

D Barry Kirkham, QC<sup>+</sup>  
Duncan J Manson<sup>+</sup>  
Daniel W Burnett, QC<sup>+</sup>  
Ronald G Paton<sup>+</sup>  
Karen S Thompson<sup>+</sup>  
Laura A Wright  
James H McBeath<sup>+</sup>  
Scott H Stephens<sup>+</sup>  
David W P Moriarty  
Katharina R Spatzl  
Patrick J Weafer

Robin C Macfarlane<sup>+</sup>  
Alan A Frydenlund, QC<sup>+</sup> \*  
Harvey S Delaney<sup>+</sup>  
Paul J Brown<sup>+</sup>  
Gary M Yaffe<sup>+</sup>  
Harley J Harris<sup>+</sup>  
Kari F Richardson<sup>+</sup>  
James W Zaitsoff<sup>+</sup>  
Daniel H Coles<sup>+</sup> \*  
Sameer Kamboj  
Georgia Barnard

Josephine M Nadel, QC<sup>+</sup>  
Allison R Kuchta<sup>+</sup>  
James L Carpick<sup>+</sup>  
Patrick J Haberl<sup>+</sup>  
Heather E Maconachie  
Jonathan L Williams<sup>+</sup>  
Paul A Brackstone<sup>+</sup> \*  
Pamela E Sheppard<sup>+</sup>  
Jocelyn M Bellerud<sup>+</sup>  
Brian Y K Cheng<sup>+</sup> \*\*  
Lucky D Johal

James D Burns<sup>+</sup>  
Jeffrey B Lightfoot<sup>+</sup>  
Christopher P Weafer<sup>+</sup>  
Gregory J Tucker, QC<sup>+</sup> \*\* † ‡  
Terence W Yu<sup>+</sup>  
Michael F Robson<sup>+</sup>  
Barbara E Janzen  
George J Roper<sup>+</sup>  
Tony R Anderson  
Steffi M Boyce

Rose-Mary L Basham, QC, Associate Counsel<sup>+</sup>  
Jennifer M Williams, Associate Counsel<sup>+</sup>  
Hon Walter S Owen, QC, QC, LL.D (1981)  
John I Bird, QC (2005)

<sup>+</sup> Law Corporation  
<sup>\*</sup> Also of the Yukon Bar  
<sup>‡</sup> Also of the Alberta Bar  
<sup>†</sup> Also of the Ontario Bar  
<sup>\*\*</sup> Also of the Washington Bar

OWEN BIRD

LAW CORPORATION

PO Box 49130  
Three Bentall Centre  
2900-595 Burrard Street  
Vancouver, BC  
Canada V7X 1J5

Telephone 604 688-0401  
Fax 604 688-2827  
Website [www.owenbird.com](http://www.owenbird.com)

August 12, 2019

VIA ELECTRONIC MAIL

Mr. Doug Slater  
Director, Regulatory Affairs  
FortisBC Group of Companies  
16705 Fraser Highway  
Surrey, BC V4N 0E8  
[gas.regulatory.affairs@fortisbc.com](mailto:gas.regulatory.affairs@fortisbc.com)

Direct Line: 604 691-7557  
Direct Fax: 604 632-4482  
E-mail: [cweafer@owenbird.com](mailto:cweafer@owenbird.com)  
Our File: 23841/0209

Dear Mr. Slater:

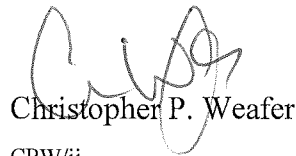
**Re: British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998**

We are counsel to the Commercial Energy Consumers Association of British Columbia (the “CEC”). Attached please find the CEC’s first set of Information Requests on written evidence to FortisBC Energy Inc. and FortisBC Inc. with respect to the above-noted matter.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Yours truly,

OWEN BIRD LAW CORPORATION



Christopher P. Weafer

CPW/jj  
cc: CEC  
cc: BCUC  
cc: Registered Interveners

**COMMERCIAL ENERGY CONSUMERS ASSOCIATION  
OF BRITISH COLUMBIA (“CEC”)**

**Intervener Information Request No. 1 to FortisBC Energy Inc. and FortisBC Inc.  
(collectively, “FortisBC”) on Written Evidence**

**British Columbia Utilities Commission Indigenous Utilities Regulation  
Project No. 1598998**

**August 12, 2019**

---

**1. Reference: Exhibit C4-2, FortisBC Written Evidence page 2 and page 7-8**

- **Determining the appropriate approach to regulation:** In general, an “indigenous utility” should be regulated similarly to a non-“indigenous utility”. That is, the form of regulation (i.e., full or light-handed) in a particular case should be dependent on the level of oversight required to achieve the underlying purpose of utility regulation – ensuring safe and reliable service is maintained at a price that reflects the nature and quality of service provided and a fair return on the utility’s investment.

