ERICA M. HAMILTON
COMMISSION SECRETARY
Commission.Secretary@bcuc.com
web site: http://www.bcuc.com

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. CANADA V6Z 2N3
TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

Log No. 27984

VIA E-MAIL

September 17, 2009

SECTION 5
TRANSMISSION INQUIRY **EXHIBIT A-21**

TO: Long-Term Transmission Inquiry Participants

Re: British Columbia Utilities Commission
Project No. 3698545/Order G-30-09
Inquiry into British Columbia's Long-Term Transmission Infrastructure

Duty to Consult with First Nations

Further to the Third Procedural Conference held on August 18 and 19, 2009, enclosed please find Commission Order G-108-09 with Reasons for Decision.

Yours truly,

Original signed by:

Erica M. Hamilton

cms
Attachment

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: http://www.bcuc.com

BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-108-09

BC TOLL FREE: 1-800-663-1385
TELEPHONE: (604) 660-4700
FACSIMILE: (604) 660-1102

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

and

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

BEFORE: L.A. O'Hara, Commissioner and Panel Chair — September 16, 2009
A.W.K. Anderson, Commissioner
D.A. Cote, Commissioner
M.R. Harle, Commissioner
R.K. Ravelli, Commissioner

O R D E R

WHEREAS:

A. Section 5(4) of the Utilities Commission Act ("UCA" or "Act") provides that the British Columbia Utilities Commission ("Commission") must conduct an inquiry ("Inquiry") to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the Inquiry begins, or a different period if so specified by terms of reference issued by the Minister responsible for administration of the Hydro and Power Authority Act ("Minister"); and

B. On December 11, 2008, the Minister issued Terms of Reference for the Inquiry which identify that the general purpose of the Inquiry is for the Commission to make determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for a 30-year period commencing from the date the Inquiry begins; and

C. The Terms of Reference for the Inquiry require the Inquiry Panel to publish its draft report and circulate the report for comments no later than June 30, 2010; and

D. By Order G-30-09, the Commission established a Preliminary Workshop on April 17, 2009 for Participants to discuss issues related to the Terms of Reference and the process to be used for the Inquiry, and a Procedural Conference on April 27, 2009 to discuss and hear submissions on Inquiry procedures and timing; and

E. After the April 27, 2009 Procedural Conference, the Commission issued Order G-47-09 and a Preliminary Inquiry Schedule, which indicated that Commission staff would draft and distribute a discussion draft paper on scoping of the issues, on which other Inquiry Participants were invited to provide written comments. A Workshop for discussion of the issues was scheduled for June 18, 2009 and a second Procedural Conference, on Inquiry issues and scoping, was scheduled for June 24, 2009; and

F. On June 17, 2009 British Columbia Hydro and Power Authority ("BC Hydro") submitted to the Inquiry Panel, a March 25, 2009 letter to BC Hydro and the British Columbia Transmission Corporation ("BCTC") from the Deputy Minister of Energy, Mines and Petroleum Resources, in which he asks that BC Hydro undertake consultation with First Nations on the evidence and submissions presented to the Commission by BCTC and BC Hydro. The letter also states that the Minister will consider whether First Nations' interests and concerns related to the transmission inquiry and the potential impacts of the Commission's determination will require further consultation before making a decision to order a regulation under s.5(7) of the UCA; and

G. At the Procedural Conference to address the scoping issues held on June 24, 2009, several Participants addressed the issue of whether there exists, and if so to what extent, an obligation on the part of the Inquiry Panel to consult with First Nations. Those Participants who addressed it generally supported the proposal for a subsequent Procedural Conference on these matters; and

H. The Commission, after reviewing the written comments and the oral comments at the June 24, 2009 Procedural Conference, concluded that a process including both written submissions and another procedural conference would be helpful to address the following questions:

- What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?
- If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?

I. By letter dated June 30, 2009 (Exhibit A-16) the Commission established a process to discuss the above questions, including written submissions which were due by July 24, 2009; reply submissions by July 31, 2009; and another Procedural Conference to be held on August 18 and 19, 2009; and

J. On August 14, 2009 the Commission issued a letter (Exhibit A-19) enclosing a list of Panel questions for parties to address during the August 18 and 19 Procedural Conference; and

K. The Inquiry Panel has considered the written submissions and reply submissions as well as the oral submissions made during the Procedural Conference that took place on August 18 and 19, 2009, and have reached the following determinations, for the reasons set out in the attached Reasons for Decision.

NOW THEREFORE the Commission determines as follows:

1. The Commission is functioning in a quasi-judicial capacity within the context of the long-term electricity transmission inquiry and does not have an independent duty to consult with and, if necessary, accommodate First Nations.

2. Even if the Commission is not fulfilling a quasi-judicial role within the context of the Inquiry, it does not owe an independent duty to consult.

3. The Inquiry Panel will provide First Nations with a meaningful opportunity to engage in the Inquiry to bring their concerns and their perspectives to bear on the analysis and conclusions, and intends to encourage such participation through a variety of means as discussed in Section 3.0 of the attached Reasons for Decision.

DATED at the City of Vancouver, in the Province of British Columbia, this 16th day of September 2009.

BY ORDER

Original signed by:

L.A. O'Hara
Commissioner and Panel Chair

Attachment

LONG-TERM ELECTRICITY TRANSMISSION INQUIRY
DUTY TO CONSULT WITH FIRST NATIONS
REASONS FOR DECISION

1.0 INTRODUCTION AND SUMMARY

The principal issue to be addressed in these reasons is whether there exists an independent duty on the part of the Inquiry Panel to consult with and, if necessary, accommodate First Nations with respect to the British Columbia Utilities Commission's ("BCUC", "Commission") Inquiry into British Columbia's long-term electricity transmission infrastructure needs. A secondary issue to be addressed is, if such an independent duty does not exist, how can First Nations be offered a meaningful opportunity to engage in the Inquiry in any event? The remainder of this section provides the contextual background relative to the issues. Section 2.0 discusses whether or not an independent duty to consult exists, and Section 3.0 discusses specific suggestions for facilitating the engagement of First Nations.

Section 5(4) of the Utilities Commission Act ("UCA" or "Act") provides that the Commission must conduct an inquiry to make determinations with respect to British Columbia's long-term infrastructure for electricity transmission ("Inquiry"). The Minister of Energy, Mines and Petroleum Resources ("Minister") issued Terms of Reference ("TOR") for the Inquiry on December 11, 2008.

The general purpose of the Inquiry is for the Commission to make determinations with respect to B.C.'s electricity transmission infrastructure and capacity needs for a 30-year period. In doing so, the Commission must assess the electricity generation resources in B.C. that will potentially be developed during that 30-year term, grouped by geographical location, and the most cost-effective and most probable sequence(s) of development by geographic area. However, the Commission is not to make determinations on the merits of specific generation projects or with respect to the specific routing or technology of transmission projects. Further, once determinations have been made in this Inquiry, applications for certificates of public convenience and necessity ("CPCN") or other regulatory applications will need to be filed separately for approval by the Commission.

