2011 CarswellBC 730, 2011 BCSC 388

Upper Nicola Indian Band v. British Columbia (Minister of Environment)

Chief Timothy Manuel, on his own behalf and on behalf of all members of the Upper Nicola Indian Band and Okanagan Nation Alliance, Petitioners and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Minister of Environment, the Minister of Energy, Mines and Petroleum Resources and the Minister of Aboriginal Relations and Reconciliation and British Columbia Hydro & Power Authority, Respondents

Chief Robert Pasco, on his own behalf and on behalf Nlaka'pamux Nation Tribal Council, Petitioners and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Minister of Environment, the Minister of Energy, Mines and Petroleum Resources and the Minister of Aboriginal Relations and Reconciliation and British Columbia Hydro & Power Authority, Respondents

British Columbia Supreme Court [In Chambers]

Savage J.

Heard: February 7-15, 2011
Judgment: March 31, 2011
Docket: Vancouver S098193, S098684

Counsel: T. Howard, B. Stadfeld McIvor, for Petitioners

P. Yearwood, J. Oliphant, for Respondent, Province of British Columbia

A.W. Carpenter, C.F. Willms, K. Grist, for Respondent, British Columbia Hydro & Power Authority

Subject: Public; Civil Practice and Procedure; Environmental

Administrative law.

Environmental law.

Aboriginal law.

***Savage J.*:**

I. Introduction — The Applications

1 This is an application for judicial review pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [

JRPA], of a decision made under the *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EA Act*] to approve an Environmental Assessment Certificate (the "EAC") relating to the construction of a transmission line from the interior of the Province to the Lower Mainland (the Interior to Lower Mainland or "ILM Project").

2 There are two petitions before the court on similar issues. The applicants in one petition (No. S098193, Vancouver Registry) are Chief Timothy Manuel ("Manuel"), the Upper Nicola Indian Band (the "UNIB"), and the Okanagan Nation Alliance (the "ONA"). The applications in the second petition are Chief Robert Pasco ("Pasco"), and the Nlaka'pamux Nation Tribal Council (the "NTC"). Collectively I will refer to all of the applicants as the "Petitioner First Nations".

3 The respondents named in the petitions are the Minister of the Environment and the Minister of Energy, Mines and Petroleum Resources (the "Ministers"), the Minister of Aboriginal Relations and Reconciliation (the "MARR") and British Columbia Hydro and Power Authority ("BC Hydro").

4 The ILM Project is a proposed high voltage transmission line which will run from a large hydro substation located east of Merritt, known as the Nicola Substation, on a southwest route to the Meridian Substation located near Coquitlam in the Lower Mainland of the Province.

5 For much of its route the proposed transmission line will parallel and make use of a right of way used by two transmission lines known as 5L81 and 5L82, which were planned and built in the late 1960s and early 1970s. The 500v transmission line proposed is 250 km long. It requires widening of 49 km of existing right-of-way and 73 km of new right-of-way.

6 Transmission lines 5L81 and 5L82 are part of an electrical grid comprised of four transmission circuits connecting the Interior and Lower Mainland (the "ILM Grid"). The ILM Project would add a fifth circuit to the ILM Grid.

7 Parts of the ILM Grid, and the ILM Project, traverse areas over which the Petitioner First Nations assert claims of Aboriginal title and/or rights. The Petitioner First Nations say that they are entitled to the various relief claimed because respondents failed their constitutional duty to consult.

II. The Issues

8 The Petitioner First Nations argue that the constitutional duty to consult was breached in two ways:

> 1. the Province and BC Hydro have taken an overly narrow view of their duty to consult. The Petitioner First Nations say that the scope of the constitutional duty to consult, once engaged by current actions, includes existing and ongoing impacts of past failures to consult. The Province has refused to consider aggregate impacts during the EA process, offering consultation and accommodation only on impacts which will arise as a result of the new ILM Project and
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> 2. even if the constitutional duty to consult is not as broad as suggested by the Petitioner First Nations, on the facts of this case the Crown must engage in consultation on ongoing and future impacts of the Existing Lines as part of the EA process because the honour of the Crown is engaged. The Petitioners First Nations say the Crown committed to engage in concurrent consultation as part of the EA process on past claims and ongoing rights infringements related to past actions and should be required to fulfill that commitment.

9 The respondents in reply say that since 2006 they have consulted sixty First Nations, seven Tribal Associations, six incorporated municipalities, four unincorporated municipalities and three regional districts on the ILM Project. Such consultations, the respondents say, fulfill their constitutional obligations to the point of issuance of the EAC. The respond-

ents deny that they agreed to consult on past claims and ongoing rights infringements related to past actions. The respondents say that there is no duty to consult on the existing and ongoing impacts related to past actions as part of the EAC process.

10 At the outset I observe that the parties have not suggested that they disagree about whether a certain impact falls within the scope of the duty to consult. In the Petitioner First Nations' affidavits there is reference to the ongoing and existing impacts including noise, electromagnetic radiation, decreased wildlife, the introduction of invasive species, herbicide use, the disruptive presence of works and other impacts. It was not suggested that there is disagreement on whether something is a new impact of the ILM Project or an existing or ongoing impact of the works involving transmission lines 5L81 and 5L82. The parties have dealt with the matter on a principled basis and I am content to deal with it on that basis as well.

11 There are substantive, evidentiary and procedural issues before the court.

A. Substantive

12 The substantial issue is whether the court should quash the joint decision of the Ministers to approve the EAC.

13 The Petitioner First Nations maintain that the honour of the Crown requires that consultations with the Petitioner First Nations address the *aggregate impacts* of the ILM Project *and* the two transmission lines 5L81 and 5L82 which form part of the ILM Grid.

14 The Petitioner First Nations seek the following specific orders:

(a) A declaration that the Crown in Right of British Columbia (the "Crown"), as represented by the Minister of Environment, the Minister of Energy, Mines and Petroleum Resources and the Minister of Aboriginal Relations and Reconciliation (the "Ministers") owes a constitutional and legal duty to consult with the Nlaka'pamux Nation Tribal Council (the "NNTC"), the Upper Nicola Indian Band ("Upper Nicola") and the Okanagan Nation Alliance (the "ONA") in good faith, and endeavour to seek workable accommodations, prior to the approval of Environmental Assessment Certificate # E09-03 for the ILM Expansion Project, on June 3, 2009 (the "EA Certificate");

(b) A declaration that the scope and content of the Crown's duty to consult with respect to the ILM Expansion Project includes consultation and, where appropriate, accommodation concerning the existing, ongoing and future impacts of the Existing ILM Project;

(c) A declaration that the Crown failed to comply with its constitutional and legal duty, as described above;

(d) A declaration that the EA Certificate is unlawful;

(e) An order in the nature of *certiorari* quashing the EA Certificate;

(f) In the alternative to (e), an order:

(i) directing the Ministers to recommence consultations with the NNTC, Upper Nicola and ONA with respect to the ILM Expansion Project, such consultations to include consultation and, where appropriate, accommodation concerning the existing, ongoing and future impacts of the Existing ILM Project, in a manner consistent with this Court's reasons for judgment and subject to the supervision of this Court;

(ii) suspending the operation and legal effect of the EA Certificate, pending completion of the consultations pursuant to (i) above or until further order of this Court;

(g) Prohibition against the issuance by any provincial agency, department or body of any further permits, licences or authorizations to the British Columbia Hydro & Power Authority in relation to the ILM Expansion Project until the Ministers' obligations pursuant to clause "f" are fulfilled;

(h) The parties are at liberty to apply for such further relief as they deem fit;

(i) Interim and/or interlocutory relief;

(j) Such further and other relief as this honourable Court deems just; and

(k) Costs.

15 The Petitioner First Nations submit that three of the above remedies are essential to the just resolution of this proceeding. First, the declaratory relief defining the proper scope of consultations (subparagraph (b)) is essential. The second is the declaratory relief that the Crown failed to comply with this duty prior to issuing the EAC (subparagraph (c)). The third essential relief is some form of order that affects the status of the EAC (subparagraphs (e) or (f)).

16 The respondents ask that the petitions be dismissed. They say that they have abided by their constitutional duties to the Petitioner First Nations. The respondents say that the Petitioner First Nations are seeking to elevate a late exchange of correspondence which included an offer by the MARR to consult on past impacts of the 5L81 and 5L82 transmissions lines into a constitutional requirement that such consultation occur before the ILM Project proceed.

17 The respondents say that they have fulfilled their constitutional obligations to the point of issuing the EAC and that further consultation will occur as the project proceeds. Such consultations, the respondents say, fulfill their constitutional obligations to the point of issuance of the EAC. Further consultations will occur as the project proceeds.

18 Attached as Schedule A" is a copy of the correspondence initiating the EAO process dated January 27, 2007. Attached as Schedule "B" is list of the consulted parties considered part of the Working Group.

19 The respondents say that consultation on the impacts of the construction of 5L81 and 5L82, which occurred in the 1960s and 1970s, although offered are not constitutionally required. That was not part of and was not offered to be part of the EAC process.

B. Evidentiary

20 The respondent's take issue with some of the affidavit material filed by the Petitioner First Nations. They say that portions of the affidavits should be disregarded or given no weight on the basis that some parts are simply argumentative, some are hearsay and other parts are inadmissible opinion evidence.

21 Some 55 objections are included in written submissions that were referred to only briefly in oral submission. The Petitioner First Nations did not respond in detail to these objections but argued that some matters were based on personal knowledge, and others expressed permissible opinion and hearsay.

22 To some degree argument and opinion infects the affidavits of both parties because the players in these proceedings were presenting positions in their exchanges. While argument and opinion is not to be encouraged in affidavits, the

Court is able to distinguish argument and opinion from fact.

23 Much of the material objected to as opinion concerns the ongoing effects of existing works. For the purpose of these reasons I accept the proposition that the there are ongoing effects of existing works. The degree of those effects involves some controversy but the court has not been asked to determine that in these proceedings.

24 The respondents also objected to a late filed affidavit. Because of the timing of the affidavit, for it to be admitted in evidence, requires leave of the court. The affidavit at issue is Affidavit No. 3 of Jay Johnson, sworn January 25, 2011 and filed January 26, 2011.

25 I have read the affidavit. Generally speaking, it appends correspondence from the Petitioner First Nations to the provincial government expressing dissatisfaction with the state of discussions, or lack thereof, regarding the ongoing effects of existing works from late 2010 to early 2011. It is said to be responsive to Affidavit No. 1 of Glen Ricketts filed October 19, 2010.

26 Pursuant to Rule 22-2 (14) of the *Supreme Court Civil Rules*, B.C. Reg. 168/ 2009 leave is required. I do not grant leave.

27 First, I do not think it is particularly helpful to the Court's determination in these proceedings. What is at issue in these proceedings is the EAC the Petitioner First Nations seek to have set aside. That was approved by the Ministers on June 3, 2009.

28 All the parties acknowledge that the key adjudicative materials concern the period from mid-2008 to mid-2009, the date of approval. Besides the impugned affidavit, the parties have filed more than 30 binders of materials giving context and content to the application. In my view the affidavit is not helpful to the central issues.

29 Had I found otherwise, in light of the late filing, and the content of the affidavit, I would have allowed the respondents to file responsive materials as the matters in the affidavit fall well outside the time frame described in the materials to which they are said to be a response.

C. Parties

30 The parties agree that Her Majesty The Queen as represented by the Ministers are proper respondents in this proceeding. Both the Minister of Energy and the MEMPR are statutory decision makers, as they are the Ministers referenced in the *EA Act*. The province says that the MARR is not a proper party to these proceedings as he is not a statutory decision maker.

31 In light of the relief sought, however, in my view the MARR is a proper party to the proceeding. In effect, part of the relief sought is to quash or suspend the EAC while there is government to government consultation between the Petitioner First Nations and MARR as part of the EAC process.

32 The Petitioner First Nations say the MARR agreed to that process and the honour of the Crown requires that commitment be carried through as part of the EAC process. Those are matters at issue and the question of who are the proper parties cannot be a lever to derail or short circuit that determination.

III. Background

33 British Columbia Transmission Corporation ("BCTC") submitted to the British Columbia Environmental Assess-

ment Office a Project Description called the "Nicola to Meridian Transmission Line Option" in 2006. BCTC at that time was a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57.

34 British Columbia Hydro and Power Authority ("BC Hydro") is a crown corporation incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212.

