission which is mandated to inquire
16 and determine options for long-term transmission
17 needs. The duty to consult exists at every stage of
18 planning before matters crystallize. The terms of
19 reference were issued to this Commission, not to
20 anyone else. It's the Commission's high-level
21 strategic planning determinations which will be the --
22 which will be potentially affecting the treaty and
23 aboriginal rights of First Nations guaranteed by
24 Section 35. B.C. Hydro is putting forward evidence
25 and scenarios, but they're not making any
26 determinations. You're making the determinations.

1 references, where the Supreme Court has laid this out.
2 So, starting at paragraph 16 of *Haida*.

3 "The government's duty to consult with
4 aboriginal peoples and accommodate their
5 interests is grounded in the honour of the
6 Crown. The honour of the Crown is always at
7 stake in its dealings with aboriginal
8 peoples. It is not a mere incantation, but
9 rather a core precept that finds its
10 application in concrete practices. The
11 honour of the ..."

12 -- now, paragraph 18.

13 "The honour of the Crown gives rise to
14 different duties in different circumstances.
15 Where the Crown has assumed discretionary
16 control over specific interests, the honour
17 of the Crown gives rise to a fiduciary
18 duty."

19 And it goes on from there. We're not suggesting at
20 all that there's a fiduciary duty at play here.

21 Paragraph 19.

22 "The honour of the Crown also infuses the
23 processes of treaty-making and treaty
24 interpretation. In making and applying
25 treaties, the Crown must also act with
26 honour and integrity, avoiding even the

1 appearance of sharp dealing."

2 Paragraph 20.

3 "Where treaties remain to be concluded, the
4 honour of the Crown requires negotiation
5 leading to a just settlement of aboriginal
6 claims."

7 Paragraph 21.

8 "This duty to consult is recognized and
9 discussed in the jurisprudence."

10 And I think that's the key paragraph in that excerpt,
11 that the Supreme Court said the honour of the Crown
12 exists. That's where the duty to consult arises, and
13 that has been recognized in the jurisprudence. That's
14 been recognized in the common law of Canada.

15 As I mentioned earlier, the Supreme Court
16 of Canada in *Mikisew Cree* went further with respect to
17 Treaty 8 and said that -- and again this is common
18 law, that the duty to consult is a procedural right
19 contained within Treaty 8. And that's been recognized
20 in the common law.

21 And then the constitutional aspect, again
22 going back to *Haida*, the Supreme Court of Canada said,
23 in paragraph 20:

24 "It is a corollary of Section 35 that the
25 Crown act honourably in defining the rights
26 it guarantees and in reconciling them with

1 other rights and interests. This, in turn,
2 implies a duty to consult and, if
3 appropriate, accommodate."

4 So the duty to consult is implied in Section 35(1) of
5 the *Constitution Act*, and the Supreme Court of Canada
6 has told us that. And then paragraph 32:

7 "The jurisprudence of this court supports
8 the view that the duty to consult and
9 accommodate is part of the process of fair
10 dealing and reconciliation that begins with
11 the assertion of sovereignty and continues
12 beyond formal claims recognition.

13 Reconciliation is not a final legal remedy
14 in the usual sense. Rather, it is a process
15 flowing from the rights guaranteed by
16 Section 35(1) of the *Constitution Act*."

17 So, in some respects, the Supreme Court
18 neatly ties them up. You have the honour of the Crown
19 doctrine recognized in common law. You have the
20 aboriginal and treaty rights of First Nations
21 recognized and affirmed under Section 35, and it's the
22 court's jurisprudence that then moves us forward and
23 brings us to today.

24 So, the source of the duty to consult was
25 well-summarized in the *Haida* decision. And that the
26 Supreme Court has made it very clear that this is a

1 core precept quite independent from statutory and
2 regulatory law.

3 So our submission to you today is that
4 regardless of whether the Minister included the duty
5 to consult in the terms of reference or not,
6 regardless of whether the Minister has delegated some
7 procedural aspects of the Crown's duty to consult to
8 B.C. Hydro and the Transmission Corporation, there is
9 no requirement in law that the Commission be expressly
10 delegated the duty to consult, in order for it to have
11 that duty. So, if you look in your statute, you look
12 in your terms of reference, and you don't see it, it
13 doesn't mean it doesn't exist. It very much exists,
14 because, as I was saying under the first part of these
15 submissions, you're the body that will make the
16 determinations that will potentially affect treaty
17 rights and aboriginal rights and title.

18 So, now I'm going to move on to my third
19 point under question 2, and I will be addressing sub-
20 questions (a) and (b). My third point is this. The
21 powers of the Commission in these circumstances are
22 unique.

23 **Proceeding Time 10:20 a.m. T19**

24 The Commission is the only Crown actor
25 effectively determining strategic direction for the
26 province over the next 30 years with respect to long-

1 term transmission needs. And in the sub-questions you
2 ask what weight should be given to Section 5(6) of the
3 Act and Section 5(7) and 5(4). Our main submission
4 here is that you should give little or no weight to
5 these provisions when assessing whether the Commission
6 has an independent duty to consult.

7 The inquiry is mandated by the legislature
8 pursuant to Section 5 of the Act, and we say this is
9 no accident. Section 5 provides for the Commission's
10 executive advisory function to the Minister and
11 through the Minister to the Cabinet, quite apart from
12 the regular hearing process in which the Panel
13 engages.

14 Now, the inquiry is unique in the sense
15 that the Minister has the authority to use the terms
16 of reference to limit not only the subject matter of
17 the inquiry, but the manner and time in which the
18 Commission is to inquire, and there have been time
19 limits imposed on this process. And the Minister has
20 the authority to declare that the Commission cannot
21 reconsider or vary its determinations in the future,
22 that it may do that and may not -- that the Minister
23 may or may not do that.

24 However, the fact that the Minister sets
25 your terms of reference and may by regulation prohibit
26 the Commission from varying or rescinding its

1 determinations, does not negate the Commission's
2 independent duty to consult. In our submissions, the
3 terms of reference establish that the Commission's
4 mandate is to help to define a strategic planning
5 framework to guide the future development of B.C.'s
6 electrical generation transmission system. That's the
7 role of a government -- the effective role of a
8 government planning agency charged with assisting the
9 government in setting long-term strategic planning.

10 As I've already stated, the Commission is
11 not engaged in a quasi-judicial manner with a dispute
12 between parties, but is rather engaged in a non-
13 reviewable administrative decision-making process.
14 And we went through Section 101 and 105 of the Act
15 before with respect to you're making a non-reviewable
16 decision. So we say that no weight should be given to
17 those factors.

18 My fourth point is my last, point but it
19 has five sub-points, so I may not be quite done by the
20 break, but I'll do my best.

21 THE CHAIRPERSON: We have some flexibility, Mr. Devlin.

22 MR. DEVLIN: All right. So our fourth point is that the
23 parallel First Nation consultation process that's
24 being conducted by B.C. Hydro and the Transmission
25 Corporation is inadequate and does not discharge the
26 Crown's duty to consult, nor does it discharge what we

1 say is your independent duty to consult. And these
2 really focus on the last two, (e) and (f) of the sub-
3 questions.

4 So my first sub-point to this last point is
5 that the parallel consultation process is only
6 concerned with the evidence B.C. Hydro and the BCTC
7 will put before the inquiry. The proposed process
8 that B.C. Hydro and the Transmission Corporation are
9 engaged in was not designed in consultation with First
10 Nations, and it should have been, and authority for
11 that is the *Dene Tha* case. That's in our book of
12 authorities, tab 7, paragraphs 107 to 110, and
13 paragraph 114.

14 More importantly -- so we had nothing to do
15 with this process to begin with, and the law says we
16 should have; but more importantly this parallel
17 consultation process is only in reference to B.C.
18 Hydro and the Transmission Corporation's own evidence
19 that they're going to be putting in front of this
20 Commission.

21 First Nation concerns about the impacts of
22 the inquiry and inquiry-specific determinations will
23 not be considered in our view, and this is a major
24 inadequacy. I discussed earlier that the Supreme
25 Court of Canada in *Haida* held that consultation, that
26 the aim of consultation must be to substantially

1 address First Nations' concerns -- I think I used the
2 words "meaningfully address" First Nations concerns.

3 **Proceeding Time 10:25 a.m. T20**

4 And that we looked at the *Mikisew Cree* case and the
5 *Halfway River* case, where consultation must
6 demonstrably integrate First Nation concerns in the
7 Crown's plan of action.

8 Our point here is that we say that this
9 parallel process is unable to do that, because
10 ultimately it's this inquiry that is making those
11 determinations based on all the evidence before it,
12 not just Hydro and Transmission Corporation's
13 evidence.

14 My second point is that the parallel
15 consultation process will not result in strategic
16 high-level determinations that may be binding on
17 future transmission project applications. Only the
18 Commission itself, under its terms of reference, has
19 the power to make that -- those determinations. And
20 B.C. Hydro has argued that consultation about
21 determinations is not necessary because there aren't
22 any draft determinations, and that the Minister in the
23 future may consult -- may instruct B.C. Hydro and the
24 Transmission Corporation to consult regarding those
25 future -- regarding the determinations.

26 Well, our response to that is that the

1 Crown is obligated to consult regarding the impacts of
2 an anticipated activity. The consultation must
3 include not only the evidence before the Commission
4 but the anticipated impacts of those determinations
5 which are based in part on the evidence. Because B.C.
6 Hydro and B.C. Transmission Corporation's evidence is
7 only part of the evidentiary basis upon which the
8 Commission will make determinations, we say that that
9 parallel process is structurally inadequate.

10 By limiting consultation -- so if we were
11 to only go with the parallel process, consultation
12 would be effectively limited to consultation about the
13 evidence being submitted by B.C. Hydro and the
14 Transmission Corporation. In our view, that will not
15 demonstrably integrate First Nation concerns about the
16 anticipated impacts.

17 And we say, furthermore, that
18 reconciliation is not achieved. So, the objective of
19 the duty to consult is reconciliation of Crown
20 sovereignty and First Nation interests. That is not
21 achieved with *post facto* consultation by B.C. Hydro
22 and the Transmission Corporation about the
23 determinations the Commission makes in this inquiry.
24 And in our view, such a proposition runs entirely
25 contrary to the existing jurisprudence in that regard.
26 You don't consult after the fact. After the fact we

1 talk about infringements, and -- but we don't talk
2 about -- but it's now that we're talking about the
3 consultation.

4 My third point is that the regional
5 collective approach to the parallel consultation
6 process is not a reasonable approach to First Nation
7 consultation in this context. Hydro has argued that,
8 in its written submissions, that the regional
9 consultation proposed for the inquiry is adequate,
10 because it intends to consult every First Nation in
11 B.C. and identify First Nations affected and adverse
12 effects. Sorry, it also says that the adverse effects
13 of any given determination will be so diffuse, it
14 would be indiscernible. And relies heavily in its
15 reply submission on a case called *Regina v. Douglas*,
16 which is a 2007 Court of Appeal decision. And that
17 was about joint consultations by the Crown over a
18 federal fishing plan for the Fraser River with several
19 First Nations. And the court held that this joint
20 approach to consultation about fishing on the river
21 was adequate, and that the First Nation involved, the
22 Cheam First Nation, should have participated, and that
23 the duty to consult was discharged.

24 Well, several points to make why we say
25 that the *Douglas* case doesn't apply to what the
26 Commission's process is in this inquiry. To be

1 reasonable, consultation must account for the nature
2 of aboriginal and treaty rights at stake. As
3 established in the *Haida* case and the *Mikisew Cree*
4 case by the Supreme Court of Canada, the level of
5 consultation must be based on the assessed strength of
6 rights claimed or the existing rights, and the
7 seriousness of the potential impacts. So, different
8 types of aboriginal and treaty rights will trigger
9 different levels and forms of consultation.

10 **Proceeding Time 10:30 a.m. T21**

11 And I think it's -- you will hear from
12 other people today, I am confident you will hear from
13 other people today, that will describe the interests
14 that they hold. You know, what I've been articulating
15 this morning so far are existing treaty rights under a
16 historic treaty that included a commercial harvesting
17 right. Others will undoubtedly talk about aboriginal
18 title. Others will talk about a variety of aboriginal
19 rights. These interests are different and, although
20 they all receive constitutional protection, the fact
21 is that the Supreme Court has been very clear with us
22 that there's a spectrum of consultation and the level
23 of consultation that's required depends to some degree
24 on where these rights fall in that spectrum.

25 So, it's not like everyone, all the First
26 Nations before you, have the identical interests. And

1 the consultation that's going to be required may well
2 be different, because the determinations you make may
3 well be different for different First Nations, or
4 different groups of First Nations. You know, they may
5 have different -- there may be different regional
6 impacts. And sort of a one-size-fits-all approach is
7 -- does not discharge the obligation.

8 In the *Douglas* case, however, the First
9 Nations involved had identical rights and the Court of
10 Appeal really zeroed in on that at paragraph 43 of the
11 decision. The decision can be found attached to B.C.
12 Hydro's reply submissions. It's not in anyone's books
13 of authorities that I'm aware of. But at paragraph
14 43, the court said:

15 "Each First Nation had a separate and equal
16 aboriginal right to fish. Now, their
17 interests were not always the same, but
18 their right was the same."

19 Well, as I've articulated, there are different rights
20 before you today.

21 So, the consultation model that was used by
22 the federal government in the *Douglas* case was
23 calibrated to the nature of the aboriginal rights at
24 stake. In the inquiry here, the First Nations before
25 you do not have identical rights. And the B.C.
26 Supreme Court has commented that a one-size-fits-all

1 approach cannot be taken to satisfy and to discharge
2 the duty to consult. And the *Huhaylt* case speaks to
3 that.

4 Now, I'm going to move to my second-to-last
5 point, that the parallel consultation process by B.C.
6 Hydro and the Transmission Corporation cannot
7 discharge the duty to consult owed by the Commission.
8 The issue here isn't whether one agency can discharge
9 the other's duty to consult. The issue is the
10 adequacy of consultation in relation to the
11 anticipated impact on aboriginal treaty rights. In
12 our submissions, and in our view, B.C. Hydro and the
13 Transmission Corporation are not positioned to
14 adequately consult on behalf of the Commission. And
15 again, I made this point earlier, consultation isn't
16 just about information-gathering, it's about
17 meaningfully addressing the First Nation concerns.

18 The parallel process is about B.C. Hydro
19 and B.C. -- and the Transmission Corporation's own
20 evidence, not about the determinations that will
21 potentially impact the aboriginal and treaty rights.
22 They are -- B.C. Hydro and the Transmission
23 Corporation are not the true decision-maker in this
24 process. It's the Commission that's the true
25 decision-maker in this process. And that's -- and so
26 we can't look to that parallel process to discharge

1 the Crown's obligation to consult.

2 Our submission is that the Commission is
3 the only entity with the sufficient mandate and
4 opportunity to discharge the Crown's duty to consult,
5 in the context of this inquiry.

6 I want to just end on my last point, and
7 then I'll sit down. The parallel consultation process
8 is not designed to be meaningfully responsive -- or,
9 our clients have grave concerns that the parallel
10 process is not designed to be meaningfully responsive
11 to First Nation concerns. And to that degree, we
12 point to some of the comments made by other First
13 Nations already. Hwlitsum has raised this in their
14 reply submissions. But there's an exhibit before you,
15 submitted by the Nations. It's Exhibit C97-5, where
16 that group of First Nations has said that B.C. Hydro
17 has made unreasonable demands on them for comments on
18 the draft scenarios.

19 So there is concern by the First Nations
20 that this process has been set up, and that Hydro and
21 Transmission Corporation are pointing to it, saying,
22 "Look, we have this separate process." But that
23 process itself is inadequate. And that there is also
24 a concern that that process will be treated not unlike
25 the general stakeholder process that Hydro and
26 Transmission Corporation are engaged in. And where

1 there's information provided, but the opportunity to
2 meaningfully address the First Nations concerns is
3 quite limited.

4 So, subject to any further questions, those
5 are my oral submissions.

6 THE CHAIRPERSON: Thank you, Mr. Devlin.

7 I think we'll take the break first, and
8 should the Panel members have some questions then
9 we'll do that after the break. So, we return in 15
10 minutes. Thank you.

11 **(PROCEEDINGS ADJOURNED AT 10:36 A.M.)**

12 **(PROCEEDINGS RESUMED AT 10:53 A.M.)** **T22/23**

13 THE CHAIRPERSON: Please be seated.

14 Thank you, Mr. Devlin, the Panel has no
15 further questions there. Your submissions were quite
16 comprehensive, and with that I'm also reminding
17 everybody, which is the usual process we have in this
18 BCUC proceedings, that there is no need to repeat any
19 of the submissions that have been heard before. So if
20 you agree you state so; if you disagree you state why,
21 and if you have something new to add then please do
22 so.

23 Mr. Fulton, who will we have next?

24 MR. FULTON: Haisla Nation, Madam Chair.

25 THE CHAIRPERSON: Thank you.

26 **SUBMISSIONS BY MS. GRIFFITH:**

1 MS. GRIFFITH: Good morning once again, Madam Chair and
2 Panel members.

3 My submissions are largely in accordance
4 with the submissions of the Treaty 8 Tribal
5 Association, and I will definitely not be drilling
6 down into the law to the same extent because you've
7 just heard it all. What I would like to address
8 though, is the question of -- well, both the questions
9 1 and 2, and particularly the question of the weight
10 that should be given to the absence of a dispute.

11 Now, I agree with the Treaty 8 Tribal
12 Association's submissions that the four factors set
13 out in *Coopers & Lybrand* are none of them
14 determinative individually, and I think the question
15 of the absence of a dispute or the presence of a
16 dispute actually goes to two of the factors that are
17 set out in *Coopers & Lybrand*, and those are, does the
18 decision or order directly or indirectly affect the
19 rights and obligations of persons, and is the
20 adversary process involved?

21 The Treaty 8 Tribal Association's
22 submissions refer to two decisions regarding inquiries
23 that were also referred to in the BCTC submissions.
24 That was *B.C. Attorney General v. B.C. Privacy*
25 *Commissioner* and *Regault v. Gove*. And in both those
26 inquiries, there were findings made with respect to

1 misconduct, with consequently serious impacts on the
2 reputations of individuals. And there's no similar
3 potential, I would submit, for a direct sort of impact
4 on existing rights of the nature discussed in those
5 two inquiries.

6 The absence of a dispute, I would say,
7 means that the process does not have to be an
8 adversarial one, because the Commission doesn't have
9 to act as an arbiter of rights and responsibilities
10 between the parties. So given the relevance of the
11 absence of a dispute to two of the factors enunciated
12 in *Coopers & Lybrand*, I think the absence of a dispute
13 should be given considerable weight.

14 Moving on to question number 2, the answer
15 to that question is yes. There appears to be little
16 dispute on the record that there's a potential impact
17 to First Nations rights as a result of the
18 determinations, and therefore a trigger for the duty
19 to consult, although I note that the submissions of
20 the Joint Industry Electricity Steering Committee do
21 take issue with that conclusion.

22 The fact that the Commission is acting
23 quasi-judicially has been raised as a shield to defend
24 against the finding that the Commission has a duty to
25 consult. In other words, the submissions have argued
26 that because the Commission is acting quasi-judicially

1 in *Kwikitlem*, particularly paragraph 62.

2 "The Crown's obligation to First Nations
3 requires interactive consultation and, where
4 necessary, accommodation at every stage of a
5 Crown activity that has the potential to
6 affect their aboriginal interests."

7 With respect to subsection (b) and the
8 authority of the Minister to issue regulations
9 pursuant to Section 5.7 of the *Utilities Commission*
10 *Act*, it's unknown at this point whether or not the
11 Minister will make regulations pursuant to Section
12 5(7) -- subsection 5(7). The determinations have the
13 potential to impacts rights regardless of whether the
14 determinations are entrenched as a result of Section
15 5(7) regulations. So the Commission can't rely on
16 potential future consultation with respect to such
17 regulations, therefore little or no weight should be
18 given to this factor. And this goes back to the
19 submissions of Treaty 8 Tribal Association, that it's
20 really only the Commission that can consult with First
21 Nations when making determinations.

22 Sub-part (c), the duty to consult arises at
23 common law and is not dependent on Crown directions.
24 The absence of a specific directive to consult does
25 not obviate the common law duty. Therefore this
26 factor should be given little or no weight.

1 The honour of the Crown, reconciliation,
2 Section 35 rights entrenched in the *Constitution* and
3 the danger of rendering those Section 35 rights hollow
4 by Crown decisions that haven't gone through a proper
5 consultation process are what inform the duty to
6 consult.

7 Under subsection (d), B.C. Hydro cannot
8 fully discharge the Crown's obligation to consult.
9 This has been set out in more detail in our reply
10 submissions, but in brief, B.C. Hydro has been
11 directed to consult on a limited aspect, information
12 that BCTC and B.C. Hydro will be submitting to the
13 Commission for the Commission to consider in reaching
14 its determinations. The Commission can consider the
15 consultation that takes place between B.C. Hydro and
16 First Nations, but the fact that this consultation is
17 taking place should be given little or no weight in
18 assessing whether the Commission has an independent
19 duty to consult.

20 And finally, as I stated earlier, the
21 Commission can't rely on a potential future
22 consultation with respect to regulations under 5(7),
23 because it's an unknown at this point. I support the
24 submissions of the Treaty 8 Tribal Association and Mr.
25 Devlin, that it is only the Commission is -- that can
26 demonstrably integrate First Nation concerns into its

1 determinations.

2 Subject to any questions, those are my
3 submissions.

4 THE CHAIRPERSON: No questions, thank you, Ms. Griffith.

5 MS. GRIFFITH: Thank you.

6 MR. FULTON: The Nations.

7 **SUBMISSIONS BY MS. GAERTNER:**

8 MS. GAERTNER: Again for the record, it's Brenda
9 Gaertner, G-A-E-R-T-N-E-R, on behalf of what has been
10 -- I think because in our submissions we used a
11 defined term, "The Nations", for all of the nations,
12 we've -- representing, we're representing the four
13 nations. Nlaka'pamux, Okanagan, Tahltan and Shishalh.

14 I welcome the opportunity to speak to this
15 Commission at this time, and I'm grateful for you
16 taking the time to hold this hearing, this procedural
17 hearing, on First Nations issues. I appreciate that
18 these issues are extremely important in the province
19 of British Columbia, not only to the province and not
20 only to First Nations, but also to proponents and
21 others within the province who are looking for
22 certainty going forward, and how best to achieve
23 certainty.

24 I'd like to introduce Chief Feschuk, who
25 was able to be here today, who's from Sechelt and
26 there were a couple of other chiefs that had hoped

1 also to make it, but I want to take -- make a note
2 that their schedules are extremely tight and extremely
3 demanded upon, and so it's difficult for them always
4 to be here. But I also want to make a note that
5 already in this hearing how many First Nations have
6 come before you, and how extremely important it is for
7 these First Nations, that inquiries like this get off
8 on a good start.

9 There's a legacy in this province in hydro
10 development -- maybe also -- I don't know how
11 appropriate this is or isn't, but I'm not typically a
12 lawyer in adversarial situations. I've been working
13 for 25 years with First Nations on legal and policy
14 issues, and over the last number of decades,
15 hydroelectricity issues have become an extremely
16 important part of my work with First Nations because
17 of the importance they have in their territories, not
18 because they're particularly interested in B.C. Hydro
19 but because B.C. Hydro and BCTC are in their
20 territories having impacts on them.

21 **Proceeding Time 11:04 a.m. T25**

22 And so my work is generally the non-
23 adversarial processes. I know a number of the people
24 here on behalf of B.C. Hydro and BCTC from that
25 perspective. And I'm here because I believe this
26 process needs to be non-adversarial to be effective

1 and to be useful to the province of British Columbia
2 at this time.

3 Through this decision that you will make on
4 this procedural conference, you have the opportunity
5 to clarify that it is a non-adversarial public inquiry
6 that will be taking into consideration appropriately
7 the First Nation issues. There's a legacy in this
8 province of exclusion of First Nations as it relates
9 to decisions that were made with respect to the
10 hydroelectric development that's already occurred.
11 That legacy and the effects that that's had on First
12 Nations is only now beginning to be identified and
13 addressed, and we can't keep feeding that legacy. We
14 have to do things differently, and I think that's been
15 clear for a long time and the courts have started to
16 make that clear, and I appreciate that that's a big
17 challenge for a Panel like you, and I'm hoping that
18 our submissions will be useful to on how to make that
19 easier.

20 With respect, I think it's wise, it's
21 useful to take up the recommendations that have been
22 offered to date by the First Nations. I was pleased
23 that they are so consistent amongst themselves, and so
24 that there isn't much debate about how it is this
25 Panel could move forward in an effort to get this
26 done. Because frankly speaking, if we don't, I fear

1 that this will be a total waste of time and effort on
2 behalf of the Panel. There are constitutional solemn
3 obligations that you have, that every Crown actor has,
4 that makes decisions that have the potential to impact
5 First Nations. You won't, in my submissions, and
6 you'll see in the law, you can't avoid those
7 obligations. And so we'd better try to do our best to
8 get you off to the right start.

9 Strategic level decisions that are a 30-
10 year roadmap providing generation and transmission
11 options can only be made with adequate engagement. We
12 noted in our submissions and I just want to stress
13 this because I think it's important, the province
14 doesn't have clear title to the land and resources in
15 this province. The law has been clear about that.
16 And you can't proceed as if you do. First Nations are
17 not just stakeholders in this process. They are
18 holders of lands and resources that are already being
19 used for hydroelectric development and are being
20 proposed for hydroelectric development, and their
21 title to those lands and resources needs to be
22 reconciled with the assertion of the province's title.
23 And it's panel like you, and in my submission,
24 commissions like you who have the opportunity to be
25 part of that reconciliation.

26 Guidance can be taken from the New

1 Relationship Vision that we've referred to in our
2 submissions, and I just want to stress why we felt
3 that the New Relation Vision should be used as
4 guidance. Twofold. One, you have to uphold the
5 honour of the Crown and that's a commitment the Crown
6 has to made to First Nations all over the province.
7 But two, it speaks of "recognition, respect, and
8 accommodation of title and rights including processes
9 and institutions for shared decision making." And
10 those are extremely fundamental parts of the
11 reconciliation that First Nations are asking of the
12 Province of British Columbia, are demanding as a part
13 of their title and rights under Section 35, and are
14 available for you to respect given the terms of
15 reference you have before you.

16 As everybody hopes, none of us are going to
17 try to repeat in our written submissions or repeat
18 what's been said before you. I'll do my best, but I
19 do want to highlight some things that I feel and my
20 clients feel are extremely important for you to
21 consider. I am going to do those only in the context
22 of the questions that you've asked, and I turn first
23 to the first question.

24 While I can adopt primarily what Mr. Devlin
25 has said with respect to question 1, I want to make
26 one distinguishing factor from the get-go, which is

1 that we do believe your decisions are reviewable and
2 we do believe they're reviewable under Section 101 of
3 the Act.

4 In answer to your first question with
5 respect to weight, we agree with the positions that
6 have been stated, that the absence of a dispute is an
7 important criteria. I want to stress, and it's funny,
8 I thought of this last night and I went this morning
9 again before I came here, what is an inquiry? What is
10 the obligation to inquire? Let's start with that
11 first name. The obligation to inquire is the
12 obligation to ask questions. You inquire about
13 something. You're not making determinations on
14 individual rights here. You're asked to inquire about
15 a significant length of very -- as your scoping
16 decision decided and your terms of reference show, a
17 broad-based 30-year map. Courts aren't asked to do
18 broad-based 30-year maps. We don't hold long judicial
19 hearings between parties on 30-year strategic plans.

20 **Proceeding Time 11:10 a.m. T26**

21 And I think that's an extremely important thing to
22 start from. When you look at the list of disputes or
23 criteria that *Coopers and Lybrand* sent out, I agree
24 with the positions taken before me that all -- and I
25 would say all of those criteria, every single one of
26 them, points to you not being a quasi-judicial board

1 when it comes to doing a 30-year strategic map.

