**COURT OF APPEAL FOR BRITISH COLUMBIA**

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

Date: 20090218
Docket: CA035864; CA035928

Docket: CA035864

In the Matter of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Project

Between:

**The Kwikwetlem First Nation**

Appellant
(Applicant/Intervenor)

And

**British Columbia Transmission Corporation,
British Columbia Hydro and Power Authority, and
British Columbia Utilities Commission**

Respondents

- and -

Docket: CA035928

In the Matter of the *Utilities Commission Act,* R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior To Lower Mainland Project

Between:

**Nlaka'pamux Nation Tribal Council,
Okanagan Nation Alliance and Upper Nicola Indian Band**

Appellants
(Applicants/Intervenors)

And

**British Columbia Utilities Commission,
British Columbia Transmission Corporation, and
British Columbia Hydro and Power Authority**

Respondents

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

| | |
|---|---|
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| A. W. Carpenter | Counsel for the Respondent,<br>British Columbia Transmission Corporation |
| Place and Date of Hearing: | Vancouver, British Columbia<br>November 26 and 27, 2008 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>February 18, 2009 |

**Written Reasons by**:
The Honourable Madam Justice Huddart

**Concurred in by:**
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Bauman

**Reasons for Judgment of the Honourable Madam Justice Huddart:**

[1] This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

[2] The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

[3] The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title, requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

[4] The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour,

the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

[5] The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

[6] The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C Letter Decision No. L-6-08, 5 March 2008 (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

[7] The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("*VITR*") and *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07 ("*Revelstoke*"). It is the reasoning in *VITR*, amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

[8] As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

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

[10] BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002,

c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

**The Issues**

[11] It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

[12] In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208. It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

> Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[13] The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

[14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. 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.

[15] I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct 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. (See *Utilities Commission Act*, ss. 99 and 101(5).)

**The Relevant Statutory Regimes**

**The CPCN Process**

*Utilities Commission Act*

> 45. (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
>
> …
>
> (3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
>
> …
>
> (6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.
>
> (7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.
>
> (8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.
>
> (9) In giving its approval, the commission
>
> (a) must grant a certificate of public convenience and necessity, and
>
> (b) may impose conditions about
>
> (i) the duration and termination of the privilege, concession or franchise, or
>
> (ii) construction, equipment, maintenance, rates or service,
>
> as the public convenience and interest reasonably require.
>
> 46. (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.
>
> …
>
> (3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.
>
> (3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and

(c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

…

99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

…

101. (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

…

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

[16] The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

> The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.
>
> CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

2. Project Description:

…

(iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;

…

3. Project Justification

…

(ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;

(iii) a statement identifying any significant risks to successful completion of the project;

…

4. Public Consultation

(i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.

…

6. Other Applications and Approvals

(i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and

(ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

**The EAC Process**

*Environmental Assessment Act*

8. (1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project,

…

unless

(c) the person first obtains an environmental assessment certificate for the project, or

…

9. (1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project,

…

unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

…

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10. (1) The executive director by order

…

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

…

11. (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

…

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

…

16. (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed

manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

…

17. (1) On completion of an assessment of a reviewable project … the executive director … must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director ...,

(b) the recommendations, if any, of the executive director, …, and

(c) reasons for the recommendations, if any, of the executive director, ….

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

…

30. (1) At any time during the assessment of a reviewable project under this Act , and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate …, the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

(a) is being or will be conducted by any of the following or any combination of the following:

(i) the government of British Columbia, including any agency, board or commission of British Columbia;

(ii) the government of Canada;

(iii) a municipality or regional district in British Columbia;

(iv) a jurisdiction bordering on British Columbia;

(v) another organization, and

(b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.

(2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

[17] The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18, "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

[18] The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

[19] The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

[20] The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

**Relevant Background**

[21] This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

[22] BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in

Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

[23] Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

[24] In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

[25] In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

> 4.1 The scope of assessment for the Project will include consideration of the potential for:
>
> > 4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,
> >
> > 4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

[26] In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

[27] The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

[28] The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these

submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

[29] On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

> In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

[30] In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

[31] On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

[32] At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

[33] Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

[34] On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

**The Scoping Decision**

[35] The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had

in *VITR* and *Revelstoke*.

[36] The Commission Secretary explained (at p. 2-3):

> In both the VITR Decision and the Revelstoke Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the VITR Decision:
>
> > The government has legislated regulatory approvals that must be obtained before VITR proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for VITR. Given the Section 11 Procedural Order and the Terms of Reference for VITR, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of VITR, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).
>
> In the *Revelstoke* Unit 5 Decision, the Commission Panel said:
>
> > The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).
>
> In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order … and the draft Terms of Reference … the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.
>
> Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

[37] In support of its position, the Commission relied on the following passage from *Haida Nation v. British Colu mbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 51 (also quoted at p. 47 of the *VITR* decision):

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

[38] To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

> The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. … [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

[39] The Commission summarized its analysis (at p. 5):

> … The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

[40] The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

[41] After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *In the Matter of British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, B.C.U.C. Decision, 5 August 2008, Commission Order No. C-4-08 (the "CPCN decision"). At page 96 of those reasons, it concluded:

> The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

[42] The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

> … although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

[43] From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

[44] On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

**Discussion**

[45] The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

[46] The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *VITR, In the Matter of BC Gas Utility Ltd. Southern Crossing Pipeline Project Application for a Certificate of Public Convenience and Necessity*, B.C.U.C. Decision, 21 May 1999, Commission Order No. G-51-99). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

[47] At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking, BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible

for concurrent review with an EAC.

[48] BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

[49] On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

[50] The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

[51] Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

[52] BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

[53] The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

[54] It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[56] Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

[57] The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act.*

[58] Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

[59] By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

[60] In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

[61] This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

[62] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

[63] The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

[64] If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

[65] Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

**Summary**

[66] BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

[67] When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices – accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

[68] Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process

of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida,* at paras. 46-47.

[69] The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

[70] If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

[71] For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

"The Honourable Madam Justice Huddart"

**I agree:**

"The Honourable Mr. Justice Donald"

**I agree:**

"The Honourable Mr. Justice Bauman"