35 Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44 [*Transmission Corporation Act*], and a series of agreements with BC Hydro, BCTC was responsible for operating and managing BC Hydro's transmission lines. Those transmission lines form the majority of British Columbia's electrical transmission system.

36 Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, were BCTC's responsibilities. BC Hydro retained responsibility for consultation with First Nations regarding the transmission system.

37 In July 2010 the *Clean Energy Act*, S.B.C. 2010, c. 22 [*Clean Energy Act*] was enacted, repealing the *Transmission Corporation Act*. As a result of the *Clean Energy Act* BCTC and BC Hydro merged. All of BCTC's EA Certificates were transferred to and are now vested in BC Hydro.

38 Electrical generation largely occurs in the interior of the province. Most of the demand arises from the Lower Mainland and Vancouver Island. The ILM Project was one of several possible alternatives suggested to address a gap between the demand for electricity and supply through the existing transmission capacity.

39 In its project description BCTC says that if the difference is not addressed through added transmission capacity then the gap would have to be addressed through either local generation or imports from the United States.

40 If the ILM Project is to proceed it also requires a Certificate of Public Convenience and Necessity ("CPCN") from the British Columbia Utilities Commission ("BCUC") as well as an EAC. The BCUC refused to consider the First Nations challenge to the consultation process in proceedings before it. That scoping decision by the BCUC was appealed to the Court of Appeal.

41 The Court of Appeal referred the scoping decision back to the Commission for reconsideration: see *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68[*Kwikwetlem*]. The Court directed that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point.

42 Huddart, J.A., speaking for the Court said at para. 14 of *Kwikwetlem*:

> ... In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

43 The matter before this court concerns only the ministerial approval of the EAC. Although there is interplay between that process and decisions respecting the CPCN, neither party suggested that the decision of the Court in *Kwikwetlem* had direct application here.

44 That is, *Kwikwetlem* found that the BCUC committed legal error when it refused to consider the First Nations challenge to the consultation process. With respect to the issuance of the EAC here, the respondents acknowledge the

duty to consult and say that the duty to meaningfully and appropriately consult was met.

A. Description of Project and System

45 Issue is taken between the parties concerning the appropriate description of the ILM Project. The petitioners refer the ILM Project as the "ILM Expansion Project". This seems an effort to tie the ILM Project to the pre-existing ILM transmission grid of which the 5L81 and 5L82 transmission lines form a part. Of course the ILM Project would form a part of the ILM Grid.

46 The existing ILM Grid consists of eight 500 kv line segments with four main segments. There are two connections from each of Kelly Lake Substation and Nicola Substation in the Interior of the province and two connections to each of Meridian Substation in Coquitlam and Ingledow Substation in Surrey in the Lower Mainland. There are line segments in both the Interior and Lower Mainland to allow power sharing between the main terminal substations. Electricity is transmitted from generating facilities including the Peace River system, Mica Dam and Revelstoke Dam.

47 It seems a misnomer, however, to describe the ILM Project as an "expansion" of previous works. It involves the construction of a separate transmission line, one proposed to be called 5L83. In places it is proposed that 5L83 share some of the right-of-way used by 5L81 and 5L82. In other places the right-of-way will be enlarged. In other places new rights-of-way will be utilized.

48 There are 34 orthophotos in evidence showing the existing and proposed works and right of ways referenced in this proceeding. There are no connections proposed between 5L83 and the other two transmission lines. The evidence, in my view, falls well short of establishing that the ILM Project is accurately described an expansion of any particular previous works.

49 Of course, like any transmission line, the proposed line 5L83 is connected to substations. It is proposed to be co-terminus with 5L81 and 5L82. The transmission line 5L83 would add a fifth circuit to the ILM Grid.

50 I have therefore chosen to employ the term "ILM Project" to refer to the proposed project.

B. EA Process

51 The *EA Act* is the legal framework for the environmental assessment process for proposed projects. I will describe briefly that process based on the affidavit material before me and the legislative and regulatory enactments. Broadly speaking the process has two components, the Pre-Application Process and the Application Review.

52 Although the *EA Act* refers to environmental assessments, the act requires a comprehensive assessment by the Environmental Assessment Office (the "EAO") of a wide variety of impacts, including "environmental, economic, social, heritage and health effects" which can occur for proposed projects.

53 Engagement of the EAO begins with a project application (the "Project Application"). The *EA Act* gives broad powers to the EAO to conduct environmental assessments and make recommendations to government on whether a project should proceed and under what conditions.

54 At the pre-application stage a proponent submits a project description to the EAO. EAO examines the project description and determines whether it is reviewable under the *EA Act*. If it is determined to be reviewable under the *EA Act*, an order under section 10 (1)(c) of the *EA Act* (a "Section 10 Order") is issued. The Section 10 Order confirms that an EAC is required for the project and states that the proponent may not proceed with the project without an assessment.

55 The EAO says that, in the case of projects impacting First Nations, that it then notifies the relevant First Nations, as well as government agencies and local governments that a Section 10 Order has been issued. The EAO offers participation on the projects assessment, including participation in the projects working group and technical subcommittees (the "Working Group").

56 The Working Group is organized and chaired by the EAO. The Working Group advises the EAO about issues related to the project assessment. That includes development of the project terms of reference ("Terms of Reference"), assessing the adequacy of the projects proponent's documentation, methodologies, and proposed mitigation measures.

57 The EAO says it also offers to First Nations the opportunity to be consulted on a "government to government" basis, that is, outside of the Working Group.

58 The EAO then establishes the scope, procedures, and methods of assessment by issuing a procedural order under section 11 of the *EA Act* (a "Section 11 Order"). The EAO generally prepares a first draft of the Section 11 Order, circulates it to the proponent and others, including First Nations, and asks for comment.

59 The Section 11 Order normally requires the proponent to confer with First Nations and report back to the EAO so that the adequacy of the consultation process can be assessed.

60 Following the Section 11 Order the EAO drafts the Terms of Reference (also called the "Application Information Requirements"). This identifies the issues to be addressed in the assessment and the information that must be in the application. With respect to First Nations issues those include the consultations undertaken, the issues identified, whether the issues are resolved, and if not, a process for resolving issues and further planned consultations. The EAO confers with the Working Group and the public on whether the Terms of Reference identifies all of the issues.

61 There are no statutory time limits on these Pre-Application steps.

62 The proponent then submits a Project Application to the EAO. The EAO involves the Working Group in screening the Project Application. The *Prescribed Time Limits Regulation*, B.C. Reg. 372/2002 [*Prescribed Time Limits Regulation*], requires that the Project Application evaluation be done within 30 days.

63 If a Project Application is accepted then the process of Application Review commences. During the Application Review stage, the Project Application is provided to the Working Group and the EAO works to resolve outstanding concerns if possible and appropriate. The *Prescribed Time Limits Regulation* requires that the Application Review be completed within 180 days. The EAO may extend the review period.

64 The EAO prepares an assessment report (the "Assessment Report") which details its findings on the Project Application during the 180 day review period. The Assessment Report includes information on the legal duty to consult and accommodation. A draft Assessment Report is provided to the Proponent and the Working Group and seeks their input. If there is disagreement then the consulted parties are invited to make a submission which the EAO will refer to the Ministers.

65 The Project Application and the Assessment Report and any recommendations of the Executive Director of the EAO are referred to the Minister of the Environment and as well as the minister responsible for the subject matter for which approval is sought. With respect to an electrical transmission project, such as the ILM Project, approvals are required from the Minister of the Environment as well as the Minister of Energy, Mines and Petroleum Resources. The materials include the Project Application, any recommendations from the Executive Director of the EAO, a draft EAC, and

recommended conditions and a table of the applicants' commitments.

66 The EA process concludes with a decision of the Ministers on the certificate application as provided for by section 17 of the *EA Act*. If approved, an EAC is issued. Only upon the issuance of an EAC can other required approvals or permits be issued, authorizing project activity.

C. Chronology

67 The following is a brief Chronology of the major events leading up to issuance of the impugned EAC:

Date	*Party*	*Nature*
1960s; 1970s	Province/First Nations	Acquisition of Rights of Way Construction of 5L81/5L82 Parties at odds over whether there was any consultation
December, 2005	BC Hydro	Contemplates increasing transmission capacity
August, 2006	BC Hydro/Petitioners	Consultation Commences on ILM Project
December 18, 2006	EAO	Section 10 Order requiring EAC for ILM Project.
February 21, 2007	EAO/ Petitioners/ BC Hydro	First Technical Working Group Meeting
May 23, 2007	BC Hydro	Selects Construction of 5L83 as preferred alternative.
May 31, 2007	EAO	Section 11 Order initiates EA process for ILM Project
September 20, 2007	Parties	Working Group Meeting
November 5, 2007	BCUC/ BC Hydro	CPCN Application
May 23, 2008	EOC	Terms of Reference Finalized.
July 9, 2008	EOC to Petitioners	Seeks Input on Technical Reports
August 5, 2008	BCUC	CPCN Issued
September 11, 2008	EOC to Petitioners	Invitation to Screen Application for compliance with Terms of Reference
October 1, 2008	BCTC to EAO	Submits Project Application.
October 23, 2008	Petitioners to EAO	Application should be rejected for failure to address past issues
October 31, 2008	EAO	Application accepted as compliant with Terms of Reference
November 12, 2008	EAO to Working Group	Advice that Application Accepted
December 2, 2008	EAO Working Group	Working Group Meeting
January 23, 2009	EAO/ Working Group	Comments on Project Application Due
February 6, 2009	Proponent	Response by Proponent Due
February 11, 2009	EAO to First Nations	Issues Tracking Table, First Nations Issues and BCTC Responses

February 16, 2009	EAO to Petitioners	BCTC Interim Updated Report on First Nations Consultation
February 18, 2009	BCCA	CPCN Suspended
February 18, 2009	EAO/ Working Group	Terrestrial Sub-Working Group Meeting
March 2, 2009 EAO First Nations	Electric and Magnetic Fields Sub-Committee Meeting in Chilliwack	
March 11, 2009	EAO First Nations	Fisheries Sub-Committee Meeting in Chilliwack
March 16, 2009	EAO to Petitioners	BCTC First Nations Consultation Report
March 17, 2009	EAO First Nations	Comments on EAO Draft First Nations Consultation Report Due
April 22, 2009	EAO to First Nations	Updated Draft Table of Commitments and Assurances to Working Group
May 12, 2009	EAO to Ministers	Referral Package to Ministers for decision
June 3, 2009	Ministers EAC Issued.	

68 Commencing in 2007 the Petitioner First Nations assert that there were ongoing requests from the Petitioner First Nations to include discussions on the existing and ongoing impacts of 5L81 and 5L82. There is no doubt that from 2007/2008 forward the Petitioner First Nations sought to include in the consultation process a consideration of the existing, ongoing and future impacts of the extant transmission lines 5L81 and 5L82 and supporting infrastructure.

69 The Petitioner First Nations say that the central adjudicative facts commence in 2008 and go to the spring of 2009. During this time period there are the following written exchanges between the Petitioner First Nations, BC Hydro, BCTC, the Ministers, MARR, and the EAO. At that point all of the parties had legal advice and the correspondence if not written by counsel appears to represent well considered and legally advised communication.