2 I also want to stress matters within your
3 own legislation. The importance should be placed on
4 the absence of any reference in -- as to a dispute in
5 Section 5. The Section read as a whole clearly
6 indicates that you're conducting an inquiry. Section
7 5.1 refers to the word "advise". Section 5.2 goes
8 back to "advise" and refers to "inquire". And it
9 contrasts that to Section 46, where you are clearly,
10 as the law has advised you and the Court of Appeal has
11 told you, you are a quasi-judicial board. In Section
12 46, when you're doing a CPCN application, you've got
13 an applicant. You have the obligation to either issue
14 one or refuse to issue one. You're clearly making a
15 decision based on a determination of somebody's
16 rights. That's not what you're doing here in my
17 submission, and this inquiry must be held in a manner
18 that provides you with the flexibility to hold
19 hearings, hold processes, which allow you to get at
20 the information you need. This is an information-
21 gathering exercise for you, not a determination
22 between parties as to what rights they have and what
23 they don't have.

24 You need to get to the information you have
25 -- that you need to have, in order to make decisions.
26 And I think it's extremely important that you ensure

1 that your process not be quickly relied upon as the
2 process you use in CPCN applications. Don't fall to
3 the quasi-judicial hearing, because you're comfortable
4 with it and we're used to it, and that's how you've
5 held hearings. You have to look at the unique and new
6 task before you, which is to hold an inquiry.

7 I want to emphasize that in the list that's
8 found in *Coopers and Lybrand*, the factors that are to
9 be weighed and evaluated really are all of the
10 factors. I think the fact that you don't have a
11 dispute is, as has been submitted, is an extremely
12 important part of that. The Nations, however, want to
13 stress that it's the subject matter of your power and
14 the nature of the issues to be decided that the
15 Supreme Court of Canada and Dixon, as he then was,
16 stressed in the quotes that have already been put
17 before you, and in our submissions, you can't
18 seriously contend that the subject matter and the
19 issues that you must decide is an activity of a quasi-
20 judicial function.

21 Going specifically to question 2, if the
22 Commission is not quasi-judicial, and for all the
23 reasons already stated that is our conclusion, then
24 does that necessarily result in you owing an
25 independent duty to consult? And the short answer is
26 "Yes." Because the Commission is a Crown actor,

1 charged with the responsibility to make determinations
2 and recommendations which have the potential to impact
3 Section 35 rights, including title of the nations, you
4 have an obligation to consult and, where appropriate,
5 accommodate. The law is clear that the Crown
6 decision-maker must consult to make the consultation
7 meaningful, and we suggest make real the possibility
8 of meaningful accommodation. The iterative process
9 that is required for consultation, the opportunity to
10 potentially negotiate accommodations as it relates to
11 the potential decisions, all must be done with the
12 Crown decision-maker. It can't be done with anybody
13 else in order for it to be effective.

14 You've had both *Haida* and the *Dene Tha* and
15 the *Squamish* decisions already put before you. I
16 emphasize that it's clear that the law provides that
17 you have a duty, and that duty is triggered whenever
18 you're aware of an existing right or title, and
19 wherever you contemplate that -- decisions that would
20 adversely affect it.

21 **Proceeding Time 11:15 a.m. T27**

22 I want to stress, I think in some ways it's
23 helpful to you. It's useful that there are decisions
24 already that tell you clearly, and I -- because Mr.
25 Devlin has stressed for obvious reasons the *Dene Tha*.
26 Want to stress the *Squamish Nation* decision. In that

1 decision we were talking -- the court there was
2 talking about asserted title and rights as distinct
3 from proven treaty rights, and Justice Konigsberg was
4 clear and it's found -- it's on tab 17 of the
5 authorities that we've put before you, but I'm just
6 going to just read the quote. You don't need to go to
7 it.

8 "The duty of consultation, if it is to be
9 meaningful, cannot be postponed to the last
10 and final point and series of decisions.
11 Once important preliminary decisions have
12 been made and relied upon by proponents and
13 others, there is a clear momentum to allow a
14 project. This case illustrates the
15 importance of early consultations being an
16 essential..."

17 not an optional, an essential,

18 "...part of meaningful consultation."

19 Given the terms of reference and your
20 scoping decision, it is clear that you're doing a road
21 map and it's clear you're engaged in consultation on a
22 strategic -- or that you need to engage in a
23 consultation on a strategic level basis.

24 In our submissions we tried to provide you,
25 and of course we're not at this point in time giving
26 you the full facts around all of these nations. We

1 provided you some introductory perspectives on The
2 Nations on how your determinations might affect their
3 rights. Because, you know, you have to sort of put
4 those two together to determine that you've got the
5 obligation. The Tehltan Nations territories is
6 clearly one in which there are extremely limited
7 energy infrastructures right now, and the parameters
8 set through this -- the determinations in this inquiry
9 will shape and directly inform the scope of mining and
10 other economic developments and what modes and size of
11 energy infrastructures will be made available to them.

12 The Okanagan Nation and the Nlaka'pamux
13 Nation are nations that their existing territories are
14 full of existing energy works and infrastructures.
15 These existing infrastructures is the source of
16 ongoing impacts and infringements, and it's been a
17 pattern in energy planning to date by B.C. Hydro and
18 the Province to seek to exploit existing energy
19 infrastructures in order to make determinations about
20 future infrastructures. The outcome of this inquiry
21 will again provide a framework for future energy
22 infrastructures within these territories that will
23 necessarily involve considerations of the existing
24 works and possibly new works.

25 Finally Sechelt's territory, which is a
26 coastal territory, is one in which since the Province

1 adopted their 2007 Energy Plan, their territory has
2 been replete of just everywhere in the territory, on
3 almost all of the rivers in their -- applications for
4 IPP projects. And they have been, since that policy,
5 stressing at many levels of government the need for
6 strategic planning with respect to that, and that had
7 not been engaged up until this inquiry. Clearly this
8 inquiry and any strategic level decisions it will make
9 regarding the use of transmission lines that feed into
10 the Lower Mainland and potentially into the United
11 States or otherwise for export, will have direct
12 impacts on Sechelt territory.

13 Moving then to specific questions around
14 question 2, you've asked us what weight should be
15 given to the fact that the Minister had determined the
16 terms of reference, and that the Minister under
17 Section 5(7) can make a declaration with respect to
18 your determinations, and finally asked us to comment
19 on whether the duty -- what weight should be given to
20 the fact that the duty of consultation is not
21 specifically set out in your terms of reference.

22 Well, the failure by the Minister to
23 specifically set out in the terms of reference this
24 legal obligation cannot and does not obviate your
25 Constitutional obligations. The terms of reference
26 don't set out any of the legal obligations which BCUC

1 has to meet, particularly things like impartiality,
2 due process. The duty to consult is a constitutional
3 obligation. It attracts to every Crown decision
4 maker. It doesn't depend on the identification of the
5 duty in an enabling statute or regulation.

6 **Proceeding Time 11:19 a.m. T28**

7 There are numerous Crown actors that are
8 involved in the strategic planning process. BCTC,
9 B.C. Hydro, BCUC and the Minister. And each of them
10 carry an obligation to consult as it relates to their
11 actions and their decisions. The Commission's duty
12 must be discharged as it relates to your
13 determinations. The Minister's decision to engage the
14 terms of reference in -- the Minister's decision to
15 pass a regulation is a distinct decision at which
16 point he may have -- he will have distinct obligations
17 to consult upon.

18 I just want to briefly emphasize that it's
19 established law, as you've already heard in *Haida*,
20 that before a Crown decision-maker can make a
21 determination they have to consult, and really it's
22 that -- it's concomitant with the Crown mandate is the
23 duty to consult. It's not something that -- if you
24 have that mandate, like a chief forester has that
25 mandate or anyone else, anyone that's going to make a
26 decision, and what the substance of your obligation to

1 consult, which was a question that arose at the first
2 hearing, and was a question that arises in the
3 subsequent questions, is the difficult question, I
4 think. How do you do it in the context of this panel?
5 I think that becomes -- not whether you have it. How
6 do you do it and how best to do it, given the
7 situations we have here. But it's clear in law that
8 you can't separate the obligation to make a decision
9 with the obligation to consult.

10 Finally, on the remaining two factors that
11 you've asked us to consider with respect to the
12 section question, which is B.C. Hydro is undertaking
13 certain steps within their process, and Exhibit B2-4
14 contemplates B.C. Hydro undertaking consultation as it
15 relates to the Minister's considerations of a
16 regulation under 5.7.

17 For obvious reasons, B.C. Hydro's
18 obligations to consult can't discharge yours. Only
19 the Commission will be able to ensure that you've been
20 -- that we've been meaningfully engaged. I support
21 the position set out before me that the B.C. Hydro's
22 obligation to consult as it relates to their
23 submissions does not take into consideration all of
24 the submissions that will be before you, and it also
25 doesn't take into consideration the submissions the
26 First Nations will want to put before you independent

1 of any discussion with B.C. Hydro or BCTC.

2 B.C. Hydro's parallel process is -- was
3 unilaterally determined. It's wholly insufficient
4 from our perspective, and it's not consultation for
5 the purposes of this Commission.

6 I must say I was a bit confused by B.C.
7 Hydro's submission on one hand that you're a quasi-
8 judicial board with a dispute in front of you, and we
9 could rely on their consultation process. And I'll
10 tell you why I was confused, because I think there's a
11 fundamental contradiction in that. If we have a
12 dispute, which of course I say we -- we say we don't.
13 But if we did, you couldn't rely on us talking to a
14 provincial Crown disputant to get the issues before
15 you. And I think that's a really important
16 contradiction to consider right from the get-go,
17 because I do think you aren't a quasi-judicial board,
18 and I think that's why people should be talking to
19 each other as much as they can to see what issues can
20 be resolved and how they can be put before you in a
21 way in which there aren't as many differences of
22 opinion, and that it's clearer as you go along how to
23 go along. But it makes absolutely no sense to me if
24 we're in dispute with the Crown that you could rely on
25 what the Crown is telling you about what we have to
26 say.

1 weight in this case. The *Coopers & Lybrand* factors
2 that Mr. Devlin in particular took you to are not
3 exhaustive and are not necessarily to be weighed
4 equally. That's evident from the decision itself.
5 These are guideposts for the Commission to consider.
6 It's not a strict test. And so it's acceptable, of
7 course, if the circumstances require, to weigh one
8 factor more than another, and in my submission the
9 fact that there is the absence of a dispute in this
10 case weighs very heavily, as does the factor
11 identified in *Coopers & Lybrand* that whether rights
12 are in play, rights or obligations are to be
13 determined.

14 A couple of my friends previously have
15 talked about there's no sanctions in issue here. This
16 isn't any kind of penalty to be imposed. But
17 moreover, there are not rights in issue in the sense
18 that we might see in say a court dispute or in a CPCN
19 application that this Commission would deal with. The
20 Commission is specifically instructed in its mandate
21 under -- I won't go there, but under Section 5 of the
22 mandate of course, not to consider specific generation
23 options, not to consider specific routing options.
24 That indicates that this is a high-level planning
25 process, not a rights determination process in your
26 very mandate. And so in my submission, that's another

1 factor to look at in considering whether there's a
2 dispute and the nature of the rights that are in play.
3 There are rights in play in the sense that aboriginal
4 rights are engaged by the planning, but not the kind
5 of specific rights that we might see in an ordinary
6 adversarial dispute.

7 The other point I wish to make on question
8 number 1 is simply to agree with my friend Ms.
9 Gaertner on the reviewable nature of the decision. I
10 would attach -- I wouldn't attach the significance to
11 that aspect that my friend Mr. Devlin did. It's not
12 one of the factors that are identified in the *Coopers*
13 *& Lybrand* analysis, at least in the four-part -- or
14 the four factors, and in my submission you simply
15 don't need to go there. The absence of a dispute and
16 the other points discussed really answer the question,
17 in my submission.

18 With regard to the second question, the
19 answer in my submission is of course "yes". Another
20 way to look at this question or to think about this
21 question might be that if the Commission is not acting
22 in a quasi-judicial capacity, is there any reason why
23 the Commission would not have the duty to consult?
24 And in my submission, there is no reason why the
25 Commission wouldn't have the duty to consult. As my
26 friends have said, the duty is imposed as a matter of

1 law, not as a matter of mandate. It's a matter of
2 constitutional law. And as Mr. Gaertner just told
3 you, it doesn't matter that it's not in your specific
4 mandate. The duty exists as a matter of law.

5 **Proceeding Time 11:29 a.m. T30**

6 Let me just say this that might give you a
7 bit of comfort, that in the *Haida* case which concerned
8 the replacement of a tree farm licence and Ministerial
9 approval for the replacement of a tree farm licence.
10 There were several factors that the Minister is to
11 consider in granting or withholding approval of the
12 transfer of a tree farm licence, and -- or the
13 replacement of a tree farm licence. Both were in
14 issue in that case. And the *Forests Act* does not say
15 that a consideration of First Nations interests or a
16 consultation with First Nations is one of the things
17 that the Minister is supposed to do in considering a
18 licence replacement.

19 So in other words, rarely will you find in
20 the consultation case law a specific mandate on the
21 part of the decision-maker to engage in First Nations
22 consultation. That's always imposed as a matter of
23 law. It was in the seminal *Haida* case and it has been
24 in several others.

25 And so that addresses questions (a) and (c)
26 -- 2(a) and (c), and consequently I would submit that

1 those points get little or no weight at all. With
2 regard to question -- sub-question (b), I want to just
3 mention if I could, and there was -- the legislative
4 provision at play here, Section 5(7) of the *Utilities*
5 *Commission Act*. Now, this Commission will make
6 determinations according to its -- both its
7 legislative mandate and the mandate provided by the
8 Commissioner. Under Section 5(7) of the *Utilities*
9 *Act*, the Minister may then declare by regulation that
10 the Commission may not, during the specified time,
11 reconsider, vary or rescind a determination made under
12 Section 4. So the Minister's authority under Section
13 5 is really to bless this Commission's determinations.

14 So, to leave the consultation until after
15 the Commission has made its determinations is too late
16 in the process. Now, my friends have -- and in both
17 the submissions orally and in writing, we have all
18 urged upon you that the duty arises at an early stage,
19 and it does, and that's critical. But putting that
20 question aside for a moment, even if we could say it
21 doesn't arise until -- or it could come up until after
22 the Commission's made its determinations, and it's
23 over to the Minister to decide, matters have
24 crystallized. And in the *Carrier Sekani* case, which
25 of course involved the Utilities Commission, and this
26 is referred to in our written submissions at paragraph

1 13, I won't take you there, but the Court of Appeal
2 said that consultation requires --

3 "...that the duty of consultation arises at an
4 early stage of the government plan that may
5 impact aboriginal interests before matters
6 crystallize."

7 So the difficulty here is that once you've
8 made your determination, matters have crystallized,
9 and they've crystallized partly because we're far
10 along in the process, and even if the Minister had a
11 discretion to vary or -- well, vary your
12 determinations, or make different determinations of
13 his own, we're still far along and things still have
14 crystallized in the sense that Madam Justice
15 Konigsberg said in the *Squamish* case that Ms. Gaertner
16 just mentioned, because they've really crystallized in
17 the sense that the Minister's authority is really a
18 "yes or no" authority and not a discretionary one.

19 So, again, I would submit for that reason,
20 as well as those that my friends have put forward,
21 that 2(b) is to be weighed -- well, to receive little
22 or no weight.

23 On the question of (d) and (e), the hydro
24 and -- the B.C. Hydro consultation process, I think my
25 friends have covered that well. I won't add to that,
26 other than to say that -- well, say we agree that

1 there's a fundamental difficulty in these, the
2 consultation being filtered through Hydro and then to
3 the Commission, rather than the Commission directly
4 engaging, which the case law directs you to.

5 But the second aspect, which is that Hydro
6 -- and I think my friend -- one of my friends did
7 touch on this, but Hydro is not -- has been directed
8 not to consult on the impacts of the Commission's
9 decision. And that's fundamental, and that goes back
10 to the point of crystallization, and whether, once the
11 Commission makes determinations, can meaningful
12 consultation take place? And in our submission, it
13 simply can't. So the fact that Hydro's been directed
14 not to consult on impacts is really fatal to the
15 adequacy of that process.

16 And those are my submissions.

17 THE CHAIRPERSON: Thank you very much, Mr. Kirchner.

18 MR. FULTON: So then, Madam Chair, that takes us back to
19 the order of appearances, and moving in reverse order,
20 the Toquaht Nation is next.

21 **SUBMISSIONS BY MR. CHRIST:**

22 MR. CHRIST: Madam Chair, Panel members. I'd just like
23 to note that this is our first appearance before the
24 Panel, and we're necessarily playing catching-up here.

25 **Proceeding Time 11:35 a.m. T31**

26 Let me introduce you briefly to the Toquaht

1 First Nation. We're a small First Nation on the west
2 coast of Vancouver Island near Ucluelet and Tofino,
3 and notably are a signatory to the Maunoth final
4 agreement. I think I'm correct in saying that we're
5 the only First Nation present at this inquiry that is
6 a signatory to a modern treaty under the B.C. treaty
7 process.

8 Toquaht Nation formally adopts its
9 submission on July 24th, with one exception. On page
10 10 of our submission under "Capacity and Funding",
11 Section C, in the first paragraph we have a small typo
12 which is slightly embarrassing. We've disavowed any
13 need for capacity funding and that's not what we
14 meant. So the word "with" should read "without".

15 In respect of clustered questions 1 and 2,
16 Toquaht is in support of the comments that have been
17 made so far and we have no further comments.

18 THE CHAIRPERSON: Thank you very much.

19 MR. FULTON: Hwlitsum First Nation.

20 **SUBMISSIONS BY MS. MUIR:**

21 MS. MUIR: Madam Chair, members of the Panel. With
22 respect to the BCUC duty to consult First Nations
23 deeply, the Hwlitsum First Nation supports and stands
24 by our written submissions of June 24th and the related
25 book of authorities, which were Exhibits C89.3 [sic]
26 and C89-2, our written submission of July 24th which is

1 C89-4, and our reply submission of July 31st which is
2 Exhibit C89-5.

3 The Hwlitsum First Nation respectively
4 differs from the characterization of BCTC in their
5 Exhibit B1-71, page 3 at footnote 2, which they state
6 on behalf of the Hwlitsum First Nation. The following
7 submissions appear to say that the duty exists but do
8 not argue this position overly strongly.

9 In contrast, Hwlitsum First Nation has
10 asserted the role of the BCUC having the duty to
11 consult early, consistently and strongly throughout
12 the development of this issue in the proceedings.

13 The Hwlitsum First Nation agrees with and
14 supports the submissions of the earlier First Nations
15 concerning questions 1 and 2. We're going to comment
16 just briefly about one aspect that's been raised and
17 that we'll speak to further in later questions, and
18 that really has been raised out of several parties
19 dealing with the deficiencies in the B.C. Hydro's
20 parallel process. We've addressed this in paragraphs
21 13 to 15 of our reply submission of July 31st, as well
22 in earlier written and oral remarks, including as
23 early as a workshop we had on process.

24 Chief Wilson and Allan Grove, who are both
25 here, have attended the B.C. Hydro's Generation
26 Resources Option Workshop of July 23rd, as well as the

1 BCTC Scenarios Workshop of August 5th. If we look to
2 that August 5th meeting dealing with the scenario
3 planning, which had both First Nation and other
4 participations, there were questions by -- numerous
5 questions by First Nations that were not fully
6 answered. Technician Allan Grove specifically asked
7 Kit Morrison, which was the manager of the long-term
8 planning for BCTC, in reference to pages 57 onwards of
9 his presentation, has the BCTC considered or factored
10 in the cost of accommodation of First Nations? And
11 the answer was a brief and terse no.

12 Hwlitsum First Nation is very concerned
13 there has been no consideration or inclusion of any
14 costs with respect to First Nations accommodations in
15 its earlier scenario planning for the next 30 years,
16 despite the range of scenarios, the spectrum of First
17 Nations rights that you've already begun to hear of,
18 and the required deep level of consultation. This
19 does not seem either appropriate or prudent on behalf
20 of BCTC.

21 **Proceeding Time 11:39 a.m. T32**

22 The Hwlitsum First Nation recognizes and
23 has asserted that it is the BCUC that holds the duty
24 to consult with First Nations, deeply including
25 Hwlitsum First Nation. And we hope in our responses
26 and questions to questions 5 to 8 to suggest some

1 measures that may assist in informing the Commission
2 in the conduct of that duty.

3 THE CHAIRPERSON: Thank you very much.

4 MR. FULTON: Shuswap Arrow Lakes Division.

5 **SUBMISSIONS BY MS. LEBOURDAIS:**

6 MS. LEBOURDAIS: Wais kukwai. My name is Sunny
7 Lebourdais with the Shuswap Arrow Lakes Division, or
8 Splats'In, Lakes Division of the Secwepemc Nation.

9 First, what I want to do is just give a bit
10 of context to who the Lakes Division are, quickly.
11 The Lakes Division is a traditional governance
12 structure which is currently comprised of the
13 Neskonlith Adams Lake and Spacheen communities of the
14 Secwepemc Nation. The Secwepemc Nation is literally
15 translated "the land of the spread-out people", and we
16 consider that we have been mandated by the creator, by
17 Kalkukwi, to manage our areas of jurisdiction and to
18 take care of these lands and resources.

19 We would like to state that we have never
20 ceded or surrendered any of our lands or resources,
21 and we never signed any historical treaties and
22 currently aren't part of the current B.C. treaty
23 process.

24 And at this time I would like to take this
25 time just to refer to a foundation document which
26 speaks to our stance regarding our title and rights

1 battle that we've had since the arrival of the first
2 white people in our traditional territory. And this
3 document is the memorial to Sir Wilfrid Laurier which
4 was presented in 1910, and therefore is having its
5 centennial next year. So these are direct quotes from
6 the memorial.

7 "When they first came among us, there were
8 only Indians here. They found the people of
9 each tribe supreme in their own territory
10 and having tribal boundaries known and
11 recognized by all. The country of each
12 tribe was just the same as a very large farm
13 or ranch belonging to all the people of the
14 tribe, from which they gathered their food
15 and clothing, et cetera. Fish which they
16 got in plenty for food, grass and vegetation
17 on which their horses grazed and the game
18 lived, and much of which furnished materials
19 for manufactures, et cetera. Stone which
20 furnished pipes, utensils and tools. Trees
21 which furnished firewood, materials for
22 houses and utensils, plants, roots, seeds,
23 nuts and berries which grew abundantly and
24 were gathered in the season just the same as
25 the crops on a ranch, and used for food,
26 minerals, shells, et cetera, which were used

1 for ornaments and for plants. Water which
2 was free to all. Thus fire, water, food,
3 clothing and all the necessities of life
4 were obtained in abundance from the lands of
5 each tribe. And all the people had equal
6 rights to access to everything they
7 required. You will see the ranch of each
8 tribe was the same as its life and without
9 it the people could not have lived.

10 What have we received for our good
11 faith, friendliness and patience? Gradually
12 as the whites of this country became more
13 and more powerful, and we less and less
14 powerful, they little by little changed
15 their policy toward us and commenced to put
16 restrictions on us. Their government or
17 chiefs have taken every advantage of our
18 friendliness, weakness and ignorance to
19 impose on us in every way. They treat us as
20 subjects without any agreement to that
21 effect, and force their laws on us without
22 our consent and irrespective of whether they
23 are good for us or not. They say they have
24 authority of us. They have broken down our
25 old laws and customs, no matter how good, by
26 which we regulated ourselves. They laugh at

1 believed guaranteed us our rights, the B.C.
2 Government has trampled underfoot. This is
3 how our guests have treated us, the brothers
4 we received hospitably in our house."

5 And that was signed in 1910 by a number of
6 the chiefs of the interior, including my own Kalkuki
7 Chief Jimmy Gabel of the Khlin Band.

8 So with that, I will refer to question
9 number 1. Unfortunately here we are 100 years later
10 and addressing the very same things that our leaders
11 had in 1910.

12 So with reference to question number 1, we
13 support the claim that the Commission Panel is not a
14 quasi-judicial body and therefore the Commission Panel
15 does have a duty to consult. We would also like to
16 state that in reference to factors (a) to (e) in
17 question number 2, we believe that no weight should be
18 given to those factors.

19 In response to question 2 as well, in
20 response to the B.C. Hydro, BCTC parallel consultation
21 process, we believe that this parallel consultation
22 process is not adequate or sufficient because it does
23 only speak to their interests, their submissions and
24 their evidence that they are going to be submitting,
25 and that in order to satisfy the duty to consult it
26 would have needed to have been developed in

1 consultation with First Nations.

2 Our experience with both B.C. Hydro and
3 BCTC do not allow us the confidence to uphold or even
4 adequately relay our interests to the Panel through
5 their consultation process. I do believe that you
6 need to hear our voice, you need to hear our evidence,
7 you need to hear our interests, and that you deserve
8 to have that on a one-on-one basis and not through a
9 third party.

10 So during this consultation process, we
11 were told that we could talk at workshops. And I
12 realize that this is a very legal and structured
13 process, but I just wanted to give you a bit of
14 information what it's been like as a First Nations
15 person going to these workshops and what the
16 experience has been like for myself to date.

17 When we attended the B.C. Transmission
18 Corporation's workshop in Vancouver, and this was one
19 of their initial workshops that they had, we were
20 introduced to a consultant from a company called E3,
21 and at that point they went through a number of
22 models, many of which went over a lot of our heads,
23 I'm sure. So unfortunately we didn't have any
24 capacity funding to send anyone there that could
25 actually make any sense of it.

26 However, despite this, what was evident

1 upon asking questions was that when they doing their
2 modelling, there was no inclusion of any aboriginal
3 title and rights policies, or any information or
4 evidence with regards to First Nations or our title
5 and rights. And that was admitted by the consultant.

6 This consultant also carried on to boast on
7 how he was a key witness in a court case which pushed
8 a transmission line through a restricted or protected
9 area, and what this did is basically scared me because
10 we don't want to be in a position where in a few years
11 down the road, a protected area of ours is ploughed
12 through under decisions made by this Panel because you
13 didn't have the information that you needed to in
14 order to make those kinds of informed decisions, with
15 our interests and our information.

16 The other means that B.C. Hydro and BCTC
17 are using to satisfy their consultation process that
18 they've developed is through regional workshops which
19 they held in July. We attended this regional workshop
20 in Kamloops. I think there was about four or five
21 chiefs, and that was for the entire interior, so you
22 can imagine the representation that would have been
23 required to properly consult with First Nations in the
24 Interior. You would definitely need more than four or
25 five chiefs. I think in total there was probably ten
26 people at the workshop.

1 I think many of our comments are similar to
2 those made by First Nations so far. But I will just
3 respond to question 1 or 2 by reading out a bit from
4 the submission by our lawyer. So, in response to
5 question 1:

6 "The Sto:lo Tribal Council submits that the
7 weight in these circumstances should be
8 great, having regard to the fact that
9 without a dispute the Commission is acting
10 in a policy advisory capacity only to the
11 Crown."

12 And question 2:

13 "Sto:lo Tribal Council submits that if the
14 Commission is not acting in a quasi-judicial
15 capacity, then it is vested with an
16 independent duty to consult and accommodate.
17 In these circumstances, there is effectively
18 no other Crown forum for the Crown to
19 consult and accommodate the concerns of
20 Sto:lo Tribal Council. This is the only
21 game in town for this matter, based upon the
22 terms of reference and the statutory
23 process, and the Commission therefore is
24 vested with an independent duty of
25 consultation and accommodation."

26 In response to 2(a):

1 "Great weight should be given to the fact
2 that the Commission has been given the terms
3 of reference by the Minister to hold the
4 Section 5 Inquiry as the Crown has decided
5 to vest its honour of the Crown
6 responsibilities to the Commission by
7 operation of its direction."

8 Response to 2(b):

9 "Equally great weight should be given to the
10 fact that under Section 5(7) of the
11 *Utilities Commission Act*, that by a
12 Ministerial regulation the Commission may
13 not reconsider, vary or rescind a
14 determination made under Section 5(4) of the
15 *Utilities Commission Act*."