The TOR direct the Commission to invite and consider submissions, evidence and presentations from any interested person, including First Nations. In a letter to British Columbia Hydro and Power Authority ("BC Hydro") and British Columbia Transmission Corporation ("BCTC") dated March 25, 2009 (Exhibit B2-4), the Deputy Minister of Energy, Mines and Petroleum Resources also directed BC Hydro to consult with First Nations on the evidence and submissions presented to the BCUC by BCTC and BC Hydro, as set out in the TOR, "[i]n order to inform the Minister's decision whether to order a regulation under section 5(7) of the UC Act…" ("Deputy Minister's Letter"). Section 5(7) of the UCA states that the Minister may declare by regulation that the Commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made by the Inquiry Panel. The Deputy Minister's Letter also indicates that prior to making a decision to order a regulation under s.5(7) of the UCA, the Minister will consider whether First Nations' interests and concerns related to the Inquiry, and the potential impacts of the Inquiry Panel's determinations, require further consultation.

Although the TOR identify matters that the Commission must assess and make determinations upon, Participants at the first Procedural Conference, held on April 27, 2009, identified that establishing an appropriate scope for the Inquiry would be a key step in the process (e.g. T1: 20, 31, 60, 69, 78, 82). Consequently, the Commission issued Order G-47-09 (Exhibit A-7) and a Preliminary Inquiry Schedule.

On May 21, 2009 Commission staff drafted and circulated a discussion draft paper on scoping of the issues (Exhibit A-12), on which Participants were invited to provide written comments. A scoping Workshop was held on June 18, 2009 and a second Procedural Conference, on Inquiry issues and scoping, occurred on June 24, 2009.

At the second Procedural Conference, several Participants addressed the issue of whether there exists, and if so to what extent, an obligation on the part of the Inquiry Panel to independently consult with First Nations. Those Participants who addressed the issue at the second Procedural Conference generally supported holding a subsequent procedural conference on these matters.

The Commission, after reviewing the written and oral comments at the June 24, 2009 Procedural Conference, concluded that a further process would be helpful to address the following questions:

- What, if any, is the duty to consult with First Nations and accommodate with respect to determinations of the Long-Term Electricity Transmission Inquiry?

- If there is a duty to consult, how would that duty be fulfilled and how can it best be fulfilled such that the Inquiry Panel can also fulfill its legal requirements to hold an Inquiry and complete its draft report by June 30, 2010?

By letter dated June 30, 2009 (Exhibit A-16) the Inquiry Panel established a timetable for a round of written submissions on the above questions to be followed by reply submissions and a third Procedural Conference to take place on August 18 and 19, 2009. On August 14, 2009, following receipt of the reply submissions, the Inquiry Panel issued a letter (Exhibit A-19) posing eight questions to assist in structuring the discussion at the third Procedural Conference.

After reviewing the submissions provided in writing, and orally at the third Procedural Conference, the Inquiry Panel has concluded that, for the reasons set out in Section 2.0 below, it is functioning as a quasi-judicial body in fulfilling its duties to hold the long-term electricity transmission Inquiry, as required by s.5(4) of the UCA and the Minister's TOR. The Inquiry Panel has further concluded that, as it is functioning in a quasi-judicial capacity, then it follows that it cannot owe an independent duty to consult given the requirements for procedural fairness and natural justice: *Quebec (Attorney General) v. Canada (National Energy Board*), [1994] 1 S.C.R. 159 ("*NEB*"). If the Commission were, however, found not to be functioning in a quasi-judicial role within the context of the Section 5 Inquiry, it would not automatically follow that it owes an independent duty to consult. As discussed later in these reasons, the Inquiry Panel has concluded that the legislative intent, which is implied by the recent amendments to the UCA, the TOR and the Deputy Minister's Letter, does not place upon the Commission an independent duty to consult with First Nations. The Minister has delegated the responsibility for current consultation to BC Hydro, and may request BC Hydro to undertake further consultation if it is required for the purposes of a decision by the Minister regarding the BCUC's determinations.

During the third Procedural Conference, several Participants suggested mechanisms that might be used in contributing to the fulfillment of the duty to consult, if the Inquiry Panel has such a duty, or to engage First Nations in the Inquiry if it does not. Although the Inquiry Panel has determined that it does not owe an independent duty to consult with First Nations, the Inquiry Panel intends to establish meaningful engagement to ensure First Nations have the ability to participate effectively in the Inquiry process, through a variety of means as discussed in Section 3.0.

2.0 DUTY TO CONSULT WITH FIRST NATIONS

Background

This section will address the primary issues raised in the oral and written submissions of the Participants as to whether the Inquiry Panel is acting in a quasi-judicial capacity and whether the Commission owes an independent duty to consult. In reviewing these submissions, two clear primary positions emerge amongst the Participants.

On one hand, representatives of various First Nations entities advanced the position that the Commission is not acting in a quasi-judicial capacity within the context of the Inquiry and as a Crown decision-maker it owes an independent duty to consult with First Nations. The main supporting factors advanced for this conclusion include the absence of an applicant in the Inquiry, the nature of the Commission's determinations, and what was described as the overall strategic planning character of the Inquiry. In contrast, it is argued by a number of other Participants including the B.C. Sustainable Energy Association et al. ("BCSEA"), BCTC, the Joint Industry Electricity Steering Committee ("JIESC"), and BC Hydro that the Inquiry Panel is performing a quasi-judicial function in conducting the Inquiry, which they submit precludes the Inquiry Panel from having an independent duty to consult and, if necessary, accommodate First Nations.

With the exception of the BC Old Age Pensioner's Organization ("BCOAPO") and the Commercial Energy Consumers Association of BC ("CEC"), all Participants requested that the Inquiry Panel decide the issue of whether it is acting in a quasi-judicial capacity in the context of the Inquiry.

Further, many of the Participants submitted their views concerning the level of consultation that will be owed by the Crown to First Nations in the context of this Inquiry.

Submissions

The Inquiry Panel has reviewed and considered all the submissions from the Participants. The absence of any reference to a specific submission from a Participant should not be taken as an indication that the Inquiry Panel did not consider that specific submission.

The submissions of the Treaty 8 Tribal Association ("T8TA") focus upon the legislative framework of the Inquiry for the assertion that an independent duty to consult properly lies with the Commission (Exhibit C105-2). With respect to the UCA, T8TA submits that section 5 casts the Commission in the role of an advisor to Cabinet which differs from the role it plays in other regulatory applications. Within the TOR, T8TA points to the Commission's mandate in developing what it describes as a strategic planning framework, as support for T8TA's argument that the Commission's role is one typically played by a government planning agency. T8TA submits the Commission is ultimately an agent or subordinate of the Minister impressed with all the duties that the Minister must fulfill in decisions which may adversely affect Aboriginal rights and title. T8TA submits that such duties apply both to decisions made during strategic planning phases, such as the Inquiry, and to decisions made within the regulatory process when specific projects are proposed.