Date	*Party*	*Nature*
February 1, 2008	First Nations Law Firm to EAO	letter to EAO addressing concerns about existing and ongoing infringements of First Nations and territory of BC Hydro
March 4, 2008	BC Hydro to petitioners	letter to petitioners regarding route alignment and three options
April 3, 2008	UN/EAO/MRR	letter to EAO seeking engagement on existing and ongoing effects of existing works
June 2, 2008	First Nations Law Firm to BC Hydro	letter requesting suspension of decision-making of preferred route alignment
June 13, 20086 BCTC to EAO	sent Working Group 17 draft discipline specific technical studies for review	
July 17, 2008	BC Hydro to First Nations6 letter regarding consultation and proposed consultation plan for Project	

	Application review process	
July 18, 2008	PFN to MEMOR	concern about EAO's and BC Hydro limited mandate
July 28, 2008	First Nations Law Firm to EAO	concern due to the significance of the unresolved issues of past and on-going infringements with this transmission line, it is premature to assume that either one of us can proceed with technical work while these issues are not being resolved.
July 31, 2008	UNB to BC Hydro & BCTC	concern about BC Hydro limited mandate
July 28, 2008	ONA to EAO	request that EAO monitor broader process
September 10, 2008	First Nations Law Firm on behalf of Chief Manuel	letter on concern about ILM project, and consultation, and infringement
September 11, 2008	First Nations Law Firm on behalf of Chief Pasco	letter concerning scope of duty to consult in regard to ILM Project
October 1, 2008	BCTC	submits EAC application and circulated to Working Group for screening review
October 7, 2008	First Nations Law Firm to Ministers, MARR, BCTC and BC Hydro	letter and Unity Declaration dated August 29, 2008 with respect to scope of consultation
October 23, 2008	First Nations Law Firm to EAO	letter critiquing ILM Project Application and impact on infringements
October 23, 2008	MARR & MEMPR to PFN	three steps to be taken
November 12, 2008	EAO to Working Group	emailed Working Group on Open Houses schedules and Project Application
November 18, 2008	First Nations Law Firm to MEMPR and MARR	letter on impact of existing and proposed transmission lines
December 16, 2008	Open House - Abbotsford	Scope of EA process discussion and minutes taken
February 26, 2009	NNTC to MARR	reiterates view that existing and ongoing infringements must be harmonized, ask suspension of EAO review
January 8, 2009	EAO to Working Group	Reminder on timelines
January 9, 2009	MARR to First Nations	Consultation process on proposed transmission lines
January 21, 2009	NNTC to BC Hydro	re January 9 letter
November 18, 2003	NNTC to MEMPR & MARR	no change in position of BC Hydro and BCTC
January 9, 2009	MARR to PFN	discussions to compliment but not displace
January 12, 2009	BC Hydro and BCTC to all Bands	Meeting held to discuss Environmental Assessment applications and First Nation concerns

January 21, 2009	Chief Manuel to BC Hydro	letter regarding MARR letter of January 9, 2009
January 28, 2009	EAO to First Nations Law Firm	Comments on Project Application and Environmental Assessment timelines
February 2, 2009	BC Hydro to First Nations	Letter to address the MARR and EAO processes
February 26, 2009	First Nations to MARR	letter regarding BC Court of Appeal decision and suspension of EA Process timelines
March 20, 2009	First Nations to BC Hydro	letter seeking suspension of ILM Project approval
March 24, 2009 and April 22, 2009	EAO to First Nations	emails reiterated EAC process timetables and First Nations consultations

70 The parties have quite different interpretations of these exchanges. The Petitioner First Nations say that the Crown *agreed to engage in discussions involving the existing and future impacts of t*he *existing transmission facilities as part of the EAC process.* The respondents deny this. It is necessary, then, to examine the key adjudicative documents.

D. Key Adjudicative Documents

71 As noted above, there were various exchanges between the parties concerning the announcement of the ILM Project, prior to 2008. I will not summarize the import of those earlier documents but they are not inconsistent with the positions the parties take in this litigation.

72 On February 1, 2008, a law firm, Mandell Pinder (the "First Nations Law Firm"), wrote to the EAO on behalf of one of the First Nations Petitioners. The letter emphasized "long standing and unaddressed concerns" about "existing and ongoing infringements" of First Nations rights and territory by BC Hydro. Issue was taken with the draft Terms of Reference as it was "fundamentally inadequate to the degree it fails to require meaningful consultation and accommodation concerning these existing and ongoing infringements".

73 On March 4, 2008 BC Hydro wrote to the petitioners regarding the preferred route alignment and three options to be considered enclosing maps showing the possible route alignments. On June 2, 2008 the First Nations Law Firm wrote requesting a suspension on decision-making on the preferred route alignment.

74 On June 13, 2008 BCTC wrote to the EAO enclosing for review by the Working Group 17 draft discipline-specific technical studies. On July 17, 2008 BC Hydro wrote to the Petitioner First Nations regarding First Nations Consultation Assessment. This included a summary of First Nations consultations and a proposed consultation plan for consulting with First Nations during the Project Application review process.

75 On July 28, 2008 one of the Petitioner First Nations wrote to the EAO advising that "due to the significance of the unresolved issues of past and on-going infringements with this transmission line, it is premature to assume that either one of us can proceed with technical work while these issues are not being resolved".

76 On September 10, 2008 the First Nations Law Firm wrote on behalf of Chief Manuel that "The position of Upper Nicola, along with the Okanagan Nation, is that the scope of the duty to consult and accommodate regarding the proposed ILM project must include consultation and accommodation regarding the existing and ongoing infringements caused by the existing right of way and transmission lines". The letter continues:

> Initially, BC Hydro had offered to work with Upper Nicola and other First Nations to gather information on the existing and ongoing infringements. Subsequently, BC Hydro and BCTC have withdrawn this offer and are of the position that they will not consult and accommodate regarding existing infringements and will not seek a mandate from the Province to do so.

77 On September 11, 2008 the First Nations Law Firm wrote on behalf of Chief Pasco regarding the scope of the duty to consult as follows:

> The position of NNTC, along with along with other First Nations, is that the scope of the duty to consult and accommodate regarding the proposed ILM project must include consultation and accommodation regarding the existing and ongoing infringements caused by the existing right of way and transmission lines. NNTC, along with other First Nations, have had several meetings with BC Hydro and BCTC in the hope of coming to an agreement on a consultation process for the ILM Project that would include the issue of existing and ongoing infringements. Initially, BC Hydro had offered to work with NNTC and other First Nations to gather information on the existing and ongoing infringements. Subsequently, BC Hydro and BCTC have withdrawn this offer and are of the position that they will not consult and accommodate regarding existing Infringements and will not seek a mandate from the Province to do so.
>
> The reference to this issue at page 26 of the draft Section 2.3 is inaccurate and misleading. The issue is not in regards to "historical grievances" or "past impacts". The issue is the existing and ongoing impacts of the existing lines, right of way and facilities. Moreover, it is inaccurate to state, as is currently stated at page 26, that these issues "cannot be addressed by BC Hydro in the context of the ILM Project". BC Hydro could address these issues as part of consultation and accommodation for the ILM Project if it chose to, and in [*sic*] should in order to uphold the honour of the Crown. The reality is that to date BC Hydro will not address these issues in the context of the ILM Project, thus leaving an outstanding obligation on the Crown which must be addressed prior to any decisions being made with respect to the project.
>
> Finally, a study of the existing and ongoing impacts of the existing lines, right of way and facilities should also be done as part of the cumulative effects assessment committed to by BC Hydro. At page 31 of the draft Section 2.3 there is a reference to cumulative effects being addressed in Chapter 10 of the Application. We have not had an opportunity to review the draft Chapter 10 and request an opportunity to review and comment on it before the Application is submitted.
>
> [Emphasis in original.]

78 On October 1, 2008 BCTC submitted the EAC Application and circulated it to the Working Group for screening review.

79 On October 7, 2008 the First Nations Law Firm circulated a letter and "Unity Declaration" dated August 29, 2008 to the Ministers, the MARR, BCTC and BC Hydro. With respect to the scope of consultation the declaration says:

> True reconciliation requires meaningful engagement with respect to existing and ongoing infringement of Aboriginal Title and Rights;
>
> BC Hydro and the British Columbia Transmission Corporation ("BCTC") is now proposing to build a new transmission line ("ILM") through Nlaka'pamux and Okanagan Territories, including building 70% of the ILM on the existing transmission system right-of-way;

> While BC Hydro, BCTC, and the British Columbia Environmental Assessment Office ("EAO") have acknowledged the requirement to consult with the Nlaka'pamux and Okanagan Nations regarding the proposed ILM, each of them has refused to study and address the impacts and infringements caused by the existing transmission system as part of the consultation and accommodation with respect to the ILM.

Attached hereto and marked as Schedule "C" is a copy of the Unity Declaration.

80 On October 23, 2008 the First Nations Law Firm wrote the EAO critiquing the ILM Project Application. The main focus of that critique is that the Project Application did not require that the "impacts of existing and ongoing infringements" be addressed.

81 On October 23, 2008 the MARR and the MEMPR wrote to the Petitioner First Nations suggesting a three step process. With respect to the first step the letter says:

> As a first step, BC Hydro initiated consultations with more than 60 First Nations whose asserted Aboriginal rights and title overlap the proposed route for the ILM Project. Significant capacity funding and other benefits have been made available to First Nations to conduct traditional use information studies to assist all of the parties in identifying and addressing potential impacts of the ILM Project on Aboriginal rights. The objectives of this consultation process also include obtaining key information to support an environmental review of the ILM Project by the Environmental Assessment Office (EAO).
>
> The Province recognizes that neither BC Hydro nor BCTC has the constitutional authority to fully address Aboriginal rights and titles issues. Similarly, the environmental assessment process has limitations in its ability to appropriately deal with the breadth of Aboriginal rights issues. However, we believe that information gained through the EAO process about the potential environmental impacts on Aboriginal rights, such as gathering, hunting and fishing, will provide a foundation to consider the overall impacts on Aboriginal rights and title. Therefore, we urge you to participate fully in the environmental review process.

Attached hereto and marked as Schedule "D" is a copy of this correspondence.

82 On November 12, 2008 the EAO emailed the Working Group setting out times for Open Houses to allow the project proponent to go through the Project Application and take questions from the Working Group. On November 18, 2008 the Petitioner First Nations wrote to the MEMPR and MARR saying:

> In an effort to provide further clarity, we are pleased to elaborate on the type of impacts and concerns we need to address with the Crown as it relates to the existing transmission lines, and provide a suggested process for reaching an honourable reconciliation in a timely manner.
>
> We must begin by gathering baseline information on what you have called the aggregate impacts of the existing and proposed transmission lines. Unfortunately, the current environmental assessment for the ILM project does not include information gathering regarding the adverse effects of the existing transmission lines, facilities or right-of-way — their assessment restricted to an assessment of the proposed new line.
>
> Also, while BC Hydro in its letter to us dated November 5, 2008 stated a willingness to explore site specific grievances associated with the existing transmission lines, to date they have expressly refused to engage in a process that includes the gathering of information on the adverse effects of the existing transmission lines, facilities and right-of-way on our Aboriginal title and rights. We have no information to indicate that there has been a change in this po-

sition taken by BC Hydro and BCTC.

83 On December 16, 2008 there was an Open House in Abbotsford. The scope of EA process was discussed. Minutes of that discussion were made. Part of those minutes record the following:

> Ministry of Aboriginal Relations (Julian Payne) Title and Rights — The EA process has specific boundaries that it will consider. BC Hydro/BCTC and province are all prepared to consider expanded issues outside the EA process.
>
> (Chief Tim Manuel returned)
>
> (JPayne cont'd) BC Hydro and he don't have a mandate to discuss Title and Rights issues on infringements in a general sense. Only through Treaty Tables. Specific issues would be considered as determined within scope of Province (I.e., flooding of village sites).
>
> . . .
>
> Response (JPayne) — Don't have answers for you today. Are and do and will speak to FN outside Of Treaty. Encourage National Congregation of FNs. Therefore not resisting this notion and in fact encourage it.
>
> • Province should be prepared to discuss other impacts but don't at this point. BC Hydro has project to discuss and it's not up to BC Hydro (ILM) Project to address these large issues.
>
> • Need to come to grips with what we can do in the context of this project and deal with other issues in another venue.
>
> • Suggest we decide which issues need to be settled in context of ILM and which issues can wait for another expanded venue.
>
> Mandell Pinder (RDanesh) — False discussion — ILM and broader discussion
>
> • Not aggregate impacts of past 35 years
>
> • Wants infringements of existing TL and new line discussed.
>
> • Mitigation is being used instead of accommodation. Not considering impacts of existing Infringements.

84 On January 8, 2009 EAO wrote the Working Group enclosing and reminding them of the following timelines:

Comments from Working Group on the Application	January 23, 2009
Proponent's responses to Working Group comments	February 6, 2009
Draft Assessment Report circulated to Working Group	February 17, 2009
Draft Consultation Report circulated to First Nations	February 17, 2009

85 On January 9, 2009 the MARR wrote to the Petitioner First Nations as follows:

> Ref. 22920
>
> Jan 09 2009

Chief Bob Pasco

Chair, Nlaka'pamux Nation Tribal Council

PO Box 430

Lytton BC V0K 1Z0

Chief Tim Manuel

Upper Nicola Band

PO Box 3700

Merritt BC V1K 1B8

Dear Chief Pasco and Chief Manuel:

I am writing in response to your letter of November 18, 2008, on behalf of myself and my colleague, the Honourable Richard Neufeld, Minister of Energy, Mines and Petroleum Resources. I am also responding as a follow-up to the meeting held in Abbotsford on December 16, 2008 with senior provincial officials regarding the proposed Interior to Lower Mainland Transmission Project (the Project) and- the process for reviewing its potential impacts on Aboriginal rights.