16 And response to 2(c):

17 "The fact that the duty of consultation is
18 not contained in the terms of reference
19 should be given little weight, as the honour
20 of the Crown is a constitutional duty that
21 imbues all of the Crown action and it's
22 implicit in all Crown legislative and policy
23 actions. The honour of the Crown is
24 upstream the statutory regulatory process
25 and is implicit in all Crown action,
26 including the issuance of its terms of

1 reference in the Section 5 Inquiry."

2 2(d):

3 "No weight should be given to the direction
4 to B.C. Hydro as a Section 5 Inquiry is
5 under the jurisdiction of the Commission."

6 And finally, in response to (e):

7 "No weight should be given to B.C. Hydro
8 consultations. B.C. Hydro cannot consult
9 and accommodate to the extent that the
10 Commission is now mandated to do under the
11 Section 5 inquiry."

12 Thank you.

13 THE CHAIRPERSON: Thank you very much, Ms. Heaslip.

14 MR. FULTON: Independent Power Producers of British
15 Columbia.

16 **SUBMISSIONS BY MR. AUSTIN:**

17 MR. AUSTIN: I'd like to say at the outset that the
18 Independent Power Producers of B.C. agrees that First
19 Nations should be consulted. IPPs have been
20 undertaking their own form of private consultation for
21 a lot of years, and prior to the formal consultations
22 undertaken by B.C. Hydro and BCTC.

23 The difference of opinion goes as to who in
24 relation to -- from the Crown is responsible for this
25 consultation. And as set out in the IPPBC submission,
26 it is B.C. Hydro's and BCTC's duty to consult.

1 **Proceeding Time 11:54 a.m. T35**

2 There's no need to go through the IPPBC's
3 submission. It's short, but it's short because the
4 IPPBC tried to reduce the large number of issues into
5 something as concise as possible. It often takes a
6 lot more time to reduce something to a concise format
7 than to go on at length.

8 With respect to the Commission Panel's
9 questions, the IPPBC would like to respond to the
10 first question, whether there is a dispute that must
11 be adjudicated, and it would like to respond to
12 submissions made by various First Nations.

13 Starting off with counsel for Treaty 8, and
14 I'm paraphrasing here, I don't have a copy of the
15 transcript, I'm looking at my notes so if I've made
16 any mistakes I can look at the transcript this
17 evening, or when Treaty 8 counsel has a chance to
18 reply they can certainly correct anything that I've
19 got down that's not properly taken down.

20 One of the things counsel for Treaty 8
21 said, "You are making decisions about those
22 scenarios," and those are the scenarios put forward by
23 BCTC and B.C. Hydro. Another thing that counsel for
24 Treaty 8 said, "Consultation only with respect to B.C.
25 Hydro and BCTC evidence." And I take both those to
26 mean that through the parallel consultation process,

1 First Nations have an opportunity to consult with B.C.
2 Hydro with respect to BCTC's and B.C. Hydro's
3 evidence.

4 Well, that's evidence of a difference of
5 opinion, because in this proceedings there are other
6 people who are going to be bringing views to this
7 Panel that are going to have a different outlook than
8 B.C. Hydro and BCTC. It's not because they've got
9 nothing else to do. It's just that's the nature of
10 the electrical industry in this province and
11 elsewhere. There are different views.

12 The IPPBC will certainly be coming forward
13 with different views than BCTC and B.C. Hydro. It's
14 not going to come forward with different views in all
15 areas, but it will be coming forward with different
16 views. So there is going to be a dispute. There is
17 going to be a dispute about facts, there is going to
18 be a dispute about technology, and there's going to be
19 a dispute about how things should proceed. And you as
20 a quasi-judicial body are going to have to make
21 decisions with respect to those disputes.

22 So, the IPPBC's view is, yes, there's going
23 to be disputes that are going to have to be
24 adjudicated. That's just the nature of the process.
25 It's not because the IPPBC wants to have an
26 adversarial process. That's just the way it's

1 structured, because there are going to be different
2 views. If there's different views there's going to be
3 different sides, and to the extent necessary it's
4 going to be adversarial. And there is absolutely
5 nothing wrong with that.

6 So the answer to the question, the first
7 issue that was raised is that there is going to be an
8 adversarial dispute that must be adjudicated in a
9 judicial or quasi-judicial manner.

10 Also with respect to that question, the
11 *Coopers & Lybrand* decision was referred to, and in
12 Exhibit B2-7 on page 12, B.C. Hydro sets out the
13 extracts from the *Coopers & Lybrand* decision. Now,
14 the IPPBC is not going to through this in any detail
15 because B.C. Hydro has covered it very adequately in
16 its submission. However, whether there is a quasi-
17 judicial function is going to be a combination of
18 factors. It's not just one factor. And when you look
19 at all the factors and you look at this process that
20 the BCUC has established for hearing the Section 5
21 Inquiry, it's fairly similar if not identical to what
22 it uses for certificate of public convenience and
23 necessity applications, long-term acquisition plan
24 decisions, rate hearings. We have a hearing, we have
25 an opportunity to present evidence, we have an
26 opportunity to cross-examine.

1 **Proceeding Time 11:59 a.m. T36**

2 We have an opportunity to provide written submissions
3 and, as set out in our argument, that is a form of
4 consultation that's in addition to what B.C. Hydro is
5 carrying on, and it was the Supreme Court of Canada
6 that recognized that in the decision of *Quebec*
7 *(Attorney-General) v. Canada (National Energy Board)*
8 at paragraphs 35 through 37, and that's tab 6 of B.C.
9 Hydro's book of authorities.

10 So, that's -- there's no requirement to
11 have that consultation by you, the Commission, but
12 it's something that's going to follow because of the
13 way the process is structured. And as set out in our
14 argument, that's the best form of consultation anybody
15 can have. It's open, it's -- in terms of First
16 Nations, it's funded, and everybody can hear what
17 everybody else has to say, and then the Commission can
18 properly adjudicate matters that are in dispute.

19 What seems to be being said is that that's
20 not sufficient enough, that there should be individual
21 consultation. And clearly the IPPBC disagrees with
22 that, because the form of consultation that will be
23 carried out through the formal hearing process is as
24 good a form of consultation as anybody has ever come
25 up with.

26 The IPPBC would like to add that it's not

1 always happy with the outcome, but as long as there's
2 natural -- the rules of natural justice are followed,
3 there's not that much that could be claimed -- that
4 can be complained about except the outcome.

5 With respect to the second question, the
6 IPPBC's position is since the Commission is forming a
7 quasi-judicial function, that there's no need for it
8 to respond to the issues raised in question number
9 two.

10 The IPPBC would also like to point out
11 that, as a matter of practical high-level planning,
12 the First Nations through the consultation process or
13 parallel consultation process with BCTC and B.C. Hydro
14 are getting access to the best body of information
15 that exists in this province for the purposes of
16 trying to look at the best possible outcomes for a
17 high-level transmission planning exercise. It's BCTC
18 and B.C. Hydro that have most of the raw data that's
19 important for this type of high-level planning
20 exercise. And I'm just pointing that out on behalf of
21 IPPs as a matter of the practical implications of
22 being able to consult directly with BCTC and B.C.
23 Hydro. That's not to say that other bodies, other
24 groups, don't have their own information, but in terms
25 of access to the biggest and probably best body of
26 technical information, the First Nations are getting

1 access directly through the parallel consultation with
2 B.C. Hydro and BCTC.

3 And subject to any questions, those are my
4 submissions.

5 THE CHAIRPERSON: No further questions. Thank you, Mr.
6 Austin.

7 And good timing. It's lunch time.

8 MR. FULTON: Thank you, Madam Chair.

9 THE CHAIRPERSON: We are taking --

10 MR. FULTON: I was about to call upon ESVI.

11 THE CHAIRPERSON: We are taking a break, and return one
12 o'clock.

13 **(PROCEEDINGS ADJOURNED AT 12:03 P.M.)**

14 **(PROCEEDINGS RESUMED AT 1:00 P.M.)**

T37/38

15 THE CHAIRPERSON: Please be seated.

16 MR. FULTON: ESVI is next, Madam Chair.

17 THE CHAIRPERSON: Thank you.

18 **SUBMISSIONS BY MR. BERTSCH:**

19 MR. BERTSCH: Good afternoon. As I mentioned earlier, I
20 don't expect to have a lot of comments in these areas,
21 but do appreciate the opportunity to participate.

22 Further to earlier this morning where we
23 heard about the initial scenarios and the First
24 Nations, I also would be very interested in hearing
25 comments on that.

26 As far as questions number 1 and 2, ESVI et

1 al at this point takes no position. However, what we
2 do recommend is the outline be very clear. I think
3 that's the most important thing that could come of
4 this, and we heard that earlier this morning, and I
5 think clarity is utmost from any of these items.

6 And those are the ends of my submissions.

7 Thank you.

8 THE CHAIRPERSON: Thank you, Mr. Bertsch.

9 MR. FULTON: Commercial Energy Consumers Association of
10 British Columbia.

11 **SUBMISSIONS BY MR. WEAVER:**

12 MR. WEAVER: Thank you, Madam Chair, members of the
13 Panel. Firstly the CEC does adopt it written
14 submissions filed as Exhibit C44-3 in this proceeding.

15 As indicated this morning, we will comment
16 fairly briefly on the questions set out by the
17 Commission Panel in Exhibit A-19, but to start off
18 just as a context comment, the CEC's position is that
19 what the Commission does in this process is as if not
20 more important than what it says in terms of rates and
21 duties. We do share the concern of counsel for The
22 Nations who spoke this morning of gaining some
23 certainty. We think that is in the interests of all
24 stakeholders, including all the customers who
25 ultimately pay the bills that fall out of the
26 recommendations and ultimate implementation of the

1 transmission infrastructure in the province. So we do
2 take quite seriously the concerns of First Nations.

3 Our pragmatic view, before we get into the
4 law in discussing questions 1 and 2, the pragmatic
5 view of the CEC is that any and all steps that this
6 Commission can take which assists in understanding the
7 implications of First Nations obligations, and indeed
8 even defining those obligations, is important. And we
9 again would encourage processes to help facilitate
10 that, and we'll comment on that later on in response
11 to question 7 and 8.

12 However, in terms of dealing with the legal
13 position, it is the CEC's submission that you need to
14 be reasonably in accommodating consultation, and that
15 reasonably in terms of your mandate and your
16 jurisdiction is that you behave in accordance with the
17 actual justice and procedural fairness.

18 The specific questions posed by the
19 Commission are useful, but ultimately the response to
20 each of them requires a dispute, an argument on the
21 interpretation. And our concern is that that dispute
22 in answering those questions may see us before another
23 body, the courts, and we, the CEC believe that there's
24 a very useful function for the Commission to fulfill
25 in terms of understanding the First Nations' interest.
26 In fact a better function than could be achieved by

1 the courts in terms of creating some long-range
2 certainty.

3 In terms of the law and answering the
4 questions though, and dealing firstly with question 1,
5 it is the CEC's position that there is a dispute in
6 this proceeding, or certainly the potential for one.
7 And I would as an indication of that highlight that
8 the terms of reference for this proceeding were
9 provided December 11th. We only agreed on the scope of
10 the issues in this proceeding July 8th.

11 **Proceeding Time 1:05 p.m. T39**

12 It's taken six months for the participants
13 and parties and the Commission to actually agree on
14 what we're going to talk about in this inquiry. And
15 that's aside from the First Nations issues which got
16 excluded from the scope.

17 So, I think to say there's not going to be
18 issues in dispute in the process that's followed by
19 the Commission is ignoring the fact that that is part
20 of what we do here, and I think the submissions by
21 counsel for IPP, which I generally agreed with, except
22 for his comments about the LTAP, were -- the fact is,
23 that's what we do. We discuss and we debate, and the
24 Commission adjudicates those issues, and that will
25 happen here.

26 And we're the first customer group to

1 speak, and we would highlight that the economic rights
2 impacted by the recommendations are real. As I said
3 earlier, at the end of the day, the ratepayers pay for
4 what falls out of the process. And while the rights
5 of First Nations have not been clearly put on the
6 table, we certainly have heard of issues of
7 reparations for past wrongs, revenue-sharing, joint
8 decision-making, those are issues which are all fair
9 ball to discuss, but clearly there will be issues with
10 respect to ratepayers about who would be responsible
11 should those recommendations fall out of this process.

12 So, in short answer to question 1, there
13 clearly is at a minimum the potential, if not a
14 dispute already in play. And that -- again, we've
15 been focused today and tomorrow on the First Nations'
16 issues. Those disputes will relate to other issues as
17 well, including what BCTC and B.C. Hydro file as their
18 scenarios. There will be debates and disputes about
19 that, and you need to maintain your role as a quasi-
20 judicial body to effectively conduct this inquiry. In
21 relation to all of the issues.

22 So, in short, we submit that the Commission
23 must maintain its position as a quasi-judicial body
24 and must act in accordance with the principles of
25 natural justice and procedural fairness in the
26 interest of all stakeholders, including First Nations.

1 And the law supporting that position, that you are
2 acting as a quasi-judicial body, is the same case law
3 referred to by my friend from Treaty 8 and other First
4 Nations, and that is the Supreme Court of Canada
5 decision in *Canada v. Coopers and Lybrand*. And that's
6 found in the BCTC book of statutory authority, which
7 is Exhibit B1-6-1.

8 And I will spend a moment and just go
9 through the indicia, and firstly, is there a hearing?
10 And I'll paraphrase the indicia. Is there a hearing?
11 Well, Exhibit A-4 contemplates regional hearings in
12 October and November, and also talks of a hearing
13 commencing January 11th. Now, there's a paraphrase
14 behind that hearing January 11th "non-adversarial". I
15 have yet to see a hearing which is non-adversarial, so
16 I'm not sure what that means, and certainly the
17 *Coopers and Lybrand* decision doesn't distinguish
18 between a non-adversarial hearing or an adversarial
19 hearing. And again I think it will be an adversarial
20 hearing.

21 So, I think the first indicia in *Coopers*
22 and *Lybrand* is met. There's a hearing in the
23 Commission's schedule.

24 Second indicia, does the decision or order
25 directly or indirectly affect the rights or
26 obligations of persons? And as I have said a couple

1 of times now, as a customer representative, we firmly
2 believe that your recommendations will have
3 implications for ratepayers. They will certainly
4 indirectly impact ratepayers.

5 Three, is the adversary process involved?
6 I've touched on that.

7 Fourth indicia, is there an obligation to
8 apply substantive rules to many individual cases
9 rather than, for example, the obligation of social and
10 economic policy in a broad sense? I don't know the
11 answer to that yet. And indeed it may be in assessing
12 the First Nations' issues that there may be, for
13 example, a resulting set of recommendations as to how
14 in the future individual applications by the utilities
15 may be dealt with. That is a reasonably -- that is a
16 possibility that guidelines may fall out of this
17 inquiry as to how to go forward. So, that would apply
18 to individual cases on an ongoing basis. I just don't
19 know. Of the four indicia, that's one which is
20 questionable to me.

21 So I think the law supports the position
22 that the Commission is operating in a quasi-judicial
23 fashion, and that the ability to pursue independent
24 consultation or obligation in pursuing in --
25 consultation would in fact breach principles of
26 fairness and natural justice.

1 **Proceeding Time 1:10 p.m. T40**

2 And that is our answer to question 2, that
3 you are behaving in a quasi-judicial fashion. And the
4 sub-paragraphs to that question I think are
5 supplemental to identifying and defining that role,
6 but don't take away from the role. That that is your
7 function.

8 So in conclusion, we think the law does not
9 create the independent duty to consult, but we do
10 think from a practical matter any and all avenues to
11 better understand the First Nations' issues, you have
12 broad procedural tools at your disposal which we can
13 speak to later on, we encourage that to occur. We are
14 pleased to see the engagement of First Nations in this
15 process. We are anxious to hear what effective
16 objectives they have and look forward to responding to
17 those throughout the inquiry.

18 Those are our submissions. Thank you.

19 THE CHAIRPERSON: Thank you very much, Mr. Weafer.

20 MR. FULTON: BCOAPO *et al.*

21 **SUBMISSIONS BY MR. QUAIL:**

22 MR. QUAIL: Madam Chairman and Panel members, you're not
23 going to hear much repetition from me because we
24 disagree with everything anybody else is saying in
25 this process.

26 But I want to preface, though, I can't

1 resist an observation I hear of my friend Mr. Austin
2 on behalf of IPPBC saying that being able to
3 participate in a hearing is as much consultation as
4 anyone could hope for. I'm filing that away till the
5 next time there's some kind of a process involving
6 B.C. Hydro where somebody has a problem with not
7 having adequate customer consultation. I have a
8 memory like an elephant for things like that. Other
9 things, where I left my keys might be a different
10 question.

11 First of all I want to make some comments
12 on the whole subject of quasi-judicial decision
13 making. The concept of quasi-judicial decision
14 making, in my submission, is a fossilized relic of the
15 early days of administrative law, and it's unfortunate
16 that we see it resurfacing in this context. Until the
17 late 1970s, administrative processes characterized as
18 quasi-judicial were subject to relatively effect
19 judicial review, and other processes were largely
20 immune. Quasi-judicial proceedings carried the duty
21 to comply with the so-called rules of natural justice,
22 but other proceedings and processes did not involve
23 any significant procedural rights or safeguards.

24 The distinction that was reflected, for
25 example, in the original version of the *Federal Court*
26 *Act*, whether a litigant should take a matter before

1 the Trial Division or the Federal Court of Appeal
2 depended on whether the challenged decision was
3 considered to be required to be made on a quasi-
4 judicial basis, in many cases floundered on the basis
5 of parties guessing wrong which side of the divide
6 would decided they belonged in. The *Coopers & Lybrand*
7 case which everybody seems to like, from 1979, was
8 about whether that litigant was in the right division
9 of the Federal Court. That was why that was a live
10 issue there.

11 Many processes of commissions, boards and
12 tribunals lie somewhere on the spectrum between purely
13 adjudicative and a purely policy-making or
14 administrative process. Therefore, whether effective
15 judicial remedies were available tended to rest upon
16 an exercise of arbitrary categorization. The
17 underlying problem is that the tests treated
18 subordinate decision-making processes, like this
19 inquiry, as though they fit into two discrete types.
20 Instead of a continuous spectrum with court-like
21 adjudication at one end of the scale and purely
22 policy-making formations at the other end of the
23 scale, the whole system cried out for reform which was
24 provided by the Supreme Court of Canada in the
25 *Nicholson* decision. The cite is *Nicholson v.*
26 *Haldiman-Norfolk Regional Police Commissioners*, which

1 is a very familiar case, [1979] 1 SCR 311, which
2 trashed the whole arcane system and instead fashioned
3 a seamless analysis recognizing that the processes of
4 inferior tribunals, boards, commissions do not neatly
5 fit into two discrete categories, and that non-
6 judicial functions should not be immune from
7 accountability before the courts.

8 The old concept of rules of natural justice
9 was discarded in favour of a more flexible concept of
10 procedural fairness, which could be adapted to the
11 character of the particular process or proceeding.
12 And it is unfortunate that the hoary old notion of
13 quasi-judicial proceedings has apparently been revived
14 from the dead, in the administrative law context, when
15 it comes to the relationship between an inferior
16 tribunal, board or commission, and First Nations.

17 **Proceeding Time 1:15 p.m. T41**

18 It is especially unfortunate, given that
19 the subject matter is one of the most rapidly-evolving
20 ones -- areas of law in Canada today, and using an
21 antiquated tool for that analysis, in my submission,
22 is not helpful. And I think that that should be
23 obvious once you've heard all of the submissions. It
24 is not a helpful analysis. The answers are not clear
25 and obvious, and there is no clear guidepost.

26 The resurrection of the quasi-judicial test

1 and the binary categorization approach is especially
2 unsuited to the subject matter of the right of First
3 Nations to be engaged in issues affecting their
4 constitutional rights, because the notion of
5 consultation itself incorporates a wide range of
6 modes, and levels of engagement, depending on the
7 circumstances in each instance. Again, not amenable
8 to a binary "yes-or-no" kind of solution.

9 The concept retains all of its old problems
10 which are apparent in the present inquiry. The role
11 and task of the Commission in this inquiry bears some
12 indicia of a quasi-judicial proceeding under the
13 *Coopers and Lybrand* test, especially in relation to
14 its real live impact on the substantive rights of
15 First Nations in a highly-contentious and adversarial
16 domain, namely territorial and economic rights in
17 relation to resource and infrastructure development.
18 The inquiry report will have a direct impact on
19 development and rights in the real world. Otherwise,
20 why would we be doing it?

21 However, it also has some of the indicia of
22 a non-judicial process, given that it will not
23 formally adjudicate between competing litigants who
24 are styled by the process as adversarial parties and
25 its formal output is not a series of project approvals
26 but a report containing assessments and non-specific

1 determinations. To some extent it will make
2 directional policy determinations which might
3 otherwise have been made within the Ministry or the
4 Crown utilities.

5 Like many non-judicial proceedings it lies
6 somewhere in the spectrum between those two poles and
7 trying to figure out where to slice the proverbial
8 salami is not really an exercise that could be done
9 with any real confidence.

10 It may be helpful to think about the
11 approach the Commission should take from a practical
12 perspective. What is the most legally correct course
13 for the Commission to adopt, is the same question as
14 which course would most likely survive review by the
15 court? If the issue is whether the Commission should
16 engage in consultation and accommodation with First
17 Nations as an agent of the Crown, guessing the wrong
18 answer can result in a jurisdictional error subject to
19 reversal on appeal.

20 We submit that the solution lies in the
21 recognition that we are asking ourselves the wrong
22 question. Instead of framing the question in the
23 context of categorization of functions in the old
24 classical framework, in my submission we should start
25 by looking at the mandate of the Commission in this
26 inquiry, and asking ourselves what approach to

1 processing First Nations' issues holds the best
2 promise for fulfilling that mandate fully?

3 As we argued in our written submission, the
4 overarching purpose of the inquiry is to develop a
5 strategic analysis about how to plan the role out of
6 the transmission system. That analysis must include
7 tools to integrate a number of driving factors, load
8 growth, probable locations of future generation
9 resources, interconnections with neighbouring
10 jurisdictions and so forth. Another key driving
11 factor is the impact of First Nations' entitlements
12 which may be affected by the growth and development of
13 the system.

14 The Commission cannot develop a robust tool
15 kit to integrate the resolution of First Nations'
16 issues into the development of the system without
17 obtaining extensive input directly from the First
18 Nations. That needs to be a relationship that is not
19 in the nature of a "consultation", which is a more
20 peripheral model of engagement, but rather working
21 with First Nations and hearing from the utilities and
22 other players to ensure that the tools and protocols
23 respond adequately to the project of planning the
24 transmission system, identifying and resolving issues
25 as they arise, and ensuring that problems like ILM and
26 Alcan EPA do not recur.

1 is more in line with the legal mandate of the inquiry
2 process itself, and not borrowed from some other
3 framework. And if placed in the context of an inquiry
4 process which focuses not on adjudication but rather
5 on fashioning analytical and planning tools, it does
6 not create a risk of vulnerability to accusations of
7 procedural unfairness, in my submission.

8 So I'm saying that the Commission should
9 adopt a strategy of substantive engagement of First
10 Nations in the project of this inquiry. That need
11 arises from the purpose and mandate of the inquiry
12 itself, and the Commission does need to base its
13 approach on the sterile categorization of quasi-
14 judicial and non-quasi-judicial proceedings.

15 Now, just addressing the two questions.
16 Comments in relation to question 1 is that the absence
17 of an adjudicated dispute is classically one of the
18 more significant indicia of a process which is not
19 quasi-judicial in nature. That I think is trite and I
20 don't think you'll hear anybody disagreeing with that.
21 Our point is, though, that, as I said, it's asking
22 ourselves the wrong question. That we think that that
23 is going to define what the optimal way is to engage
24 First Nations in the project, the inquiry.

25 Regarding the second question, our response
26 is that the duty of the Commission is more usefully

1 analyzed in relation to the purpose of the inquiry and
2 the Commission's mandate under Section 5 of the
3 *Utilities Commission Act* and the terms of reference.
4 One of the key outputs of the inquiry should be the
5 development of better tools to integrate the
6 consideration of First Nations' entitlements into the
7 utilities applications and into the Commission's
8 determinations. Regardless whether one might
9 characterize the inquiry as a quasi-judicial process,
10 that objective cannot be achieved adequately without a
11 substantial process of dialogue between the Commission
12 and First Nations, as well as input from other
13 stakeholders. That is a different kind of process
14 than is usually contemplated by consultation. It
15 involves inviting First Nations to play a more
16 integral role in examining the best way to address the
17 jurisdiction of the Commission in relation to these
18 issues as applications arise going forward.

19 Subparagraphs (a) and (b) to this question
20 are indicia that the Commission is in some respects an
21 agent of the Minister in the conduct of the inquiry.
22 It could be used to support arguments in favour of a
23 standalone duty on the Commission's part to consult
24 and accommodate. But again, our submission is that
25 that is the wrong frame of reference to answer the
26 question -- to address this issue.

1 Subparagraph (c) has no bearing either way,
2 as the duty to consult, if one exists, would arise by
3 operation of the general law of the *Constitution of*
4 *Canada*, and the absence of an express sub-delegation
5 of responsibility to consult does not indicate that
6 one does not exist.

7 Subparagraphs (d) and (e) have no bearing
8 either way, in our submission. The duty of the Crown
9 utilities to consult and accommodate is a different,
10 an independent question from the way the Commission
11 itself should approach the engagement of First Nations
12 in relation to carrying out its mandate in this
13 process.

14 Subject to any questions, that's what I've
15 got to say on questions 1 and 2. I don't think I've
16 agreed with anything anybody said so far.

17 THE CHAIRPERSON: Perhaps just a bit more elaboration.
18 You may get back to that in your response to some of
19 the other questions, but if the Commission was to
20 proceed along the path you are painting here, can you
21 then explain to us how can we then ensure the
22 procedural fairness from the point of view of other
23 participants with these concerns have been expressed
24 in many submissions as well?

25 MR. QUAIL: Well, the most fundamental response to that
26 that I would give is that if one views the purpose of

1 the Commission to be a project of designing planning
2 and analytical tools, in my submission there is no
3 conflict, there's no unfairness in integrating a
4 process where you hear the perspectives directly from
5 First Nations in relation to the rights and interests
6 of other parties. They'll also have a right to have
7 input.

8 We'll be addressing this in a later
9 question having to do with a suggestion that's come
10 forward from First Nations of an advisory panel, which
11 I would submit sounds like a very useful thing to do.
12 So maybe anticipating some of my comments later, one
13 of the issues I know the Commission is wrestling with
14 now that it's got this new responsibility that's been
15 defined by the court is having the institutional
16 resources to understand and process these issues. And
17 it seems to me almost a no-brainer that it would be a
18 very useful thing.

19 If this inquiry does nothing else, in
20 practical terms, than develop protocols and tools for
21 processing the jurisdiction of the Commission dealing
22 with First Nations entitlements, it will have been a
23 very worthwhile process.

24 **Proceeding Time 1:25 p.m. T43**

25 And if the focus is on that, on developing tools
26 rather than trying to resolve any disputes or

1 differences between parties, in my submission there's
2 no question of unfairness that's going to arise in
3 practical terms, especially if the Commission is alive
4 to the need for transparency and permitting access to
5 the process by anyone who has something to say.

6 So, that's sort of my long and short answer
7 to your question.

8 THE CHAIRPERSON: Thank you, Mr. Quail.

9 COMMISSIONER HARLE: You characterized the difference
10 between -- or you mentioned the words "engagement"
11 versus "consultation". I wonder if you could
12 characterize what you see what some of the differences
13 might be between engagement versus consultation.

14 MR. QUAIL: Yes. Consultation is, in a way -- I don't
15 want to put this negatively. It's a bit of a loaded
16 word, because it has a specific history that it's been
17 put there by the courts who have intervened because,
18 you know, Canada was not responding adequately as a
19 nation to our obligations to our First Nations. So it
20 has a particular sort of structure and definition
21 which is still undergoing evolution -- fairly rapid,
22 extensive evolution in the hands of the court. And
23 part of -- I think one way of phrasing my message is
24 that if the analysis is put into that framework,
25 there's a whole lot of boxes and constraints that are
26 placed around it. Things are sort of loaded, and you

1 characterize your obligation as one of consultation in
2 that sense. That does confer almost a party status to
3 the Commission itself. You know, and some people
4 might think that that's appropriate, but in my
5 submission that creates needless barriers to getting
6 the job done effectively.