In the absence of regulation, an “indigenous utility” (given that term’s broad definition) is no less capable than a non-“indigenous utility” of allowing service quality and reliability to decline or of charging excessive rates to a captive consumer. The key is to assess whether market forces or governance mechanisms exist to provide an effective substitute for BCUC oversight. It is also critical for the BCUC to avoid a regulatory approach to “indigenous utilities” that, however well-intentioned, effectively opens the door for monopoly providers of energy services to circumvent effective oversight at the expense of consumers.

**Table 1 – Hypothetical examples of utilities that would meet the definition of “indigenous utility”**

Geographic scope	Ownership	Number of Indigenous ratepayers	Number of non-Indigenous ratepayers	“indigenous utility” under definition?
Reserve only	Indigenous Nation 100%	100	0	Yes
Reserve only	Indigenous Nation only 0.01%	100	0	Yes
Reserve only	Indigenous Nation 0% but operates	100	0	Yes
Reserve and one other building off-reserve	Indigenous Nation 100%	100	1	Yes
Reserve and one other building off-reserve	Indigenous Nation 100%	1	100	Yes
Reserve and one other building off-reserve	Indigenous Nation only 0.01%	100	1	Yes
Reserve and one other building off-reserve	Indigenous Nation only 0.01%	1	100	Yes

Geographic scope	Ownership	Number of Indigenous ratepayers	Number of non-Indigenous ratepayers	"indigenous utility" under definition?
Reserve and one other building off-reserve	Indigenous Nation 0% but operates	1	100	Yes
Large portion of BC	Indigenous Nation 100%	10,000	1.5 million	Yes
Large portion of BC	Indigenous Nation only 0.01%	10,000	1.5 million	Yes
Large portion of BC	Indigenous Nation 0% but operates	10,000	1.5 million	Yes

- 1.1 Please provide FortisBC's comments as to the appropriateness of a definition of Indigenous Utility as 'majority ownership'.

## 2. Exhibit C4-2

A natural monopoly exists when, in broad terms, it is more cost-effective to have services provided by one entity and where there are barriers to entry. In other words, the public interest is better served by one utility, with one set of utility infrastructure, providing a certain service. However, the absence of competition creates the potential for abuse. Regulation of natural monopolies is intended to replace the safeguards inherent in competition.

In the AES Inquiry, the BCUC stated:

The Commission Panel agrees that the purpose of the UCA is to regulate natural monopolies and protect consumers from the exercise of economic power. The Commission Panel is of the view that a reasonable interpretation should consider the market context within which the proposed service or facility will exist, the degree to which natural monopoly characteristics are present and whether the consumer requires protection. The Commission Panel finds that in general, a provider of services which meets the definition of a public utility in the UCA, and where natural monopoly characteristics are present and consumers require protection, will be subject to regulation.

- 2.1 Please list the types of barriers to entry that might be considered as applicable in creating a 'natural monopoly' as it relates to indigenous utilities.

### 3. Exhibit C4-2, FortisBC pages 10-11 and page 18

#### 4.3 Approach to Indigenous Utility Regulation Can Be Usefully Considered in Relation to Five Groupings

The BCUC could approach these questions by distinguishing among the following five groupings, which address the underlying rationale behind the UCA and utility regulation more generally. The primary distinctions among the groupings are whether the customers receiving service has some other recourse for protection – either by having a choice of providers (competition) or another form of oversight or participation in governance.

Grouping	Description	FortisBC Position	Rationale
1	An "indigenous nation" <sup>15</sup> provides unmetered service to members only, without compensation.	Not subject to the UCA.	This service is not "public utility" service if there is no compensation payable.
2	Public utility with <u>controlling</u> interest owned by an "indigenous nation", serving only Indigenous peoples who <u>have</u> a say in the governance of the "indigenous nation".	Section 88(3) exemption from Part 3 of the UCA.	Similar to municipalities, where consumer protection is provided by the ability to vote for municipal government.

Grouping	Description	FortisBC Position	Rationale
3	Public utility with <u>controlling</u> interest owned by an "indigenous nation"; serving one or more customers who <u>don't have</u> a say in the governance of the "indigenous nation" <sup>16</sup>	Regulated by BCUC.  Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.  The nature of regulation (i.e. whether light-handed or not) should depend on the extent of consumer vulnerability and proportionality of regulatory burden. <sup>17</sup>
4	Public utility with <u>non-controlling</u> interest owned by an "indigenous nation"; serving one or more customers who <u>don't have</u> a say in the governance of the "indigenous nation". <sup>18</sup>	Regulated by BCUC.  Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.  Necessary to avoid gaming. An investor owned public utility should not be able to avoid regulation by the BCUC, simply by granting a non-controlling interest to an "indigenous nation".
5	Public utility owned either by "indigenous nation", other non-Indigenous investors, or both; "indigenous nation" is contracted operator;	The owner is a public utility, regulated by the BCUC.  A contractor may or may not be a public utility regulated by the BCUC.  Nature of regulation depends on other factors typically considered by the BCUC.	A contractor may or may not be a public utility regulated by the BCUC, depending on the extent of delegation of the owner's rights and obligations.  The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.