I note that you have proposed a new consultation process to augment that which has been undertaken by BC Hydro and the comprehensive process underway pursuant to the Environmental Assessment Act. I also note the wide range of issues that you have identified as examples of the type of matters that these separate consultations should address. I understand that at the December meeting with you and senior officials from our ministries, BC Hydro and the BC Transmission Corporation there was a frank discussion of the issues that you have raised and the best way to address them.

I am pleased to confirm that the Province is prepared to enter into expedited discussions with the three tribal groups identified in your proposal and to provide funding of up to $225,000 to facilitate the consultation process. The provision of funds will be subject to development of work plans that will identify how funding will be utilized. The terms of reference for the process will encompass impacts that may have arisen from the construction and operation of the existing transmission line.

These discussions will complement but not displace the current environmental assessment (EA) process being administered by the Environmental Assessment Office (EAO). The EAO will continue to hold responsibility for ensuring appropriate consultation and accommodation respecting the assessment of the Project.

I want to clarify the statement in our previous letter regarding the ability of the EA process to deal with the breadth of Aboriginal rights issues. It is our view that the Crown's legal obligations to consult and, where appropriate, accommodate impacts of major development on Aboriginal rights can be effectively addressed through the EA process, as the Supreme Court of Canada has acknowledged. We are, however, prepared to consider other avenues for discussing Aboriginal interests, including asserted rights and title issues that pertain to matters that are not part of the duty to consult in respect of an EA project. This would include asserted past infringements respecting the existing transmission lines, as we have noted already.

I look forward to beginning the new consultation process as soon as practicable. Officials from BC Hydro and the Province will contact you in the near future to discuss development of funding agreements.

Michael G. de Jong

Minister of Aboriginal Relations and Reconciliation

Government House Leader

pc: Bob Elton

President/CEO

BC Hydro

Jane Peverett

President/CEO

BC Transmission Corporation

Honourable Richard Neufeld

Minister of Energy, Mines and Petroleum Resources

86 On January 12, 2009 a meeting was held by BC Hydro, BCTC to which all Bands were invited. The following is described as the purpose of the meeting:

The purpose of the meeting was to discuss the Environmental Assessment application and to principally address concerns that the First Nations may have had. First Nations issues included 1) concern about study methods 2) the EA process does not address FN rights and title 3) that FN concerns were not explicitly included in all 18 discipline studies 4) inadequacy of the socioeconomic study which does not include the socioeconomic effect of loss of habitat 5) interest in IBA. All issues were addressed by BCTC, BC Hydro and Golder personnel.

87 The following exchange took place between Chief Manuel and Erik Denhoff:

Comment: Chief Manuel; EA process does not address Aboriginal title and rights (T&R). There are bigger issues than just the EA process. He hoped that this meeting would be an opportunity to address title and rights issues. He feels the process is minimizing FN T&R. He said Upper Nicola Band (UNIB) and ONA (Okanagan Nation Alliance) refused to participate in EA process and TUS (Traditional Use Studies). Current, and ongoing Impacts of existing (Infrastructure) on NNTC, UNIB, and ONA are not being addressed. Meaningful consultation is going to come from hearing comments that come from FN. T&R are important issues. He awaits letter from BC Provincial Government. Has not had opportunity to discuss T & R Issues. Can't tell elders to hurry up, but need to go on Elder's time. In today's discussion he'd like to hear what BCTC/BCH has to say about what was brought up on Dec 2/08 (at EAO-WJG meeting). Does not have notes from that meeting, but sure others in the room have.

A: EDenhoff — BC Hydro started consultation in late 2006, but many did not engage until late 2007. FN engaged at different rates and in different ways. Some FN such as UNIB did not want to consult with BCH prior to addressing existing grievances. BCH has no mandate to discuss the past Issues. However, since Dec 16/08 meeting, the Prov

> Gov't has come back to say they are prepared to discuss past issues, but at a different table to ILM. This is outlined in the letter to NNTC, ONA and UNIB sent on Friday Jan 9/09 from the Minister Aboriginal Relations and Reconciliation (MARR). On Issues of R&T directly relating to the ILM Project, BCH is prepared to sit down and talk about mitigations/accommodations. ED hopes the Province's response letter will provide FN with some assurance that both the existing grievances, and the ILM project impacts will be considered. Repeated that BCH is willing to discuss concerns with regard to the ILM Project.

88 On January 21, 2009 Chief Manuel wrote to BC Hydro regarding the MARR letter of January 9, 2009. On January 28, 2009 the EAO wrote to the First Nations' Solicitors as follows:

> As previously communicated to your clients on November 12, 23, and 28, 2008, at the December 2, 2008 Working Group meeting, and on January 8, 2009, comments on the Project Application were due to the Environmental Assessment Office (EAO) by midnight on January 23, 2009. The BC Transmission Corporation (Proponent) will be responding to the comments by February 6, 2009. We have not been given any reason to warrant a departure from this schedule (attached), which all parties have been aware of for some time.
>
> Minister de Jong's letter of January 9, 2009 confirmed that the proposed additional discussions regarding existing transmission lines does not displace the current environmental assessment process being administered by the EAO including ensuring consultation and accommodation respecting the assessment of the Project.

89 On February 2, 2009 BC Hydro wrote to the Petitioner First Nations. One of the items they sought to address was the relationship between the MARR process and the EAO process. Regarding that the letter says:

> As outlined in the letter from Minster de Jong, dated January 9, 2009, the new consultation process with MARR is intended to augment that which has been undertaken by BC Hydro and the comprehensive process under way pursuant to the *Environmental Assessment Act*. The discussions with MARR will complement but will not displace the current environmental assessment process being administered by the EAO. The EAO will continue to hold responsibility for ensuring appropriate consultation and accommodation respecting the assessment of the ILM Project.
>
> BCTC/BC Hydro notes that the discussions between your communities and MARR involve issues and concerns of your communities that have been outstanding for quite some time. We believe it is reasonable to expect that those discussions may themselves take quite some time. However, we do not accept the premise that a resolution of these long outstanding issues is a necessary precondition to your participation in a consultation process regarding the new transmission line proposed in the ILM Project. If, however, there is information that comes to light that is pertinent to the Environment Assessment Process, this information will be considered.
>
> BCTC and BC Hydro wish to continue and renew their ongoing commitment to engage your communities in a good faith consultation process aimed at identifying any specific Aboriginal interests which may be potentially affected by the ILM Project and, further, to identify measures to avoid, mitigate the potential adverse effects and/or to otherwise address or accommodate First Nations' interests. We sincerely hope that your communities can see their way to continuing and deepening their participation and engagement in this process. We continue to believe that addressing potential issues (before they arise) in respect of new projects is by far preferable to attempting to address issues after the fact in respect of existing projects.

Attached hereto and marked as Schedule "E" is a copy of that letter and project schedule.

90 On February 26, 2009 the Petitioner First Nations wrote to the MARR following the decision of the BC Court of

Appeal. A copy of the letter was provided to BC Hydro and BCTC. The letter asks that timelines for the EA Process be "immediately suspended":

> Our view continues to be, that the review of existing and ongoing infringements of the existing transmission system — installed without consent or consultation — must be harmonized with the meaningful engagement of the proposed new line, including the required strategic-level engagement.
>
> We remain committed to participating in a meaningful harmonized process and are reviewing how some of the collaborative work done over the last few weeks with respect to a process for existing and ongoing infringements might be developed to include the required, upstream, strategic engagement of alternatives.
>
> In light of this decision, the most immediate step is to ensure that the timelines of the environmental assessment process for the ILM project be immediately suspended. It is not productive nor reasonable for the Province to push ahead with that process at this time. We ask that your Ministry take immediate steps to work with the Crown's Corporations and other relevant Ministries to implement a suspension. With that timeline suspended we can all work in good faith to further develop and implement a harmonized process.

91 On March 20, 2009 the Petitioner First Nations wrote to BC Hydro seeking a suspension of the ILM Project approval "...to ensure a comprehensive consultation process is taking place in which the issues identified by the Court of Appeal, the existing and ongoing infringements, and the proposed ILM Project may all be meaningfully addressed".

92 In the meantime, email correspondence of March 24, 2009 and April 22, 2009 from the EAO reiterated the EAC process timetables and sought input from the Petitioner First Nations in that process.

IV. Duty to Consult

A. The Duty

93 Section 35 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Constitution Act*], provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

94 Section 35 not only guarantees existing aboriginal and treaty rights but it also imposes on government the duty to engage in various processes even before an aboriginal or treaty right is established. Section 35 gives constitutional protection to a special relationship between the Crown and aboriginal peoples under which the "honour of the Crown" must govern all dealings.

95 The honour of the Crown entails a duty to negotiate aboriginal claims with First Nations. While aboriginal claims are unresolved, the honour of the Crown entails a duty to consult, and if necessary accommodate, the interests of the aboriginal people, before authorizing action that could diminish the value of the land and resources that they claim.

96 The framework of the duty to consult was developed by the Supreme Court of Canada in two decisions in 2004, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511[*Haida Nation SCC*] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, and the *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388[*Mikisew Cree First Nation*] decision in 2005.

97 The duty is a significant addition to the modern law of aboriginal and treaty rights in Canada. It was developed as

a remedial mechanism to promote the reconciliation objectives underlying section 35 of the *Constitution Act*: Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, Ont.: Canada Law Book, 2009) [*Aboriginal Law Since Delgamuukw*] at 313.

98 Proof of title is not required before the Crown will be held to the strict obligation of proactively addressing the aboriginal right being asserted. That is, the Crown has a duty to consult, and where appropriate, accommodate aboriginal interests even if an aboriginal right, including aboriginal title, has not been proven in a court of law or accepted by the Crown.

99 The threshold for triggering the duty to consult is low; if the Crown "*should have"* (rather than "does have") knowledge of "*potential"* (rather than "proven") aboriginal rights or title, and "*contemplates"* (not "carries out") conduct that "*might"* (rather than "will") affect the claimed right or title, the Crown must consult with the potentially affected aboriginal people: *Aboriginal Law Since Delgamuukw* at 210.

100 The depth of the consultation and the extent of accommodation required at law is a function of the strength of the *prima facie* case regarding the aboriginal right and the severity of the potential infringement of the right in question.

101 In cases where the claim is weak or the adverse effect minimal, mere notification may be sufficient to satisfy the Crown's duty to consult. Conversely, where both the claim and the potential adverse effect are strong, deep consultation and accommodation may be appropriate.

102 The duty to consult does not give aboriginal groups a veto over what can be done with land pending final proof of the claim. The aboriginal consent spoken of in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 is appropriate only in cases of established rights and by no means is it required in every case. What is required is a process of balancing interests, of give and take: *Haida Nation SCC*.

B. Scope of the Duty

103 What is at issue here is the scope of the Crown's duty to consult. The Petitioner First Nations say that "[t]he scope of the duty to consult includes the aggregate effects of the full ILM system". The petitioners argue that:

> **The scope of the duty to consult and accommodate in this case includes an inquiry into the combined, or aggregate, impacts of the full ILM system to the Petitioner First Nations' Aboriginal title and rights.** The proposed course of Crown conduct at issue is the Province's expansion of the existing ILM system, built without consultation and causing ongoing impacts to the Petitioner First Nations' rights, through the addition of a third power line. The new line is wholly dependent on the existing system, and will increase and compound the existing adverse impacts to the lands and resources to which the Petitioner First Nations' rights apply through, *inter alia*, the addition of further right-of-way, access roads and transmission towers. On these facts, **the Province's duty to advance reconciliation through consultation and, where appropriate, accommodation, requires that the Province consult in good faith towards accommodation for the full impact of the system before it proceeds with the expansion.**
>
> [Emphasis added.]

104 The petitioners elaborate:

> What is required to maintain the honour of the Crown will depend on the facts of each case, and in this case the facts are clear and compelling. The proposed new 5L83 line is an expansion to the existing ILM system that relies on, and will compound, the footprint and impacts of that system. **A consultation process that is limited to an examination**

> **of the incremental footprint of the new line would artificially separate and isolate the components of a project that is planned and operated by the Crown as an integrated system, and thereby produce an entirely artificial picture of the nature and extent of the impacts to the Petitioner First Nations' Aboriginal title and rights**.
>
> [Emphasis added.]