7 And instead, if you just set aside all of
8 that analysis, and say what we need to do in order to
9 really do our job in this inquiry is to make sure we
10 have as vigorous and fulsome as possible input from
11 First Nations and discussion about how are we going to
12 deal with these issues so we don't -- they don't turn
13 into speed bumps at every turn. Stuff is processed in
14 a timely way, we come to a proper mutual
15 understanding. If you put it in those terms, rather
16 than putting in the sort of legal box of consultation
17 and accommodation, my submission, a great deal could
18 be achieved.

19 And if the end result is that there has
20 been that kind of engagement of First Nations, in my
21 submission, nobody is in a position to take issue with
22 the process that you followed on the basis that you --
23 you've gotten from point A to point B. The fact that
24 the road map you used wasn't the -- you know, the
25 jurisprudence about consultation and accommodation
26 isn't really material. The important thing is having

1 a process where there is that input on a really
2 meaningful basis, where people are really heard and
3 really engaged, and most importantly that it isn't
4 something that ends in June when you write your
5 report, but that it's designing tools to make
6 everything work better for everybody. Work better for
7 First Nations, certainly work better for ratepayers
8 whom I represent. Having things occur like the ILM
9 process is certainly not in the interests of my
10 clients either, from a different perspective.

11 COMMISSIONER ANDERSON: Can you just maybe clarify for
12 us, if we follow this route of total engagement, do we
13 then implicitly satisfy the requirement for
14 consultation?

15 MR. QUAIL: Yeah, I think it was --

16 COMMISSIONER ANDERSON: Do they go hand in hand?

17 MR. QUAIL: I think it would exceed --

18 COMMISSIONER ANDERSON: Or are you talking about
19 something separate?

20 MR. QUAIL: In my analysis, I think that you've exceeded
21 it objectively. Like I said, you might have gotten
22 from Point A -- not if you've gotten from Point A to
23 B, you've gone from Point A to Point C.

24 COMMISSIONER ANDERSON: So we at least in fact --

25 MR. QUAIL: You have moved beyond it, but it's a
26 different kind of dynamic, in my submission. And if

1 you compare it with the way that, at least in
2 practice, utilities and government agencies and other
3 players deal with the obligation to consult, it could
4 be a bit of a checklist item on the things to do on a
5 project. So, you check off, "Okay, we've consulted."
6 And you know, file evidence, say "We've had these
7 discussions, we've consulted." It could be rather
8 formalistic. And my understanding is that this could
9 be a real source of frustration for First Nations as
10 well.

11 And so it's like clear away some of the
12 clutter of some of the formalisms, and invite First
13 Nations to participate in designing a process where
14 they feel they can have full and proper opportunity to
15 help the Commission and all of us to understand the
16 way that their issues should flow into the decision-
17 making of the Commission, in the design and regulation
18 of our energy systems. We'll all be way better for
19 doing that, and any clutter that gets in the way
20 should be swept away to the extent that can happen.

21 Now, maybe that everybody else that gets up
22 to the microphone will say that this is not practical,
23 but in my submission, I think we should be thinking
24 out of the box, because there is an opportunity to do
25 this. And, you know, this -- and especially given the
26 character of the mandate of the inquiry. The fact

1 decision between parties B and C. However, there is
2 very much a dispute, and a number of disputes, at
3 issue in this inquiry proceeding, and this is what's
4 called a polycentric proceeding.

5 And we have heard today already numerous
6 references by, in this particular example, First
7 Nations themselves saying that their rights and
8 interests may be adversely affected by determinations
9 made by this Panel. I totally agree with that. Those
10 are rights and interests that are at stake in this
11 proceeding, or are arguably at stake. Likewise
12 ratepayers have interests that are at stake or will
13 arguably be at stake. Likewise utilities have
14 interests that are or might be argued to be at stake.
15 Likewise public interest factors beyond the ratepayer
16 interest will be at stake in this proceeding.

17 So in my submission, this is a polycentric
18 proceeding. It is not a traditional dispute, but it
19 is very much a dispute, and there are very much rights
20 and legal interests that are at stake. And the
21 proceeding is adversarial. The criteria in *Coopers &*
22 *Lybrand* -- and I should say I agree with Mr. Quail's
23 synopsis of the place where quasi-judicial fits into
24 the history of administrative law here, and if I may
25 digress for a moment, we got into -- the whole topic
26 of use of the term "judicial" and "quasi-judicial" got

1 raised here because that was the term used in the
2 *Quebec Hydro* case, which was of a similar era to the
3 *Coopers & Lybrand* case.

4 So at that point it was really important
5 for the courts to determine between on the one hand
6 whether a tribunal was judicial or quasi-judicial, and
7 then on the other hand if it was not. That
8 distinction, as Mr. Quail said, is no longer of the
9 same importance because it no longer follows that if
10 something is not judicial or quasi-judicial, then
11 there's no judicial review at all. But the test is
12 still there, and this proceeding, in my respectful
13 submission, and I've detailed it in the written
14 argument, is abundantly on the quasi-judicial end of
15 that continuum.

16 Now, having said that, you don't need to go
17 to the most elaborate indicia of quasi-judicial
18 function. This is not a matter of whether the
19 Commission has the ability to subpoena witnesses,
20 which it does, or to do other major elements. The
21 issue at stake or in question here are two simple
22 concepts: independence of the tribunal, and
23 impartiality. If the Commission Panel in carrying out
24 this function is required to be independent and if
25 it's required to be impartial, that's as far as you
26 need to go in terms of the panoply of things that

1 follow from the Commission being judicial or quasi-
2 judicial.

3 So back to *Coopers & Lybrand*. Yes, there's
4 four criteria there. I say that all four of those
5 criteria point towards the Commission Panel in its
6 proceedings, in its inquiry proceeding being quasi-
7 judicial. But as I say, you don't need to make that
8 ultimate determination. The only thing you really
9 have to decide is are you supposed to be independent?
10 And for that you have to look at the statute, the
11 *Utilities Commission Act*, and the references in that
12 *Act* to the *Administrative Tribunals Act*, and I submit
13 that it is abundantly clear that the government -- the
14 legislature rather, intends that the Commission be
15 independent from the government, that a Commission is
16 not an agent of the government.

17 **Proceeding Time 1:36 p.m. T45**

18 We literally have a Ministry of the
19 government appearing as a party before you. And I'd
20 like to refer you to Section 82 of the *Utilities*
21 *Commission Act*, because this section relates to the
22 distinction that has been made a number of times, that
23 correctly notes that there is no application in this
24 proceeding. And from that it's been argued that if
25 there's no application, there's no dispute; if there's
26 no dispute, there's no need to be quasi-judicial. If

1 there's no need to be quasi-judicial, there's no need
2 to be independent and impartial. Then what I --
3 Section 82 makes it very clear in the first subsection
4 that the Commission has the authority, either on its
5 own motion or at the request of the Lieutenant
6 Governor in Council, to inquire into, hear and
7 determine a matter that, under this Act, it may
8 inquire into hear or determine on application or
9 complaint.

10 So what that's saying is that there are
11 various ways under the Act in which the Commission can
12 do things on application. Others -- things it can do
13 on complaint, and here 82(1) is saying the Commission
14 can also do those things when they didn't arise
15 because of an application or because of a complaint,
16 but on the Commission's own motion, or at the request
17 of the Lieutenant Governor in Council.

18 And then the kicker is 82(2), which says
19 that for the purposes of subsection (1) -- that is,
20 where the Commission has, on its own motion or at the
21 request of the Lieutenant Governor in Council, gone
22 ahead to do the kinds of things that it could
23 otherwise do as a result of an application or a
24 complaint, for those purposes the Commission has the
25 same powers as are vested in it by this Act in respect
26 of an application or complaint.

1 So the legislature has spoken. The
2 Commission has the same powers, whether there's an
3 application or not.

4 And while we're looking at the Act, I'd
5 like to refer you to Section 5, because it's been said
6 a number of times that there is some significance to
7 Section 5(1) and 5(2). The argument is made that
8 these two subsections refer to the duty of the
9 Commission to respond to a request from Cabinet for
10 advice, which those subsections definitely do say.

11 In my respectful submission, it's
12 completely fallacious to mix the Commission's
13 obligation under subsection (4) with the Commission's
14 powers or -- and obligations under 5(1) and (2). In
15 other words, the legislature already had the
16 opportunity under 5(1) or 5(2) or -- and both
17 together, to ask the Commission to advise the
18 Lieutenant Governor in Council on a matter. But it --
19 the Lieutenant Governor in Council did not choose to
20 do that. It didn't -- it had that power, but it chose
21 not to do it. Instead, the legislature, not Cabinet,
22 the legislature in Section 5(4), established the
23 requirement that the Commission proceed with this
24 inquiry.

25 So that was a legislative decision. And as
26 a footnote, I do want to reply to the suggestion in

1 the written reply by counsel for the Treaty Tribal
2 Alliance that refers to the -- establish the creation
3 of the inquiry as being an executive function. I
4 respectfully disagree. It is clearly a legislative
5 function. This inquiry was established by the B.C.
6 Legislature.

7 Now, the Commission is required by the
8 legislature to carry out this inquiry and, in doing
9 so, Section 82 says that it has all the powers that it
10 has if it had been initiated by an application or a
11 complaint. And the list of the powers that the
12 Commission has is extensive, and I won't go through
13 it. They are all the indicia of judicial or quasi-
14 judicial tribunals, but as I say, you don't have to go
15 to the limits of those. All you have to decide is,
16 are you supposed to be independent and are you
17 supposed to be impartial?

18 **Proceeding Time 1:41 p.m. T46**

19 And incidentally I think it's important
20 because some of the questions don't use both terms.
21 Independence is different than impartiality.
22 Impartiality refers to the state of mind, the attitude
23 and the motivations of the individual members, and the
24 Commission Panel, as I'm sure you're aware, takes an
25 oath of office, the members take an oath of office and
26 they're required by that oath and also by statute in

1 Section 30 of the *Administrative Tribunals Act* to
2 exercise their functions in a manner that is honest
3 and impartial.

4 Independence is established by the
5 structure of the Commission in relation to the
6 Legislature. And that is where you look at the fact
7 that commissioners have defined terms of office, that
8 the Commission has powers to make decisions. And
9 ultimately the key is that the Commission has
10 exclusive jurisdiction to make decisions within its
11 jurisdiction. The determinations that will be made by
12 this Commission are not policy advice to anybody.
13 They are determinations that carry with them the force
14 of the Commission's authority under the *Act*. The
15 Minister does not have any authority to approve your
16 determinations or to vary them. These determinations
17 are of the Commission and they are within your
18 exclusive jurisdiction.

19 The Commission does not have the authority,
20 whether it would like to or not, to simply abdicate
21 its independence and impartiality. It is not -- with
22 all due respect, it's not up to the Commission to
23 decide whether it might be better if it didn't have a
24 duty of independence and impartiality, and if it in
25 that circumstance could accomplish some ends that
26 would be desirable in a better manner than what has

1 been laid before. That would be an abdication of
2 jurisdiction.

3 In my respectful submission, in concluding,
4 the Commission's opportunity to uphold the honour of
5 the Crown and to promote the objective of
6 reconciliation between the Crown's sovereignty and the
7 rights and interests of First Nations and First
8 Nations' rights and title is to run a fair, effective
9 and efficient inquiry proceeding. As Mr. Austin says,
10 to paraphrase, it's the best proceeding devised for
11 getting fair and comprehensive input from a variety of
12 different parties with different interests and
13 different rights before the decision maker. This is
14 the ultimate way that different parties have an
15 opportunity to influence in a proper way the
16 Commission's decisions and determinations at the end
17 of the inquiry.

18 Subject to any questions, those are my
19 submissions.

20 THE CHAIRPERSON: Thank you very much, Mr. Andrews.

21 MR. FULTON: Joint Industry Electricity Steering
22 Committee.

23 **SUBMISSIONS BY MR. BURSEY:**

24 MR. BURSEY: Good afternoon, Madam Chair and
25 Commissioners.

26 The first question asks, what weight should

1 the Commission place on the absence of what might be
2 described as a dispute in the traditional sense,
3 determining whether or not it is acting in a quasi-
4 judicial manner in the context of the Section 5
5 inquiry? The short answer is little weight should be
6 given to that factor. But there's a couple of
7 elements of the way the question is phrased that need
8 to be drawn out.

9 First, the use of the phrase "traditional
10 sense", "a dispute in the traditional sense," that's
11 referring to a dispute in the context of a court
12 proceeding, and this is something that counsel for
13 Treaty 8 has referred to at length. That there's no
14 dispute in a traditional sense as it would be in
15 court.

16 **Proceeding Time 1:46 p.m. T47**

17 And that's true, but it's also true that
18 the Commission rarely is involved in that type of
19 dispute. There is power for the Commission to hear a
20 complaint from a party about some activity of a public
21 utility, but that's rarely exercised. Most of the
22 applications before the Commission do not involve a
23 dispute in the traditional sense. That there's an
24 adjudication between B by A, the Commission, between B
25 and C. And that's important, and it's also important
26 to keep in mind that the case law that talks about

1 quasi-judicial functions for administrative tribunals,
2 the National Energy Board case, and also the *Kwikitlem*
3 and the *Carrier Sekani* case also did not involve a
4 dispute in the traditional sense.

5 In the *National Energy Board* case, it was
6 an application by Hydro-Quebec for an export licence
7 to export power to the United States. In determining
8 whether or not to grant that licence, the NEB looks at
9 its tests under the legislation and also developed
10 through its jurisprudence about whether it's in the
11 public interest. And there's certain tests that have
12 been evolving over time about whether an export
13 licence is granted.

14 In the *Kwikitlem* case, it was an
15 application for a certificate of public convenience
16 and necessity. Again, there's no dispute between
17 parties in the traditional sense in that case. The
18 Commission decides whether or not to grant that
19 application. And in the *Carrier Sekani* case, there
20 was an energy supply contract that was filed by the
21 Commission -- filed with the Commission, and the
22 Commission held a hearing to determine whether or not
23 it's in the public interest.

24 In all of those cases, it's akin to this
25 case in that there is no dispute. That there was
26 applications in two of the cases, and in the case of

1 the *Carrier Sekani* case, there wasn't even an
2 application. It was just the filing of a contract.

3 So, this -- the concept of dispute in the
4 traditional sense is a concept that you need to be
5 careful with, because the Commission does not act in
6 that capacity, nor do -- does the National Energy
7 Board or other regulatory tribunals like the CRTC and
8 others that are involved in regulated industries.
9 That's why the phrase "quasi-judicial" has been used.
10 It's not a judicial dispute resolution process. There
11 are procedural fairness indicia and procedural
12 fairness criteria that are applied in the proceedings,
13 and that's to preserve administrative fairness.

14 And I agree with Mr. Quail that the concept
15 of "quasi-judicial" has moved on. I think it's more
16 important to look at what the Commission is doing and
17 the need for independence and procedural fairness,
18 which is something that Mr. Andrews just referred to.
19 I'll come back to that point in a moment.

20 The BCUC has been determined to be a quasi-
21 judicial tribunal in the two recent Court of Appeal
22 cases in *Kwikitlem* and *Carrier Sekani*, and that's at
23 paragraph 8 of the *Kwikitlem* decision and paragraph 54
24 of the *Carrier Sekani* case. My friends who argue
25 differently haven't shown how to distinguish that
26 finding.

1 It's also important that the Commission
2 look at the statute in the context as a whole, and
3 that's the *Bell Canada* case and the *Ocean Port* case
4 which we've cited in our reply. There's excerpts
5 there that talk about the need to look at the
6 structure as a whole. And I'd add one further
7 element. When you look at the National Energy Board
8 case, which we say governs this situation, the court
9 there was trying to determine whether there was some
10 special obligation owed to First Nations in that case,
11 and the court determined that it would be unfair to
12 grant certain parties before the proceeding special
13 privileges, or to have a fiduciary relationship in
14 relation to those parties.

15 Similarly, here, it would -- the Commission
16 would run into difficulty if it attempted to do that.
17 I think if you go back and look at the terms of
18 reference, and the whole idea of setting up the
19 Commission to have this inquiry, there's some
20 important conclusions to be drawn. The Ministry could
21 have undertaken the planning process through the
22 Ministry itself. It could have set up some agency, it
23 could have instructed some of the bureaucrats within
24 the organization to engage in a planning process. But
25 instead, we have a situation where there's a
26 legislative imperative that Mr. Andrews just referred

1 to, plus terms of reference from the Minister issued
2 to the Commission.

3 **Proceeding Time 1:51 p.m. T48**

4 And the reason can only be that the
5 Commission was chosen because it is independent and
6 has a structure in place that would allow the inquiry
7 to take place in a fair and transparent way. The
8 Commission cannot start splitting the case.

9 If I was to stand here and say to you, "I'd
10 like to deliver my submissions on this procedural
11 point in private with the Commission, and ask to
12 schedule a time to do that to exclude the other
13 parties," I don't think there would be much support
14 for that idea from the other parties in the room. I'm
15 just guessing but -- and I don't think the Commission
16 would feel comfortable doing that. And you have to
17 ask yourself why is that? It's because you're trying
18 to conduct this proceeding in a transparent and fair
19 way, which is why it was given to the Commission in
20 the first place. That's why you have elaborate terms
21 of reference.

22 So the Commission cannot start splitting
23 the case and say, "Well, we'll have most of the
24 proceeding conducted in one way, and then do the rest
25 of the case with bilateral discussions." That's
26 precisely what the NEB case was about. It says you

1 cannot do that. And the NEB case, there's been some
2 attempt to discredit it saying, well, that was a long
3 time ago. It's still good law. It makes sense. And
4 if you also look at the recent *Kwikitlem* cases and the
5 *Carrier Sekani* case, and the *Carrier Sekani* case in
6 particular referred to the NEB case, so our Court of
7 Appeal has recently affirmed that principle.

8 So where does that leave us? It does mean
9 that the First Nations do not have an opportunity to
10 be heard. One question that arises is what exactly
11 would you discuss during the bilateral one-on-one
12 discussions? That question hasn't really been
13 answered. I expect that maybe through the course of
14 the next couple of days there may be some elaboration
15 on that point. But at this early stages it would
16 probably be only procedural issues because there has
17 -- there's so much of this case that's in the
18 abstract, and we're discussing procedure.

19 And if it discussing procedure or if it
20 discussing some merits of the case, then that is
21 something that should occur on the record. If it's an
22 issue of there's excessive formality in these
23 proceedings or there's difficulty with access to the
24 proceedings or there's difficulty with capacity, all
25 of those issues can be resolved within the
26 Commission's structure. There is possibility for

1 workshops. There's possibility for capacity funding.
2 The Commission has the opportunity to make the process
3 quite informal, but you don't have to sacrifice the
4 procedural fairness. The Commission can still conduct
5 the hearing in a transparent way and in a way that
6 preserves those basic elements.

7 So in conclusion on that point, we say that
8 the *NEB* case is a full answer. We say that the
9 Commission is acting in a quasi-judicial capacity.
10 That's clear from the rulings of the recent Court of
11 Appeal decisions but also by the nature of this
12 proceeding. The fact that there isn't an applicant,
13 the fact that there isn't a dispute in a traditional
14 sense, is not determinative of that issue whatsoever.

15 In fact the Commission also has held
16 generic proceedings, as well as other regulatory
17 tribunals, such as the rate of return proceedings or
18 utility system extension test hearings, where there's
19 no specific applicant but the Commission is trying to
20 set policy and to determine issues.

21 By way of reply to some of the comments I
22 heard this morning, Mr. Devlin from the Treaty 8
23 Association referred to the fact that there's limited
24 rights of appeal from the Commission's determinations,
25 and referred to the section of the *Act* that talks
26 about how an appeal may be framed. But that applies

1 to all the Commission's determinations, and it applied
2 in the *Carrier Sekani* case in which the Court of
3 Appeal said that the Commission is a quasi-judicial
4 tribunal. It said also that the question of whether
5 the Commission owes an independent duty has not been
6 answered, this is something new. We say it's not new
7 at all. The *NEB* answers those questions squarely, and
8 it's been reaffirmed by the two cases I've just
9 referred to.

10 And finally there was quite a discussion
11 about what sort of rights are affected. And as I
12 tried to follow the argument, it seems that, well,
13 there's clearly some rights that are affected. First
14 Nations' rights may be affected by the determination.
15 But that's a different category of rights, otherwise
16 we don't have a traditional dispute. There is issues
17 that will be dealt with. The Commission is not really
18 affecting anyone else's right.

19 **Proceeding Time 1:56 p.m. T49**

20 I think Mr. Andrews went through a pretty
21 good list of the types of rights that would be
22 affected. In all cases when you are trying to
23 determine a public interest finding, there are
24 different levels of interest. Some are direct, some
25 are quite indirect, but the Commission has to weigh
26 all of those interests and determine what is in the

1 public interest at the end of the day.

2 And in that determination, the Commission
3 will find that there will be vigorous disputes between
4 the parties, and I'd also suggest to you that if you
5 were to try to set up a process of having an
6 independent process to hear First Nations' concerns,
7 one-on-one discussions, you'll find that the First
8 Nations groups, as has been acknowledged by my friends
9 earlier, are not a homogenous group. They have a
10 variety of interests, a variety of perspectives. So
11 there would be within that group disputes.

12 Where that takes you is you always come
13 back to the idea, well, how do we act in a fair way so
14 that we give everybody a chance to be heard, we give
15 proper weight to the concerns and then make a decision
16 in the public interest? I think that takes you back
17 to preserving procedural fairness.

18 In answer to question 2, there is a preface
19 that's difficult to deal with. The Commission says if
20 the Commission is not acting in a quasi-judicial
21 manner in the context of the Section 5 Inquiry, does
22 that necessarily result in the Commission owing an
23 independent duty to consult? And that question is
24 difficult to answer because I'd have to assume that
25 the Commission is not acting quasi-judicially, but
26 ignore the fact that the Commission must act in a

1 procedurally fair way, and it must be independent and
2 impartial, which is impossible to do, because I'd have
3 to assume away the terms of reference and assume that
4 you are on some other sort of an expedition.

5 But that said, let me suspend my disbelief
6 and try to give some quick comments on the list of (a)
7 to (e) comments. (a) and (b) talk about steps the
8 Minister has taken. In (a) it's the fact that the
9 Minister has issued the terms of reference and (b) the
10 Minister has the authority to issue regulations. I
11 think those points point to the fact that the
12 Commission is a creature of statute and the Minister
13 is following certain steps in relation to the statute.
14 The Commission itself cannot change the terms of
15 reference. You cannot change the legislation. You
16 are bound to follow it.

17 (c) and (d) and (e) refer to the fact that
18 there is no duty of consultation that's been
19 explicitly given to the Commission and B.C. Hydro has
20 an explicit direction and it has also indicated that
21 it wishes to -- that it will file a plan for
22 consultation.

23 On (c), the fact that there is no explicit
24 duty of consultation, that would not be a bar. There
25 is certain procedural requirements and constitutional
26 requirements that bind administrative tribunals. In

1 MR. FULTON: First Nations Energy and Mining Council.
2 Mr. Dimitrov?

3 MR. DIMITROV: I filed a case this morning and I don't
4 think it's gone before you, so there's just a copy.

5 MR. FULTON: Mr. McDonell is approaching.

6 MR. McDONELL: Just to use the time efficiently, at least
7 waiting for Mr. Dimitrov, I can advise that FortisBC
8 has no further submissions and no reply. Thank you.

9 THE CHAIRPERSON: Thank you, Mr. McDonnell.

10 MR. FULTON: Mr. Dimitrov, perhaps you can come forward
11 and start your submissions, and Mr. Bemister can make
12 the authority available for you when he has it, so
13 that we're using our time efficiently.

14 **SUBMISSIONS BY MR. DIMITROV:**

15 MR. DIMITROV: Madam Chairperson and Panel members, this
16 morning I filed some matters in response to your
17 questions and I included the *Baker* decision, which is
18 actually a Supreme Court decision in 1999 which is
19 directly on point with respect to what constitutes
20 procedural fairness. And I didn't think you had the
21 copies before you, so I asked for copies to be made.

22 THE CHAIRPERSON: Thank you.

23 MR. DIMITROV: And here's some more here.

24 Prior to -- yes.

25 MR. FULTON: Madam Chair, as a matter of procedure, if
26 parties are going to rely on cases that they haven't

1 previously produced, they should be made available to
2 everyone so that they can follow along, rather than
3 the cases go immediately to the Commission Panel,
4 because others may have comments that they want to
5 raise in terms of the case not being provided before
6 now. So moving forward, if everybody could take that
7 into account I'd very much appreciate it, again from
8 an efficiency and also a fairness standpoint.

9 THE CHAIRPERSON: Thank you, Mr. Fulton, a very valid
10 comment.

11 MR. DIMITROV: I would certainly have done that, but the
12 questions were -- it came in late Friday and didn't
13 get around to them till Monday, so that's the
14 difficulty.

15 But prior to answering, and I will -- the
16 questions posed by the Commission, with respect to
17 question number 1, that's certainly one way to frame
18 what's going on in this particular inquiry, and I
19 would say to you that the *NEB* case is not necessarily
20 authoritative with respect to determining how this
21 inquiry could proceed.

22 I think that the preeminent case is the
23 *Baker* decision, a 1999 case of the Supreme Court of
24 Canada, which sets out in quite a great deal of detail
25 what constitutes procedural fairness in the context of
26 administrative law, administrative decisions. And

1 it's within that case as well that there is the
2 opportunity for taking recognition of First Nations'
3 rights. And so I'd like to review part of that case
4 with you, and my apologies to those who don't have the
5 case. It's available at CanLIT, the Supreme Court of
6 Canada 1999 case, file number 25823. And as I said,
7 this case essentially scopes out what the duty of
8 procedural fairness is, and I'm going to quote from it
9 from the headnote. The end of the first para --
10 second page end the first paragraph -- first page.
11 The second page, the last paragraph, sorry.

12 "The duty of procedural fairness is flexible
13 and variable and depends on an appreciation
14 of the context of the particular statute and
15 the rights affected. The purpose of the
16 participatory rights contained in it is to
17 ensure that administrative decisions are
18 made using a fair and open procedure
19 appropriate to the decision being made, and
20 a statutory institutional and social
21 context, with an opportunity for those
22 affected to put forward their views and
23 evidence fully and have them considered by
24 the decision maker."

25 The paragraph goes on to state in the
26 headnote:

1 "Several factors are relevant to determine
2 the content of duty of fairness: (1) the
3 nature of the decision being made and
4 process followed in making it; (2) the
5 nature of the statutory scheme and the terms
6 of the statute pursuant to which the body
7 operates; (3) the importance of the decision
8 to the individual or individuals affected;
9 (4) the legitimate expectations of the
10 person challenging the decision; (5) the
11 choice of procedure made by the agency
12 itself..."

13 and the list is not exhaustive.

14 Further into the decision, I'm thinking
15 that it would be about paragraph -- commencing at
16 paragraph 19 which is under section (c) of that
17 decision. The court goes on to scope out in greater
18 detail the -- I suppose relevant to determining the
19 content of the duty of fairness. That's paragraph 19
20 of the *Baker* decision.

21 **Proceeding Time 2:07 p.m. T51**

22 And the paragraph 20 states:

23 "The fact that a decision is administrative
24 and affects the rights, privilege or
25 interests of an individual is sufficient to
26 trigger the application of a duty of

1 fairness."

2 And then the -- taking you now to other factors,
3 paragraph 21.

4 "The existence of a duty of fairness,
5 however, does not determine what
6 requirements will be applicable in a given
7 set of circumstances. The concept of
8 procedural fairness is eminently variable,
9 and its (inaudible) is to be decided in the
10 specific context of each case. All of the
11 circumstances must be considered in order to
12 determine the content of the duty of
13 procedural fairness."