**4.6 It Will Be Important to Avoid Creating Loopholes that Would Allow Utilities to Avoid Scrutiny**

This section addresses the following question posed in the Terms of Reference:

*v. If an Indigenous utility is not regulated under the UCA, would the utility become subject to the UCA on ceasing to be an Indigenous utility, and, if not, what transitional and other mechanisms are required to ensure that the utility is subject to the UCA on ceasing to be an Indigenous utility?*

FortisBC's view is that "indigenous utilities" should generally be regulated in a similar manner to non-"indigenous utilities". In that case, a change in ownership should not result in the need to change the form of regulation. The same test governing a share disposition should apply (UCA, section 54).

In the event that less oversight were to be applied to all "indigenous utilities", this would create an opportunity for abuse unless the BCUC scrutinized changes of ownership more rigorously in the case of a sale to an "indigenous nation" than is currently contemplated under section 54. The sale of any share (even a single share) to an "indigenous nation" would have to be scrutinized to avoid the potential for abuse. It should not be possible for utilities to avoid oversight by the BCUC (or any other regulatory body), simply by selling a share of the utility to an "indigenous nation".

- 3.1 Please confirm that commercial customers do not typically have 'voting rights'.
- 3.2 Would the addition of a single customer that does not have a 'say' in the governance of the indigenous nation justify changing the regulatory oversight? Please explain.
- 3.3 Please comment on the appropriate regulation of an indigenous public utility serving customers that do not have a say in the governance of the indigenous nation, that grants a controlling interest to a municipality.
- 3.4 Please comment on the appropriate regulation of an indigenous public utility serving customers that do not have a say in the governance of the indigenous first nation, that grants a non-controlling interest to a municipality.

#### 4. Exhibit C4-2, FortisBC pages 12-13 and page 14

Grouping	Description	FortisBC Position	Rationale
3	Public utility with <u>controlling</u> interest owned by an "indigenous nation"; serving one or more customers who <u>don't have</u> a say in the governance of the "indigenous nation". <sup>16</sup>	Regulated by BCUC.  Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.  The nature of regulation (i.e. whether light-handed or not) should depend on the extent of consumer vulnerability and proportionality of regulatory burden. <sup>17</sup>
4	Public utility with <u>non-controlling</u> interest owned by an "indigenous nation"; serving one or more customers who <u>don't have</u> a say in the governance of the "indigenous nation". <sup>18</sup>	Regulated by BCUC.  Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.  Necessary to avoid gaming. An investor owned public utility should not be able to avoid regulation by the BCUC, simply by granting a non-controlling interest to an "indigenous nation".
5	Public utility owned either by "indigenous nation", other non-Indigenous investors, or both; "indigenous nation" is contracted operator;	The owner is a public utility, regulated by the BCUC.  A contractor may or may not be a public utility regulated by the BCUC.  Nature of regulation depends on other factors typically considered by the BCUC.	A contractor may or may not be a public utility regulated by the BCUC, depending on the extent of delegation of the owner's rights and obligations.  The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.

<sup>16</sup> These customers could be non-Indigenous people, Indigenous people without voting rights or companies owned by either of these groups.

<sup>17</sup> This is reflected, in the case of small thermal energy utilities, in the Thermal Energy System Regulatory Framework Guidelines.

<sup>18</sup> These customers could be non-Indigenous people, Indigenous people without voting rights or companies owned by either of these groups.

#### Municipal Utilities Are Excluded Due to Voting Rights of Residents

The definition of "public utility" in the UCA excludes "a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries...".<sup>19</sup> The logic behind this exclusion is that these bodies have in place governance structures that allow all ratepayers to hold the municipality accountable. Residents of a municipality can exercise the right to vote if they object to how service is provided. The qualifier "within its own boundaries" ensures that all recipients of the service can avail themselves of that right to vote.

they charge to customers, who are often captive, are reasonable for the level of service provided.

The scheme of the UCA acknowledges that there may be circumstances where an entity is caught by the definition of public utility yet the rationale for regulation is not compelling because the public utility has little or no ability to exercise monopolistic behaviour to the detriment of ratepayers and the public interest. In those situations, the UCA allows the BCUC, with the advance approval of the responsible Minister, to grant exemptions in whole or in part from regulation under the statute.

The Panel also notes that generally speaking, ratepayers of a municipal utility are entitled to vote in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility. However, for ratepayers of Spirit Bay Utilities who are not members of Beecher FN, participation in the ratemaking process of Spirit Bay Utilities appears to be limited to making comments and asking questions of Beecher FN Council. [Emphasis added.]

- 4.1 Please confirm that municipalities, as exempted by the *Utilities Commission Act*, were not determined to be exempt by the BCUC.
- 4.2 Would FortisBC agree that having a say in ‘governance of the indigenous nation’ can also be likened to having a say in the governance of the province, but not directly in the crown corporation BC Hydro which is regulated by the BCUC?
  - 4.2.1 If not, please explain why not.
  - 4.2.2 If yes, please provide FortisBC’s views as to the distinction between a municipality and its public utility and the province and its public utility.