105 The petitioners argue that the decision of the Court of Appeal in *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462[*Haida Nation BCCA*] at paras. 91 and 123, supports the notion that the duty to consult arises from the first infringement. They say that although the Supreme Court of Canada identified a different source for the duty to consult, the duty was "triggered" by the initial infringement.

106 With respect, I have difficulty in interpreting the decision of the Court of Appeal in the way contended. In paragraph 123 of the decision Chief Justice Finch refers to a duty to consult on Weyerhauser. The Chief Justice says that the duty existed "at least" when it received the replacement TFL 39 in 2000.

107 In *Haida Nation BCCA* what was at issue was the replacement of a long held tree farm licence, TFL 39 in Haida Gwaii. There was no consultation on the replacement. The decision of the Court is reflected in the actual order of the Court referenced at paragraph 104. The order granted a declaration that there was a duty on the Crown to consult *from 2000*.

108 In any event, there is nothing in this decision that suggests that the duty to consult triggered by the contemplated actions in 2000 concerned *past* infringements, such as those which may have occurred when the original tree farm licence was issued decades earlier in 1961.

109 The Petitioner First Nations also argue that the decision of Tysoe J., as he then was, in *Gitxsan v. British Columbia (Minister of Forests)*, 2002 BCSC 1701[*Gitxsan*] supports the notion that once a duty to consult is triggered, the scope and content of the duty includes existing and ongoing impacts of past actions.

110 I do not read *Gitxsan* as standing for that proposition. In my view Justice Tysoe required that the duty to consult arose with respect to the renewal of a tree farm licence at each transaction of the licence. That does not suggest that the scope of the duty to consult includes past infringements as opposed to future impacts of a licence *renewal* or, as in *Gitxsan*, a change in control.

111 It is also argued that the case involving the University of British Columbia Golf Course supports the Petitioner First Nations' position. In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 506the question arose whether there was a duty to consult regarding the sale of the University Golf Course to the University of British Columbia. It is said that the case stands for the proposition that once the duty to consult was triggered "the scope of the duty included the existing and continuing infringement".

112 With respect, I disagree with that interpretation. While the province argued that any infringement of Musqueam's *prima facie* claims occurred long before the contemplated sale, Warren J. was considering the proposed sale of the lands in 2000 to the University of British Columbia. Such a sale would take the matter outside of the potential land claim of Musqueam who claimed title to the said lands.

113 Justice Warren did not suggest that consultation must include past infringements. There is nothing in the decision of the Court of Appeal in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128that, in my view, assists the petitioners on this point.

114 In my opinion the cases cited hold that the duty of the Crown to consult is triggered by *contemplated* government action. In the case of the renewal of long term leases on or the sale of claimed lands, the duty to consult arises *before the actual conduct* lest the subject matter of the duty to consult be irretrievably lost. The logic in that is unassailable.

C. Carrier Sekani

115 The respondents say that the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43[*Carrier Sekani*] is a complete answer to this argument. In *Carrier Sekani* what triggered the issue was an electricity purchase agreement between Rio Tinto Alcan Inc. and BC Hydro, filed with the BCUC.

116 Rio Tinto Alcan operates a dam and an aluminum smelter near Kitimat, B.C. Under the electricity purchase agreement Rio Tinto Alcan would sell electricity it generated from the Kenney Dam on the Nechako River, which was excess to the smelter requirements, to BC Hydro. The Carrier Sekani Tribal Council have aboriginal claims regarding the Nechatko River and the Nechatko Valley. They claimed that the electricity purchase agreement should be subject to consultation.

117 The Nechako River was dammed by Rio Tinto Alcan in the 1950s for the purpose of power production ancillary to the construction of an aluminum smelter. The provincial government of the day granted rights in perpetuity to Rio Tinto Alcan to develop hydro-electric facilities to support a power intensive industry, aluminum smelting.

118 The Petitioner First Nations argue that the disposition in *Carrier Sekani* concerned the narrow question of whether a "Crown action that was related to an existing, unresolved impact to Aboriginal rights but caused no new impact itself, could trigger a duty to consult". Thus the disposition in that case turned on its unique facts and the narrow question before the courts. I disagree.

119 In my opinion *Carrier Sekani* explains *Haida Nation SCC*. It does not support the position that consultation must go beyond *contemplated conduct* and address the ongoing impacts of past decisions. *Carrier Sekani* confirms that consultation is to be directed at the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions.

120 *Carrier Sekani* confirms and expands on the conclusions of the Court in *Haida Nation SCC*. The purpose of the duty to consult is to protect unproven or established rights from the effects of proposed conduct pending claims resolution. The Court in *Carrier Sekani* described the scope of the duty to consult on the issue of past wrongs in the face of the position that a current proposal is part of a larger project:

> 45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> 46 Again, a generous, purposive approach to this element is in order, given that the doctrine' s purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27, 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 (B.C. C.A.), at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

48 **An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway**: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

49 **The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right**. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.

50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

52 The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project

> which continues to impact its rights. **The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.**
>
> [Emphasis added in bold, underlining in original.]

121 In this case the question is whether the ILM Project becomes the hook that secures and reels in the constitutional duty to consult on the past actions of the Crown or the Crown agency in building and constructing the ILM Grid or, alternatively, transmission lines 5L81 and 5L82 and the associated substations. Chief Justice McLachlin, speaking for the Court in *Carrier Sekani*, answered that question in this way:

> 53 I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. **It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the current decision under consideration.**
>
> 54 The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree — an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. **An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate**.
>
> [Emphasis added.]

122 In my view these passages specifically address the issue posed by the arguments of the Petitioner First Nations. In *Carrier Sekani*, the action contemplated — the sale of surplus power by Rio Tinto Alcan to BC Hydro — as stated by these First Nation Petitioners, arguably would cause no impact itself. The project of which it was a part no doubt had profound impacts on the Nechako River, Nechako Valley and surrounding lands, and the aboriginal claims of the *Carrier Sekani* First Nation.

123 The Court, however, deals with the argument in a broader context. It poses the question of whether the scope of the duty to consult extends to consultation "on the entire resource", i.e., to the "larger adverse impacts of the project of which it is a part". In answering the question the Court assumes there *is* an adverse impact. The Court answers the question saying the foundation of the duty "confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue": *Carrier Sekani* at para. 53. It is confined to "the impact on the claimed rights of the *current* decision under consideration": *Carrier Sekani* at para. 53 [emphasis in original].

124 As noted by Groberman J.A., in *Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)*, 2011 BCCA 78at para. 72, *Carrier Sekani* appears to place historic effects on potential claims of Aboriginal rights outside of the scope of the right to consultation. I agree with that observation. I do not see that the decision of Bruce J. in *Adams Lake Indian Band v. British Columbia*, 2011 BCSC 266retreats from that view, as it found a duty to consult on the incorporation decision, not earlier works, as reflected in the order of the Court.

125 There is logic in this limitation. As the court notes in *Carrier Sekani*, there are other avenues available to deal with historic and ongoing issues, such as damages and the treaty table. In British Columbia where there are few treaties, many First Nations, and overlapping concurrent claims, existing linear developments traverse many claims. The identified First Nations potentially impacted by the ILM Project are numerous and referenced in Schedule "B". The decision in *Carrier Sekani* recognizes the importance of those historic and ongoing issues but does not make them a required part of consultation on present proposed developments, such as the ILM Project.

D. Was the Duty Breached?

126 The position advanced by the Petitioner First Nations is that there is a constitutional duty to seek to resolve ongoing and existing wrongs as part of the consultation and accommodation process for the current project which gives rise to a right to quash the EAC. I disagree for the reasons given above concerning the required scope of the consultation.

127 Of course, decisions on the scope of the duty to consult have no bearing on the questions of past or ongoing infringements, or proof of the existence of aboriginal title or aboriginal rights: *Haida Nation SCC* at para. 66, and *Lax Kw'alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 140at para. 26. All of those questions regarding the particularized existing and ongoing impacts referenced earlier (noise, electromagnetic radiation, decreased wildlife, the introduction of invasive species, herbicide use, the disruptive presence of the existing works and other ongoing impacts) remain live issues with their own remedies.

128 Regrettably, the Petitioner First Nations participation in the environmental assessment process may have been limited as they focussed on the process as being flawed because they disagreed on the required scope of the consultation. As the respondents note, there is an obligation on both parties to "carry their end of the consultation, to make their concerns known, to respond to the government's attempts to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution": *Mikisew Cree First Nation* at para. 65.

129 While past actions may include the infringement of rights and actionable wrongs, for which there are other remedies, in my view the consultation process in this case amounted to a process of "deep consultation" (see *Haida Nation SCC* at para. 44) on the ILM Project. Deep consultation in this case included the following:

- All First Nations potentially affected by the proposed transmission line were contacted by phone and email at the outset of the project (in January 2007) and offered membership in the Working Group established in relation to the Environmental Assessment of the proposed transmission line;

- The petitioners were invited to all Working Group meetings and meetings of the technical sub-committees established under the Working Group;

- The petitioners were requested to comment on the various work plans drafted in relation to the project, including the "Archeological and Heritage Overview", "traditional use study" and a "terrestrial/wildlife and vegetation assessment", each of which provided for First Nations involvement in the studies culminating in their respective work plan;

- The petitioners were invited to participate in the drafting of the Order pursuant to s. 11 of the *EA Act* which defined the scope of the project and the Terms of Reference, with several extensions for delivery of comments by the petitioners;

- Comments were solicited from the petitioners in the drafting of the Project Terms of Reference;

• The petitioners were invited to participate in screening the formal application (received October 2008) for compliance with the Terms of Reference;

• Preparation of an Issues Tracking Table which memorialized comments and issues raised by First Nations throughout the consultation process, and the responses to those comments and measures taken to address the concerns raised;

• EAO invited participation in the drafting of the Assessment Report, which includes a section describing the First Nations consultation and an assessment as to whether that process met the Crown's duty;

• The petitioners were asked to comment on the "Table of Commitments and Assurances" drafted in relation to the Assessment Report, which includes a section on mitigative measures to be employed in relation to the transmission line.

130 In my opinion, the duty was not breached as the scope of required consultation was not as broad as that asserted by the Petitioner First Nations.

V. The Honour of the Crown

131 Shifting the focus somewhat, the Petitioner First Nations say that the Crown breached its commitment to consult on aggregate impacts *as part of* the EA Process. Thus the honour of the Crown is engaged.

132 The parties are at issue over whether there was any such commitment. The respondents say that the MARR did commit to consult on existing works but not as part of or as harmonized with the EA Process.

A. Was There a Commitment to Consult as part of the EA Process?

133 It is asserted that the Province's commitment arose from a meeting with Minister Neufeld on September 10, 2008 that led to a letter of October 23, 2008. There was a further letter of January 9, 2009 which confirmed the Province's commitment to enter into consultations with the Petitioner First Nations regarding the aggregate impact of the ILM Project and existing works. The honour of the Crown is thus engaged as it failed to abide these commitments.

134 I have earlier summarized and extracted from what the parties assert are key adjudicative documents on this issue. There are also the parties' recollections of meetings and meeting minutes. Some of the affidavit material is argumentative and includes opinions. I have preferred to rely on the documentary evidence or contemporaneous meeting minutes.

135 In my view, a fair reading of those documents indicates that it was repeatedly expressed that discussion on the existing works were beyond the EA process and that neither the EAO nor BC Hydro had the authority to address allegations of infringement of aboriginal rights arising from the existing works. The pleadings are instructive.

136 Paragraphs 27-37 of the amended Petition reads as follows:

27. On or about August, 2006 the Crown, through BC Hydro, sought to initiate consultations with NNTC concerning the ILM Expansion Project.

28. Consistently throughout the process of engagement with the Crown, NNTC advised the Crown that the scope and content of consultations concerning the ILM Expansion Project must include and address the existing, ongoing and

future impacts of the Existing ILM Project upon which the ILM Expansion Project depends.

29. Consistently throughout the process of engagement with the Crown, NNTC advised the Crown that such consultations as are described above must precede the issuance of any EA Certificate for the ILM Expansion Project.

30. Consistently throughout the process of engagement with the Crown, NNTC advised the Crown that they were prepared to participate in such consultations as are described above in a manner that was coordinated with the timelines for environmental assessments established pursuant to the *Environmental Assessment Act*.