In the case of the Inquiry, T8TA contends that the determinations to be made will outline the course for the regulation and development of electricity and generation transmission projects. T8TA submits these determinations are strategic planning decisions which may adversely affect its Treaty rights. It submits that such conduct has been confirmed by Canadian courts to sufficiently trigger the duty to consult with First Nations: *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139. T8TA further submits that pursuant to the decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 ("*Kwikwetlem*"), the

Crown is not permitted to defer consultation until later stages in a regulatory process. Given its assertion that the Commission owes an independent duty to consult, T8TA contends that the Commission must assess the scope and content of its duty prior to the commencement of the Inquiry and throughout. T8TA submits that the parallel consultation process undertaken by BC Hydro and BCTC should be understood as complementary to the independent consultation which the Commission should fulfill.

In its reply, T8TA submits that the quasi-judicial criteria set out in *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 ("*Coopers & Lybrand*") leads to the conclusion that the role of the Commission within the Inquiry is not quasi-judicial (Exhibit C105-6). T8TA submits that first, while hearings are contemplated within the Inquiry, these hearings will be more investigative in nature rather than adjudicative. Second, while the determinations of the Inquiry Panel may affect the rights and obligations of various persons, rights may equally be affected by policy decisions. Consequently, this factor is not conclusive. Third, the Inquiry does not involve an adversarial dispute which must be adjudicated in a judicial or quasi-judicial manner. Finally, the T8TA asserts that within the context of the Inquiry, the Inquiry Panel is concerned not with individual cases, but with long-term energy policy development, a policy-making process characteristic of an executive or advisory role.

In their reply, the Haisla Nation and We Wai Kai Nation generally agree with T8TA and submit that within the context of the Inquiry, the Inquiry Panel is within the realm of public debate and policy-making on transmission planning (Exhibit C84-3). The Haisla and We Wai Kai Nations distinguish the role of the Inquiry Panel from the roles the Commission usually performs within the applications reviewed under the BC Court of Appeal decisions in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 ("*Carrier Sekani*") and *Kwikwetlem*.

Further, they submit that the role of the Inquiry Panel differs from the role of the National Energy Board, which was examined by the Supreme Court of Canada in the *NEB* decision. Haisla and We Wai Kai Nations submit that the *NEB* decision is not instructive as the Inquiry Panel is not acting in a quasi-judicial capacity in the Inquiry and further, the duty to consult flows from the honour of the Crown, not a specific fiduciary duty as was the case in the *NEB* decision. The Haisla and We Wai Kai Nations submit that the absence of a specific directive within the legislative framework does not preclude the Commission from owing the common law duty to consult (T3:430-31). They further point out that in the *NEB* decision the issue was whether to approve the issuance of export licenses, a decision-making process similar to that involved in an application for a CPCN. In support of the conclusion that the Inquiry Panel is not acting in a quasi-judicial capacity, Haisla and We Wai Kai Nations refer to case law confirming that a tribunal, such as the Oil and Gas Commission, may assume multiple roles.

In their reply, the Haisla and We Wai Kai Nations also respond to BC Hydro's application of the criteria set out in *Coopers & Lybrand* (Exhibit C84-5). With respect to the first criterion, they submit that while the Inquiry may result in a public hearing, it has not yet been conclusively determined that a hearing will occur. Second, the Inquiry lacks adversarial parties, the filing of arguments and an adversarial hearing, elements which, together, suggest a non-adversarial nature. They contend that the Inquiry Panel itself is not contemplating an adversarial process in which it will solely be weighing evidence and hearing argument. Third, the Inquiry Panel is not adjudicating a dispute within the Inquiry. Finally, while the Haisla and We Wai Kai Nations recognized that the Inquiry Panel could exercise the powers normally available to it under the UCA, they emphasize that the Inquiry Panel is not required to use such powers.

The Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance, the shíshálh Nation, and the Tahltan Central Council (collectively "the Nations") concur with the submissions of T8TA and the Haisla and We Wai Kai Nations (Exhibit C97-3). They submit that the nature of the Inquiry is not quasi-judicial but is best understood as establishing a framework and road map for the scope and nature of energy development, pursuant to the TOR and the Inquiry Panel's Scoping Decision (Appendix A to Order G-86-09). The Nations assert that the Inquiry Panel's determinations within the Inquiry have the potential to seriously and adversely affect Aboriginal title and rights. Consequently, the Inquiry Panel must ensure that the duty to consult and accommodate is fulfilled before reaching any determinations. The Nations relied upon the Deputy Minister's Letter in support of the position that BC Hydro has no mandate or intention to fully discharge the Crown's duty to consult. Further, they submit that the *NEB* decision does not address the question of whether a tribunal may discharge the duty to consult in a non-adjudicative context such as this Inquiry.

With respect to the *Coopers & Lybrand* criteria, the Nations submit that when considered together, the criteria point to the Inquiry Panel not fulfilling a quasi-judicial role within the Inquiry. Similar to the other First Nation Participants, the Nations emphasize the absence of a dispute within the Inquiry, focusing specifically on the lack of reference to a dispute within the legislative framework (T3:438). The Nations submit that the Inquiry constitutes an information gathering exercise rather than a determination as to what rights parties possess. The Nations assert that because the Inquiry Panel is a Crown actor mandated to make determinations with the potential to adversely impact constitutional rights granted to First Nations under section 35 of the Constitution Act, 1982, it will possess the duty to consult regardless of whether it is found to be fulfilling a quasi-judicial role (T3: 439-40). Finally, the Nations submit that if there is indeed a dispute at play in the Inquiry as submitted by other Participants, it is a fundamental contradiction that the Inquiry Panel would rely upon a provincial body such as BC Hydro to put the First Nation's concerns before it (T3:446).

The Squamish Nation, Carrier Sekani Tribal Council and Lax Kw'alaams Indian Band ("Squamish et al.") generally agree with the other First Nation Participants and focus upon the absence of a dispute and the lack of sanctions or penalty to be imposed as support for their position that the Inquiry Panel is not fulfilling a quasi-judicial role within the Inquiry (Exhibit C98-2). Squamish et al. assert that in the case of the Inquiry, it is clear that the Inquiry Panel itself is the decision-maker on behalf of the Crown, by making determinations which may be irrevocable pursuant to s.5(7) of the UCA. Squamish et al. contend that consultation is to begin in the planning stages and not once determinations have already been made and matters have crystallized, and that the Deputy Minister's Letter "…misses the mark on the timing of consultation…" (Exhibit C98-2, p. 4). They submit that if the Inquiry Panel is, however, found to be acting in a quasi-judicial role, an independent duty to consult would still arise on the part of the Commission as it is a matter of constitutional law and not mandate (T3:449-50). Finally they submit that if consultation is not properly fulfilled within the Inquiry, then future consultation of other Crown agencies will need to begin from the position that future consultation is not bound by the Inquiry Panel's determinations.

The Toquaht Nation supports the positions put forth by the other First Nation Participants (Exhibit C103-2). It submits that the Inquiry is a strategic planning initiative that triggers a duty to consult on the part of the Inquiry Panel as Crown agent. Accordingly, submissions from First Nations should inform the assessments, determinations and recommendations that the Inquiry Panel eventually arrives at. Toquaht Nation suggests that if the Inquiry Panel does not find it owes an independent duty to consult, it must promptly identify which Crown actors or agencies are responsible for fulfilling the duty.

The Hwlitsum First Nation raises the argument that given the Inquiry Panel has an independent duty to consult; it cannot rely on a general public consultation forum to fulfill its consultation obligations with First Nations (Exhibit C89-4). As such, the Inquiry Panel must look to supplement its existing process with other processes and approaches.