14 The court then states, in paragraph 22, that it would
15 be helpful to review the criteria that should be used
16 in determining what procedural rights the duty of
17 fairness requires in a given set of circumstances.
18 And at paragraph 21, it states,

19 "One important consideration is the nature
20 of the decision being made and the process
21 followed in making it."

22 It states further in that paragraph that:

23 "The more the process provided for the
24 function of a tribunal, the nature of the
25 decision-making body and determinations that
26 must be made to reach a decision resemble

1 judicial decision-making, the more likely it
2 is that procedural protections closer to the
3 trial model will be required by the duty of
4 fairness."

5 The following page, at paragraph 24:

6 "A second factor is the nature of the
7 statutory scheme and the terms of the
8 statute pursuant to which the body
9 operates."

10 Paragraph 25 states that:

11 "A third factor in determining the nature
12 and extent of the duty of fairness owed is
13 the importance of the decision to the
14 individual or individuals affected. The
15 more important the decision is to the lives
16 of those affected, the greater is -- and the
17 greater its impact on that person or those
18 persons, the more stringent the procedural
19 protections that will be mandated."

20 And that ties in, I would say to you, with the First
21 Nations' rights which I'll talk about further.

22 Paragraph 26:

23 "(4) the legitimate expectations of the
24 persons challenging the decision may also
25 determine what procedures the duty of
26 fairness requires in given circumstances."

1 "As applied in Canada..."

2 On the following page,

3 "...if a legitimate expectation is found to
4 exist, this will affect the content of the
5 duty of fairness owed to the individual or
6 individuals affected by the decision."

7 Paragraph 27:

8 "(5) the analysis of what procedures the
9 duty of fairness requires should also take
10 into account and respect the choice of
11 procedure made by the agency itself,
12 particularly when the statute leaves to that
13 -- to the decision-maker the ability to
14 choose its own procedures or when an agency
15 has expertise in determining what procedures
16 are appropriate in the circumstances."

17 And paragraph 28, it concludes:

18 "I should note that this list of factors is
19 not exhaustive."

20 And the final sentence, which I think is key:

21 "The values underlying the duty of
22 procedural fairness relate to the principle
23 that the individual or individuals affected
24 should have the opportunity to present their
25 case fully and fairly and have decisions
26 affecting their rights, interests or

1 privileges made using a fair, impartial and
2 open process appropriate to the statutory
3 institution with social context of that
4 decision."

5 It's submitted that this particular case,
6 which elaborates the duty of fairness, is legally and
7 more relevant in trying to sort out which way to go,
8 than trying to look at this in a dualistic
9 perspective, quasi-judicial -- not quasi-judicial.
10 And with respect, therefore, to the first question,
11 we're silent with respect to an answer to that. We
12 think it's the wrong question. We think that
13 certainly within the context of this inquiry, it is
14 foreseeable that there may be disputes, but they
15 certainly are not in the traditional sense as others
16 have commented upon.

17 With respect to question number 2, we are
18 in agreement with what counsel for Treaty 8 and others
19 have said with respect to the duties of the Commission
20 to itself consult with First Nations, and we say to
21 you that that duty is emphasized and in fact brought
22 within the *Baker* decision in terms of the third
23 criteria, namely a third factor to determine the
24 nature and extent of the duty of fairness owed is the
25 importance of the decision to the individual or
26 individuals affected.

1 Hydro does not fully discharge the Crown's duty to
2 consult, and it doesn't discharge the Commission's
3 duty to consult and apply the duty of fairness towards
4 First Nations. So there is a gap there, which I think
5 only you can fulfill given that you are decision maker
6 making determinations that will affect the rights and
7 lives of First Nations that are noted in the *Baker*
8 decision.

9 It's our submission that at this juncture,
10 you know, the Commission has to make a decision
11 whether or not it has an independent duty to consult
12 First Nations and it can make that decision based on
13 the *Baker* decision and on the constitutional rights
14 that flow to First Nations, because I think they
15 support each other. The *Baker* decision, while not
16 explicitly mentioning First Nations, talks about that
17 the duty -- the content of the duty of fairness must
18 be affected or influenced by the rights of individuals
19 affected by a decision. In this case we are talking
20 First Nations' rights.

21 So it also has come to our observation that
22 this inquiry relying on Section 10(b) of the terms of
23 reference may decline to use all of the powers
24 provided to it under the *Act*. That is it could not
25 necessarily use all the powers. It could rather use
26 the powers enumerated in Section 10(c) of the terms of

1 reference, which allows the Commission to use
2 administrative procedures like workshops, mediation,
3 dispute resolution mechanisms, pre-hearing conferences
4 and working groups to carry out a strategic planning
5 role. And if the Commission chooses the latter
6 possibility which is lawfully open to it, there would
7 be no participants in the inquiry with natural justice
8 rights, rather it would be, it's submitted,
9 stakeholders and First Nations involved collaborately
10 in a strategic planning exercise, each with different
11 bundles of legal rights.

12 The Commission, with the input of
13 stakeholders and First Nations could then design a
14 stakeholder and First Nation engagement process that
15 accords with the principles of administrative fairness
16 and also accords with the principles enunciated in
17 *Haida Nation* and other cases.

18 This, then, is the solution that we see to
19 the myriad of natural justice questions posed by the
20 Commission in question number 2.

21 Those are our submissions on questions 1
22 and 2.

23 THE CHAIRPERSON: Thank you very much, Mr. Dimitrov.

24 MR. FULTON: B.C. Hydro and Power Authority.

25 **SUBMISSIONS BY MR. GODSOE:**

26 MR. GODSOE: Thank you, Mr. Fulton.

1 judicially in the sense of being required to
2 afford an opportunity to be heard, the
3 courts must give effect to that intention."

4 In other words, the four non-exhaustive
5 criteria that we've been talking about only serve to
6 look at whether the legislature intended the
7 Commission to hear or decide. And I submit that in
8 fact it's clear from both the *Utilities Commission Act*
9 and the terms of reference that the legislative intent
10 is clear. The Commission is to hear and decide like
11 it would on any other matter.

12 That brings me to point 2, and I agree
13 completely with the submissions of counsel for BCSEA
14 on this point. Section 5(1) does not apply to this
15 inquiry in any way, shape or form. It is Section 5(4)
16 through Section 5(9) that apply. It is of enormous
17 significance that in May 2008, the Legislature amended
18 Section 5. Prior to May 2008, all this Commission
19 could do under Section 5(1) is investigate and report
20 with recommendations, which is exactly what you did in
21 the Heritage Contract inquiry. This is very
22 different.

23 The Legislature turned its attention to
24 this matter, inserted Sections 5(4) through 5(9) and I
25 think it's beyond dispute, everybody agrees, that
26 determinations mean decisions. So in other words,

1 you're not making policy recommendations. You're not
2 -- what you're doing is not in the nature of advice.
3 You're not being asked to merely investigate and
4 report but not decide. It's clear you are deciding.
5 And in my view, one of the criterion that we've talked
6 about that should be afforded significant weight is
7 the nature of the determinations this Commission has
8 been called upon to make as part of Section 5 Inquiry.
9 And I say this. The need determinations are to be
10 based on findings of fact on evidence, not policy.
11 The terms of reference make that clear in paragraphs 6
12 through 9.

13 Subject to judicial remedies, and I'm going
14 to come back to this point in a minute, the
15 determinations are of a final nature and they're not
16 interim decisions.

17 Staying with the theme of the nature of the
18 determinations, several First Nations have maintained
19 that the determinations have the potential to
20 adversely affect their interests. I accept that.
21 B.C. Hydro has accepted that in B2-7. I also agree,
22 though, with counsel for JIESC, counsel for CECBC and
23 counsel for BCSEA, that other rights are affected as
24 well. B.C. Hydro submitted in its Exhibit B2-7 that
25 its rights will be affected because the determinations
26 of need of transmission will impact development of

1 future generation, and of course that will then impact
2 ratepayer interests. So when I look at the criterion
3 set out in *Coopers & Lybrand*, rights are affected
4 here.

5 Now, I think that brings me to point number
6 3, which is my rely to several submissions on, first,
7 the reviewability of your decisions; second, whether
8 there's an applicant or not; third, the adversarial
9 nature; and fourth, sanctions. I think those are the
10 four I need to address.

11 First of all, with all due respect, Treaty
12 8 Tribal Association is completely wrong that your
13 decisions are not reviewable. Section 105 applies to
14 the scope of the review, not whether a decision is
15 reviewable. I agree completely with counsel for JIESC
16 that Section 101 of the Act, which provides for appeal
17 subject to leave, is clearly applicable here. And I
18 also agree with counsel for JIESC that the law
19 jurisdiction limitation applies across the board to
20 everything you do. So with all due respect, the
21 reviewability issue is a complete red herring.

22 I move now to the issue of the applicant,
23 and I say this. I agree with counsel for BCSEA in
24 Exhibit C10-4 that there is no applicant with respect
25 to the filing of energy supply contracts pursuant to
26 Section 1 -- sorry, Section 71(1).

1 **Proceeding Time 2:22 p.m. T54**

2 I also look to paragraph 9 of the terms of
3 reference, which no one has touched upon, and I must
4 say we get close to an applicant here. Paragraph 9
5 says:

6 "The Commission 'must' invite and have
7 regard for the evidence and submissions from
8 the transmission service providers with
9 respect to the specific determinations the
10 Commission should make."

11 And of course, the terms of reference define
12 "transmission service providers" as BCTC and FortisBC.
13 In other words, you must hear from BCTC on the nature
14 of the determinations.

15 But I also agree with counsel for JIESC in
16 particular that, because there's no applicant in the
17 traditional sense, is not determinative. And I've
18 pointed you on another section of the Act where it
19 doesn't matter, there's no -- or sorry, I've pointed
20 you to another section in the Act, Section 71, where
21 *Carrier Sekani* said it was quasi-judicial and yet
22 there is no applicant. So I don't believe that this
23 is determinative in any way, shape or form.

24 I move now to the adversarial nature of the
25 proceeding, and to state the obvious, the Commission
26 has already been involved in two disputes. First, the

1 scoping issue mentioned by CECBC's counsel. That
2 entailed the Commission adjudicating disputes and
3 rendering a decision pursuant to Commission Order G-
4 86-09, found at Exhibit A-18. Second, this procedural
5 conference has all the trappings of an adversarial
6 process. There is a clear dispute as to the
7 Commission's role with respect to First Nation
8 consultation. And like IPPBC's counsel, I note we are
9 very early in the regulatory review process. So, I
10 think it flies in the face of the facts on the ground
11 to assert that there is no dispute. There is. And
12 there's going to be as we proceed.

13 Lastly, I'm struggling with this idea of no
14 sanctions because, of course, it would apply to CPCN
15 proceedings and Section 71 proceedings. I note only
16 that in Exhibit B2-7, lines 11 to 14 on page 18, we
17 say that the offenses and penalties section of the Act
18 clearly apply here. So, I caution you on the
19 sanctions issue. I don't quite understand it. I
20 don't understand how it applies -- it would magically
21 make this one non-adversarial or not quasi-judicial,
22 but it wouldn't on CPCN and Section 71.

23 Lastly, on the requirement to hold a
24 hearing, I note that under Section 46(2), you're not
25 required to hold a hearing under CPCN provisions. I
26 note under Section 71(2), you're not required to hold

1 a hearing on energy supply contracts being filed. You
2 always have the discretion, as you do here, under
3 paragraph 10 of the terms of reference.

4 And subject to any questions, those
5 conclude my submissions on question 1.

6 THE CHAIRPERSON: No questions, thank you.

7 MR. GODSOE: I'll move, then, to question 2.

8 By way of opening submission, as indicated
9 in B.C. Hydro's submission at Exhibit B2-7, a
10 determination that the Commission is acting in a
11 quasi-judicial capacity necessarily precludes the
12 Commission owing an independent duty to consult, and
13 we agree with counsel for JIESC and rely on the
14 Supreme Court of Canada case in the *National Energy*
15 *Board*. However, the converse does not necessarily
16 follow.

17 Now, the Commission has further asked what
18 weight, if any, should be given to the five factors
19 listed in Question 2. I'm going to review these
20 factors in two groupings, and I'm going to differ
21 slightly from the order presented by the Commission in
22 Exhibit A-19. First, I'm going to address factors
23 (a), (c) and (d), because they all relate to
24 determinations previously made by the Minister or by
25 the government. Then I'm going to go to factors (b)
26 and (e), as they both relate to future decisions by

1 the Minister under Section 5(7) of the *Utilities*
2 *Commission Act*.

3 So, turning first to factors (a), (c) and
4 (d), which I'll call the "pre-inquiry factors". As
5 stated in Exhibit B2-7, and as reiterated by counsel
6 for JIESC, any decisions made by the Minister in
7 formulating the terms of reference are legally binding
8 on this Commission. The Council has -- or, sorry, the
9 Minister has issued the terms of reference and, as
10 noted by the Commission Panel in (c), the duty of
11 consultation is not set out in the terms of reference,
12 nor is it specified as an obligation the Commission
13 must discharge.

14 As the Supreme Court of Canada noted in the
15 *Haida* case at paragraph 51:

16 "It is open to governments to set up
17 regulatory schemes to address the procedural
18 requirements appropriate to different
19 problems at different stages, thereby
20 strengthening the reconciliation process and
21 reducing recourse to the courts."

22 And for the record, a copy of the *Haida* case is found
23 at tab 4 of Exhibit B2-7.

24 **Proceeding Time 2:27 p.m. T55**

25 In other words, like counsel for JIESC, I
26 say to you the government has set up the current

1 regulatory scheme of the Section 5 Inquiry by issuing
2 the terms of reference.

3 Now, much has been said about B.C. Hydro's
4 parallel process not being sufficient to discharge the
5 duty of consultation. We agree, and we've never said
6 otherwise. What we've emphasized in Exhibit B2-7 and
7 what I don't think has been addressed by First Nation
8 participants, it is the combination of (1) the
9 Commission regulatory review process, and (2) B.C.
10 Hydro's parallel consultation process, that we say
11 together, together, uphold and maintain the honour of
12 the Crown and discharge the Crown's obligations at
13 this stage.

14 And while there's been a number of
15 assertions with respect to the B.C. Hydro/BCTC
16 parallel process, I would prefer to address those as
17 part of question 8. As I said, I gave you a bit of a
18 strip tease in my appearance that there might well be
19 flexibility -- sorry, that's an awful image.

20 MR. FELDBERG: I was about to object.

21 MR. GODSOE: Well, that's the danger of having Peter
22 Feldberg go after you.

23 I think there is flexibility within the
24 parameters of natural justice, and I'm going to
25 address that in question 3, to make some modifications
26 to both the regulatory review process as it's set out

1 in Exhibit A-7 or contemplated in Exhibit A-7 and B.C.
2 Hydro's parallel process. But I prefer to address
3 those as part of question 7 and 8 if that would be
4 appropriate.

5 THE CHAIRPERSON: That's fine.

6 MR. GODSOE: Turning now to factors (b) and (e) which
7 are the post-inquiry factors. Under Section 5(7) of
8 the *Utilities Commission Act* it is the government who
9 has the authority to issue regulations. This has been
10 said by other participants. This stage of Crown
11 decision making will occur after the Commission
12 regulatory review process.

13 The Supreme Court of Canada has made it
14 clear that the focus of the analysis must be on what
15 is required to that stage of the decision-making
16 process. And I'm going to quote from paragraphs 45
17 and 46 of the *Taku* case but I'm not going to ask you
18 to turn to it. The Supreme Court of Canada stated in
19 considering the consultation required at the
20 environment assessment stage the following:

21 "Project approval certification is simply
22 one stage in the process by which a
23 development moves forward. ...

24 The project committee concluded that
25 some outstanding First Nation concerns could
26 be more effectively considered at the permit

1 stage, or at the broader stage of treaty
2 negotiations or land use strategy planning.
3 The project committee, and by extension the
4 Minister, has therefore clearly addressed
5 the issue of what accommodation of the First
6 Nations' concerns was warranted at this
7 stage of the project, and what other venues
8 would also be appropriate for the First
9 Nations continued input. It is expected
10 that throughout the permitting approval
11 licencing process, as well in the
12 development of a land use strategy, the
13 Crown will continue to fill its honourable
14 duty to consult, and if indicated,
15 accommodate."

16 And for the record, a copy of the *Taku* case is found
17 at tab 11 of Exhibit B2-7.

18 As the Commission has noted in (e), Exhibit
19 B2-4 contemplates B.C. Hydro undertaking consultation
20 with First Nations for the purposes of any decision
21 the Minister may make regarding regulation under
22 Section 5(7) of the *Utilities Commission Act*. Thus
23 the government has clearly addressed the issue of what
24 consideration of First Nation concerns is warranted at
25 this stage, and by that I mean during the Section 5
26 Inquiry stage, and what other venues may be

1 appropriate for the First Nations' continued input.

2 And subject to any questions, those
3 conclude my submissions respecting question 2.

4 THE CHAIRPERSON: Thank you, Mr. Godsoe.

5 MR. GODSOE: Two housekeeping matters. B.C. Hydro filed
6 a capacity funding letter together with a cover letter
7 yesterday and that was assigned Exhibit B2-9. I will
8 be relying on that to address question 7 and 8. I've
9 got 50 copies I can put in the back of the room for
10 everybody if they haven't had time to look at it.

11 I can also provide the Commission Panel
12 with copies.

13 **Proceeding Time 2:32 p.m. T56**

14 THE CHAIRPERSON: The Panel members already have copies
15 of that.

16 MR. GODSOE: Great.

17 Secondly with respect to question 3, I
18 anticipate relying on a one-page extract from *Black's*
19 *Law Dictionary* that again I will put at the back of
20 the room. It will be for questions 3 and 4. Thank
21 you.

22 THE CHAIRPERSON: Thank you.

23 MR. FULTON: British Columbia Transmission Corporation.

24 **SUBMISSIONS BY MR. FELDBERG:**

25 MR. FELDBERG: Madam Chair, Panel members, this may come
26 across a little bit disjointed because after hearing

1 most of my friends, much of what I have to say is
2 going to be struck. It also may be a little bit
3 disjointed because I am still reeling from the image
4 of Mr. Godsoe's striptease.

5 I do adopt in answer to question 1, much if
6 not all of what was said by Mr. Andrews in respect of
7 the Commission's obligations, and particularly in
8 respect of the true question to ask yourselves, which
9 is do we have an obligation to be independent and
10 impartial, and if so, then that's inconsistent with
11 having an independent duty to consult. I agree with
12 what was said by my friend Mr. Bursey for JIESC, and
13 particularly his discussion with respect to the role
14 of the Commission generally, the types of disputes
15 that you typically look at and resolve, the lack of
16 relevance, if I can put it that way, to the dispute in
17 a classical sense, and the applicability of the *NEB*
18 case. In my submission what Mr. Bursey said was
19 accurate and I adopt what he said. And I also adopt
20 much of what was said by Mr. Austin and Mr. Godsoe.

21 I do want to make a couple of points,
22 though, on those and reinforce a couple of points if I
23 may. As many have mentioned, the absence of a dispute
24 in the classical sense is only one factor for the
25 Commission to consider when determining whether or not
26 its role or function is amenable to having an

1 independent duty to consult. And I say and others
2 have said in the classical sense, because in the
3 context of a regulatory tribunal like the Utilities
4 Commission, like the National Energy Board, like other
5 regulatory tribunals, disputes in the classical sense
6 don't arise for your resolution other than perhaps in
7 the complaints process.

8 And we have many types of disputes or
9 proceedings in front of the Commission which range
10 from rate hearings where the issue may arise without
11 an applicant, as Mr. Bursey indicated, if it's going
12 to be, you know, a generic cost of capital type
13 application, to the approval or review of contracts
14 where there is no applicant, to the review of CPCN
15 proceedings where you have the discretion as to what
16 procedure to use and where you're ruling on an
17 applicable but really the test you're applying is
18 whether a particular application is in the public
19 interest, not a dispute as between A and B. And those
20 are the types of disputes that this Commission
21 typically hears. Those are also the types of disputes
22 that the Court of Appeal considered in *Kwikitlem* and
23 in *Carrier Sekani* were the subject of quasi-judicial
24 decision. Those are the types of disputes that were
25 in issue in the *NEB* case, which is effectively
26 approval of an export licence, where again there isn't

1 an A and B, it's merely an approval in the public
2 interest and different parties will come in front and
3 they will have a right to be heard, they will have a
4 right to a fair and open process, and they will have a
5 right to be treated in a transparent, impartial,
6 independent and fair way.

7 And it's really, as Mr. Andrews said, what
8 this really boils down to is, do you have an
9 obligation in this proceeding to proceed in an
10 impartial and in an independent manner? And I think
11 Mr. Andrews' analysis of that was very accurate. You
12 only have to go as far as Section 30 of the
13 *Administrative Tribunals Act* to find a statutory
14 obligation to be impartial, and you only have to look
15 at the *Act*, the *Utilities Act* as a whole and as we set
16 it out in our submissions to find out that your role
17 is one -- or your function is one of independence.
18 And in my submission, the obligation to treat parties
19 independently and fairly is well made out.

20 **Proceeding Time 2:37 p.m. T57**

21 The other thing I wanted to add, though,
22 and this -- Mr. Bursey mentioned the *Bell Canada* case.
23 It's referred to in -- you can find it, actually, in
24 -- it's referred to in JIESC's submissions, but also
25 you can find it at tab 1 of the Haisla submissions in
26 Exhibit C83-3. And I won't go to it, in the interests

1 of time, but I'll refer to the paragraphs that I think
2 are instructive for the Commission. They're
3 paragraphs 21 to 31 to read.

4 And what that case says is that, in that
5 case the court analyzed the nature of the Canadian
6 Human Rights Tribunal and concluded that its main
7 function was adjudicative, after going through the
8 analysis you've now seen probably in a number of cases
9 that you have had to look at. But in doing so, the
10 court indicated that the analysis was not to parse
11 each role or function of the tribunal to determine the
12 level of procedural protections that would apply, but
13 rather to read the statute as a whole, and to
14 determine the legislature's intention. And this you
15 heard a fair bit from my friend Mr. Godsoe.

16 And I'll just read this quote, I won't take
17 you to it in the interests of time, but this comes out
18 of it.

19 "All aspects of the tribunal structure as
20 laid out in its enabling statute must be
21 examined, and an attempt must be made to
22 determine precisely what combination of
23 functions the legislature intended that
24 tribunal to serve, and what procedural
25 protections are appropriate for a body that
26 has those particular functions."

1 In other words, look at the functions of the tribunal
2 as a whole, and don't look at its role in this aspect
3 or in that aspect or in the other aspect to determine
4 whether over here it might have to give a certain
5 level of procedural protection but it doesn't in the
6 others.

7 In our submissions, we laid out that
8 analysis for you. We set out fairly clearly what we
9 thought your role was, what your function was, et
10 cetera. In my submission your primary role is to hear
11 and decide. It's to hear and decide from the people
12 in front of you, from those that have been -- as my
13 client has been in the terms of reference, plucked and
14 required to provide the evidence that you're required
15 to hear. And the terms of reference are pretty
16 specific in laying out that -- giving the load-serving
17 entities a particular job to bring you a rock, giving
18 the transmission company a responsibility really to
19 take the evidence as a whole, put it together and, as
20 my friend Mr. Godsoe said, Section 9 of the terms of
21 reference says "Here's the determinations we think you
22 should make." Now, you're to hear from everybody, but
23 that's the process you're given. Your role is to hear
24 and decide. No one is asking you to go out and plan
25 the transmission system. That's not the function of
26 the Section 5 inquiry.

1 Now, in my submission the absence of a
2 dispute in the classic context is not significant
3 here, and it's -- as I said, it's because you don't
4 generally decide disputes in the classic sense, and
5 that has not been a bar to the finding that tribunals
6 are quasi-judicial in nature and owe a duty of
7 impartiality and to all those who appear in front of
8 them. The Court of Appeal has already decided that
9 the Commission is a quasi-judicial tribunal in respect
10 of the functions it exercises on a CPCN application.
11 It's already decided that in Section 71 application.
12 As my friends before me have said, not that much
13 difference between what you're being asked to do in
14 those cases and what you're being asked to do in this
15 case.

16 When I look at what it is that you're being
17 asked to decide, I disagree very strongly with those
18 that say what you are to do is to give policy advice.
19 The words in Section 5 are, you're to make
20 "determinations of need". Determinations of need are
21 in essence the first step in any CPCN process. It's
22 the first step in making a decision that a project
23 will be required. A determination of need is one that
24 is legally binding. Your decision in that is not
25 subject to a Minister's blessing later. The
26 Minister's regulation in Section 5 serves only to

1 preclude you from reconsidering that decision. But in
2 no sense is your decision on a determination subject
3 to approval, acceptance, or anything by the Ministry.
4 It can be relied on in the next CPCN application as a
5 binding determination of need. It's a legal
6 determination.

7 In terms of -- I also disagree strongly
8 that you're not here to determine planning tools.
9 Again, there's nothing in Section 5 that says what
10 you're to do is to -- and I can't remember the exact
11 phrase, I apologize, that Mr. Quail used, but what
12 you're to do is to design planning tools. That's not
13 the exercise. You're to make a determination of need.
14 At the end of the day, what will come out of this is
15 that you will say that certain things are needed.
16 What those are have yet to be seen. But that's what
17 you're to determine. That's not a planning tool,
18 that's a decision.

19 **Proceeding Time 2:42 p.m. T58**

20 Finally, that decision that you make will
21 have impact. As others have said, they will have real
22 and ascertainable impacts on the ratepayers because it
23 is the first step in project approvals. It will have
24 real effect on the First Nations as they have
25 indicated, and it will have the most direct and real
26 effect on my client, because what others are not

1 mentioning but what you will see from Section 5(9) is
2 one of the things you are entitled to do after making
3 a determination is to order a utility to bring an
4 application in front of you. So coming out of this,
5 from my client's perspective, is a real impact on a
6 legal right, which is you can compel my client to file
7 an application by a certain time.

8 So all those that say there aren't
9 sanctions, there aren't rights affected, in my
10 submission just look at Section 5(9). That is one
11 provision where a right is affected.

12 The real question, as others have said, is
13 not is there a dispute in the classic sense, but
14 rather that in all of the circumstances whether you
15 have to discharge your functions in a manner that is
16 impartial and fair to all participants, whether the
17 participants have a right to be heard and a right to
18 an impartial process. And I think what's been
19 troubling those people, those including my client with
20 respect to whether or not you have an independent duty
21 to consult is the fact that accepting a duty that is
22 special to one party in front of you necessarily affects
23 the impartiality with which you an adjudge the process
24 for others, and necessarily affects the fairness with
25 which it proceeds. All participants in front of a
26 regulatory tribunal expect that they will be -- they

1 will have all of the evidence available to them to
2 look at, they expect that they will be able to make
3 their case properly and expect that the case will be
4 done in an open and fair manner.

5 VOICE: Could you speak up just a bit, please?

6 MR. FELDBERG: Certainly. They make these things too far
7 away from me.

8 Just checking. Much of what I had to say
9 on question one I think has been addressed by others
10 and so I'll move quickly to question 2, if I may.

11 On question 2 I echo the concern that my
12 friend Mr. Bursey had with respect to the answer to
13 this question, because I frankly find myself unable to
14 look at it and divorce myself from the legislative
15 framework within which you work. In my submission,
16 the cases are so clear and the legislative framework
17 is so clear that you are operating in a quasi-judicial
18 manner with respect to this inquiry, that it makes it
19 very difficult to suspend that and take a look at the
20 circumstances if you weren't.

21 However, I think I can look at the specific
22 sub-questions and perhaps add a few comments. In my
23 submission, what you've set out, or what the
24 Commission has set out in the subparagraphs to
25 question 2 are really observations on the way the
26 terms of reference have been set out and the structure

1 of Section 5 and the way that the Minister has set out
2 a process by which B.C. Hydro and BCTC are to consult.