31. At all material times, the EAO on behalf of the Crown refused and/or failed to enter into such consultations as are described above with NNTC.

32. On or about April 22, 2008 and June 17, 2008 BC Hydro advised NNTC that such consultations as are described above were beyond its mandate as a Crown agent, and BC Hydro failed and/or refused to enter into such consultations with NNTC.

33. BC Hydro and/or the EAO advised that NNTC should pursue such consultations as are described above directly with the Ministers.

34. Commencing in the spring of 2008 and continuing to the present, NNTC have sought such consultations as are described above directly with the Ministers.

35. By letter dated October 23, 2008 the Minister of MARR, on behalf of the Crown, acknowledged that BC Hydro and the EAO had both stated their inability to enter into the consultations sought by NNTC.

36. The Minister of MARR committed in that letter to establish a process of information-gathering and consultation with, *inter alia*, NNTC concerning "the existing and ongoing transmission lines", for the purpose of determining and establishing a "wider scope of consultations ... to consider the aggregate impacts of the transmission lines on Aboriginal rights and title".

37. By letter dated January 9, 2009 the Minister of MARR confirmed the Crown's commitment to "enter into expedited discussions ... and to provide funding ... to facilitate the consultation process", to be guided by "terms of reference [that] will encompass impacts that may have arisen from the construction and operation of the existing transmission line."

137 In an undated letter of April 3, 2008 Chief Manual wrote as follows to the Environmental Assessment Office:

Upper Nicola has been, and continues to be, seriously affected by the existing activities and infrastructure of BC Hydro within Okanagan Territory. BC Hydro's current presence and actions in our Nation's Territory derive from past unlawful acts. Lands have been taken up, cultural, social, and economic practices infringed, and essential resources and ways of life have been interfered with, all without any meaningful engagement with Upper Nicola or the Okanagan Nation. BC Hydro and BCTC now seek to exploit these existing wrongs to facilitate the Project. It is Upper Nicola's position that an honourable process of engagement by the Crown about this Project must examine and seek to resolve these existing wrongs as part of consultation and accommodation for the Project.

To date, BC Hydro has rejected this position, insisting that it can rely on past and existing actions and infrastructure for the purposes of designing and implementing the Project, but is not required to consult or accommodate regarding existing infringements. As well, BC Hydro, BCTC and the B.C. Utilities Commission rely on the Province's environ-

> mental assessment process as the primary forum through which lawfully required reconciliation will be achieved.
>
> As the ONA has already made clear, the environmental assessment process does not facilitate the gathering of the necessary information for understanding infringements of Okanagan Title and Rights, and does not represent a model of engagement that respects and recognizes Okanagan responsibility and jurisdiction over the lands and resources entrusted to us by the Creator. The EAO process is a technical process focused on mitigating environmental impacts — it has never meaningly addressed Okanagan Title and Rights. We have been advancing this position before the British Columbia Utilities Commission and elsewhere, and will continue to do so.

138 In the letter dated October 23, 2008, the MARR and the MEMPR wrote to the Petitioner First Nations. I have quoted from that correspondence above. The correspondence emphasizes that neither BC Hydro nor BCTC has the constitutional authority to fully address Aboriginal rights and titles issues. The Petitioner First Nations, however, are urged to participate fully in the environmental review process.

139 The Ministers in that correspondence offer other steps. Those other steps, however, are not committed to be part of the EA Process in that correspondence or in other exchanges between the parties. Following that correspondence there continues to be disagreement over what should form part of the EA Process.

140 By the letter dated January 9, 2009, the MARR responded that the Crown was committed to engaging in "separate consultations" concerning the existing works but such consultations were intended to "compliment but not displace the current environmental assessment process being administered by the Environmental Assessment Office".

141 There followed a series of communications between the MARR and the Petitioner First Nations regarding, *inter alia*, how separate consultations were to take place. That those consultations were not agreed to be "harmonized" with the EA Process is clear from correspondence dated February 26, 2009 from the Petitioner First Nations to BC Hydro, BCTC, and the MARR.

142 The correspondence of February 26th *sought* to secure agreement to harmonize the discussions and to *suspend* the EA Process. No corresponding agreement was reached and the EA Process continued in accordance with established time lines with repeated notifications concerning those timelines.

143 Between March 2009 and December 2009 no discussions on the existing works took place, possibly because of the intervening provincial elections and discussions regarding proposed reconciliation legislation (See letter December 17, 2009, from MARR to petitioners). In a late filed affidavit the Petitioner First Nations sought to introduce more documentation on their frustrations with that separate process.

144 In my opinion, there was no commitment made to harmonize the separate consultations that were to take place on existing works. Nor was it agreed to suspend the EA Process. In my view, the actions of the respondents could not reasonably be interpreted to have made such commitments.

B. Commitments outside Statutory Powers

145 While not acknowledging that there was any commitment of the sort alleged, the respondents assert that judicial review does not lie here in any event. In this aspect of their argument the Petitioner First Nations have not identified any "exercise, refusal to exercise, or proposed or purported exercise, of a statutory power": see section 2 (2)(b) of the *JRPA*.

146 Arguably, the discussions offered by the MARR and/or the MEMPR do not reflect on the performance of a specific statutory power, but rather the exercise of prerogative or natural person powers: see the decision of Garson J., as she

then was, in *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722at paras. 68-72.

147 In the usual course the statutory enactment circumscribes and provides a framework for the analysis. In the absence of the exercise of a statutory power, one is driven back to an analysis on the constitutional duty to consult. As that is confined to prospective actions, a proceeding under the *JRPA* seems singularly inappropriate to proffered consultation of a non-constitutional nature outside of a statutory process. In my view the courts are ill-equipped to peer over the shoulders of the participants in such a process.

C. Doctrine of Legitimate Expectations

148 Although not pleaded, the doctrine of legitimate expectations looks to the conduct of a public authority in the exercise of discretionary powers. I do not think this doctrine assists the Petitioner First Nations here as the conduct or representations must be "clear, unambiguous and unqualified": *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539at para. 131, and the cases cited therein.

VI. Ongoing Consultation

149 Because of the manner in which this case arose, I have some concern that the Petitioner First Nations, by challenging the scope of the duty to consult, failed to consult on the impacts of the ILM Project in a manner in which they might have otherwise done. While this is a concern, a concern of this nature does not give rise to a legal remedy.

150 The concern here is alleviated somewhat by the fact that the EAC contains provisions for ongoing consultation on a wide range of topics arising from the consultations with many of the First Nations, as listed in Schedule "B". The materials before the Court include the Report on First Nations Consultation and a summary of the commitments made by BC Hydro and BCTC.

151 Those commitments are general in nature and apply to all of the first nations affected. For example, Commitment No. 42 states:

> BC Hydro and BCTC will work with First Nations to incorporate their recommendations for site specific mitigation and management strategies into the Environmental Management Program where feasible.

152 Commitment No. 60 states:

> BCTC and BC Hydro AR&N will work closely with affected First Nations during the detailed design phase to select appropriate locations for towers, access roads and staging areas where there is potential to affect documented traditional use areas or cultural sites. Where possible, road and tower placement will be adjusted to avoid traditional use sites and cultural areas.

153 In other words, the ILM Project will involve *ongoing consultation*.

154 During the course of argument counsel advised that the time lines are now substantially more relaxed (the project completion is estimated at 2019 rather than 2014). In my view, those relaxed timelines and the general commitments which form part of the EAC will afford the parties the opportunity to consult on those areas that might have been less well addressed while the parties argued their respective positions on the legal scope of consultation. It does not change the legal analysis here.

VII. Summary

155 In approving the EAC, the Ministers had a duty to ensure there was appropriate consultation with the affected Petitioner First Nations. The required consultation under Section 35 of the *Constitution Act* concerns the adverse impacts flowing from the specific ILM Project proposed by the respondent BC Hydro and BCTC.

156 The constitutional duty to consult does not apply to the larger historic impacts of previous works, or the ongoing existing impacts arising from previous decisions, for which there are other remedies. The subject of the right of consultation is the impact on the claimed rights of the current decision under consideration.

157 There was no broader commitment to consult on the existing or ongoing impacts in a way which harmonized with or displaced or suspended the EAC Process.

158 In the result, the Petitions are dismissed.

Schedule "A"

Letter dated January 26, 2007

[British Columbia Letterhead Logo]

File: 30050-20/ILM-10

Ref: 96840

January 26, 2007

Chief Timothy [petkwumen] and Manuel and Councillors

Upper Nicola Indian Band

P0 Box 2700

Merritt BC V1K 1B8

Dear Chief Manuel and Councillors:

I am writing to advise Chief and Council that British Columbia's environmental assessment (EA) process for the Interior to Lower Mainland Transmission Reinforcement Project (Project) proposed by British Columbia Transmission Corporation (Proponent) has been initiated.

The Proponent is proposing to construct a 500 kilovolt transmission line from the Nicola Substation near Merritt to the Meridian Substation in Coquitlam. Further Information on the Project is available on the Environmental Assessment Office's website at *www.eao.gov.bc.ca*.

The Project is currently in the early steps of the pre-appIication stage of the EA process. If the Project is subject to the *Canadian Environmental Assessment Act,* a cooperative EA will be undertaken In accordance with the Canada/British Columbia Agreement on Environmental Assessment Cooperation (March 2004).

I have delegated responsibility for managing the EA of this Project to Brian Murphy, Project Assessment Director. Brian will be contacting you to discuss the role and Involvement of the Upper Nicola Indian Band in the review. Brian can be

reached by telephone at (250) 387-2402 or by e-mail at *Brian.Murphy@gov.bc.ca*.

Yours truly,

"Joan Hesketh"

Joan Hesketh

Associate Deputy Minister

pc: George Saddleman

Chair, Nicola Tribal Association

Grand Chief Stewart Phillip

Chair, Chiefs Executive Council

Okanagan Nation Alliance

Bruce Barrett

Vice President, Major Projects

British Columbia Transmission Corporation

Jason Quigley

Regional Director

Canadian Environmental Assessment Agency

Brian Murphy

Letter dated January 26, 2007

[British Columbia Letterhead Logo]

File: 30050-20/ILM-10

Ref: 96840

January 26, 2007

Chief Robert Pasco and Councillors

Chair, Nlaka'pamux Nation Tribal Council

PO Box 430

Lytton BC V0K 1Z0

Dear Chief Pasco and Councillors:

I am writing to advise you that British Columbia's environmental assessment (EA) process for the Interior to Lower Mainland Transmission Reinforcement Project (Project) proposed by British Columbia Transmission Corporation (Proponent) has been initiated.

The Proponent is proposing to construct a 500 kilovolt transmission line from the Nicola Substation near Merritt to the Meridian Substation in Coquitlam. Further Information on the Project is available on the Environmental Assessment Office's website at *www.eao.gov.bc.ca*.

The Project is currently in the early steps of the pre-appIication stage of the EA process. If the Project is subject to the *Canadian Environmental Assessment Act*, a cooperative EA will be undertaken In accordance with the Canada/British Columbia Agreement on Environmental Assessment Cooperation (March 2004).

I have delegated responsibility for managing the EA of this Project to Brian Murphy, Project Assessment Director. Brian will be contacting you to discuss the role and involvement of the Nlaka'pamux Nation Tribal Council in the review. Brian can be reached by telephone at (250) 387-2402 or by e-mail at *Brian.Murphy@gov.bc.ca*.

Yours truly,

"Joan Hesketh"

Joan Hesketh

Associate Deputy Minister

pc: Chief Greg Blain

Ashcroft Indian Band

Chief Phillip Campbell

Boothroyd Indian Bank

Chief Dolores O'Donaghey

Boston Bar First Nation

Chief Robert Pasco

Oregon Jack Creek Band

Chief Jennifer Bobb

Spuzzum First Nation

Bruce Barrett

Vice President, Major Projects

British Columbia Transmission Corporation

Jason Quigley

Regional Director

Canadian Environmental Assessment Agency

Brian Murphy

Letter dated January 26, 2007

[British Columbia Letterhead Logo]

File: 30050-20/ILM-10

Ref: 96840

January 26, 2007

Grand Chief Stewart Phillip and Councillors

Chair, Chiefs Executive Council

Okanagan Nation Alliance

3255C Shannon Lake Rd

Westbank BC V4T 1V4

Dear Grand Chief Phillip and Councillors:

I am writing to advise you that British Columbia's environmental assessment (EA) process for the Interior to Lower Mainland Transmission Reinforcement Project (Project) proposed by British Columbia Transmission Corporation (Proponent) has been initiated.

