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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-126-10**

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

and

**Application by the Sinixt Nation for Reconsideration of
Commission Order G-12-10 and Reasons for Decision
regarding the British Columbia Hydro and Power Authority
Acquisition from Teck Metals Ltd. Of an Undivided One-Third Interest
In the Waneta Dam and Associated Assets**

BEFORE: A.W.K. Anderson, Panel Chair/Commissioner
D.A. Cote, Commissioner August 5, 2010
P.E. Vivian, Commissioner

ORDER

WHEREAS:

- A. On February 3, 2010, the British Columbia Utilities Commission (Commission) issued Order G-12-10 which accepted the application by the British Columbia Hydro and Power Authority (BC Hydro) to acquire a one-third interest in the Waneta Assets as being in the public interest. The Commission issued the Reasons for Decision for Order G-12-10 on March 12, 2010; and
- B. On April 13, 2010, the Sinixt Nation (Sinixt) applied for Reconsideration of Order G-12-10. The Sinixt asserted the Commission made errors of fact and/or law in determining that the consultation undertaken by BC Hydro had been adequate to uphold the honour of the Crown; and
- C. On April 23, 2010, the Commission issued Letter L-38-10 establishing a written comment process for Phase One of a Reconsideration on the Sinixt's application. According to Commission procedures, a Reconsideration follows two phases with the first phase assessing the merits of the application to warrant a full Reconsideration in the second phase; and
- D. The Commission received comments on the Sinixt's application from the Okanagan Nation Alliance (ONA) the Ktunaxa Nation Council (KNC), Teck Metals Ltd. (Teck), the Joint Industry Electricity Steering Committee (JIESC) and BC Hydro; and

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- E. In response to the submissions of the ONA and the KNC, BC Hydro submitted that those groups asserted the Commission made different errors than those asserted by the Sinixt. Accordingly, BC Hydro requested the Commission accept comments on the errors alleged by the ONA and the KNC. Teck supported BC Hydro's position while the ONA requested the Commission dismiss BC Hydro's request; and
- F. The Commission accepted BC Hydro's request and by letter dated May 20, 2010, established a comment period for the submissions made by the ONA and the KNC; and
- G. The Commission received comments on the ONA and KNC's submissions from BC Hydro and Teck; and
- H. The Commission has considered the application for Reconsideration by the Sinixt, the submissions of the parties in support of the reconsideration, the ONA and the KNC, and the comments from BC Hydro, Teck and the JIESC; and
- I. The Commission has determined that the Sinixt, the ONA and the KNC have not established the alleged errors of fact and/or law on a *prima facie* basis and have accordingly failed to meet the Commission criteria for the second phase of Reconsideration.

NOW THEREFORE the Commission orders as follows:

- 1. The application for Reconsideration of Order G-12-10 by the Sinixt Nation and the submissions by the ONA and the KNC in support of Reconsideration are denied.
- 2. The Reasons for the Decision are attached as Appendix A.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of August 2010.

BY ORDER

Original signed by:

A.W.K. Anderson
Panel Chair/Commissioner

Attachment



IN THE MATTER OF

**AN APPLICATION BY THE SINIXT NATION FOR RECONSIDERATION
OF COMMISSION ORDER G-12-10 REASONS FOR DECISION ON THE
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
ACQUISITION FROM TECK METALS LTD. OF AN UNDIVIDED
ONE-THIRD INTEREST IN THE WANETA DAM AND ASSOCIATED ASSETS**

REASONS FOR DECISION

August 5, 2010

BEFORE:

A.W.K. Anderson, Panel Chair / Commissioner
D.A. Cote, Commissioner
P.E. Vivian, Commissioner

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1. INTRODUCTION

1.1 Background

These Reasons for Decision are in respect of an application (Application) of the Sinixt Nation (Sinixt) for reconsideration of Order G-12-10 setting out the findings of the British Columbia Utilities Commission (Commission) with respect to the application to the Commission by the British Columbia Hydro and Power Authority (BC Hydro) for acceptance of expenditures for the acquisition of a one-third interest in the Waneta Dam (the Waneta Transaction) from Teck Metals Ltd. (Teck). The acquisition required an \$825 million payment to Teck plus transaction costs estimated at \$25 million. The BC Hydro application sought a Commission determination that the expenditures are in the public interest.