The Shuswap-Arrow Lakes Division (the "Lakes Division") also supports the conclusion that the Inquiry Panel is not acting as a quasi-judicial body (Exhibit C79-3-1). With reference to sections 5(4) and 5(6) of the UCA, the Lakes Division submits that the duty to consult lies with both the Minister and the Commission - a duty which cannot be delegated to BC Hydro and/or BCTC. It submits that the Minister has already failed to properly consult with respect to the creation of the TOR for the Inquiry. In fulfilling the next stages of the duty to consult, the Lakes Division has suggested that the Minister and the Commission uphold the principles put forth in the New Relationship[1] and look to develop an integrated intergovernmental structure or institution which could foster shared decision-making for land and resource planning, tenuring, and benefits sharing.

The Sto:lo Tribal Council ("STC") supports the positions of the other First Nations Participants (Exhibit C72-4). STC submits that the determinations to be made by the Inquiry Panel are distinguishable from binding decisions typically made by quasi-judicial tribunals. STC submits that the Inquiry Panel's role is more properly understood as being an agent of the Crown, charged with the duty to consult and accommodate. STC contends that the determinations to be made within the Inquiry will have an adverse impact upon the constitutional rights of First Nations and that the opportunity to accommodate the interests and concerns of First Nations will be lost once a determination is arrived at and accepted by the Crown. STC submits that this is an outcome which is inconsistent with the honour of the Crown.

Finally, the First Nations Energy & Mining Council ("FNEMC") likewise submits that the Commission is assuming the role of an executive agent of the Crown in fulfilling a strategic planning role within the context of the Inquiry (Exhibit C1-8). Regardless of whether the Inquiry Panel is acting quasi-judicially, the FNEMC contends that the determinations of the Inquiry constitute a Crown activity with the potential to adversely affect Aboriginal rights and title and that role, in and of itself, gives rise to an independent duty to consult. FNEMC further submits that the TOR fail to specify that the Commission must allow First Nations to provide evidence and fail to allocate time or authorization of monies to facilitate First Nations participation. In accordance with *Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 ("Baker*"), FNEMC submits that this treatment is unequal to that established in the TOR for the load serving utilities, and is unlawful and conflicts with the principles of fairness. Further, the FNEMC relies on the *Baker* decision to argue that the content of the duty of fairness must take into account the rights of individuals affected by a decision (T3:525). Therefore, FNEMC submits that an independent duty to consult on the part of the Inquiry Panel arises with respect to the potential adverse impacts upon the section 35 constitutional rights of First Nations.

The Independent Power Producers Association of British Columbia ("IPPBC") submits that although unlikely, the Inquiry Panel's determinations could adversely impact the interests of First Nations (Exhibit C59-4). Further, IPPBC submits that the lack of legal clarity as to whether a duty to consult exists in the context of the Inquiry combined with the potential of the Inquiry Panel's determinations to adversely affect First Nations, gives rise to a duty to consult. However, IPPBC submits that the Crown's duty to consult would be more properly undertaken at the stage of capital expenditures/construction approval, not at the theoretical planning level. IPPBC asserts that the duty to consult is the obligation of BCTC and BC Hydro given the quasi-judicial function performed by the Inquiry Panel (T3:467). IPPBC submits that within the Inquiry, adversarial disputes will arise which must be adjudicated by the Inquiry Panel in a judicial or quasi-judicial manner. IPPBC further suggests that many of the

[1] http://www.gov.bc.ca/themes/new_relationship.html.

elements of CPCN applications, such as a hearing, submission of evidence and cross-examination, are present within the Inquiry. IPPBC maintains that it would prefer for First Nations Participants to provide their views concerning transmission planning directly to the Inquiry Panel at the earliest opportunity.

BCSEA asserts that the duty to consult with respect to the determinations of the Inquiry does not rest with the Inquiry Panel, but with the Provincial Crown (Exhibit C10-4). Within the context of the Inquiry, the sections of the *Administrative Tribunals Act*, S.B.C. 2004, c.45 ("ATA") made applicable to the Commission under s.2(4) of the UCA, endow the Commission with the authority and responsibility of a quasi-judicial tribunal. For instance, s.11 of the ATA allows the Commission to create its own rules and procedures, while s.48 provides authority to make orders to maintain order at a hearing, including the right to avail the assistance of a peace officer. Section 49 of the ATA grants the Commission the ability to find a witness liable for contempt on an application to the court. Also, s.56 of the ATA provides civil immunity to members of the Commission while acting in the course of their duties. While BCSEA notes that many of the ATA powers it refers to are applicable in the context of an "application", it submits that an "application" includes the Inquiry as the term has a different and broader meaning within the ATA. BCSEA submits that the term "application" in the ATA is similar to the ways in which the UCA uses the terms "hearing" or "proceeding". In other words, when referring to an "application", the ATA refers to the proceeding itself and not the method by which a proceeding is initiated.

BCSEA also points to numerous sections of the UCA which provide the Commission with quasi-judicial powers. In reply to the argument that the Inquiry is not a quasi-judicial process due to the lack of an applicant, BCSEA submits that s.82(2) of the UCA confirms that the Commission's powers are the same in proceedings whether or not initiated by an application. Those powers are indicative of a quasi-judicial function. BCSEA also refers to the protection of the exclusive jurisdiction clause in s.105(1) of the UCA which, it argues, supports the conclusion that the Inquiry Panel will issue legally binding determinations within the Inquiry rather than mere policy advice or recommendations. BCSEA submits that under s.1 of the ATA, the term "decision" explicitly includes "a determination, an order or other decision". BCSEA generally agrees with the comments of IPPBC and submits that the Inquiry will involve a number of disputes, that legal interests will be at stake, and that the proceeding is adversarial (T3:496-97). Finally, BCSEA emphasizes that the Inquiry Panel must maintain the independence and impartiality that the legislature intended.

The JIESC submits that while the Inquiry Panel's determinations are important, they do not trigger a duty to consult with First Nations (Exhibit C6-3). The report to be drafted is not an authorization or approval and the determinations to be made will be of a higher conceptual nature. JIESC states that any duty that may be found to be owed will be at a preliminary level and must lie with a Crown entity other than the Commission. JIESC asserts that the Commission is barred from discharging the duty to consult as it is acting in a quasi-judicial capacity and must arrive at determinations through an impartial process that maintains procedural fairness. In support of the Inquiry Panel acting in a quasi-judicial capacity, JIESC points to the procedural fairness elements which the Inquiry has incorporated including the rules of procedure, written evidence, pre-hearing discovery through information requests, a public hearing, rights of cross-examination, an evidentiary record, and final argument. It runs contrary to impartiality and procedural fairness for a quasi-judicial tribunal to fulfill a special duty to a subset of participants before it, as was held in the *NEB* decision. To the contrary, the JIESC believes the Commission was chosen to conduct the Inquiry precisely because it is independent and would allow the Inquiry to occur within a fair and transparent structure (T3:509). JIESC contends that while there may be an absence of dispute in the case of the Inquiry, many of the traditional Commission decisions under the UCA, such as the granting of a CPCN or the approval of a rate tariff, do not entail an adjudication of rights between parties.