The Proponent is proposing to construct a 500 kilovolt transmission line from the Nicola Substation near Merritt to the Meridian Substation in Coquitlam. Further Information on the Project is available on the Environmental Assessment Office's website at *www.eao.gov.bc.ca*.

The Project is currently in the early steps of the pre-appIication stage of the EA process. If the Project is subject to the *Canadian Environmental Assessment Act*, a cooperative EA will be undertaken In accordance with the Canada/British Columbia Agreement on Environmental Assessment Cooperation (March 2004).

I have delegated responsibility for managing the EA of this Project to Brian Murphy, Project Assessment Director. Brian will be contacting you to discuss the role and Involvement of the Okanagan National Alliance in the review. Brian can be reached by telephone at (250) 387-2402 or by e-mail at *Brian.Murphy@gov.bc.ca*.

Yours truly,

"Joan Hesketh"

Joan Hesketh

Associate Deputy Minister

pc: Chief Joseph Dennis

Lower Similkameen First Nation

Chief Fabian Alexis

Okanagan Indian Band

Chief Clarence Louie

Osoyoos Indian Band

Grand Chief Stewart Phillip

Penticton Indian Band

Chief Timothy [petkwumen] Manuel

Upper Nicola Indian Band

Chief Rick Holmes

Upper Similkameen Indian Band

Chief Robert Louie

Westbank First Nation

Pauline Terbasket

Executive Director

Okanagan Nation Alliance

Bruce Barrett

Vice President, Major Projects

British Columbia Transmission Corporation

Jason Quigley

Regional Director

Canadian Environmental Assessment Agency

Brian Murphy

Schedule "B" — Appendix D - Working Group Members

Provincial Government

Environmental Assessment Office

Ministry of Agriculture and Lands

Ministry of Community

Development

Ministry of Energy, Mines and Petroleum Resources

Ministry of Environment

Ministry of Forests and Range

Ministry of Tourism, Culture and the Arts

Ministry of Transportation and Infrastructure

Federal Government

Canadian Environmental

Assessment Agency

Environment Canada

Fisheries and Oceans Canada

Health Canada, BC Region

Indian and Northern Affairs Canada

Industry Canada

Transport Canada

Local Government/Health Authorities

City of Coquitlam

City of Pitt Meadows

District of Kent

District of Maple Ridge

District of Mission

Fraser Valley Regional District

Metro Vancouver

Thompson Nicola Regional District

Village of Harrison Hot Springs

Fraser Health Authority

Interior Health Authority

First Nations

Aitchelitz First Nation

Ashcroft Indian Band

Boothroyd Indian Band

Boston Bar First Nation

Chawathil First Nations

Cheam First Nation

Chehalis Indian Band

Chemainus First Nation

Coldwater Indian Band

Cook's Ferry Indian Band

Cowichan Tribes

Esh-kn-em Joint Ventures

Halalt First Nation

Hul'qumi'num Treaty Group

Hwlitsum First Nation

Kanaka Bar Indian Band

Katzie First Nation

Kwantlen First Nation

Kwaw-kwaw-apilt First Nation

Kwikwetlem First Nation

Lake Cowichan First Nation

Leq'á:mel First Nation

Lower Nicola Indian Band

Lower Similkameen Indian Band

Lyackson First Nation

Lytton First Nation

Matsqui First Nation

Musqueam Indian Band

Naut'sa mawt Resources Group

Naut'sa mawt Tribal Council

Nicola Tribal Association

Nicomen Indian Band

Nlaka'pamux Nation Tribal Council

Nooaitch Indian Band

Okanagan Indian Band

Okanagan Nation Alliance

Oregon Jack Creek Indian Band

Osoyoos Indian Band

Penelakut Tribe

Penticton Indian Band

Peters Band

Popkum First Nation

Qayqayt First Nation

Scowlitz First Nation

Seabird Island Band

Shackan Indian Band

Shxwha:y Village

Shxw'ow'hamel First Nation

Siska Indian Band

Skawahlook First Nation

Skowkale First Nation

Skuppah Indian Band

Skwah First Nation

Soowahlie Indian Band

Spuzzum First Nation

Squamish First Nation

Squiala First Nation

Sto:lo Nation Society

Sto:lo Tribal Council

Sumas First Nation

Tsawwassen First Nation

Tsleil-Waututh Nation

Tzeachten First Nation

Union Bar Indian Band

Upper Nicola Band

Upper Similkameen Indian Band

Westbank First Nation

Yakweakwioose First Nation

Yale First Nation

Schedule "C" — Unity Declaration

Proposed Interior to Lower Mainland Transmission Line Unity Declaration

WHEREAS:

The Nlaka'pamux and Okanagan Nations have always held and continue to hold Aboriginal Title and Rights to the lands and resources within their respective Territories;

Aboriginal Title includes the right to make decisions concerning how our land and resources are to be used, to exercise our responsibilities to protect our Territories for future generations, and to derive the benefit from that use;

Nlaka'pamux and Okanagan Title and Rights have never been extinguished;

Since Confederation the Province of British Columbia and the Government of Canada have exploited our Aboriginal Title lands without proper consent, without consultation and accommodation or recognition of our laws and jurisdiction;

The Provincial Crown, including the British Columbia Hydro Corporation ("BC Hydro"), infringed our Aboriginal Title and Rights when it first took lands to build a transmission system across our Territories without consent, consultation or accommodation;

True reconciliation requires meaningful engagement with respect to existing and ongoing infringement of Aboriginal Title and Rights;

BC Hydro and the British Columbia Transmission Corporation ("BCTC") is now proposing to build a new transmission line ("ILM") through Nlaka'pamux and Okanagan Territories, including building 70% of the ILM on the existing transmission system right-of-way;

While BC Hydro, BCTC, and the British Columbia Environmental Assessment Office ("EAO") have acknowledged the requirement to consult with the Nlaka'pamux and Okanagan Nations regarding the proposed ILM, each of them has refused to study and address the impacts and infringements caused by the existing transmission system as part of the consultation and accommodation with respect to the ILM.

The Government of Canada has, to date, made no effort to meaningfully engage with the Nlaka'pamux and Okanagan Nations with respect to the existing transmission system or the ILM.

THE UNDERSIGNED AGREE:

1. The signatories to this Declaration will collectively and unitedly advance with the Crown-including Provincial Ministers, BC Hydro, BCTC, EAO, and the British Columbia Utilities Commission ("BCUC") — the common position that:

• Reconciliation with the Crown with respect to the ILM requires addressing impacts and infringements caused by the existing transmission system;

• The scope of consultation with respect to the ILM which the Provincial Crown is pursuing through the EAO, BC Hydro, BCTC, and BCUC is insufficient and unlawful;

• A clear, transparent, and defined process for study and resolution of existing and ongoing infringements, including mandates that will allow for meaningful accommodations, must be identified and implemented prior to

the issuance of any authorizations required for the proposed new transmission works.

2. The signatories to this Declaration will collectively and individually resist efforts by the Crown, including through the EAO, BC Hydro, and BCTC, which could "divide and conquer", or to otherwise act in a dishonourable and divisive manner.

3. The signatories to this Declaration will regularly update each other on substantive communications they are having with the EAO, BC Hydro, BCTC, or any other Provincial or Federal Crown entity regarding the existing transmission system and/or the ILM, and will not sign any agreement with respect to any aspect of the review or approval of the proposed new transmission system without first notifying the other signatories.

4. The Nlaka'pamux and Okanagan Nations will together develop and implement political and legal strategies that support their common goal of ensuring that consultation and accommodation regarding the ILM will include consultation and accommodation with respect to the impacts and infringements of the existing transmission system.

DATED this 29 day of August, 2008.

NLAKA'PAMUX NATION	OKANAGAN NATION
"Bob Pasco"	"Stewart Phillip"
Chief Bob Pasco	Grand Chief Stewart Phillip
Chair, NNTC	Chair, ONA
"Jim Billy"	
Jim Billy	
Chair, NTA	
	"Joseph Dennis"
Chief Greg Blain	Chief Joseph Dennis
Ashcroft Indian Band	Lower Similkameen Indian Band
"Phillip Campbell"	"Fabian Alexis"
Chief Phillip Campbell	Chief Fabian Alexis
Boothroyd Indian Band	Okanagan Indian Band
"Dolores O'Donaghey"	"Clarence Louie"
Chief Dolores O'Donaghey	Chief Clarence Louie
Boston Bar First Nation	Osoyoos Indian Band
"James Frank"	"Stewart Phillip"
James Frank	Chief Stewart Phillip
Kanaka Bar First Nation	Penticton Indian Band
"Byron Spinks"	"Tim Manuel"
Chief Byron Spinks	Chief Tim Manuel
Lytton First Nation	Upper Nicola Band
"Bob Pasco"	"Richard Holmes"
Chief Bob Pasco	Chief Richard Holmes

Oregon Jack Creek Band
"Douglas McIntyre"
Chief Douglas McIntyre
Skuppah First Nation
"Jennifer Bobb"
Chief Jennifer Bobb
Spuzzum First Nation
Chief Donald Moses
Lower Nicola Indian Band
"Harold Aljam"
Chief Harold Aljam
Coldwater Indian Band
"David Walkem"
Chief David Walkem
Cook's Ferry Indian Band
"Prescott Shackelly"
Chief Prescott Shackelly
Nooaitch Indian Band
"Arlene Quinn:
Chief Arlene Quinn
Nicomen Indian Band
"Percy [*sic*]"
Chief Percy [*sic*]
Shackan Indian Band
"Fred Sampson"
Chief Fred Sampson
Siska Indian Band

Upper Similkameen Indian Band
"Robert Louie"
Chief Robert Louie
Westbank First Nation
["Signature"]

Schedule "D"

Letter dated October 23, 2008

[British Columbia Letterhead Logo]

Ref: 22568 X Ref 22558

October 23 2008

Chief Bob Pasco

Chair, Nlaka'pamux Nation Tribal Council

P0 Box 430

Lytton BC V0K 1Z0

Chief Tim Manuel

Upper Nicola Band

P0 Box 3700

Merritt BC V1K 1B8

Grand Chief Stewart Phillip

Okanagan Nation Alliance

3255 C Shannon Lake Road

Westbank BC V4T 1V4

Dear Chief Pasco, Chief Manuel and Grand Chief Phillip:

We are in receipt of your October 7, 2008, correspondence, with attached Unity Declaration, outlining your concerns about the Interior to Lower Mainland (ILM) Transmission Project, and we also note your request to establish a government-to-government table to address past, current and ongoing activities of BC Hydro and British Columbia Transmission Corporation (BCTC) within your traditional territory.

It is clear that meaningful engagement with First Nations is necessary to identify the impacts of adding a third transmission line to the existing transmission system. The Province suggests that this engagement take place with your First Nations through several steps.

As a first step, BC Hydro initiated consultations with more than 60 First Nations whose asserted Aboriginal rights and title overlap the proposed route for the ILM Project. Significant capacity funding and other benefits have been made available to First Nations to conduct traditional use information studies to assist all of the parties in identifying and addressing potential impacts of the ILM Project on Aboriginal rights. The objectives of this consultation process also include obtaining key information to support an environmental review of the ILM Project by the Environmental Assessment Office (EAO).

The Province recognizes that neither BC Hydro nor BCTC has the constitutional authority to fully address Aboriginal rights and title issues. Similarly, the environmental assessment process has limitations in its ability to appropriately deal with the breadth of Aboriginal rights issues. However, we believe that information gained through the EAO process about the potential environmental impacts on Aboriginal rights, such as gathering, hunting and fishing, will provide a foundation to consider the overall impacts on Aboriginal rights and title. Therefore, we urge you to participate fully in the environmental review process.

Secondly, we understand that at meetings in June 2008, BC Hydro and BCTC indicated that they were open to exploring site specific grievance issues associated with the existing transmission line. To date, you have not offered any information about the particulars of your potential claims in this regard. We invite you to provide BC Hydro, BCTC and the Province with information about such issues so that we may begin to discuss how they might be addressed.

Finally, if the information gained through the EAO process and exploration of any site specific issues supports a wider scope of consultations, such a process could then be established to consider the potential aggregate impacts of the transmission lines on your Aboriginal rights and title. We also note that if your evidence includes alleged infringements on Indian reserve lands, the federal government will need to be included to address potential specific claims.