The Commission issued Order G-12-10 - Decision on the Waneta Transaction on February 3, 2010 in which the Commission accepted BC Hydro's acquisition of a one-third interest in the Waneta Dam as being in the public interest. As part of the acceptance, the Commission determined that BC Hydro's consultation with First Nations, to the date of the decision, had been adequate to uphold the honour of the Crown. On March 12, 2010, the Commission issued the Reasons for Decision which described the determinations and views of the Commission as set out in the decision.

The Sinixt Application of April 13, 2010 asserts that the Commission made errors of fact and law in determining that BC Hydro's consultation with the Sinixt was adequate to uphold the honour of the Crown. In summary, the Sinixt submit that the Commission erred in the assessment of BC Hydro's determinations of the Sinixt strength of claim and resulting requirements for consultation and accommodation with respect to the Waneta Transaction.

1.2 Summary of Findings

The criteria for reconsideration of Commission decisions are outlined in the following section.

In summary, the Commission Panel finds that criteria for advancement to the second phase of this reconsideration application have not been met by the submissions of any of the Sinixt, the ONA, or the KNC. The application for reconsideration is accordingly denied.

1.3 Reconsideration Regulatory Process

An application for reconsideration with the Commission proceeds in two phases as outlined in the Participants' Guide to the British Columbia Utilities Commission. The first phase is an initial screening phase where an applicant must establish that a reasonable basis exists for allowing reconsideration. To advance to the second phase, the applicant must establish that at least one of the following criteria has been met to establish a reasonable basis for reconsideration:

- the Commission has made an error in fact or law;
- there has been a fundamental change in circumstances or facts since the Decision;
- a basic principle had not been raised in the original proceedings; or
- a new principle has arisen as a result of the Decision.

When an error of law or fact is alleged, the applicant must establish:

- the claim of error is substantiated on a *prima facie* basis; and
- the error has significant material implications.

(Understanding Utility Regulation: A Participants' Guide to the British Columbia Utilities Commission, 1999, p. 35)

For the first phase of the reconsideration, the Commission received submissions from the ONA, the KNC, BC Hydro, Teck, and the JIESC addressing whether the errors of fact and law alleged by the Sinixt were substantiated on a *prima facie* basis and whether there were significant material implications to support advancing the reconsideration to the second phase.

In response to submissions from the ONA and the KNC, BC Hydro filed a letter on May 12, 2010, asserting that the First Nations' submissions allege different errors on the part of the Commission than those alleged by the Sinixt. BC Hydro requested the Commission to allow parties to file submissions on whether the errors alleged by the ONA and the KNC meet the criteria to advance to phase two reconsideration. Teck supported BC Hydro's request. The ONA submitted that BC Hydro's request should be denied because the first phase of the reconsideration process does not allow for reply submissions and is not the forum for argument on all issues that may be argued in the second phase.

The Commission reviewed the requests and on May 20, 2010, determined that BC Hydro, interveners and interested parties were to submit their written comments on the submissions of the ONA and the KNC by June 2, 2010. The ONA and the KNC were to submit their written replies by June 16, 2010.

2. THE SINIXT APPLICATION

The Sinixt initiated the first phase of the reconsideration process by letter dated April 13, 2010 asserting that the Commission had made errors of fact and jurisdictional errors in finding that BC Hydro reasonably and adequately assessed the Sinixt's strength of claim at the low end of the *Haida* spectrum. Specifically, the Sinixt submitted that the Commission erred in:

- Failing to determine which of the First Nation interveners had a predominant presence in the Waneta area. The Sinixt submitted that conclusive evidence was filed as a report on Aboriginal Interests in the Waneta Area by historians Bouchard and Kennedy;
- Failing to assess the Sinixt's strength of claim on the basis of the evidence available to the Commission; and
- Incorrectly relying on overlapping claims as a means of relieving itself from having to exercise its jurisdiction to weigh the evidence with respect to each claim.