3 And in my submission probably the right way
4 to look at those is that they are reflective of the
5 Commission's role in the sense that they probably take
6 a view of what the Commission's role is and then
7 design a process in accordance with that, rather than
8 define the Commission's role. In other words, I don't
9 think you determine your role from those various items
10 that you listed in the sublist. I think actually they
11 are reflective of a regulatory scheme which has you as
12 the hearer and decider and others as the Crown actors
13 that appear in front of you. And I think it's more
14 appropriate to look at it that way, rather than
15 telling you what your role is.

16 If I can -- just turning quickly to each of
17 the sub-headings in terms of what weight should be
18 given to the following factors, and as I say, I don't
19 think these really are the factors you need to be
20 cognizant of in determining what your duty is. I
21 think rather you look to the statute and look to the
22 way you make decisions.

23 **Proceeding Time 2:49 p.m. T59**

24 But in terms of the -- if you look at
25 subsection 5(6) and 5(7), the terms of reference
26 requiring the power of the Commission to hold a

1 Section 5 inquiry, I think Mr. Godsoe said that that
2 is just the terms of reference are binding upon you.
3 I don't think there's anything else you can say about
4 that. I don't think that particularly defines any
5 duty that you have to consult, nor do I think that the
6 -- or (c) are particularly determinative of that.

7 A couple of comments on that fact that B.C.
8 Hydro has been requested to undertake certain aspects
9 of the duty to consult. Again, I'm not sure that's
10 determinative at all one way or the other, as to
11 whether or not the Commission has a duty to consult.
12 I will have comments on the nature of that process,
13 its sufficiency and how it's to be carried out when we
14 get to questions 7 and 8, and I think in that -- at
15 that time, too, I'd also like to address your
16 concerns, or your questions that you raised earlier in
17 the day, Madam Chair, because I think it's probably
18 most appropriate in that context.

19 The final comment I guess I'd like to add
20 is that I'd like to echo the comments that I think
21 most of the counsel in the room have made, and that is
22 by disagreeing on the role of the Commission in terms
23 of whether or not it has an independent duty to
24 consult, is not meant to take away from the fact that
25 I think everybody in the room sees a very real need
26 and advantage in having an engagement process with

1 First Nations and ensuring that First Nations are here
2 and able to make their submissions in the best and
3 most useful way.

4 I think the dispute that we're having over
5 the role of the Commission is merely -- not merely,
6 but significantly boils down to how the Commission can
7 fulfill the very important role that it has to hear
8 this and run this inquiry in a fair and impartial
9 manner, and while still ensuring that the interests of
10 the First Nations are heard. And I think that's the
11 balance we're all striving for.

12 Those are my submissions on 1 and 2.

13 THE CHAIRPERSON: Thank you, Mr. Feldberg.

14 And now it's ten to three, so we are taking
15 a 15-minute coffee break, and reconvene at five past
16 three.

17 **(PROCEEDINGS ADJOURNED AT 2:50 P.M.)**

18 **(PROCEEDINGS RESUMED AT 3:07 P.M.)** **T60/61**

19 THE CHAIRPERSON: Please be seated.

20 MR. FULTON: Madam Chair, before I turn to the issue of
21 replies for questions 1 and 2, I did canvass the room
22 a few moments ago to see if there was an appetite for
23 sitting until 5:00 tonight, and there is, so that
24 subject to the Panel endorsing that extension to the
25 time for sitting today, that's what I propose we do.

26 THE CHAIRPERSON: Thank you, Mr. Fulton. I guess it's

1 not the first and last time we are modifying our
2 process. So yes, the Panel certainly is prepared to
3 sit until 5:00.

4 MR. FULTON: Thank you. Now, in terms of reply then,
5 starting in -- or scrolling back, B.C. Hydro and Power
6 Authority.

7 MR. GODSOE: I have no reply to counsel for BCTC.

8 MR. FULTON: First Nations Energy and Mining Council.

9 **REPLY BY MR. DIMITROV:**

10 MR. DIMITROV: To those that say that there cannot be a
11 duty by the Commission itself to directly consult with
12 First Nations because that would, if you're quasi-
13 judicial, violate natural justice, that then is a
14 shield that in a sense disallows you from taking
15 cognizance of the constitutional rights of First
16 Nations under Section 35 and common law rights, and we
17 can't agree with that.

18 Those are my comments. Thank you.

19 MR. FULTON: Joint Industry Electricity Steering
20 Committee.

21 **REPLY BY MR. BURSEY:**

22 MR. BURSEY: Thank you, Mr. Fulton.

23 Madam Chair, I have a couple of quick
24 comments, one just to the comment from Mr. Dimitrov,
25 and he may not agree with it but the Supreme Court of
26 Canada and the Court of Appeal disagree with Mr.

1 Dimitrov.

2 I also wanted to comment on the *Baker*
3 decision which Mr. Dimitrov filed. First I'd note
4 that he didn't file the full case. There's just
5 certain paragraphs. He referred you to paragraph 22
6 and then read a portion of that, but he didn't read
7 the next sentence, which I will read for you. I don't
8 know that it's necessary to turn it up but it's
9 paragraph 22, halfway through:

10 "I emphasize that underlying all these
11 factors is the notion that the purpose of
12 the participatory rights contained with the
13 duty of procedural fairness is to ensure
14 that administrative decisions are made using
15 a fair and open procedure appropriate to the
16 decision being made and its statutory,
17 institutional and social context, with an
18 opportunity for those affected by the
19 decision to put forward reviews and evidence
20 fully and have them considered by the
21 decision maker."

22 There's a similar statement in paragraph
23 28. And there's also a statement in the headnote,
24 which is the third page in, the start of the third
25 paragraph, which I'd like to read to the Panel. I
26 couldn't find a paragraph from the main part of the

1 text because that isn't copied in this excerpt from
2 the case. It says:

3 "Procedural fairness also requires that
4 decisions be made free from reasonable
5 apprehension of bias by an impartial
6 decision maker."

7 So again we come back to the principles of
8 the independence of the Commission, the fact that the
9 Commission must makes its decision impartially and in
10 accordance with procedural fairness. The *Baker*
11 decision supports that proposition.

12 The other point I wanted to make with the
13 *Baker* decision is this is not a First Nations case,
14 it's a case about immigration case and a certain
15 proceeding involving the *Immigration Act*. But the
16 comments on procedural fairness I think are apropos.

17 Thank you.

18 THE CHAIRPERSON: Thank you, Mr. Bursey.

19 MR. FULTON: BCSEA.

20 **REPLY BY MR. ANDREWS:**

21 MR. ANDREWS: Thank you. In reply to Mr. Dimitrov, I
22 endorse what Mr. Bursey said regarding the *Baker* case.
23 I would just add that thought *Baker* does deal with the
24 principles governing the content of procedural
25 fairness, to be clear here, I don't think anybody is
26 disputing that the Commission panel owes a duty of

1 fairness to the participants in the inquiry, of
2 course, including First Nations participants.

3 **Proceeding Time 3:12 p.m. T62**

4 And secondly, I would note that in *Baker*,
5 the decision-maker in question was an immigration
6 officer who was not independent of government, and was
7 -- so, the parallels are not particularly helpful in
8 that respect. The case does say that the principles
9 of fairness apply, but as I say, I don't think that's
10 really an issue.

11 And I think that in a sense, that is a
12 segue to my second and far more important response to
13 Mr. Dimitrov, which is that it's not as though if the
14 Commission decides that it doesn't owe an independent
15 duty to First Nations to consult and accommodate, that
16 the First Nations are without recourse and have no
17 access to their constitutional rights. On the
18 contrary, the First Nations have the complete panoply
19 of procedural and substantive rights to put before the
20 Panel and to persuade you that there are aspects of
21 their constitutional rights and their rights and
22 interests that aren't constitutional that ought to
23 persuade you to come to some conclusion regarding
24 determinations concerning transmissions --
25 transmission lines. So they're -- it's fully open to
26 them to provide evidence and make arguments about how

1 their constitutional rights should cause you to make
2 your determinations at the end of the day.

3 Subject to questions, those are my
4 submissions.

5 THE CHAIRPERSON: Thank you, Mr. Andrews.

6 MR. FULTON: BCOAPO *et al.*

7 MR. QUAIL: No reply.

8 MR. FULTON: Commercial Energy Consumers Association of
9 British Columbia.

10 MR. WEAVER: No reply.

11 MR. FULTON: ESVI *et al.*

12 MR. BERTSCH: We have no reply as well.

13 MR. FULTON: IPPBC.

14 **REPLY BY MR. AUSTIN:**

15 MR. AUSTIN: I would just like to make a quick reply to
16 Mr. Quail's comments. As I understand Mr. Quail's
17 comments, perhaps there is ways to improve the
18 engagement with First Nations through the Commission
19 process. But that, in the IPPBC's view, does not
20 necessarily translate or does not translate into duty
21 of the Commission Panel to consult with First Nations
22 on an independent basis.

23 I would also like to point out to Mr. Quail
24 that before he turns on his elephantine memory, that
25 my comments in relation to consultation with B.C.
26 Hydro were subject to something that I would think I

1 was careful to put in on the record, called "natural
2 justice". And I would also point out that we now have
3 before this Commission the concepts of independence,
4 impartiality, natural justice and procedural fairness.
5 So if all of those are followed, then I'm sure we'll
6 have a fair hearing.

7 Thank you.

8 THE CHAIRPERSON: Thank you.

9 MR. FULTON: Sto:lo Tribal Council.

10 MS. HEASLIP: No reply.

11 MR. FULTON: Shuswap Arrow Lakes Division.

12 MS. LEBOURDAIS: No reply.

13 MR. FULTON: Hwlitsum First Nation.

14 MS. MUIR: No reply.

15 MR. FULTON: Toquaht Nation.

16 MR. CHRIST: No reply.

17 MR. FULTON: Squamish Nation.

18 **REPLY BY MR. KIRCHNER:**

19 MR. KIRCHNER: Just a couple of points, and I -- these
20 may stray into the next couple of questions, but the
21 suggestion has been made a couple of times that if the
22 Commission has a duty to consult with First Nations,
23 then somehow the principles of natural justice or the
24 duty of fairness or the obligation of the Commission
25 to act fairly, impartially, independently and
26 transparently is compromised. And my submission in

1 reply is, that's simply not the case.

2 We are operating within a legal framework
3 where First Nations people do have special legal
4 status. That's a fact of life in Canada. That the
5 Supreme Court of Canada said in *Vanderpeet*, and I'm
6 afraid I don't have copies, I just looked this up, but
7 the reference is *Vanderpeet*, [1996] 2 S.C.R. 507 at
8 paragraph 30. And there the court noted that Section
9 35 exists and arises out of the simple fact that
10 aboriginal people here when European arrived, they
11 were living in societies, and living their life on the
12 land. And the court said it is this fact and this
13 fact above all others which separates aboriginal
14 peoples from other minority groups in Canadian
15 society, and which mandates their special legal status
16 -- their special legal and now constitutional status
17 is what the court said.

18 So, we're operating within a legal
19 framework where, as a fact of life, aboriginal people
20 do have special rights that are not enjoyed by other
21 members of Canadian society. And one of those rights
22 -- or at least the duty to consult arises out of the
23 existence of those rights.

24 So as a matter of law, administrative
25 decision-makers must ensure this duty is fulfilled.
26 And it's a special duty, and in the course of making

1 sure the duty is fulfilled, including the execution of
2 the duty by the decision-maker itself, does not mean
3 that its obligations -- or it does not mean that it
4 must act unfairly, partially, and not transparently.
5 These two principles in my submission, coexist. The
6 duty of fairness coexists completely with the duty to
7 consult.

8 The duty to consult, by the way, arises out
9 of the honour of the Crown, not out of a fiduciary
10 obligation, which is the subject of the *National*
11 *Energy Board* case. And the court in *Haida* was very
12 explicit about this. The court found that fiduciary
13 duty in *Haida* did not arise because there was not a
14 sufficient aboriginal interest sufficiently to find
15 aboriginal interest based on asserted aboriginal
16 rights. So there's no fiduciary obligation.
17 Therefore the court in *Haida* went to the honour of the
18 Crown, where there is not this duty of utmost loyalty
19 that you might find in a fiduciary obligation. And
20 the fiduciary -- and the duty to consult then came out
21 of the honour of the Crown, not the fiduciary
22 obligation.

23 **Proceeding Time 3:20 p.m. T63**

24 And as I've said, decision makers in all
25 kinds of circumstances who owe fairness obligations to
26 all kinds of participants and applicants and

1 interested parties still engage directly with First
2 Nations and maintain their impartiality. So that's
3 one point I just want the Commission to bear in mind,
4 both in reply to my friends but also throughout the
5 rest of the hearing.

6 Another, the second point I wanted to
7 comment on, a couple of people have suggested that --
8 a couple of my friends have suggested that the formal
9 hearing process such as this one is as good a
10 consultation process as anyone has come up with. I'm
11 not a First Nations person. I would suspect that if
12 you consulted on what a good consultation process
13 would be, that most First Nations people would tell
14 you this is not the most comfortable environment in
15 which they would be consulted, and likely would
16 suggest there are much better processes for them to
17 air their views and concerns; which is why we and
18 other aboriginal intervenors have put forward the idea
19 of community engagement, direct engagement and a First
20 Nations advisory panel.

21 And of course I mean no disrespect for the
22 Commission or to the process. It's a process that has
23 developed out of our common law traditions obviously
24 and works very very well in most circumstances. But
25 here we are dealing with different cultures and
26 different backgrounds that, of course, we need to be

1 sensitive to, and in my respectful submission the
2 first step in a consultation process would be to ask
3 the First Nation about the process. And that's not
4 been done, obviously, except for -- well, it's being
5 done here.

6 But in my respectful submission, in a
7 proper consultation process I very much doubt that we
8 would come up with the answer that -- from a First
9 Nation, "How do you want to be consulted?" I very much
10 doubt the response would be, "I want to be consulted
11 in a formal hearing process where there's lawyers and
12 evidence and set schedules and coffee breaks."

13 Those are my submissions.

14 THE CHAIRPERSON: Thank you, Mr. Kirchner.

15 MR. FULTON: The Nations.

16 **REPLY BY MR. STADFELD:**

17 MR. STADFELD: Good afternoon, Chair, Commission Panel.
18 It's Dr. Bruce Stadfeld, S-T-A-D-F-E-L-D. Good to see
19 you all again, and this time I'm going to try to keep
20 my submissions a bit shorter than the last time that I
21 appeared before you, and that might be why I ended up
22 in reply this time and not in chief. Just so you
23 know.

24 So I'm going to start with question 1, and
25 we do have a few points in reply here. The first one
26 that I would like to raise is there's been a lot of

1 talk about Section 5, what's in, what's not in Section
2 5. I don't think there's a big disagreement, of
3 course, that there's no specific reference anywhere in
4 Section 5 to a dispute or an applicant that is part of
5 this. I thought it would be helpful, let's go to the
6 terms of reference, because of course it's not just
7 Section 5. You're also acting under the terms of
8 reference.

9 So when I go to the terms of reference, I
10 go to paragraph 2. It says, "What is the general
11 purpose?" And of course we've all read this. It's
12 the purpose of this inquiry is for the Commission to
13 make determinations with respect to B.C.'s electricity
14 transmission infrastructure and capacity needs for a
15 30-year period. Nothing in there about settling a
16 dispute.

17 And then when we go down, we go to
18 paragraph 3, you must assess. So you're proceeding on
19 an assessment. Again there's no dispute here.

20 When we go on to paragraph 4, again you're
21 making determinations. You're not deciding a dispute
22 between parties.

23 **Proceeding Time 3:24 p.m. T64**

24 Paragraph (5), again, determinations; (6),
25 assessment. That's the language used. Paragraph (7)
26 again assessment, determinations. I could go on and

1 on.

2 I thought just on the final point here, if
3 you go to paragraph 12, because of course part of the
4 test is, are you acting like a court? Is this quasi-
5 judicial? Well, what are you going to do near the end
6 of all this? According to paragraph (12), you're
7 going to publish a report setting out the
8 determinations and then you're going to allow for a
9 30-day period for input, written comments on those.
10 And then, where appropriate, you're going to consider
11 them and take them into account.

12 Well, that doesn't sound like a court to
13 me. I've never appeared before a court where the
14 judge has published a draft decision and asked all of
15 the parties to comment first. So, I think based both
16 on Section 5 and on the terms of reference, it's
17 pretty clear you're not acting in a quasi-judicial
18 fashion.

19 I'll pick up on a couple of more points.
20 My friend, Mr. Bursey, referred to *Kwikitlem* and
21 *Carrier Sekani*. Well, there was no dispute there too,
22 he said. Well, of course, there was a dispute, based
23 on the application, based on the filing, based on the
24 decision whether or not to grant the CPCN. That's the
25 decision that the Commission had to make, and the
26 dispute was based on that. Same thing with *Carrier*

1 *Sekani*. Based on the filing, whether or not to accept
2 it. That gave rise to a dispute between parties. But
3 it was all triggered by the application, by the
4 filing, gave rise to a dispute. Here that's not the
5 case.

6 Now, also we heard from my friend Mr.
7 Austin, from the IPP and from several counsel here,
8 there's no dispute, but -- well, there is a dispute,
9 there's all these disagreements. Well, what I just
10 say -- would say to that would be a difference of
11 opinion does not make a dispute. That's not what's
12 regarded in quasi-judicial, is there a list between
13 parties. That's what referred to. It's not
14 difference of opinion. And so, sure, you've heard all
15 day today, you'll hear tomorrow, there is a wide range
16 of difference of opinion. But that's not a dispute in
17 the sense of quasi-judicial.

18 I want to turn to question 2. I want to
19 turn to 2(b). You see, I have learned to move a
20 little bit faster here. We're on to 2(b).

21 Now, on this point, I just have one quick
22 point to make. This is the issue of Section 5(7), and
23 first of all, I just want -- the point that my friend,
24 Mr. Kirchner, made was, under 5(7), I think I heard
25 him say, there will be a decision by the Minister, yes
26 or no, on this. On your decisions. Well, that's not

1 actually how I read it. It's an authority by the
2 Commissioner to say you can't change it. That's what
3 that does. It says, "You can't go back, vary,
4 rescind." So it's not yes or no, it's just you can't
5 change it.

6 On that point, I think it's important to
7 keep in mind all the time we're not talking about
8 Section 5(7). Whether or not there is a duty to
9 consult that's triggered, what that would look like,
10 the exact scope and content of 5(7), that's not the
11 issue before you. You can't rely, I submit, on 5(7).
12 You have to look at the determinations that you will
13 be making and there's no substitute for consultation
14 regarding those determinations. Not a determination
15 under 5(7).

16 Now, the question 2(c), again, I'll be
17 quick on this point, I think we've heard quite a bit.
18 There's been a lot of argument on this, that -- you
19 don't have to look to the terms of reference for the
20 duty to consult. I just draw your attention to a case
21 that was decided last fall by the B.C. Supreme Court,
22 the *Klahoose* case which my friend from BCTC was kind
23 enough to advise me can be found at tab 15 of the
24 Treaty 8 submission, and that's document 105-4.

25 **Proceeding Time 3:29 p.m. T65**

26 And it's been summed up there by Mr. Justice Grauer at

1 paragraph 131, and there he said:

2 "It is consistent with the observations of
3 the Court of Appeal of B.C. that the
4 constitutional duty to consult and
5 accommodate is 'upstream' of the statutes
6 under which the ministerial power has been
7 exercised, so that the district manager is
8 not able to follow a statute, regulation or
9 policy in such a way as to offend the
10 Constitution."

11 I think that's nice and concise and recent
12 encapsulation of the law on that point.

13 Question 2(d), and you'll find that this is
14 one that I've had a bit of difficulty in struggling on
15 the right way to characterize what has been suggested
16 to you, and you'll find that as I go along here I'll
17 probably suggest more than one way. But this fits
18 with 2(e) about B.C. Hydro's consultation efforts.

19 The point here that I'd like to make at
20 first is you can't splice and dice consultation.
21 That's not what the law requires. And I think a very
22 good summary of the basis of that principle can be
23 found at paragraph 51 of *Carrier Sekani*, where the
24 court again was speaking directly to this Commission.
25 And at 51, this is under the heading "Duty to Decide"
26 and it's about the relationship between duty to decide

1 and the duty to ensure that consultation has been
2 fulfilled.

3 So at paragraph 51 the court says:

4 "Not only has the Commission the ability to
5 decide the consultation issue, the only
6 appropriate is to decide the issue in a
7 timely way. Furthermore, the honour of the
8 Crown obliges it to do so. As a body to
9 which powers have been delegated by the
10 Crown, it must not deny the appellant timely
11 access to a decision maker with authority
12 over the subject matter."

13 And I think it's that point here. It's the access to
14 the decision maker, because consultation, when you're
15 deciding consultation means you have to have access to
16 the person who's going to decide. It can't be done
17 secondhand, third-hand, fourth-hand, all the different
18 options. It's not one, two and three add up to six.
19 That's not what the law requires. And that would not
20 uphold the honour of the Crown, and of course as we
21 all know, because the decision-making authority has
22 been delegated to the Commission, you must uphold the
23 honour of the Crown.

24 Now, I'd like to go to 2(e), and again I'm
25 trying -- I'm struggling here to describe what's been
26 suggested to you based on, "Well, there'll be

1 consultation done by B.C. Hydro. When you add it all
2 up, that's enough. There will be a decision by the
3 Minister perhaps under 5(7) so, you know, there'll be
4 an opportunity there. This consultation here will
5 substitute."

6 It's in some ways, to me it sounds like
7 it's preemptive consultation. It'll be done in
8 advance of your decision. And as we know from
9 *Kwikitlem*, you can't do that. You can't delegate it
10 to somewhere else in the sense of consultation would
11 take place by someone else. You can't defer it to
12 someone else, making a different decision. That's
13 what the court said in *Kwikitlem*. Because there the
14 Commission said, well, there will be a decision made
15 by the Minister in the future about the same project,
16 and it won't be able to go ahead without his or her
17 decision.

18 **Proceeding Time 3:34 p.m. T66**

19 And the Court of Appeal said no, that's insufficient.
20 You can't defer it into the future. You can't defer
21 it to someone else who's making a different decision
22 under a different Act. Here it would be a decision
23 under a different section of the same Act but by
24 someone else.

25 So I think it's on point that you can't do
26 that. The court has recently said that that wouldn't

1 be appropriate.

2 One way I was trying to think of what this
3 would be, it would be like three -- consultation by
4 three degrees of separation, because what they're
5 saying here is that we'll have consultation now on
6 submissions, and that will equal consultation for a
7 future undefined decision by the Minister based on
8 future undefined determinations by this Commission.
9 That boggles the mind, how that could uphold the
10 honour of the Crown.

11 Now, a few final points. This point that's
12 kept coming up and I think we'll come back to this as
13 we go on, about there's opportunities here. There's
14 opportunities for First Nations to appear before you.
15 There will be procedural and substantive rights, and
16 that's how -- I think it was the Consumer Energy or
17 the Commercial Energy Consumers suggested that you'll
18 have the ability to ensure that your rights are
19 respected, your constitutional rights, by the
20 substantive and procedural rights that you're afforded
21 as everyone else is, before the Commission. We've
22 heard on this before. The courts have said no. That
23 doesn't fulfill that.

24 And the fact that the Commission will be
25 fair and impartial, I think it was the BCTC counsel
26 suggested this, that's true, but again that's not what

1 the requirement is. Not for the constitutional right
2 to ensure that First Nations are consulted and
3 accommodated.

4 And I want to stress this point. The
5 suggestion by Mr. Quail that, well, what we're
6 concerned about here is don't get so tied up with what
7 exactly is required for consultation. What we should
8 be concerned about is the tool box, the processes.
9 And I want to stop right there. I would say that
10 would fall short, that is the wrong question, because
11 while those processes are important, the fact here is
12 that you cannot ignore the legal obligations. And
13 it's a determination on what are your legal
14 obligations to First Nations.

15 Once you determine those, then you can
16 decide what the appropriate process is. But you can't
17 move to the process, I submit, without a clear eye on
18 what your obligations are. Because if there is a
19 constitutional obligation to consult, then you'll know
20 what the requirements are, then you can design the
21 process that fits. And it's more than simple
22 procedural fairness and access.

23 I want to pick up on a point that my friend
24 Mr. Bursey raised, and this has come back to the
25 quasi-judicial and you've heard this from a few
26 parties, that, oh, you don't have to be worried about

1 independent," that's why I think it's just as likely
2 because you have the expertise. That's the likely
3 answer. Who's going to decide 30-year plan for long-
4 term transmission? Well, I think you would probably
5 look to the Utilities Commission. So, it's more
6 likely your expertise.

7 Subject to any questions, those are my
8 submissions.

9 THE CHAIRPERSON: Thank you, Dr. Stadfeld.

10 MR. FULTON: Now, before I call upon the Treaty 8 Tribal
11 Association, I just want to make sure that I haven't
12 missed anybody in terms of the reply and, yes, I have.
13 So -- yes -- Haisla is next and then the Treaty 8
14 Tribal Association. Thank you, Ms. Griffith.

15 **REPLY BY MS. GRIFFITH:**

16 MS. GRIFFITH: Madam Chair and Commission Panel, just a
17 few short comments.

18 First of all, the applicability of the
19 National Energy Board decision, and *Carrier Sekani* and
20 *Kwikitlem* have been addressed in the oral submissions
21 here. I made extensive submissions on that in my
22 written submissions. I'm not going to canvass them
23 again, but I would like to draw your attention to them
24 once more in Exhibits C83-3/83-4. It's the same
25 submission.

26 B.C. Hydro referred to the *Takla River*

1 *Tlingit First Nation* decision, and referred to the
2 fact that downstream of the EA decision there were
3 going to be other decisions that attracted the duty to
4 consult. It's important to remember that in that
5 decision, the Takla River Tlingit First Nation was
6 engaged in consultation. It was part of a project
7 committee. It was involved in that process. And the
8 court determined that the consultation process had
9 been meaningful in that EA process. So the fact that
10 there were other opportunities for consultation
11 downstream didn't obviate the requirement for
12 consultation within the EA process.

13 And then finally there's been, I think,
14 some suggestion that the only way that procedural
15 fairness can be achieved is through a quasi-judicial
16 process. And I'd have to disagree with that. Mr.
17 Kirchner has spoken to that. The case law doesn't
18 bear that up. The decision in *Baker v. Canada*
19 contemplates that a contextual analysis is required to
20 determine what the content of procedural fairness is,
21 and I think there will probably be more submissions on
22 that point, both from me and from other parties, in
23 response to questions 3 and 4.

24 Subject to any questions, that's my reply.

25 THE CHAIRPERSON: Thank you, Ms. Griffith.

26 MR. FULTON: Treaty 8 Tribal Association.

1 MR. DEVLIN: One of the benefits of being the last in a
2 long list is that everyone else has said what I was
3 going to say. So, we have no reply.

4 THE CHAIRPERSON: Oh, thank you, Mr. Devlin. We are
5 making progress.

6 MR. FULTON: Madam Chair, that concludes the cycle for
7 questions 1 and 2. And therefore, we are now ready to
8 go on to questions 3 and 4. And as the question 3 was
9 directed to the Treaty 8 Tribal Association, question
10 4 was directed to The Nations and the Haisla Nation,
11 the Weiweikei, I'm assuming that Treaty 8 Tribal
12 Association is going to go -- or Haisla will go first
13 on question 3 and 4.

14 **Proceeding Time 3:44 p.m. T68**

15 MR. DEVLIN: Yes.

16 MR. FULTON: All right. It will be Haisla, then the
17 Nations and then the Treaty 8 Tribal Association on
18 these two questions, Madam Chair.

19 **SUBMISSIONS BY MS. GRIFFITH:**

20 MS. GRIFFITH: Good afternoon again. As I just referred
21 to, I think what these questions are really going to,
22 questions 3 and 4 is procedural fairness and grounded
23 in the principles of natural justice. Mr. Dimitrov
24 has submitted a hard copy of the *Baker* decision. It
25 was referred to in his earlier submissions, in his
26 written submissions. It's referred to at Exhibit C1-

1 8. And he quoted from paragraphs 21 and 22 and I'm
2 just going to re-quote from them because I think they
3 are particularly applicable.