FortisBC Inc. ("Fortis") submits that the *Carrier Sekani* and *Kwikwetlem* decisions stand for the authority that the Commission itself does not possess an independent duty to consult (Exhibit B3-4). In contrast to the circumstances in *Carrier Sekani* and *Kwikwetlem*, the Inquiry is not the only forum in which the adequacy of

consultation will be examined. Fortis believes that the Inquiry Panel's role within the Inquiry is to monitor the progress of BC Hydro and BCTC's parallel consultation process and assess its adequacy as the Inquiry proceeds. In the event that a duty to consult is identified on the part of the Inquiry Panel, Fortis contends that the fulfillment of the TOR and the assessment of the parallel consultation process will suffice to discharge the duty.

BC Hydro submits that the Crown's duty to consult is likely triggered as a result of the nature of some of the determinations to be made by the Commission (Exhibit B2-7). However, the quasi-judicial status of the Commission and its necessary adherence to natural justice precludes it from owing an independent duty to consult, pursuant to the *NEB* decision. BC Hydro further submits that the *NEB* decision remains determinative of the Commission's role. At the root of the problem is the inherent inconsistency of imposing Crown duties upon a board that owes a duty of good faith as the decision-maker to the parties before it. BC Hydro submits that the quasi-judicial status of the Commission is settled by the *Coopers & Lybrand* criteria. First, an oral hearing process will occur within the context of the Inquiry. Second, the determinations of the Inquiry Panel will affect the rights and obligations of persons including First Nations, BC Hydro, BCTC and Fortis. Third, the repeated references within the TOR to "evidence" support the position that the Commission is tasked to receive and evaluate evidence and, ultimately, adjudicate the need for additional transmission capability. To this end, BC Hydro submits that the powers available to the Commission under s.82(2) of the UCA resemble litigation procedures and clearly suggest that the Inquiry is an adversarial process.

BC Hydro also submits that the powers available extend to the sections of the ATA which include the authority to compel witnesses (s.34(3)), examine witnesses (s.38) and exercise powers in the event that a participant fails to comply with a Commission order or its rules of practice and procedure (s.18). Further, BC Hydro submits that the Commission is not fulfilling a policy-making function within the Inquiry, as that is a role reserved for the Provincial government, and further, that it is clear that the Inquiry Panel will arrive at decisions of a final nature. Like BCSEA, BC Hydro also refers to the term "decision" as it is defined under s.1 of the ATA and notes that the term includes "a determination". The lack of a formal applicant or the fact that the Inquiry may resemble strategic planning is not believed to be determinative.

BC Hydro submits that it is the entirety of the Inquiry regulatory process in combination with the BC Hydro and BCTC parallel consultation process which will discharge the duty to consult and maintain the honour of the Crown. It maintains that these two processes together provide First Nations with Crown consultation and direct access to the decision-maker to bring forward concerns or issues pursuant to 10(a) of the TOR. Accordingly, BC Hydro submits that the Inquiry Panel does not owe a separate or independent duty to consult in the traditional sense of direct, bilateral engagement with First Nations. BC Hydro also relied upon the decisions in *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 and *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, and submits that a regulatory process has been recognized by the courts as sufficient to discharge the Crown's duty of consultation in addressing the specific concerns of First Nations. In BC Hydro's view, the Commission hearing process provides all the elements of consultation including the provision of: adequate notice, necessary information in a timely fashion, an opportunity to express interests and concerns, and a commitment to ensure that the interests and concerns are seriously considered and where possible, demonstrably integrated into the Inquiry Panel's ultimate determinations. BC Hydro also reminds Participants that the Minister has indicated that BC Hydro may be responsible for consulting with First Nations in respect of the Inquiry Panel's determinations. Further, the BC Hydro and BCTC parallel consultation process provides a distinct and separate process for First Nations to access information in a timely fashion and to engage the Crown utilities, all under the supervision of the Minister and Ministry of Energy, Mines and Petroleum Resources ("MEMPR").

BCTC is in general agreement with the positions of BC Hydro and BCSEA (Exhibit B1-6). BCTC submits that, in the case of the Inquiry, the Crown's duty to consult is likely triggered as the nature of the strategic determinations will lead to specific future decisions concerning transmission projects. BCTC argues that, while the Commission does not and cannot owe an independent duty to consult, a meaningful consultation process has been developed through BC Hydro and BCTC's parallel consultation process, the Commission's process itself, and a potential review by the Commission of the parallel consultation process. BCTC contends that the Commission maintains the same jurisdiction within the Inquiry that it exercises in the context of other proceedings such as CPCN approvals. BCTC relies upon the *NEB* decision for the position that a quasi-judicial body cannot be impressed with a duty that will require it to treat one of the parties before it in a preferential manner.

In response to the contrary arguments of other Participants, BCTC asserts that the *Coopers & Lybrand* criteria demonstrate that the Commission is fulfilling a quasi-judicial role within the Inquiry as follows. First, the TOR require the Commission to make determinations and assume an adjudicative function as it is weighing various factors. These determinations will indirectly, and possibly directly, affect the rights of Participants. Second, a hearing will be conducted for the purposes of receiving evidence and submissions from Participants. Third, the Commission is directed in the TOR to consider several forms of evidence. Finally, the Inquiry will proceed in accordance with the powers and procedures the Commission has for all proceedings before it, pursuant to s.82(2) of the UCA. Further, BCTC agrees with BC Hydro and BCSEA that the ATA confers various quasi-judicial powers upon the Commission and makes it clear that a "decision" includes a "determination". BCTC submits that the chosen format of the inquiry process rather than an application process does not alter the quasi-judicial nature of the Inquiry or the Commission's obligations to maintain independence and impartiality.

The Ministry of Energy, Mines and Petroleum Resources agrees with the submissions of BC Hydro and BCTC and adopts their arguments as its position (Exhibit C60-2).

The Association for Mineral Exploration BC ("AME") submits that the Inquiry Panel's determinations do not contemplate specific conduct which may adversely affect Aboriginal rights and title (Exhibit C28-3). Instead, it is the subsequent stages of planning and execution of generation and transmission projects which will trigger a duty to consult.

The CEC submits that it is unnecessary at this point for the Inquiry Panel to determine whether it owes an independent duty to consult with First Nations (Exhibit C44-3). While the law concerning consultation is evolving, it remains unclear as to whether a process such as the Inquiry will give rise to a duty to consult. CEC submits that a decision on this issue would likely be subject to legal challenge which, in turn, will make it difficult for the Commission to meet its deadline under the TOR. If the Inquiry Panel does determine that it must answer this legal question, CEC adopts the position put forth by BC Hydro. With respect to the criteria of the *Coopers & Lybrand* test, CEC submits that disputes will arise within the Inquiry, a hearing is contemplated, and the economic rights of ratepayers are at stake (T3:476-77). Therefore, the Inquiry Panel must maintain its quasi-judicial role and behave in accordance with natural justice and procedural fairness. Regardless of whether a duty to consult exists on the part of the Inquiry Panel, CEC asserts that the effective participation of First Nations in the Inquiry must be developed.