The Sinixt submitted further that the Commission made errors in law in determining that BC Hydro is not required to consult and accommodate the Sinixt regarding the Waneta Dam's historic and ongoing infringements on Aboriginal rights. Additionally, the Sinixt assert that the Commission committed errors of fact in:

- Finding that the Waneta Transaction does not affect historic and ongoing infringements;
- Suggesting that that the original construction of the Waneta Dam was lawful; and
- Determining that historic claims of infringement need not be discharged by BC Hydro for consultation to be adequate.

The Sinixt argue that BC Hydro will benefit from the historic and ongoing infringements associated with the construction and operation of the Waneta Dam and the Commission cannot excuse BC Hydro from having to consult and accommodate the Sinixt for those infringements.

2.1 Responses from BC Hydro, Teck Metals and the Joint Industry on Electricity Steering Committee to the Application by the Sinixt Nation

In response to the Sinixt, BC Hydro submits that the issues raised by the proponents for reconsideration do not meet the criteria to advance the reconsideration process to the second phase and the application for reconsideration should be denied. Teck and the JIESC both submit that the Sinixt have not established errors of fact or law on a *prima facie* basis and the application for reconsideration should be dismissed.

Strength of Claim Errors

Regarding the Sinixt's allegation that the Commission erred in determining its strength of claim at the low end of the Haida spectrum, BC Hydro submits that the evidence, including the submissions of the three First Nation groups that intervened in the Waneta Transaction proceeding, showed competing claims to the Waneta area. Specifically, BC Hydro does not agree with the Sinixt's interpretation of the Bouchard and Kennedy report as showing conclusive evidence of the Sinixt having predominant presence in the Waneta area. The JIESC agrees that the facts presented by the Sinixt do not show that the Commission's determination was in error (JIESC, p. 2). Teck also agrees that the Commission correctly concluded that the evidence as a whole is inconclusive and submit that the Sinixt have not substantiated that the Commission's conclusion as in error.

Historical Infringement Errors

In response to the Sinixt's assertion of Commission error regarding historical and ongoing infringements, BC Hydro submits that the issue was fully considered in the original proceeding and the Commission determined there would be no new physical or non-physical impacts from the Waneta Transaction.

The JIESC submits that the Sinixt's allegations of error regarding historical infringements is a repetition of its argument in the original proceeding and do not demonstrate any errors of fact or law. Teck submits that the Sinixt have not substantiated an error by the Commission regarding historical infringements and argue that the Commission rightly excluded it from the scope of consultation.

BC Hydro, Teck and the JIESC take the position that the Sinixt failed to substantiate the alleged errors on a *prima facie* basis and therefore did not establish a case proceed to phase two of the reconsideration process.

3. SUBMISSIONS FROM THE OKANAGAN NATION ALLIANCE

In its submission, the ONA argued that the Commission's decision that the Waneta Transaction is in the public interest is based on substantial errors of law and has significant material implications. The ONA assert that the Commission erred by failing to acknowledge that the Crown's duty to consult and accommodate was triggered by BC Hydro's decision to acquire an interest in and benefit from the Waneta Dam which continues to infringe on the Okanagan Nation's Aboriginal rights and title. Specifically, the ONA assert that the Commission erred in:

- Determining the scope and content of the duty to consult based on a standard of reasonableness rather than on a standard of correctness. The ONA argue that the Commission concluded that unless a First Nation's strength of claim could be firmly established, BC Hydro's assessment is reasonable and should be accepted. The ONA argue that case law directs the Crown to consult based on a *prima facie* strength of claim and the Commission erred in accepting BC Hydro's conclusion that a low level of consultation was required. As well, the ONA argue that the Commission erred in excluding historic and ongoing adverse effects from the ongoing operation of the Waneta Dam;
- Determining that BC Hydro had adequately consulted and accommodated the Okanagan Nation. Specifically, the ONA argue that BC Hydro did not consult early enough as it presented its plan for the acquisition to the ONA after it had negotiated the Master Term Sheet with Teck.
- Concluding that BC Hydro had adequately accommodated the ONA by offering to advise Teck of the ONA's concerns. The ONA argue that forwarding a First Nation's concerns without tangible action is not meaningful consultation.

In addition to alleging errors of fact and law, the ONA requests that the reconsideration process be expedited because it has filed a leave to appeal the Commission's decision with the BC Court of Appeal.