4 "The existence of a duty of fairness,
5 however, does not determine what
6 requirements will be applicable in a given
7 set of circumstances. Although the duty of
8 fairness is flexible and variable, and
9 depends on an appreciation of the context of
10 the particular statute and the rights
11 affected, it is helpful to review the
12 criteria that should be used in determining
13 what procedural rights the duty of fairness
14 requires in a given set of circumstances.

15 I emphasize that underlying all these
16 factors is the notion of the purpose of the
17 participatory rights contained within the
18 duty of procedural fairness is to ensure
19 that administrative decisions are made using
20 a fair and open procedure appropriate to the
21 decision being made and its statutory
22 institutional and social context with an
23 opportunity for those affected by the
24 decision to put forward their views and
25 evidence fully, and have them considered by
26 the decision maker."

1 The jurisprudence reviewed by the court in
2 the *Baker* decision suggests that the closer the
3 process is to quasi-judicial, the more likely that the
4 procedural protections are closer to the trial model.

5 Procedural fairness doesn't necessarily
6 mean that everyone has to be treated equally -- or
7 sorry, the same, identically. Just fairly given the
8 circumstances. And I think its important to recognize
9 that the Commission may have a different duty towards
10 different parties, particularly in light of First
11 Nations' Section 35 rights and the constitutional
12 protection of Section 35 rights.

13 There is support for this in the *Mikisew*
14 *Cree* decision and in the *Apsassin* decision, which is
15 at Exhibit B1-61, tab 2, where the Oil and Gas
16 Commission engaged directly with the Saulteau First
17 Nation in the process of deciding whether or not to
18 issue an exploration permit. The process wasn't found
19 to be quasi-judicial in the end, but the Commission
20 itself felt that it was engaging in a quasi-judicial
21 process. Despite that, it met directly with the
22 Saulteau First Nation, and it also had commission
23 staff meet directly with representatives of the
24 Saulteau First Nation.

25 So there is support for the proposition
26 that a Commission that even thinks it is engaging in a

1 quasi-judicial process can meet directly with parties,
2 with First Nation parties.

3 I don't think consultation with First
4 Nations is necessarily inconsistent with procedural
5 fairness. In fact, we've heard that meaningful
6 engagement of First Nations is an integral part of
7 procedural fairness and one of the early decisions
8 that sort of has led to the development of the concept
9 of consultation, the *Halfway River* decision was based
10 also in part on the question of what is required for
11 the process to be fair.

12 **Proceeding Time 3:49 p.m. T69**

13 The duty to consult and procedural fairness
14 are not mutually exclusive. The question is I think
15 one of, what is the bundle of rights that the parties
16 bring to the process that have the potential to be
17 impacted or affected by the decision? And what that
18 means is that the dialogue that takes place may be
19 different with the different parties, depending on
20 what that bundle of rights is.

21 With First Nations bringing
22 constitutionally protected rights to the discussion,
23 the dialogue between the Commission and the First
24 Nations asserting those rights is necessarily
25 different than the dialogue with stakeholders who
26 don't have constitutionally protected rights.

1 The question is, though, how could the
2 Commission proceed in a manner that is consistent with
3 principles of natural justice? And sort of the
4 underlying premise for procedural fairness is a fair
5 and open procedure. So I think that the Commission
6 can have direct discussions with First Nations, but it
7 would be important for the Commission to report out on
8 those discussions.

9 I don't want to necessarily endorse the
10 British Columbia EA process or the decisions that are
11 made pursuant to the *EA Act*, but the EA process does
12 provide for consultation by the Environmental
13 Assessment Office and staff with First Nations, and
14 the development of a First Nations' consultation
15 report. That report is dealt with iteratively between
16 the EA Office and the First Nations, and then subject
17 to some redaction for some particularly sensitive
18 information or spiritual information is then made
19 public to the broader EA process.

20 So there are means by which an impartial
21 decision maker can engage directly with one party or
22 one group and have a separate dialogue, but still
23 report out on the nature of that dialogue to the other
24 participants, so that it is a transparent and open
25 process.

26 Particularly with respect to question 3,

1 how could the Commission find that it has an
2 independent duty to consult and also perform the role
3 of assessing the adequacy of consultation in an
4 impartial manner that is consistent with principles of
5 natural justice? I think the question is if the
6 Commission has an independent duty to consult, what is
7 its obligation? And it would be the Commission's
8 obligation to consult directly.

9 As part of that consultation, it could take
10 into consideration the consultation that may or may
11 not have occurred between B.C. Hydro and First
12 Nations. It wouldn't necessarily have to go to the
13 step of assessing it the way the Court of Appeal
14 directed in *Kwikitlem* and *Carrier Sekani*, because it
15 wouldn't be the only consultation process taking
16 place. The Commission itself would be engaging in
17 consultation. So the consultation that occurs between
18 B.C. Hydro and First Nations would just be part of the
19 information that the Commission uses in its
20 consultation process.

21 Subject to questions, those are my
22 submissions.

23 THE CHAIRPERSON: No questions, thank you, Ms. Griffith.

24 **SUBMISSIONS BY MS. GAERTNER:**

25 MS. GAERTNER: Madam Chair, members of the Panel, I'll
26 direct my comments only to questions 3 and 4, and I

1 agree with Ms. Griffith's comments with this fine-
2 tuning. is that I don't think at all that a duty to
3 consult is necessarily inconsistent with the
4 obligations of fairness. I think absolutely you can
5 consult and absolutely you can meet your obligations
6 to be fair. I think that's the -- she said "not
7 necessarily", so we may be quibbling, but otherwise I
8 fully endorse her submissions.

9 With respect to question 3, I was a little
10 bit confused but I think the confusion may have arisen
11 from some of the submissions that you had before you.
12 I understood the question to say how do you do both
13 duties? How do you both consult and figure out if
14 you've met the consultation adequately? And I think
15 that may have arisen from some of the submissions. I
16 hope not ours, but we for sure say you have an
17 obligation to consult.

18 But I want to say this. As a duty -- as
19 you do the consultation in the iterative, broad kind
20 of inquiry that you are going to hold under Section 5,
21 you are going to have to make a final determination at
22 the end of the day whether your consultation has been
23 adequate. And so you have to make sure that your own
24 consultation is adequate, as any statutory decision
25 maker or any actor of the Crown who has an obligation
26 to consult. The obligation to consult is a new body

1 of law, it's a new body of practice. You know, not
2 everybody can stand in front of you. If we could this
3 would have been a much shorter proceeding, to say
4 exactly what you have to do and how you need to do it.
5 And given the iterative nature of this proceeding, at
6 the end of the day you're going to have to say, "Have
7 we meaningfully consulted? Have we meaningfully
8 engaged First Nations? Have we meaningfully addressed
9 their concerns as it relates to our determinations?"

10 **Proceeding Time 3:55 p.m. T70**

11 So you will have to consult, and you will
12 have to ask yourself that question, because if you say
13 -- answer the second question "No," you're going to
14 have to do more before you come to your
15 determinations.

16 So, as a statutory decision-maker, as
17 yourself, must consult and must at the end of the day
18 determine whether your consultation has been adequate.
19 And that's my full answer to question 3.

20 I'm going to take a little bit more time
21 with respect to question 4, because it's been
22 suggested already in the submissions by a number of
23 parties in answers to question 1 and 2, that somehow
24 the obligation to consult and the obligation to be
25 procedurally fair isn't consistent.

26 The fact that the Commission has an

1 obligation to act impartially doesn't preclude you
2 from consulting. And the duty to consult with First
3 Nations and the duty to make determinations on an
4 impartial basis are not mutually exclusive.

5 I want to give you an example of the Chief
6 Forester, under the *Forest Act*. He is a statutory
7 decision-maker. He must consult as it relates to, for
8 example, an annual allowable cut. Clearly a decision
9 that he makes that will affect the rights of First
10 Nations and it will also affect the rights of forest
11 companies that are operating in that area. Directly
12 the Chief Forester must gather all information
13 necessary to make that decision, and he must gather
14 that information in an impartial manner. He can't
15 just make -- he can't -- but he does and he has and he
16 will continue to, when making those decisions, engage
17 in a process directly with First Nations and he'll
18 hold meetings directly with First Nations to do so.
19 And there is no suggestion that, by holding meetings
20 directly with First Nations pursuant to the
21 consultation he must conduct, that he is acting
22 impartially or improperly, or procedurally unfair.

23 He must, of course, and in our submissions
24 the suggestions that we have made as to how you would
25 consult are consistent with this, ensure that everyone
26 has an ability to know the information that you are

1 going to rely upon, and have an obligation to and an
2 opportunity to comment on that. And so again as an
3 example, if he's consulting with the First Nation as
4 -- on an AAC, and he hears something the First Nation
5 that he is going to rely on in making the decisions,
6 and he thinks that will affect a forest company, he
7 will bring that to the attention of the forest
8 company, and he will make sure the forest company has
9 an opportunity to be heard on that. That doesn't mean
10 he's -- you know, that he's holding an iterative
11 process with the First Nation, doesn't make him
12 impartial, and doesn't make it procedurally unfair.

13 I think it's extremely important, this
14 follows from my comment earlier today, that we don't
15 conflate what is procedurally necessary in a quasi-
16 judicial process to meet the obligations of fairness
17 to the procedural requirements in a non-quasi-judicial
18 proceeding. You know, all of a sudden -- and I think
19 again this may be, again, the comfort that parties
20 have in your -- in the process that you've used to
21 make decisions in a quasi-judicial manner, but the
22 duty of fairness in a quasi-judicial matter is
23 different than the duty of fairness in a non-quasi-
24 judicial matter. You're obtaining information, you're
25 ensuring that you're impartial in the state of mind
26 and the attitude that you have in taking that

1 information, and you're making sure that you conduct
2 that in a fair and transparent manner.

3 You can design processes for consultation
4 and accommodation that adhere to that. I have great
5 faith in you, and I have -- I feel that the
6 submissions of First Nations that are before you as to
7 how you can do that meet the test, both of the duty of
8 fairness and the principles of natural justice.

9 Now, the rules of natural justice as I
10 understand them are intended to preclude you from
11 being arbitrary. And of course there is no suggestion
12 by any of the First Nations in the submissions I've
13 read, or the ones that we've placed before you, that
14 we're asking you to be arbitrary, discriminatory or
15 biased in rendering your decisions.

16 There are two basic procedural fairness
17 principles, as I understand it, and I'll summarize
18 them. Those that ensure that a party can present
19 their case in a manner that's fair and appropriate,
20 and I stress here in our view First Nations as it
21 relates to this -- the matters that you have before
22 you in this hearing would not think a Panel hearing
23 such as the one today that's filled with lawyers is a
24 way that you will get information that you will need
25 to make the strategic level kinds of determinations
26 that you must make in this inquiry. And for the

1 reasons that I'll stress tomorrow in answer to the
2 other -- question 5 and 6, in particular, the Panel
3 needs to get into the communities and hear from the
4 communities directly on the issues that are important
5 to them. It's an expertise you don't have and it's an
6 expertise and experience you must have when
7 consulting.

8 **Proceeding Time 4:00 p.m. T71**

9 So that's the first principle. You have to
10 ensure that a party can present their case. And
11 secondly you have to ensure that there is an
12 independent and unbiased and partial decision maker,
13 and again I have all confidence that the Panel members
14 here can ensure that the process that you use will
15 ensure your impartiality and your unbiased nature.

16 Those are my submissions on questions 3 and
17 4.

18 THE CHAIRPERSON: Thank you very much, Ms. Gaertner.

19 MR. FULTON: Treaty 8 Tribal Association.

20 **SUBMISSIONS BY MS. RANA:**

21 MS. RANA: Good afternoon, Madam Chair and Panel members.
22 My name is Alison Rana. The last name is spelled R-A-
23 N-A. Thank you for hearing us so late in the day and
24 ensuring that we get through two more questions. I
25 think it's valuable. Tomorrow will be a big day,
26 especially with questions 7 and 8.

1 And I note that one of my friends was also
2 a little confused with question 3, and I really
3 struggled with it and I was relieved to hear that the
4 two First Nations participants before me confirm my
5 views on it. I don't see a conflict with natural
6 justice, principles of fairness, and the duty to
7 consult. I struggle to find it and I went over the
8 cases again and I went over my own experiences, and I
9 simply do not see the conflict.

10 Particularly -- let's deal with question 3
11 first. And just to be clear, in our submissions we --
12 I note that in the question the Treaty 8 Tribal
13 Association submissions are quoted, and we are
14 describing really two different roles for the
15 Commission here. The first role is that we expect
16 that the Commission will take into consideration the
17 adequacy of the consultation process that B.C. Hydro
18 and B.C. Transmission Corporation undertakes for the
19 First Nations. We fully expect that you'll take that
20 into consideration in assessing this entire process.
21 And that's a role that you have that we do not expect
22 the First Nations will be engaged in or consulted in.
23 That's your job to do as the Commission.

24 With respect to your independent duty to
25 consult with the First Nations, we understand that you
26 can assess the adequacy of your own consultation

1 process throughout this inquiry. And as my friends
2 before me have said, that is something that statutory
3 decision makers do all the time. A good example is
4 the Oil and Gas Commission. The Treaty 8 First
5 Nations deal directly with the Oil and Gas Commission
6 all the time on a daily basis. The Saulneau First
7 Nation in the vintage case that was referred to by my
8 friend is actually a case brought by one of the
9 members of the Treaty 8 Tribal Association with
10 respect to an oil and gas disposition in their
11 territory.

12 And the consultation process that the
13 province of B.C. engages with First Nations on with
14 respect to oil and gas in Treaty 8 territory is a
15 direct consultation process between the decision-
16 making authority and the First Nations. The oil and
17 gas companies are certainly part of that process.
18 They put in their applications. The consultation is
19 bilateral between the Commission and the First
20 Nations. If there are issues, the Oil and Gas
21 Commission can go to the company and say, "These are
22 the problems with your application, this is the
23 concerns the First Nation has raised." Sometimes they
24 have tripartite meetings. Depends on the nature of
25 the application. It's an iterative, organic process.
26 It works. First Nations participate. The Crown goes

1 through its process, and the industry players are
2 always there.

3 So we're not suggesting that this is a
4 process that would exclude the other participants in
5 the inquiry. We just see it as you have to recognize
6 first what the constitutional obligation is. The
7 obligation to consult is paramount. You look at it
8 first. Then you design a process that will
9 necessarily reflect and appreciate the duty to
10 fairness that you have to all participants. But as I
11 heard earlier this afternoon, you can't use the duty
12 of fairness as a shield to say, "Well, we can't have a
13 duty to consult because the duty of fairness prevents
14 us from having that duty."

15 With respect to question 4, Mr. Dimitrov
16 spoke of the *Baker* case earlier today, and I've quoted
17 from it, and there is a paragraph that I think we
18 should focus on in the *Baker* case.

19 **Proceeding Time 4:04 p.m. T72**
20 Paragraph 28, and I'll just read from it. This, I
21 think, is the fundamental point. It says:

22 "I should note that this list of factors is
23 not exhaustive. These principles all help a
24 court determine whether the procedures that
25 were followed respected the duty of
26 fairness. Other factors may also be

1 important, particularly when considering
2 aspects of the duty of fairness unrelated to
3 participatory rights. The values underlying
4 the duty of procedural fairness relate to
5 the principle that the individual or
6 individuals affected should have the
7 opportunity to present their case fully and
8 fairly and have decisions affecting their
9 rights, interests or privileges made in a
10 fair, impartial and open process appropriate
11 to the statutory, institutional and social
12 context of the decision."

13 Now, I would submit that the context of the
14 decision must take into account the constitutional
15 framework with which we are all operating. And it
16 seems to me that the concerns that we're hearing from
17 some of the parties here today, that the duty of
18 fairness precludes the duty to consult, is a failure
19 to accept or to acknowledge that we have the
20 *Constitution*, we have Section 35 of the *Constitution*
21 *Act* that requires the Crown to consult with a First
22 Nation when making decision that will affect their
23 rights. There's no doubt about that, and if people
24 don't like it, there's nothing that we can do about
25 that. That's the *Constitution* and that's the law.

26 I'll just refer you in closing to a quote

1 from the *Mikisew* case, which was at tab 9 of the
2 Treaty 8 authorities. And it's paragraph 64. And
3 it's important because it points to the fact that
4 First Nations are entitled to a separate process in
5 terms of consultation. As my co-counsel, Christopher
6 Devlin, said this morning, because it was a Treaty 8
7 case, the Treaty 8 First Nation in Alberta brought a
8 challenge to a decision made by Canada on their
9 traditional territory and it provides a good framework
10 for understanding the role of the Crown in consulting
11 with treaty First Nations, First Nations with
12 established rights. So these are not asserted claims,
13 but they are recognized and established constitutional
14 rights.

15 In paragraph 64, the Crown -- the court
16 says that

17 "The Crown was required to provide notice to
18 Mikisew and to engage directly with them,
19 and not, as seems to have been the case
20 here, as an afterthought to a general public
21 consultation with park users."

22 It's a separate process that Treaty 8 First Nations
23 are entitled to, and that would include in the context
24 of this inquiry.

25 And subject to any questions, those are my
26 submissions.

1 THE CHAIRPERSON: Thank you very much, Ms. Rana.

2 MS. RANA: Thank you.

3 MR. FULTON: Toquaht Nation.

4 MR. CHRIST: Toquaht Nation has no comment (inaudible).

5 MR. FULTON: Squamish Nation *et al.*

6 **SUBMISSIONS BY MR. KIRCHNER:**

7 MR. KIRCHNER: I very much agree with what my friends
8 previous have said, and would endorse them, their
9 submissions.

10 One very minor point I will -- it may not
11 be a minor point. One point I just wish to make in
12 respect of question 3. It's our submission that the
13 Commission does not need to evaluate the adequacy of
14 consultation by others if you've got the duty to do it
15 yourself. Your obligation, if you have the duty, is
16 to satisfy yourself that you've fulfilled the
17 obligation in accordance with the principles set out
18 by the courts, and if you're satisfied that you've met
19 the duty, in our submission, it really doesn't matter
20 whether others have or not.

21 And apart from that, I fully agree with
22 what my other friends have said.

23 THE CHAIRPERSON: Thank you, Mr. Kirchner.

24 MR. FULTON: Hwlitsum First Nation.

25 **SUBMISSIONS BY MS. MUIR:**

26 MS. MUIR: Thank you, Madam Chair and panel.

1 In the interests of time, I will support
2 and commend the eloquent statements of the different
3 First Nations counsel that have come forward. The
4 Hwlitsum First Nation does not find consultation with
5 First Nations as inconsistent with procedural fairness
6 or natural justice in this inquiry.

7 Thank you.

8 THE CHAIRPERSON: Thank you, Ms. Muir.

9 MR. FULTON: Shuswap Arrow Lakes Division.

10 **SUBMISSIONS BY MS. LEBOURDAIS:**

11 MS. LEBOURDAIS: Hwaik. I'm Sunny Lebourdais with the
12 Secwepemc, Shuswap Arrow Lakes Division.

13 With regards to questions 3 and 4, we would
14 just like to state that we do believe that the Panel
15 may consult with First Nations and also assess the
16 adequacy of that consultation and other consultation.

17 If anything, I think that today has shown
18 you that the current consultation process that has
19 been developed by B.C. Hydro and that they were deemed
20 to undertake by the Minister is woefully inadequate.

21 **Proceeding Time 4:10 p.m. T73**

22 Even what we've seen today, the
23 representation that B.C. Hydro and a number of their
24 different views and interests that they have brought
25 to this Panel has shown that they have very different
26 views, very different interests than we do. And I

1 certainly don't think that the Panel can possibly
2 expect us to rely our interests and our views through
3 them and their process.

4 And just thinking on a way of turning the
5 table, I certainly don't think that B.C. Hydro would
6 let us speak for them if the tables were turned. So I
7 certainly wouldn't think that it would work the other
8 way around.

9 I do find this somewhat exciting, in that
10 if the panel does decide that it has the duty to
11 consult, and I let all the legalese work on the legal
12 things, this is an opportunity where we can develop a
13 consultation process together and this is something
14 that would be very original and new and perhaps a lot
15 of uncharted territory for yourselves. However, this
16 is also an opportunity where we could develop a
17 process together, in terms of the Lakes Division,
18 which would bring our interests to the Commission and
19 to the Panel so that you have considerations and have
20 all of our interests in way that is both fair to
21 ourselves and so that you can make your decisions
22 based on a true representation of where our people are
23 coming from.

24 This would allow us to consult and also
25 consultation, there is another side to consultation.
26 We understand that you have a duty to consult in that

1 we need to come to you and rely our interests and
2 speak to you, but we also have a duty in terms of our
3 traditional governance systems, we need to be able to
4 go back to our own communities and tell them about
5 these processes as well, and make sure that when we
6 are speaking we are speaking for all of them in their
7 collective voice. So it works both ways as well.

8 So the duty to consult, when we are
9 developing this new consultation process, not only
10 allows the communication to go from us to you, but
11 also from us to our people and through. So that what
12 you are essentially getting is the information from
13 our people through our leadership.

14 This being said, of course, there is a vast
15 variety of First Nations throughout British Columbia
16 and therefore these consultation processes would need
17 to be developed in a manner that is consistent with
18 each of their consultation and accommodation
19 guidelines. Many nations have these consultation and
20 accommodation guidelines already in place, and
21 therefore those would be used as a reference that we
22 could use to set up these different processes with
23 each of the groups. And within each of these
24 processes then what I would expect then is that within
25 that process there would be some sort of stipulation
26 that would allow for the assessment of that

1 consultation within each of those agreements or
2 consultative processes.

3 So I do believe that you do have the
4 ability to assess, together with the First Nations, on
5 the adequacy of that consultation at those tables and
6 levels. Thank you.

7 Oh, do you have any questions?

8 COMMISSIONER ANDERSON: I'm just curious about your
9 comment about the vast number of First Nations. My
10 recollection is that it's something in excess of 200,
11 203. That presents us with a logistical challenge to
12 say the least.

13 MS. LEBOURDAIS: Right.

14 COMMISSIONER ANDERSON: Do you see some way where we
15 could, if we choose to go this route, how would we be
16 able to do that on a more collective sort of a basis,
17 regional or --

18 MS. LEBOURDAIS: Right.

19 COMMISSIONER ANDERSON: We'd be, I think, interested in
20 hearing about that. Not necessarily now but
21 something we'll probably be looking at.

22 MS. LEBOURDAIS: Absolutely, and I certainly can't speak
23 on behalf of all of the First Nations within the
24 province, but I would certainly willing to share any
25 ideas that I might have with you.

26 COMMISSIONER ANDERSON: Thank you.

1 THE CHAIRPERSON: Thank you, Ms. Lebourdais. Oh, sorry.

2 COMMISSIONER RAVELLI: One more question for you. Just
3 to clarify, you talked about your feelings as far as
4 the other parallel process and I can sense your
5 frustration. Are you still -- is your group still
6 engaged in that process as going forward or have you
7 reached a decision not to go --

8 MS. LEBOURDAIS: Well, in reality, it's the only way we
9 can get any information about this process, so we have
10 to go there to get any information. There is no other
11 process that we can utilize to try to access any of
12 that information. So it's the only option there for
13 us right now.

14 MR. FULTON: Sto:lo Tribal Council.

15 **SUBMISSIONS BY MS. HEASLIP:**

16 MS. HEASLIP: Good afternoon. In response to question
17 3, Sto:lo Tribal Council submits that if the
18 Commission finds that it has an independent duty of
19 consultation and accommodation, then it is open for
20 the Commission to determine the degree of impact of
21 the various scenarios on the rights, title and
22 interest of the affected First Nations.

23 This assessment of adversity of impact is
24 implicit in the hearing as any scenario is going to
25 have adverse impact on existing aboriginal rights
26 title and interests.

1 **Proceeding Time 4:16 p.m. T74**

2 This conclusion is entirely consistent with
3 the principles of natural justice, as this
4 constitutional duty and its accompanying assessment
5 occurs simultaneously with the principles of natural
6 justice. I think we're in agreement with most of the
7 others on that.

8 In response to question 4, Sto:lo Tribal
9 Council submits that meeting with First Nations and
10 advising on potential impacts on the various options
11 by the Commission is mandated and it could be achieved
12 through an independent First Nations Only forum. The
13 rules of natural justice could be met by the summary
14 of the findings to all other participants, and a
15 chance for other participants to file their respective
16 submissions on any Commission and First Nations
17 exchanges.

18 THE CHAIRPERSON: Right. Thank you very much, Ms.
19 Heaslip.

20 MR. FULTON: IPPBC.

21 **SUBMISSIONS BY MR. AUSTIN:**

22 MR. AUSTIN: With respect to questions 3 and 4, the IPPBC
23 is having difficulty in squaring the concepts of
24 natural justice and procedural fairness in the context
25 of how the questions are framed. The concepts of
26 natural justice and procedural fairness, as the IPPBC

1 understands the current case law, relate to an
2 administrative tribunal's actions in relation to a
3 quasi-judicial manner. So if you look at the concept
4 of the quasi-judicial manner in this Commission, and
5 that leads into the concepts of natural justice and
6 procedural fairness, the question should probably be
7 framed such that there's a reference to quasi-judicial
8 manner in both of them and not natural justice and
9 procedural fairness.

10 So for example, if we looked at the
11 question number 3, the very last sentence -- or the
12 very last two sentences, how could it also perform the
13 role of assessing the adequacy of the consultation in
14 an impartial manner that is consistent with its role
15 as a quasi-judicial institution? I think that should
16 be the question. And if it's framed in that context
17 as the IPPBC currently understands the law, it
18 couldn't act in an impartial manner. It would be in
19 conflict.

20 The whole concept of a quasi-judicial body
21 means that it follows natural justice and it follows
22 the procedural fairness and has to be independent and
23 has to be impartial. So it would be at cross-purposes
24 with itself in relation to the two questions that are
25 set out in 3 and 4. So as far as the IPPBC
26 understands the current laws, it wouldn't be possible

1 for a quasi-judicial body to engage in the type of --
2 not so much conduct, but consultation set out in 3 and
3 4 if it's a quasi-judicial body.

4 And those are the IPPBC's submissions on
5 that point, subject to any questions.

6 THE CHAIRPERSON: Thank you, Mr. Austin.

7 MR. FULTON: *ESVI et al.*

8 **SUBMISSIONS BY MR. BERTSCH:**

9 MR. BERTSCH: Good afternoon. Just some very brief
10 comments. Perhaps when looking at it from a natural
11 justice point of view, and that all have a fair
12 opportunity, that perhaps one of the ways to look at
13 it is if you decide for direct duty to consult, that
14 that decision be made very clear on how the decision
15 is made. Is it because of landowners or is it because
16 of land usage? And if you'd look at some of the
17 parameters under which you are building your case, and
18 build it upon that, perhaps you can deal with a
19 natural justice process.

20 Those are all my comments, thank you.

21 THE CHAIRPERSON: Thank you, Mr. Bertsch.

22 MR. FULTON: Commercial Energy Consumers Association of
23 British Columbia.

24 **SUBMISSIONS BY MR. WEAVER:**

25 MR. WEAVER: Good afternoon, Madam Chair, members of the
26 Panel. In dealing with questions 3 and 4, both of

1 consultation and what flows from it.

2 How that can be achieved, we will address
3 in the later questions in 7 and 8 because we do think
4 there are processes available to the Commission to
5 pursue. And so those are our submissions on question
6 3 and 4. Thank you.

7 THE CHAIRPERSON: Thanks, Mr. Weafer.

8 MR. FULTON: BCOAPO *et al.*

9 **SUBMISSIONS BY MR. QUAIL:**

10 MR. QUAIL: Yes, I'll be brief. First I'd like to
11 dispel, if I had left a misunderstanding, that what
12 we're advocating is a process where the content of
13 engagement with First Nations should be limited to
14 questions of process. I thought in fact I'd said the
15 opposite, but I want to be clear the content of the --
16 not suggesting at all that the content of the
17 engagement should just be about tools or process, but
18 that we don't even have tools or a process at this
19 point.