Reconciliation of Crown sovereignty and Aboriginal tights and title requires all parties to engage without preconditions. While we believe that full reconciliation is best achieved through lasting reconciliation agreements negotiated through government-to-government processes, we do think that any adverse impacts on your Aboriginal tights and title may be mitigated, and where appropriate accommodated, through the existing consultation processes.

Yours truly,

"Michael de Jong"
Michael de Jong
Minister of Aboriginal Relations and Reconciliation
Government House Leader

"Richard P. Neufeld"
Richard P. Neufeld
Minister of Energy, Mines and Petroleum Resources

pc: Bob Elton

President/CEO

BC Hydro

Jane Peverett

President/CEO

British Columbia Transmission Corporation

Schedule "E"

Letter dated February 2, 2009

[BC Hydro Letterhead Logo]
Lyle Viereck
Director
Aboriginal Relations & Negotiations
BC Hydro
6911 Southpoint Drive
Burnaby, BC V3N 4x8

[BC Transmission Corporation Logo]
Bruce A. Barrett
Vice President
Major Projects
BC Transmission Corporation
Suite 1100, Four Bentall Centre
1055 Dunsmuir St.
Vancouver, BC V7X 1V5

February 2, 2009
Nlaka'pamux Nation Tribal Council
P0 Box 430
Lytton, BC V0K 1Z0

Upper Nicola Indian Band
P0 Box 3700
Merritt, BC V1K 1B8

Attention: Chief Bob Pasco
c/o Mandell Pinder
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4

Attention: Chief Tim Manuel

Attention: Bruce Stadfeld

Dear Chief Pasco and Chief Manuel:

Re: Interior to Lower Mainland (ILM) Project

Further to Chief Pasco's letter of January 21, 2009 to Lyle Viereck, we would like to thank you for meeting with BC Hydro and BCTC on January 26, 2008 in respect of the ILM Project. This meeting followed your earlier meeting that day with Glenn Ricketts and John Pyper of the Ministry of Aboriginal Relations and Reconciliation (MARR).

At our meeting you asked us to provide a letter outlining further details in respect of:

- the timelines for the Environmental Assessment Office (EAO) process;
- capacity funding available for First Nation participation in the EAO process;
- an outline of opportunities for participation in the EAO process; and
- the relationship between the environmental assessment office (EAO) process and the MARR process.

We address each of these points in turn below.

Timelines:

As you are aware, BC Hydro made initial contact and held introductory meetings with First Nations starting in August 2006. Offers of initial capacity funding were made starting in November 2006 — at which time the regulatory and environmental processes were reviewed with First Nations. Heritage Overview work began in February 2007 and the ILM Project was selected from among alternatives in May 2007. Offers of comprehensive capacity funding were made starting in July 2007 and offers to undertake Traditional Use Studies were made starting in August 2007. Archaeological Impact Assessment field work took place between March and August 2008. Route alignment meetings were offered and took place starting in March 2008. The draft discipline-specific technical studies that were prepared for the environmental assessment were provided to First Nations in June 2008 and comments and feedback were received and incorporated from June to September 2008.

The ILM Application was submitted to the EAO on October 1, 2008. In accordance with the procedures and time limits specified in the Section 11 Order, the EAO and other interested members of the Project's Working Group screened the application. On October 31, 2008, after considering comments from reviewers, the EAO accepted the application for a formal detailed review.

On November 13, 2008, BCTC submitted the Environmental Assessment Certificate Application for the ILM Project for regulatory and public review. BCTC submitted the Application for the 180-day regulatory review. Copies of the application were produced and distributed on November 13 and 14, 2008. The project documents were posted on the EAO web-

site and the 180 day review period commenced on November 14, 2008. Open houses and presentations were held on the following dates and locations: Merritt (November 24, 2008), Hope (November 25, 2008), Harrison Hot Springs (November 26, 2008), Coquitlam (December 1, 2008), Mission (December 1, 2008).

As you are also aware, on December 2, 2008 the EAO hosted a full working group meeting to review the application. A 60 day public review and comment period ran from November 24, 2008 to January 23, 2009.

The EAO directed that BCTC must provide a written report on the results of the First Nations consultation activities during the review of the Application. This interim report is due 21 days from the close of the public comment period (February 13, 2009). A final report is required to be submitted 42 days after the close of the comment period (March 6, 2009). After review the reports, EAO may specify additional measures for BCTC to complete during the Application review stage.

The remaining steps in the application review stage are outlined in the attached document entitled Projected Schedule of Major Steps during Application Review Stage for the ILM Project.

In particular, we note the following upcoming dates:

• Proponent submits First Nations Consultation Report to EAO	February 13, 2009
• EAO's draft Consultation Report circulated to First Nations for one month review	February 17, 2009
• First Nations section of EAO's draft Assessment Report circulated to First Nations only for two week review	February 17, 2009
• Comments due from First Nations on First Nations section of the draft Assessment Report	March 3, 2009
• Proponent submits final First Nations Consultation Report to EAO	March 6, 2009
Comments due from First Nations on EAO's draft Consultation Report	March 17, 2009

The above dates are excerpted from the enclosed schedule. We refer you to the entire enclosed schedule for further details.

Following the submission of the Final Assessment Report, Consultation Report and referral package to the ministers, the ministers have 45 days to render a decision on the Application.

Capacity Funding:

As you are aware, following initial contact regarding the project starting in the summer of 2006, BC Hydro has offered initial capacity funding (starting in late 2006 and early 2007) to numerous First Nations and Tribal Councils, including, Nlaka'pamux Nation Tribal Council, Upper Nicola Indian Band, and Okanagan Nation Alliance. Subsequently, comprehensive capacity funding was offered (commencing in July 2007). In addition, commencing in August 2007, BC Hydro has been offering to provide support for Traditional Use Studies for potentially affected communities. In most cases this work was undertaken through a Comprehensive Capacity Funding Agreement; however in certain circumstances the Traditional Use Studies work was contracted by BC Hydro through a separate contract arrangement. A number of the First Nations and Tribal Councils have accepted and are implementing some combination of initial capacity funding, comprehensive capacity funding and/or traditional study funding.

BC Hydro remains committed to pursuing comprehensive capacity funding discussions with First Nations as interests are identified and as consultation progresses. We continue to be prepared to provide capacity funding including funding to undertake studies related to the new line.

We would like to meet with each First Nation and/or Tribal Council, as appropriate, to discuss what funding, if any, has been provided to date to such First Nations and/or Tribal Councils, what work remains to be done and what the budgetary requirements might be. We would be pleased to have Eric Denhoff and James Ross meet with interested First Nations as early as possible (we would propose to schedule meetings early during the week of February 2, 2009) to attempt to work out agreements. We would hope to have agreements in place by mid-February with any First Nations that has not yet concluded a capacity funding agreement.

Participation in the EA Process:

BC Hydro/BCTC are committed to supporting all reasonable requests to facilitate participation in the Application review process. As you can see from the attached discussion of Timelines and the enclosed Schedule, there are numerous opportunities for First Nations to continue direct engagement with the proponent and/or the EAO. In particular, First Nations are encouraged to provide comments on the Application as well as the various reports being prepared during the application review stage. (Refer to the enclosed schedule, especially those items that include "First Nations" under the column entitle "Responsibility".)

In addition and commencing in February 2009 we will be offering to meet with all ILM Project First Nations to provide information on the process for designing and building the Project, the opportunities for First Nation businesses to participate and the ways in which First Nations may identify their capabilities and services. Capacity Funding is available when needed to ensure full participation in the contracting and procurement process for the Project. We look forward the earliest possible opportunity to meet in First Nations communities.

Beyond application review, BCTC/BC Hydro wish to encourage ongoing participation of the First Nations in the implementation phase for the ILM Project (if an environmental assessment certificate (EAC) is issued). BC Hydro and BCTC are committed to continuing to do work related to considering their interests and looking at benefit arrangements beyond the completion of the EAC process, should that prove to be necessary.

Relationship between ILM and MARR Processes:

As outlined in the letter from Minster de Jong, dated January 9, 2009, the new consultation process with MARR is intended to augment that which has been undertaken by BC Hydro and the comprehensive process under way pursuant to the *Environmental Assessment Act*. The discussions with MARR will complement but will not displace the current environmental assessment process being administered by the EAO. The EAO will continue to hold responsibility for ensuring appropriate consultation and accommodation respecting the assessment of the ILM Project.

BCTC/BC Hydro notes that the discussions between your communities and MARR involve issues and concerns of your communities that have been outstanding for quite some time. We believe it is reasonable to expect that those discussions may themselves take quite some time. However, we do not accept the premise that a resolution of these long outstanding issues is a necessary precondition to your participation in a consultation process regarding the new transmission line proposed in the ILM Project. If, however, there is information that comes to light that is pertinent to the Environment Assessment Process, this information will be considered.

BCTC and BC Hydro wish to continue and renew their ongoing commitment to engage your communities in a good faith

consultation process aimed at identifying any specific Aboriginal interests which may be potentially affected by the ILM Project and, further, to identify measures to avoid, mitigate the potential adverse effects and/or to otherwise address or accommodate First Nations' interests. We sincerely hope that your communities can see their way to continuing and deepening their participation and engagement in this process. We continue to believe that addressing potential issues (before they arise) in respect of new projects is by far preferable to attempting to address Issues after the fact in respect of existing projects.

We look forward to hearing from you.

Sincerely,

"Lyle Viereck"	"Bruce A. Barrett"
Lyle Viereck	*Bruce A. Barrett*
Director	Vice President, Major Projects
Aboriginal Relations & Negotiations	BCTC
BC Hydro	

cc: Julian Paine, ADM, MARR

Jody Shimkus, ADM, MEMPR

Glenn Ricketts, Chief Negotiator, MARR

Environmental Assessment Office—Projected Schedule of Major Steps During Application Review Stage for the Interior to Lower Mainland Transmission Project—(Dates subject to change)

Activity	*Target (Actual) Date*	*Responsibility*
Application for LA Certificate submitted	(October 1, 2008)	Proponent
Application for EA Certificate evaluated and accepted	(October 31, 2008)	EAO
Copies of Application produced and distributed	(November 13-14, 2008)	Proponent
Commencement of maximum 180 day review period — project documents posted on EAO website	(November 14, 2008)	EAO
60-day public review and comment period	November 24, 2008 to January 23, 2009	EAO—Proponent
Full working group meeting to review Application	December 2, 2008	First Nations, federal, provincial, and local governments
Public Open Houses and Presentations	November 24,25,26 & Dec. 1,2, 2008	EAO—Proponent
Comments due on the Application from public and Working Group members (First Nations,	January 23, 2009	Public, First Nations, federal, provincial, and local governments

federal government, provincial government and local government)		
Responses from the Proponent to public, First Nations, and agency comments provided to EAO and posted to EAO website	February 6, 2009	Proponent
Proponent submits First Nations Consultation Report to EAO	February 13, 2009	Proponent
Proponent submits Public Consultation Report to EAO	February 13, 2009	Proponent
Full/partial working group meeting (if required)	To be determined at Dec. 2 meeting	EAO
EAO's draft Consultation Report circulated to First Nations for one month review	February 17, 2009	EAO
First draft of EAO's Assessment Report circulated to Working Group (without First Nations section) for two week review	February 17, 2009	EAO
First Nations section of EAO's draft Assessment Report circulated to First Nations only for two week review February	17, 2009	EAO
Comments due from the Working Group on first draft of EAO's Assessment Report	March 3, 2009	First Nations, federal, provincial, and local governments
Comments due from First Nations on First Nations section of draft Assessment Report	March 3, 2009	First Nations
Proponent submits final First Nations Consultation Report to EAO	March 6, 2009	Proponent
Comments due from First Nations on EAO's draft Consultation Report	March 17, 2009	First Nations
Second draft of Assessment Report (includes First Nation section) circulated to Working Group for two week review March	17, 2009	EAO
Comments due from the Working Group on second draft of EAO's Assessment Report	March 31, 2009	First Nations, federal, provincial, and local governments
Day 150 - Closure on changes to Assessment Report and Proponent's Commitment Table — all comments must by received by EAO by this date	April 13, 2009	First Nations, federal, provincial and local governments
Day 150 to 180 — EAO prepares final Assessment Report, Consultation Report and referral package and submits to ministers for decision	April 13, 2009 to May 13, 2009	EAO

END OF DOCUMENT