3.1 Responses from BC Hydro and Teck Metals to the Submission by the ONA

In response to the errors alleged by the ONA, BC Hydro submits that the application for reconsideration should be denied because none of the alleged errors have been substantiated on a *prima facie* basis or have material

implications. Teck is of a similar view and submits that the errors alleged by the ONA have not been substantiated on a *prima facie* basis and the request for reconsideration should be denied.

Scope of Duty to Consult

With respect to the allegation that the Commission committed an error in law in requiring a “firmly established” strength of claim, BC Hydro submits that the Commission agreed with BC Hydro’s assessment of the strength of claim, which was based on a preliminary assessment of the existence of rights or title. This, BC Hydro asserts, is the correct standard for strength of claim: the *prima facie* standard. BC Hydro also notes that the Commission did not simply defer to the assessment of BC Hydro and states: “The BCUC reviewed all of the evidence itself and made several factual findings including that the issue of competing and conflicting claims was unresolved, and that the strength of the asserted claims had not been firmly established through the evidence.” [Exhibit 3-3, p. 3] Thus, BC Hydro argues, the Commission’s assessment was based on its own review of the evidence and factual findings and a review of the evidence. Teck notes that when the decision of the Commission is reviewed in its entirety, it is evident that the Commission did not require claims to be “firmly established” before a duty to consult arose and that the Commission reviewed the evidence independently and eventually agreed with BC Hydro’s assessment. Teck further submits that since the First Nations did not provide evidence of the potential impact of the Waneta Transaction on their asserted rights, the error cannot be substantiated on a *prima facie* basis.

Historical Infringements

In response to the alleged errors of excluding ongoing and historical infringements of Aboriginal rights from the operation of the Waneta Dam, BC Hydro submits that the ONA has not substantiated that the Commission’s determination that historical infringements were outside the scope of consultation was an error of law on a *prima facie* basis.

Adequacy of Consultation

BC Hydro submits that the ONA’s argument that they should have been consulted prior to the signing of the Master Term Sheet was already considered by the Commission when it determined that the engagement of First Nations immediately following the completion of the Master Term Sheet was timely, and that the ONA failed to

substantiate that this was an error. Teck submits that the ONA did not challenge the Commission's finding of fact that the completion of the Master Term Sheet before First Nation engagement was timely and complete.

BC Hydro also does not accept the ONA's argument that they were inadequately accommodated because forwarding First Nation concerns does not constitute meaningful engagement. BC Hydro argues that it identified the focus of First Nation's concerns early in the consultation process and created a conduit for these concerns to reach Teck, the Waneta Dam operator. Teck submits that it is not aware of nor did the ONA cite case law to support the general proposition that forwarding concerns does not constitute meaningful consultation or accommodation. Teck contends that the ONA misstates BC Hydro's commitment to bring First Nations concerns to the Waneta Operating Committee and its potential effect.

In conclusion, Teck argues that the ONA disagrees with the Commission's decision but that the errors they have alleged are factual and have not been substantiated on a *prima facie* basis.

4. SUBMISSION FROM THE KNC

In its submission, the KNC agreed with the Sinixt that the Commission made errors of fact and law in:

- Determining that BC Hydro had fulfilled the Crown's duty to consult and accommodate the KNC and other First Nations; and
- Determining the required scope and content of the duty to consult the KNC and other First Nations. The KNC submits that the Commission made a serious error of fact and law in stating, "nothing about the Waneta Transaction, in itself, changes or has any potential adverse effect on any pre-existing and ongoing infringements or the day to day operations of the Waneta Assets."¹

The KNC submits that the Crown will significantly benefit from the Waneta Transaction and it is not honourable for the Crown to take part in the ongoing adverse impacts of the Waneta Dam on the KNC's Aboriginal title and rights.

¹ British Columbia Utilities Commission. A Filing by British Columbia Hydro and Power Authority for the Acquisition from Teck Metals Ltd. of an Undivided One-third Interest in the Waneta Dam and Associated Assets. Reasons for Decision to Order G-12-10, March 12, 2010, p. 28.