20 On the question of -- one other point that
21 was raised a moment ago, there was a suggestion that
22 it shouldn't matter to the Commission, or the
23 Commission shouldn't concern itself with whether the
24 utilities have consulted adequately as long as it is
25 performing its own consultation role. I'd like to say
26 as a regular participant in Commission proceedings,

1 we'd be very concerned if the Commission ever gave a
2 direction to utilities to do something and then did
3 not concern itself with whether it was being properly
4 discharged. We simply don't agree with that.

5 Much of the discussion in this matter seems
6 to be complicated by the fact that a lot of it is
7 being placed very abstractly. And as I understand
8 what is being proposed concretely, again, assuming
9 that we're talking about consultation, is first of all
10 that there be meetings with communities and second
11 that there be an advisory panel process. I'd just
12 like to point out that there's nothing new about town
13 hall meetings, as they get called, where the
14 Commission goes out to communities and hears from
15 people about their concerns. It's a very familiar
16 process of this Commission, and nobody has ever
17 suggested that that in any way sullied the fairness of
18 the Commission's process.

19 And in terms of an advisory council, the
20 Commission as it will -- maybe is anticipating a later
21 question, but it has explicit authority under Section
22 8 of the *Utilities Commission Act* to engage that kind
23 of expertise or input. And in my submission that in
24 itself doesn't in any way threaten the fairness of the
25 Commission's process.

26 And as several people have said, in

1 principle there should be no difficulty -- there
2 should be no difficulty in fashioning a consultation
3 process which is open and transparent and fair and
4 meets the necessary standard as laid out in *Baker*,
5 which we agree correctly states the content of the
6 duty of procedural fairness.

7 And those are all the comments I have on
8 questions 3 and 4, subject to any questions you might
9 have.

10 THE CHAIRPERSON: Thank you, Mr. Quail.

11 MR. FULTON: BCSEA *et al.*

12 **Proceeding Time 4:26 p.m. T76**

13 **SUBMISSIONS BY MR. ANDREWS:**

14 MR. ANDREWS: Question 3 asks if the Commission were to
15 determine that it owes an independent duty to consult
16 First Nations in the context a Section 5 inquiry, how
17 could it also perform the role of assessing the
18 adequacy of the consultation in an impartial manner,
19 and I would add, "and independent manner", that is
20 consistent with the principles of natural justice?

21 In short my answer is that it could not,
22 that the two roles are inconsistent. The Commission,
23 in my submission, will be likely called upon to make a
24 decision about the adequacy of the Crown's
25 consultation. It is the Crown that owes the duty to
26 consult, and the Crown in this instance will

1 presumably look to consultation and accommodation
2 provided by B.C. Hydro, on behalf of B.C. Hydro and
3 BCTC, and to the Commission proceeding as such as
4 contributing to the Crown's satisfaction of its duty
5 to consult and accommodate. And the Commission would
6 have -- if it had the authority -- and so what I am
7 suggesting is that if you decide that you, the
8 Commission are carrying out the consultation, that you
9 have an independent duty to do the consultation, then
10 you would not be in the role of deciding whether you
11 actually met the same duty.

12 Regarding question 4, the first element is
13 -- where shall we put it here? Whether -- if the
14 Commission were to determine that it owes an
15 independent duty to consult with First Nations in the
16 context of the Section 5 Inquiry, how could it also
17 provide the procedural fairness it owes to all inquiry
18 participants consistent with the principles of natural
19 justice? Short answer: It could not. And the
20 essence of that is that for the Commission to have a
21 duty to some parties, First Nations, that is not owed
22 to other parties, is simply the opposite of
23 impartiality and independence.

24 The concept of the Commission meeting
25 directly with First Nations is, in and of itself, not
26 a problem at all. As has been said many times, the

1 Commission routinely has public townhall meetings or
2 whatever. As long as those meetings are open to the
3 public and otherwise subject to rules of fairness,
4 that may well be an appropriate way for the Commission
5 to obtain information and the views of First Nations,
6 and for that matter, non-First Nations communities who
7 are not comfortable with a formal legal process.

8 But if the suggestion is that the
9 Commission would meet with a party in the absence of
10 other parties, then that would violate one of the -- I
11 would say three important principles of fairness, Ms.
12 Gartner having correctly identified two. The third
13 being *audi alteram partem*, the right to know the case
14 to be met, which is violated if the decision maker
15 meets in private with another party so that other
16 parties are unable to know what submissions were made
17 to the panel.

18 Now, a summary may be a way to try to
19 mitigate the damage caused by meeting with somebody in
20 private, but unless there is a need to do that, which
21 doesn't seem like there is, it would better simply to
22 have those proceedings be public.

23 There is a mention in part of the preamble
24 to question 4 about First Nations receiving
25 information from the Panel about potential
26 determinations that the Panel might make. That, I

1 think, is a really important concept and it applies to
2 all of the participants, which is that it would be
3 really useful as this proceeding goes forward for the
4 Panel to advise the participants, when it has started
5 to formulate ideas about what might be eventual
6 determinations, what those possible determinations are
7 so that the participants can begin to look at what
8 evidence might be required in order to distinguish
9 between one version of the possible determination and
10 other, and they can start orienting their submissions
11 toward meeting those needs.

12 **Proceeding Time 4:31 p.m. T77**

13 If the Commission were to owe a duty to
14 consult and accommodate, I want to, I guess, point out
15 that the duty to consult and if necessary accommodate
16 the First Nations' interests is not merely a
17 procedural obligation, it is substantive. And that's
18 most clearly seen in the accommodation portion of the
19 obligation. And I mean, that's very significant. If
20 the Commission had an obligation to accommodate First
21 Nations' interests to the extent they were being
22 infringed by the conduct of the Crown, then you would
23 have to find statutory authority to do that, and I
24 submit that that would not be consistent with being
25 independent and impartial.

26 And briefly, mention has been made of other

1 bodies, the Oil and Gas Commission being one example.
2 The Oil and Gas Commission is significant because it
3 is not considered a quasi-judicial body by the courts,
4 and in my submission that's what makes this Commission
5 quite different. And it may be fine for the Oil and
6 Gas Commission to meet privately with First Nations
7 and privately with oil and gas companies, but that is
8 not what would be appropriate for this Commission to
9 do.

10 And similarly, at least somewhat similarly,
11 the Environmental Assessment Office -- and I note that
12 Ms. Griffith was cautious about not endorsing it and I
13 don't want to take her to have done so, but just so
14 that we're clear here, the Environmental Assessment
15 Office under the *Environmental Assessment Act of B.C.*
16 does conduct or purport to conduct consultation and,
17 if necessary, accommodation. But first of all the
18 Environmental Assessment Officer is not a decision
19 maker, period. The decision making is done by the
20 Ministers under the *Act*. The Environmental Assessment
21 Office is not impartial and it is not independent.
22 The Ministers make the decision under that statute,
23 and they receive no input from the First Nations
24 directly at all. That's in total contrast to this
25 Commission, where First Nations and other parties are
26 able to make their submissions directly to you.

1 Subject to any questions, those are my
2 submissions.

3 COMMISSIONER ANDERSON: Mr. Andrews, I just want to make
4 sure I understand the context of your short answer,
5 "it could not with respect to question 4". Is that
6 under conditions where we would be meeting with them
7 in private, period? Is it just in the sense of a
8 private consultation that you say it could not?

9 MR. ANDREWS: That would be one of the problems. The
10 other problem would be, if you've acknowledged an
11 obligation to provide substantive remedies, then it
12 would be unclear to participants the extent to which
13 you were making your decisions on the basis of your
14 assumed obligation, like the obligation that you have
15 taken on yourselves, to accommodate potential
16 infringements as distinct from obligations under the
17 statute.

18 COMMISSIONER ANDERSON: I was looking at the question at
19 the second page and the second line, where it refers
20 to an independent duty to consult, and I wondered
21 whether you were interpreting that to mean a private
22 -- an independent duty to consult privately.

23 MR. ANDREWS: No, I was not. I was interpreting that to
24 mean that the Commission Panel in the course of the
25 inquiry itself owes -- that is, as an agent of the
26 Crown, the Crown's obligation to consult and, if

1 independent duty of consultation, the Commission could
2 be called upon to assess the adequacy of consultation
3 by other aspects of the Crown, if that's relevant to
4 your inquiry and relevant to the statutory framework.
5 So, the short answer is "Yes" to the last part of that
6 question.

7 On the independent duty to consult, that
8 triggers substantive and procedural obligations on
9 behalf of the Commission if you have that duty. And
10 Mr. Andrews just started to get into that sort of a
11 discussion. So, the Commission can't tread lightly
12 into that area and try to satisfy some notion of
13 consultation unless it has a clear vision and idea of
14 what its obligation is in that regard.

15 The terms of reference, for instance, allow
16 you to take into account First Nations' interests. So
17 there's a role that you're playing in consultation.
18 But we say you do not have an independent duty to
19 consult.

20 The question then is, if you determine that
21 you did have an independent duty to consult, could you
22 fulfill that in a way that wouldn't conflict with the
23 principles of natural justice or administrative
24 fairness? And our answer to that is, "No, you could
25 not." It's inherently inconsistent. That's what the
26 National Energy Board case was saying.

1 And I've said earlier that the Court of
2 Appeal in the *Carrier Sekani* case has endorsed that
3 principle. And Mr. Stadfeld took you to the paragraph
4 56 of that decision to say that no one suggests the
5 Commission has a duty to consult. And then the court
6 cites the case. It cites the case because people
7 accepted the principle in the National Energy Board
8 and the court, by citing the case, is citing that as
9 proposition for that statement. And further, the
10 court in paragraph 54 acknowledges that the Commission
11 is a quasi-judicial tribunal bound to observe the duty
12 of fairness and to act impartially.

13 MR. STADFELD: Will we all be receiving a right to reply
14 on submissions from the earlier questions?

15 THE CHAIRPERSON: Mr. Fulton, help us out.

16 MR. FULTON: Well, it seems to me, Madam Chair, that
17 we're beyond the first two questions. Mr. Bursey's
18 answering questions 3 and 4. The Nations will have an
19 opportunity, as anyone else who has not had an
20 opportunity to hear his submissions -- or has not
21 heard his submissions yet, will have an opportunity to
22 reply under questions 3 and 4.

23 MR. BURSEY: This bears on the question of the
24 independent duty to consult. I mean, it's the very
25 point of the NEB case. So it's in response to 3 and
26 4. And I don't intend to go back through the argument

1 on questions 1 and 2. That's already there.

2 THE CHAIRPERSON: So now we are, and we'll stay in
3 question 3 and 4.

4 MR. BURSEY: That was my intent.

5 The other point that Mr. Andrews was
6 speaking to, which is one that I wanted to raise and
7 explore a bit further, was the -- it's a bit difficult
8 to argue this case in the abstract, because you don't
9 have any real concrete suggestions about what the duty
10 to consult would entail for the Commission in its
11 procedure.

12 **Proceeding Time 4:41 p.m. T79**

13 We've heard about one-on-one consultations,
14 one-on-one meetings, that's one idea. We've heard
15 about a advisory panel which will come up again, I
16 think, in the final two questions that are before the
17 Commission here.

18 I think it's appropriate for the groups
19 that are advocating that the Commission adopt an
20 independent duty to consult to be very specific about
21 what order it is that they want from you. What
22 specifically would they like to see this Commission
23 order? Because right now I'm not sure that you have
24 much on the record to issue an order.

25 If it is simply private one-on-one
26 meetings, I'm not sure what it is about the one-on-one

1 meetings that's so important. If there is a duty to
2 consult, why does it necessarily entail one-on-one
3 meetings in private? Is there something about the
4 nature of that meeting that will help the Commission
5 make its decision? Because ultimately all of the
6 submissions that you are receiving are intended to
7 create a record to influence your decision at the end.
8 And that is the very reason why there is certain
9 aspects of procedural fairness that are in play.

10 Mr. Andrews talked about the *audi alteram*
11 *partem*, make sure that you understand the case that is
12 being put forward to the Commission. *Ex parte*
13 meetings conflict with that idea. So if parties want
14 this extraordinary procedural adjunct to this
15 proceeding to be installed, I think there should be --
16 it is incumbent on them to make the case for why that
17 should occur. It's not sufficient to say there's a
18 Section 35 protection of Aboriginal rights and from
19 that arises a duty of consultation. That doesn't
20 answer the question about why you need those specific
21 trappings for this proceeding.

22 I would suggest that the Commission's
23 procedures are flexible enough to allow considerable
24 range of types of proceedings and ways of receiving
25 evidence and interests. If the goal of consultation
26 is to understand and respond to reasonable First

1 Nation's concerns, then it should follow that having
2 procedural fairness adopted within that consultation
3 shouldn't conflict with it.

4 I would suggest also that you get a
5 stronger record if all parties can hear the
6 submissions that are being made by all the other
7 parties. Often you can learn from it, adopt some of
8 the ideas, and the goal also of First Nations
9 consultations is to bring the concerns and interests
10 to light, to bring them forward so they are
11 understood, and that doesn't work if you are having
12 one-on-one meetings.

13 So I'd suggest you'd end up with a more
14 efficient, fair and effective process. So apart from
15 the legal reasons, which I say are a full answer,
16 there is practical reasons that this Commission should
17 look at maintaining its procedural fairness, and that
18 means open, transparent process.

19 Ms. Rana also spoke to the Oil and Gas
20 Commission and said there's an example of a
21 commission that does meet with First Nations. I don't
22 have a copy of the *Oil and Gas Commission Act*, but
23 Section 2 of that Act says that the Oil and Gas
24 Commission is an agent of the Crown. It's in a very
25 different situation, and there's case law that's been
26 put before you that -- where the courts have gone

1 through and analyzed the difference between the
2 National Energy Board and the Oil and Gas Commission,
3 for the purpose of trying to distinguish the Oil and
4 Gas Commission function from the quasi-judicial
5 function of the National Energy Board and the case in
6 the Hydro Quebec decision.

7 **Proceeding Time 4:45 p.m. T80**

8 If there is a duty to consult, it lies
9 elsewhere, not with this Commission.

10 Thank you. those are all my submissions,
11 subject to any questions.

12 THE CHAIRPERSON: Thank you very much, Mr. Bursey, and I
13 certainly didn't -- when there will be the turns for
14 reply to these questions 3 and 4, I am sure that I
15 would appreciate additional answers to the question
16 Mr. Bursey just put forward. Thank you.

17 MR. BURSEY: Thank you.

18 MR. FULTON: First Nations Energy and Mining Council.

19 **SUBMISSIONS BY MR. DIMITROV:**

20 MR. DIMITROV: Thank you, Panel members.

21 I'd like to go back to the *Baker* decision,
22 and in particular commencing at paragraph 21 to
23 paragraph 29, the Supreme Court lays out the factors
24 affecting the content of the duty of fairness. And it
25 sets out five factors. At paragraph 22 it indicates
26 that contextual reasoning must be employed to

1 understand the content of the duty of fairness. It
2 states it's flexible, it's a variable duty, it depends
3 on such matters as the particular statute and the
4 rights affected. That's at paragraph 22.

5 Then I'd like to go to paragraph 25 of the
6 *Baker* decision, and it mentions a third factor that
7 affects the content of the duty of fairness that is
8 owed, and namely the nature and extent it's owed as a
9 consequence of the importance of the decision to the
10 individual or individuals affected. In this case the
11 individuals affected are First Nations communities and
12 their title and their rights flowing from that title.

13 Paragraph 25 of the *Baker* decision, which
14 is another factor with respect to the content of the
15 duty of fairness, indicates that the more important
16 the decision is to the lives of those affected, the
17 greater its impact on that person or those persons,
18 the more stringent the procedural protections that
19 will be mandated. And in this case it's been stated
20 by various First Nations intervenors that the
21 determinations that will flow from this inquiry are
22 important and will indeed affect the lives of First
23 Nations people and their economies.

24 Most interesting, though, that at paragraph
25 28 the Supreme Court states that with respect to the
26 factors affecting the content of the duty of fairness,

1 to say -- to refer you to the last paragraph at page
2 28 of the *Baker* decision. And the last sentence in
3 that paragraph points to values. It says, "Look, if
4 you want to -- the values include -- if you relate to
5 the principle that the individual or individuals
6 affected should have the opportunity to present their
7 case fully and fairly," well, that means there needs
8 to be capacity funding provided to First Nations,
9 "fairly" means that there needs to be some way that
10 they can, indeed, make direct contact with you, not
11 necessarily in a city like Vancouver or Prince George
12 or Prince Rupert, but perhaps in their own
13 communities, their own territories. And values mean
14 that the decisions affecting their rights, interests
15 or privileges are made in a fair, impartial and open
16 process. So there you go. I mean, there is an answer
17 there that talks about how this might proceed.

18 Secondly, with respect to principles that
19 might guide you and how to balance these competing
20 ideas which are very large legal constructs, I would
21 say look to the "new relationship" document. It's
22 full of principles that talk about how we can do this
23 in a collaborative kind of sense. And secondly, and
24 perhaps lastly, I think that there are sufficient
25 legal, historical examples of how this was done. The
26 Berger inquiry went to virtually every settlement in

1 the Northwest Territories and listened to indigenous
2 people, and others who were present. And that was a
3 deep, meaningful consultation. And no one, I think,
4 in this room would probably say otherwise.

5 So those are some of the ways that the law
6 in a sense suggests a way that you can balance these
7 competing rights. And those are my submissions,
8 thank you.

9 **Proceeding Time 4:52 p.m. T782**

10 THE CHAIRPERSON: Thank you, Mr. Dimitrov.

11 MR. FULTON: Fortis BC.

12 MR. McDONELL: No submissions on questions 3 and 4.

13 MR. FULTON: British Columbia Hydro and Power
14 Authority.

15 **SUBMISSIONS BY MR. GODSOE:**

16 MR. GODSOE: Madam Chair, Commissioners, two housekeeping
17 matters. I had foreshadowed I would referring to
18 *Black's Law Dictionary*. I'm just having an excerpt
19 passed around and I think it would be appropriate at
20 this time to pass up copies to the Panel itself.

21 Secondly, in the interests of time, and
22 also because I think the two questions are completely
23 interlinked, I'm going to address questions 3 and 4 at
24 the same time and I essentially think it boils down to
25 can you owe a duty to consult and still abide by the
26 principles of natural justice, and my clear answer is

1 going to be no.

2 I will agree with The Nations on this. The
3 quasi-judicial status does inform the principles of
4 natural justice, and that's why I reiterate our
5 request in Exhibit B2-7 that you rule as soon as
6 possible on whether you are a quasi-judicial body in
7 this inquiry or not. And I say this referring to the
8 *Nicholson* case that B.C. Old Age Pensioners mentioned,
9 and I think we should file a case of that tomorrow so
10 you have it in front of you, but I maintain that the
11 principles of natural justice are different than
12 fairness. What the cases have said is that if you are
13 a quasi-judicial body you must adhere to the
14 principles of natural justice, and I agree with
15 counsel for BCSEA, there are three of them and I'll
16 come to those in a minute.

17 I think the idea of fairness is more
18 nebulous. I don't think it's as strict. It causes me
19 concern that if you find yourself not to be a quasi-
20 judicial body that only the principles of fairness
21 apply. So I think we need to have the *Nicholson* case
22 in front of you and I will ensure that happens
23 tomorrow.

24 **Proceeding Time 4:54 p.m. T83**

25 I also agree with the Nations that there
26 are either two or three principles of natural justice,

1 and they are first of all, the Commission must act in
2 an impartial manner, and I'm going to be referring to
3 *Black's Law Dictionary* for a definition of
4 "impartiality". And secondly, I'd say the second one
5 is effectively exercising one's right to be heard, and
6 underneath that, informing is the right to know the
7 case that must be met, and I'll be addressing that as
8 well.

9 So *Black's Law Dictionary* defines
10 "impartial" as "favouring neither, disinterested,
11 treating all alike, equitable, fair and just."

12 B.C. Hydro agrees with counsel for BCSEA
13 and counsel for JIESC that you cannot owe an
14 independent duty to consult and remain impartial. I
15 agree with counsel for JIESC that this issue was
16 squarely addressed by the Supreme Court of Canada
17 *National Energy Board* case, and I would recommend
18 JIESC's submission in Exhibit C6-3, page 5, paragraph
19 3.11. I agree with counsel for JIESC the holding in
20 the *National Energy Board* case is this. The
21 imposition of an independent duty to consult on a
22 quasi-judicial tribunal such as the Commission would
23 compromise the Commission's impartiality because such
24 a duty would cause the Commission to treat some of the
25 parties appearing before it in a preferential manner.
26 In other words, the Commission would not be treating

1 all alike, would not be favouring neither, and could
2 not be equitable, fair and just. And this is why I
3 say this.

4 I need only to look at some of the
5 suggestions put forward by the First Nations
6 participants as to what an independent duty to consult
7 entails. Let me deal with example 1, meeting directly
8 with First Nations. Now, I hear counsel for BCSEA
9 that meeting directly in terms of regional hearings
10 which are open to all is entirely consistent with the
11 principles of natural justice, and I'm going to
12 elaborate on question 8. It might be that additional
13 regional hearings should be scheduled in January or
14 February as put forward by the First Nations Energy
15 and Mining Council. I think we'll end up supporting
16 that.

17 However, what I heard from the Sto:lo
18 Tribal Council causes me concern. She used the term
19 "First Nations Only Forum". In B.C. Hydro's
20 submission, consulting with one or more parties in the
21 absence of others amounts to a denial of natural
22 justice because among other things, it raises a
23 reasonable apprehension of bias.

24 **Proceeding Time 4:57 p.m. T84**

25 As we've already established, the terms of
26 reference are clear that the Commission's

1 determinations will turn on findings of fact, on
2 evidence, from, among other things, probably
3 conflicting evidence. How would B.C. Hydro and
4 actually Section 5 inquiry participants obtain
5 disclosure of, and be given an opportunity to respond
6 to, what First Nations are saying directly to the
7 Commission in the absence of other parties?

8 B.C. Hydro submits that without knowledge
9 of the matters in issue, one cannot effectively
10 exercise one's right to be heard which, as I've said,
11 together with impartiality is a fundamental principle
12 of natural justice. B.C. Hydro and other Section 5
13 inquiry participants should not be left in the
14 position of discovering upon receipt of the
15 Commission's draft determinations and report that the
16 determinations turned on a matter in which B.C. Hydro
17 had made no representations because B.C. Hydro was not
18 aware it was an issue.

19 Let me turn to the second example, and
20 that's the provision of information by the Commission
21 to First Nations about potential determinations the
22 Commission might make.

23 B.C. Hydro interprets this First Nation
24 request as going well above and beyond the paragraph
25 12 terms of reference requirement to issue a draft
26 report and provide First Nations and others with an

1 opportunity to comment. So I look at the Weiweikei
2 submission in Exhibit C83-3, page 20, which would have
3 the Commission "reporting back to First Nations"
4 concerning the engagement process, including "the
5 provision of information by the Commission about
6 potential determinations that the Commission might
7 make".

8 I look to the Nations at Exhibit C97-3,
9 page 15, where they state that a First Nations
10 advisory panel would "directly work with the
11 Commission to shape the Commission's determinations as
12 they relate to matters of concern for First Nations".
13 And I look to the Toquaht Nation makes a similar
14 submission at Exhibit C103-2, page 11: "The
15 appointment of a First Nations advisory body with a
16 direct and equal role in some or all of the
17 Commission's deliberations."

18 With respect, and leaving aside
19 jurisdictional issues that are raised, and will be
20 addressed by myself and others as part of question 5,
21 B.C. Hydro submits that these requests are entirely
22 inconsistent with the principles of natural justice.
23 There is clearly going to be preferential treatment.
24 There would be a reasonable apprehension of bias. The
25 Commission would be providing First Nations'
26 participants with opportunities not provided to other

1 participants.

2 **Proceeding Time 4:59 p.m. T85**

3 In short, the Commission would seem to be
4 connected to some of the participants appearing before
5 it.

6 I want to just take this opportunity to
7 address the separate process issue which was raised by
8 one of the First Nation participants. I believe it
9 was the Treaty 8 Tribal Association. I don't agree
10 legally that a separate process is always required.
11 We addressed this issue in Exhibit B2-7, Section
12 3.2.1, which is found at pages 20 to 22 and also in
13 Exhibit B2-8, footnote 25 on page 14. That being
14 said, when I come to question 8, I'm going to be
15 categorizing all these process submissions into three
16 categories, so I won't use the term strip tease, but
17 I'll foreshadow what I'm going to say tomorrow.

18 Category one will be those procedural
19 requested amendments that are entirely consistent with
20 the quasi-judicial function and principles of natural
21 justice. I've alluded to the regional hearings and
22 I'm going to elaborate on that tomorrow.

23 Category two will be those that we say are
24 completely inconsistent with a quasi-judicial function
25 and principles of natural justice, and I say meeting
26 separately with First Nations falls under that

1 category.

2 And category three is where we would
3 request additional information for First Nations.

4 So I would say that the separate process
5 requirement is beginning to be met by the fact that
6 you're going to have regional hearings, and we'll come
7 to those tomorrow in question 8. I would say that we
8 have a parallel B.C. Hydro/BCTC process which is First
9 Nations only, but I leave the door open for additional
10 suggestions on what the separate process requirement
11 put forward actually means. So I don't want to shut
12 the door prematurely. And in fact, I reiterate
13 counsel for JIESC's comments that the Commission
14 process itself within the confines of a finding of
15 quasi-judicial status and principles of natural
16 justice is quite flexible, as is our parallel process,
17 and I look forward to discussing that further as part
18 of question 8.

19 Very briefly, I agree with counsel for
20 BCSEA and JIESC that the Oil and Gas Commission is not
21 a quasi-judicial body. I think BCTC has done an
22 admirable job of distinguishing the case in Exhibit
23 B1-6, page 10 and I would adopt those submissions
24 completely.

25 **Proceeding Time 5:02 p.m. T86**

26 I also agree the Chief Forester is not

1 quasi-judicial in any sense, and I also agree with
2 counsel for BCSEA's comments on the Environmental
3 Assessment Office process.

4 And those conclude my submissions with
5 respect to questions 3 and 4, subject to any
6 questions.

7 THE CHAIRPERSON: Thank you, Mr. Godsoe, and now it's
8 5:00. Will you be long, Mr. Feldberg?

9 MR. FULTON: I'm told that Mr. Feldberg will be brief.

10 THE CHAIRPERSON: All right, so then I think we can still
11 hear Mr. Feldberg out tonight then, before we call it
12 a day.

13 SUBMISSIONS BY MR. FELDBERG:

14 MR. FELDBERG: As evidence I brought up the thin binder,
15 Madam Chair. I can be brief, Madam Chair.

16 I don't have much to add to the submissions
17 of Mr. Godsoe, Mr. Andrews and Mr. Bursey. And in
18 fact I only want to make one observation other than to
19 tell you that I basically agree with those
20 submissions, and that is this. This is actually a
21 fairly simple proposition.

22 No one, by saying that a quasi-judicial
23 tribunal does not have a duty to consult, is denying
24 the Section 35 rights of First Nations. It's not an
25 issue as to whether or not you're denying the rights
26 of First Nations. Those rights exist and the Crown's

1 noted that this Commission was a quasi-judicial
2 tribunal that did not itself have a duty to consult.
3 It's not a denial of First Nation rights to do so.
4 It's simply a recognition that there's some
5 institutions within our society upon whom it is not
6 appropriate to place that obligations.

7 Those are my submissions.

8 THE CHAIRPERSON: Thank you, Mr. Feldberg. And with
9 that, I believe it's time to adjourn for the day, and
10 we shall reconvene nine o'clock tomorrow morning.

11 **Proceeding Time 5:05 p.m. T88**

12 Perhaps before we -- there is one Panel
13 member suggesting 8:30 tomorrow morning. Is there
14 interest for that?

15 MR. QUAIL: It's much preferable to going really late
16 tomorrow.

17 MR. FULTON: All right. 8:30 it is then, Madam Chair.

18 THE CHAIRPERSON: 8:30 it is.

19 MR. FULTON: Okay.

20 **(PROCEEDINGS ADJOURNED AT 5:06 P.M.)**

21

22

23

24

25

26