A further position was put forward by BCOAPO. BCOAPO submits that while it may not be expressly set out in the TOR, one of the factors the Inquiry Panel must take into account in reaching its determinations is the implication of First Nation territorial rights and the subsequent right of consultation and accommodation of potentially affected First Nations (Exhibit C26-3). BCOAPO submits that the Inquiry Panel itself should collaboratively engage with First Nations, to determine how First Nations' concerns can be integrated into the Inquiry's analysis. This approach exceeds the standards of typical "consultation". BCOAPO further submits that the *Coopers & Lybrand* test is a dated analysis relying upon arbitrary categorization (T3:481-82). In the case of this Inquiry, it bears characteristics of both a judicial and non-judicial process. Accordingly, BCOAPO submits that the question be reformulated to examine the mandate of the Commission and which approach to address First Nations' issues best aligns with that mandate. In conclusion, BCOAPO asserts that both the purpose and mandate of the Inquiry gives rise to a need for substantive engagement of First Nations.

INQUIRY PANEL DETERMINATIONS

1. *Is a duty to consult with and, if necessary, accommodate First Nations, triggered with respect to the determinations of the Inquiry?*

With respect to whether the Inquiry triggers a duty to consult with and, if necessary, accommodate First Nations, the Inquiry Panel finds that the Crown has knowledge, real or constructive, of existing or potentially existing Aboriginal rights and title which may be adversely affected by the Inquiry determinations. The Inquiry Panel recognizes and agrees with the majority of Participants that the nature of the Inquiry and the determinations to be made, trigger the Crown's duty to consult and, if necessary, accommodate First Nations.

2. *If a duty to consult does exist, does the responsibility for fulfilling the duty lie with the Inquiry Panel?*

Upon consideration of the submissions and legal cases included in the Books of Authorities, the Inquiry Panel determines that it is acting in a quasi-judicial capacity and not as an administrative body acting as an agent of the Crown.

a) *Coopers & Lybrand* Criteria

Coopers & Lybrand offers guidance to the Inquiry Panel in resolving the issue of whether it is acting in a quasi-judicial capacity and not as an administrative body acting as an agent of the Crown by providing a non-exhaustive list of four criteria on this issue. Cases such as the *NEB* and *Carrier Sekani* decisions, address the nature of quasi-judicial tribunals but only in the context of whether a duty to consult applies to quasi-judicial bodies and contribute little if anything to assist in separating quasi-judicial functions from those which could be best described as administrative. Similarly, while the *Baker* case was relied upon by the FNEMC for the position that a high duty of fairness is owed to First Nations, the Inquiry Panel finds that the *Baker* decision does not determine whether the Inquiry Panel is acting in a quasi-judicial capacity or as an agent of the Crown. Rather, the Inquiry Panel finds that the *Baker* decision supports the proposition that the Inquiry Panel must make its own decisions impartially and in accordance with procedural fairness.

The Inquiry Panel notes, however, that in providing the criteria the Supreme Court of Canada takes great care in pointing out that none of the questions they pose are determinative: "these are all factors to be weighed and evaluated, no one of which is determinative" (*Coopers & Lybrand,* p. 105). The Inquiry Panel's views on the four criteria are summarized below:

1. *Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?*

   Section 10(c) of the TOR provides the Commission with procedural options ranging from workshops and mediation to written and oral public hearings. On May 4, 2009, following the first Procedural Conference, the Commission issued Order G-47-09 with an Appendix A outlining a preliminary Inquiry schedule which includes an oral public hearing phase for early March 2010. Although the Inquiry Panel will use workshops and other mechanisms as well, it finds that an oral hearing will be required to completely and fairly address all evidence being filed.

   The oral hearing will be adjudicative in nature as Participants will be given an opportunity to cross-examine other Participants on the evidence filed and make submissions based on the filed evidence and testimony.

2. *Does the decision or order directly or indirectly affect the rights and obligations of persons?*

   The rights and obligations of many persons, including both Participants and others not participating in the Inquiry, may be both directly and indirectly affected by the determinations of the Inquiry Panel. Under s.4 of the TOR, the Inquiry Panel must determine various needs including the need for and timing of, additional transmission infrastructure and capacity and the supply and delivery of electricity. These determinations will impact the development of future generation and transmission, affecting the rights and obligations of both the utilities and ratepayers. Additionally, to the extent that the Inquiry Panel's determinations impact future operational resource activities occurring within British Columbia and the traditional territories of many First Nations, these determinations may have the potential to adversely affect Aboriginal rights and title.

3. *Is the adversary process involved?*

   The object of the Inquiry is to make determinations with respect to British Columbia's electricity transmission infrastructure and capacity needs for the next 30 years. When the procedures and processes of the Inquiry are viewed in their entirety, the Inquiry Panel finds that they provide for a structure that is adversarial in nature. To date there are 105 registered Participants who are participating in an active intervenor status. Many Participants represent interest groups whose various views on the Inquiry Panel's determinations are likely to conflict. Some Participants will file evidence while others will cross-examine on that evidence and present their own argument in March 2010 at the oral hearing. Following the oral hearing, the Participants will be provided an opportunity to file final submissions with the Inquiry Panel which will then render its determinations based upon the evidence and submissions received. The Inquiry Panel finds that in this regard, the Inquiry is similar to the adversarial nature of other Commission proceedings.

   The Inquiry Panel agrees with the submissions of BCSEA in that the Inquiry Panel's determinations will flow from a proceeding which utilizes, and complies with, various powers and requirements set out in the UCA and the ATA that are indicative of a quasi-judicial proceeding.

   Further, the Inquiry Panel accepts the submission of BC Hydro that the repeated references to "evidence" within the TOR (sections 7, 8, 9 and 10(a)), indicate an onus upon the Inquiry Panel to receive and evaluate evidence, and make findings based upon that evidence. Accordingly, the Inquiry Panel finds that its role within the Inquiry as determined by the TOR, UCA and ATA is one in

which it has been asked to exercise powers of a quasi-judicial nature because the Inquiry will examine matters which are adversarial in nature.

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

   The Inquiry Panel agrees with BCSEA, BC Hydro and BCTC that s.1 of the ATA directs that the "determinations" of the Inquiry are to be understood as "decisions" and not mere policy recommendations.

   The Inquiry Panel further recognizes that its exclusive jurisdiction as confirmed in s.105(1) of the UCA is re-affirmed by s.5(7) of the UCA in that the Minister has no authority to reconsider, vary or rescind the Inquiry determinations and instead, may only declare that the Inquiry determinations cannot be altered later by the Commission itself. Accordingly, it follows that the determinations to be made by the Inquiry Panel are beyond mere policy advice and fall within the definition of "decision" in section 1 of the ATA.