4.1 Responses from BC Hydro and Teck Metals to the Submission of the KNC

In response to the errors alleged by the KNC, both BC Hydro and Teck submit that the applications for reconsideration should be denied because none of the alleged errors can be substantiated on a *prima facie* basis or have material implications

Potential Impacts

BC Hydro argues that, contrary to the KNC's view, the Commission did not fail to consider evidence of non-physical impacts, and that the Commission not finding any persuasive evidence does not constitute an error of law. BC Hydro also submits that the KNC failed to substantiate, on a *prima facie* basis, the alleged error that the Commission restricted its definition of potential adverse impacts to those arising from the Waneta Transaction itself. Teck argues that since the First Nations did not submit evidence of the impact on their asserted rights from the Waneta Transaction, the claims of error are not substantiated on a *prima facie* basis.

5. COMMISSION DETERMINATION

The Commission Panel finds that the Sinixt Nation, and the parties in support of the reconsideration, the ONA and the KNC, have not established the alleged errors of fact and/or law on a *prima facie* basis, and have not established that any of the alleged errors have significant material implications. Both criteria must be met to warrant the application proceeding to the second phase of the reconsideration process.

The First Nations have submitted that Commission erred, in respect of two of its findings:

- With respect to strength of claim, "that the evidence tends to support the conclusion that there was some use and occupation by each of the First Nations of the area asserted to be impacted by the Waneta Dam. However, the evidence taken as a whole is inconclusive as to which, if any, of the First Nations had a predominant presence"²; and

² British Columbia Utilities Commission. A Filing by British Columbia Hydro and Power Authority for the Acquisition from Teck Metals Ltd. of a n Undivided One-third Interest in the Waneta Dam and Associated Assets. Reasons for Decision to Order G-12-10, March 12, 2010, p. 31

- With respect to potential impact, “the Commission Panel finds that nothing about the Waneta Transaction, in itself, changes or has any potential adverse effect on any pre-existing and ongoing infringements or the day to day operations of the Waneta Assets.”³

The First Nations have not convinced the Commission Panel on a *prima facie* basis through or argument that these Commission findings were in error. Findings of fact were made independently by the Commission Panel from the record of evidence available to it. These findings of fact formed the basis for the Commission’s assessment of BC Hydro’s determination of the First Nations’ strength of claims and scope of the duties to consult. Specifically, BC Hydro’s strength of claims determinations were made on a *prima facie* basis and were not required to be firmly or definitely established. Thus, with no new evidence or persuasive argument to refute these findings, the Commission Panel finds that the First Nations’ allegations of errors of fact and law in the Commission Panel’s assessment of the determination of the strength of claims and scope of the duties to consult have not been substantiated.

With respect to the alleged errors related to excluding historical and ongoing infringements from the scope of duty to consult have also not been substantiated on a *prima facie* basis by the First Nations. The Commission Panel assessed the scope BC Hydro’s duty to consult based, in part, on the lack of any evidence which brought into question BC Hydro’s evidence that there were no incremental impacts arising from the Waneta Transaction itself. The First Nations have provided neither new evidence nor a *prima facie* case in support of their submissions that incremental impacts do arise from the transaction itself.

Finally, the allegations by the ONA and the KNC that the Commission erred by not assessing the required consultation and accommodation as inadequate were not supported on a *prima facie* basis. No new evidence or argument has been presented regarding the assessment of the adequacy of consultation or the timing of consultation in relation to the signing of the Master Term Sheet. Consultation and accommodation requirements are determined relative to the strength of claim and adverse impacts arising from the project. None of the Sinixt, the ONA, or the KNC substantiated any error in the Commission’s assessment of BC Hydro’s determination that the Waneta Transaction itself will give rise to any adverse impacts. The Commission accordingly finds that the allegations of error in assessing consultation and accommodation requirements are not substantiated.

³ Ibid, p. 28

In conclusion, the Commission finds that criteria for advancement to the second phase of this reconsideration application have not been met by the submissions of any of the Sinixt, the ONA or the KNC. The application for reconsideration is therefore denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of August 2010.

Original signed by: _____

A.W.K. ANDERSON
PANEL CHAIR/COMMISSIONER

Original signed by: _____

D.A. COTE
COMMISSIONER

Original signed by: _____

P.E. VIVIAN
COMMISSIONER