By way of a summary comment, the Inquiry Panel finds that in most regards this Inquiry is quite similar to the other quasi-judicial proceedings of the Commission.

b) Legislative Intent

In assessing whether there is an independent duty to consult with First Nations, the Inquiry Panel is of the view that even more important than the four non-exhaustive criteria addressed above is the legislative intent: "Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention." (*Coopers & Lybrand,* p. 503). The Inquiry Panel finds that it is bound by the UCA and the TOR that are the foundation for its mandate. In *Rigaux v. British Columbia (Commission of Inquiry into the death of Vaudreuil – Gove Inquiry),* (1998) 155 D.L.R. (4th) 716, the BC Supreme Court emphasizes the importance of the boundaries of the legal mandate. At paragraph 25, the Court states: "... a commissioner's jurisdiction is circumscribed by the terms of reference found in the governing statute and the instrument of appointment. Even if he or she has the noblest of motives, a commissioner has no discretion to exceed those terms of reference".

In the case of the UCA, the Inquiry Panel agrees with the submission of BC Hydro that it "is of enormous significance that in May 2008, the Legislature amended section 5 [of the *Act*]" (T3:528). Prior to May 2008, the Commission could only investigate and report under s.5(1) of the UCA. In effect, the Commission's role was limited to providing "advice" to the Provincial Government. With the introduction of the amendments, the Commission must now conduct this Inquiry where it will decide and make determinations of need based on findings of fact on evidence.

The Inquiry Panel finds that with respect to the TOR, s.10(a) instructs the Commission to invite and consider the submissions and evidence of various persons and entities, including First Nations. There is no specific requirement within the TOR of any further responsibility of the Commission to discharge the Crown's duty to consult with and, if necessary, accommodate First Nations with respect to the Inquiry's determinations. The Inquiry Panel finds that neither the TOR nor the UCA provide the Inquiry Panel with the power to make accommodation arrangements with First Nations on behalf of the Crown. The Inquiry Panel is of the view that s.10(a) only provides the Commission with an obligation to carry out certain procedural aspects of the consultation duty owed by the Crown.

In addition, the Inquiry Panel finds that the Deputy Minister's Letter provides further assistance in understanding the TOR and the Inquiry Panel's role within the Inquiry. In the letter, the Deputy Minister instructs that BC Hydro "undertake consultation with First Nations on the evidence and submissions presented to the BCUC by the BCTC and BC Hydro". The Deputy Minister further advises that the Minister will consider whether First Nations interests and concerns, in relation to the Inquiry and the potential impacts of the determination, will require further consultation before making a decision to order a regulation under s.5(7) of the UCA. While the Deputy Minister notes that the MEMPR is not requesting BC Hydro to undertake consultation on the impact of the Commission's determination at this time, he also states that "… I request BC Hydro undertake these consultations should they be required for the purpose of any decision the Minister may make regarding a regulation".

In conclusion, the Inquiry Panel finds that the legislative intent, which is implied by the recent amendments to the UCA, the TOR and the Deputy Minister's Letter, does not place upon the Commission an independent duty to consult with First Nations. The Minister has delegated the responsibility for current consultation to BC Hydro, and has requested BC Hydro to undertake further consultation if it is required for the purposes of a decision by the Minister regarding the Commissions' determinations. However, in the Inquiry Panel's view, the regulatory process that the Inquiry Panel is responsible for will fulfill certain procedural aspects of the consultation duty owed by the Crown.

3. If a duty to consult with and, if necessary, accommodate First Nations does exist, what is the scope and content of the duty to consult?

On the issue of the scope and content of the Crown's duty to consult, the Inquiry Panel is of the view that until evidence is received, no determination can be made on this issue. The Inquiry Panel adopts the statement of the Haisla and We Wai Kai Nations in that "[i]t is premature to determine, at this stage, where, on the spectrum enunciated in *Haida*, the Crown's duty to consult with respect to the potential impacts of the Inquiry will fall" (Exhibit C83-5, p. 7).

3.0 FIRST NATIONS ENGAGEMENT

Although the Inquiry Panel has determined that it does not owe an independent duty to consult with First Nations, the Inquiry Panel intends to provide First Nations with a meaningful opportunity to engage in the Inquiry through submissions, evidence, and presentations, and to bring their concerns and their perspectives to bear on the evidence and submissions of other Participants, as well as the Inquiry Panel's assessments and determinations.

The Inquiry Panel will develop, with First Nations and other Participants, comprehensive engagement processes which are intended to address the needs of First Nations and all other Participants in a transparent and open way. The Inquiry Panel expects that the procedures to be undertaken in the course of this Inquiry will make a significant contribution toward the Crown meeting its constitutional duty to consult with and, if necessary, accommodate First Nations as the electricity transmission needs, planning, and eventual project proposal stages unfold.

Some First Nations Participants argue that the Inquiry Panel must, or at least should, establish separate consultation processes such as a separate co-panel on First Nations issues, private meetings with First Nations, or a First Nations Advisory Panel to meet separately with the Inquiry Panel. The Inquiry Panel is acutely aware of its responsibilities to ensure natural justice by acting in an impartial, independent, and fair manner, and to avoid

any apprehension of bias. The Inquiry Panel therefore does not endorse those engagement suggestions that would conflict with its responsibilities to act in an impartial, independent, and fair manner. In addition to the written submissions on the Inquiry Panel's duty to consult and/or engage First Nations, the oral submissions received at the third Procedural Conference were particularly informative for the Inquiry Panel.

There is much that the Inquiry Panel is able to do within the confines of the TOR, the UCA and the ATA. Commissioner Anderson addressed this directly in an exchange with Squamish Nation et al. He asked: "If we don't have a duty to consult, does that by definition mean that we're not able to consult? What's precluding us from doing consultation in any event?" (T4:844). Some Participants addressed this question in their oral submissions.

Some First Nations Participants were concerned about such a consultation process, identifying that consultation cannot happen by accident and the consultation that they were proposing was a constitutionally protected consultation process pursuant to section 35 of the Constitution Act, 1982. The Haisla Nation and We Wai Kai Nation assert that "the consultation that could take place within the confines of a quasi-judicial process would be an impoverished consultation process that would not meet the honour of the Crown" (T4:850). The Lakes Division asserts that, "Even if you decide that you don't have the duty to consult, I still think there is a responsibility to ensure that we have both the opportunity and the capacity to present our evidence and submissions" (T4:851).

Other Participants submit that there is an opportunity for the Inquiry Panel to undertake extensive First Nations engagement within the jurisdiction afforded to it. CEC states that even though the Inquiry Panel is a quasi-judicial body with no independent duty to consult, "what could be more honourable for a representative from the Crown but to implement all meaningful stages and steps to ensure a deep engagement with First Nations in this proceeding?" (T4:854). This sentiment was echoed by several other Participants, with the caveat that the Inquiry Panel must ensure an open and transparent process. Some Participants pointed to the flexible nature of past Commission processes and the funding and procedural options available under the UCA.

The Inquiry Panel agrees that it is able to, and should, implement many of the Participant suggestions to provide enhanced First Nations engagement in this Inquiry. First Nations participation in the Inquiry is important since it could be anticipated that some of the Inquiry Panel's determinations on long term electricity transmission needs may eventually lead to future projects which may also impact Aboriginal rights and title. However, in considering the options available to it within the confines of its jurisdiction and the rules of natural justice, the Inquiry Panel has placed considerable weight on the purpose of this Inquiry, which is to make determinations with respect to B.C.'s electricity transmission infrastructure and capacity needs for a 30-year period. Moreover, the Inquiry Panel is not to make determinations on the merits of specific generation projects or with respect to the specific routing or technology of transmission projects.

The Inquiry Panel is already committed to undertaking Regional Sessions in October and November of this year. These sessions in regional centres are open to all Participants and the public. As with Regional Sessions in other Commission hearings, the Sessions are relatively informal and Participants wishing to make statements without being cross-examined are allowed to do so.

Some Participants note that the available information base at the time of these Sessions will include the September information filings but not the evidentiary filings. Therefore, in addition to the normal process of written information requests and submissions, the Inquiry Panel intends to undertake a second round of Regional Sessions in January 2010 to ensure the opportunity to comment on actual proposals. The Inquiry Panel recognizes that some First Nations would prefer that it hold private meetings at their communities. The Inquiry Panel, however, must avoid any perception or apprehension of bias from private meetings. The Inquiry Panel

has identified some initial actions it will consider, as discussed below, in order to improve the opportunities for First Nations to engage in the Inquiry. The Inquiry Panel also recognizes that it is still early in the Inquiry process and no evidence has yet been filed. Therefore, the Inquiry Panel may consider modification of and/or additional engagement activities as the Inquiry evolves.

1. First Nations Phase

Some Participants suggest that the Inquiry could be conducted in phases to allow for a specific phase focused on transmission and other issues important to First Nations. The Inquiry Panel agrees. In addition, the Inquiry Panel will consider matters such as location(s) where this phase of the Inquiry should be held, whether these proceedings should be less formal and structured, and whether specific First Nations scenarios should be developed and reviewed in this phase. The Inquiry Panel welcomes submissions from Participants on this issue by October 7, 2009.

2. First Nations Consultant(s)

Many First Nation Participants and other Participants encourage the Inquiry Panel to obtain expert assistance regarding First Nations issues in this Inquiry. JIESC and other Participants suggest that, pursuant to s.8 of the UCA, the Commission could appoint or engage persons having special or technical knowledge necessary to assist the Inquiry Panel in carrying out its functions. The Inquiry Panel will therefore seek to engage a First Nations consultant or consultants to assist Commission staff and the Inquiry Panel to engage effectively with First Nations so as to better understand First Nations issues in this Inquiry. The Inquiry Panel welcomes proposals from Participants regarding the identity of potential consultants by October 7, 2009.

3. Participant Assistance Cost Awards ("PACA")

Many Participants comment that the normal practice for PACA funding creates a barrier to effective participation by First Nations in the Inquiry. Often, First Nations do not have the financial resources to pre-fund the technical resources they need, even if they could anticipate PACA funding after the completion of the Inquiry. To overcome this barrier, some Participants suggest that the Commission's PACA Guidelines are only guidelines and that they already provide latitude for pre-funding in exceptional circumstances.

The requests for funding are not only for legal counsel and case managers to participate in the Inquiry proceedings, but also to develop studies and evidence to submit to the Inquiry Panel. One concrete example was provided by the Lakes Division:

> "We're just looking to be able to have some of the resources that both B.C. Hydro and BCTC have at their disposal, so that we can bring our evidence up to the same level so that we're on the same playing field with them." (T4:851-852)

The Inquiry Panel wishes to overcome these barriers to effective participation in the Inquiry. It is considering an expedited PACA approval process and given the unique circumstances of this Inquiry, the Inquiry Panel will also consider detailed requests to pre-fund necessary studies in support of relevant evidence to be submitted to the Inquiry. The Inquiry Panel will provide more detailed comments soon in response to the PACA budgets filed by Participants in August.

4. Draft Report for Comment

Some First Nations Participants request time to review and comment on the draft Inquiry Report. Section 12 of the TOR already provides an initial period of 30 days to receive written comments on the draft Inquiry Report and a further period to allow comments on those initial written comments. Thereafter, the Inquiry Panel is to incorporate, as it considers appropriate, the comments and responses into the Inquiry Report.

Although some First Nations Participants preferred a 45 or even a 60 day comment period, the Inquiry Panel is of the view that it is bound by the time limit set in the TOR.

5. First Nations Advisory Panel ("Advisory Panel")

The Inquiry Panel heard several variations regarding an Advisory Panel and how it would interact with the Inquiry Panel. Some of the suggestions were premised on the assumption that the Commission is an agent of the Crown and owes an independent duty of consultation to First Nations. The Inquiry Panel has determined it does not owe an independent duty to consult and must act within the confines of its jurisdiction as provided by the UCA and the TOR, and in accordance with the rules of natural justice. The Inquiry Panel accepts the arguments of JIESC and others that there is no jurisdiction for the Commission to appoint an Advisory Panel to sit as an equal or private advisor to the Inquiry Panel (T4:706,719,738).

Nonetheless, the Inquiry Panel is open to suggestions on how an Advisory Panel, acting as an independent Participant in this Inquiry, might assist the Inquiry Panel, First Nations Participants, and other Participants within this Inquiry. For example, how could an Advisory Panel assist the Inquiry's engagement process, help with the First Nations phase of the Inquiry, and develop First Nations scenarios?

Several First Nations Participants suggest that it is too early for them to specify the makeup and role of such a panel, and offer to develop terms of reference and submit a formal proposal (T4:672,681). BC Hydro endorses the Nations' suggestion for development of a transparent draft terms of reference to be circulated to all parties for comment (T4:740). BC Hydro submits that the composition of the Advisory Panel must include ratepayer participation (T4:741).

The Inquiry Panel agrees with the First Nations Participants that the makeup of the Advisory Panel should be limited to First Nations representatives. The Inquiry Panel encourages the First Nations Participants to propose terms of reference for an Advisory Panel, including membership, and a description of how an Advisory Panel could assist First Nations engagement in the Inquiry. The Inquiry Panel requests First Nations Participants to submit any proposal(s) no later than October 14, 2009.

6. BC Hydro/BCTC Parallel Consultation Process

The Inquiry Panel intends to keep itself informed of the adequacy of the BC Hydro and BCTC parallel consultation process. First Nations Participants were critical of the process to date, particularly with the quality of the information shared and a lack of meaningful discussion. BC Hydro responded to the criticism, stating:

> "It is true that Phase 1 was largely the provision of – well, was the provision of information by the utility to First Nations, but that's to be expected. We were explaining what the Section 5 inquiry is and how our process fed into that.
>
> Phase 2 will be much more interactive so it won't be just the utilities providing information. We'll be welcoming feedback, and I've already told you that with respect to the resource options and in particular the filters, that's something we're looking to First Nations for in Phase 2." (T4:866).

BC Hydro went on to explain that a number of First Nations had requested one-on-one consultation but that was not practical with over 200 First Nations and Tribal Councils. However, BC Hydro further stated that, as the potential determinations become more geographically specific, BC Hydro might depart from its regional sessions and meet with individual First Nations in those geographic regions.

The Inquiry Panel must remain adequately informed regarding the parallel process and therefore directs BC Hydro and BCTC to file a joint monthly report on the process commencing October 1. These reports are to be substantive reports on what has been undertaken in the preceding month and a description of what is planned in the upcoming months. The October 1 report should also explain how the Phase 2 sessions will be more interactive to engage First Nations in discussion of options and First Nations scenarios.