

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-51-10**

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

**and
2010 First Nations Information Filing Guidelines for Crown Utilities**

BEFORE: L.F. Kelsey, Commissioner
D.A. Cote, Commissioner

March 18, 2010

O R D E R

WHEREAS:

- A. Section 35.1 of Part II of the *Constitution Act, 1982* states “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”; and
- B. The British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* 2009 BCCA 67 states at paragraph 41: “The Commission is therefore presumed to have the jurisdiction to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled the duty. These are issues of law arising from Part II of the *Constitution Act, 1982*, ss. 35 and 35.1 that the Commission is competent to decide”; and
- C. The BC Court of Appeal in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68 states at paragraph 13: “The Commission’s constitutional duty was to consider whether the Crown’s constitutional duty of consultation had been fulfilled with respect to the subject matter of the application”; and
- D. The *Utilities Commission Act* (the Act) states in section 24 that in its supervision of public utilities, the Commission must make examinations and conduct inquiries necessary to keep itself informed; and
- E. On September 16, 2009, the Commission issued draft First Nations Information Filing Guidelines for Crown Filings and Crown Applications for a 60-day comment period from regulated utilities, the public and First Nations; and
- F. Comments were received from British Columbia Hydro and Power Authority, British Columbia Transmission Corporation, Cheam Indian Band, FortisBC Inc., Pacific Northern Gas Ltd., Skeetchestn Indian Band and Terasen Utilities; and

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- G. The Commission has reviewed the comments and considers the establishment of the 2010 First Nations Information Filing Guidelines for Crown Utilities is warranted.

NOW THEREFORE the Commission orders as follows:

1. Applications and filings made by a Crown utility under sections 44.1, 44.2, 45, 46 and 71 of the Act will contain information to satisfy the requirements outlined in Appendix A to this Order.
2. Applications and filings made by a Crown utility under any other section of the Act, which require the Crown to consult First Nations, will contain information to satisfy the requirements outlined in Appendix A to this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 18th day of March 2010.

BY ORDER

Original signed by:

D.A. Cote
Commissioner

Attachment



British Columbia Utilities Commission

2010 First Nations Information Filing Guidelines for Crown Utilities

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BACKGROUND

On February 18, 2009, the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 confirmed that where the duty to consult is triggered, the Commission has the obligation to assess the adequacy of Crown consultation with First Nations within the scheme of its regulation.

The Commission, in its role as a quasi-judicial tribunal, does not itself have an independent duty to consult First Nations (*Carrier*, para. 56). Rather, it is the Crown who has a legal duty to consult First Nations when making decisions that may affect Aboriginal¹ and treaty rights.

The Crown's duty is guided by numerous court decisions, most notably the Supreme Court of Canada's decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*). The paragraphs from *Haida*, listed below, are not intended to provide a comprehensive overview of case law on Crown consultation and accommodation, but rather, are intended to provide context for this Information Filing Guideline. Notable context from *Haida* includes:

"The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown." (para. 16);

"The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'..." (para. 17);

¹ The term Aboriginal rights, in this document, refers to Aboriginal rights, within the meaning of section 35 of the *Constitution Act, 1982*, that are established, asserted or otherwise recognized by the Province of British Columbia.

“...the duty [to consult] arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it...” (para. 35);

“The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.” (para. 39);

“At all stages [of consultation], good faith on both sides is required.” (para. 42)

Haida introduced the concept of a spectrum to determine the scope of the duty to consult.

“At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice ...” (*Haida*, para. 43).

“At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case ...” (*Haida*, para. 44).

In deciding whether the duty to consult has been fulfilled up to the point of its decision, the Commission will consider the following sub-issues, based on the test set out in *Haida* and guidance from other applicable case law:

- (1) Existence of a duty to consult;
- (2) Scope of the duty to consult along the *Haida spectrum*, taking into account:
 - i) Aboriginal rights or treaty rights. In the case of asserted rights, the strength of claim must be taken into account; and
 - ii) The seriousness of the potential adverse impact(s) of the project applied for; and
- (3) The adequacy of the Crown’s consultation.

The Commission is guided by the emerging law in the area of First Nations consultation and accommodation and will update this guideline and its practices as the law evolves.

PURPOSE AND SCOPE OF THE GUIDELINE

The purpose of this guideline is to identify the information that must be filed by Crown utilities, in support of applications and filings. For Crown utilities, the Information Filing Requirements contained in this guideline replace and supersede the requirements for First Nations consultation in section 3 of the 2010 CPCN Application Guidelines.

The Commission's assessment is based on the evidence filed prior to the close of the evidentiary portion of a proceeding. The Commission encourages Crown utilities to file this information early.

The filing of evidence related to First Nations consultation is subject to the Commission's practice directive related to confidentiality filings

http://www.bcuc.com/Documents/MiscDocs/Confidential_Filings_Practice_Directive.pdf

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INFORMATION FILING REQUIREMENTS

Applications and filings should contain the information that is required to allow the Commission to assess whether the Crown's duty to consult, and if necessary accommodate, First Nations has been fulfilled to the point of the Commission's decision. If a Crown utility is of the view that the particular application or filing does not trigger the duty to consult, or is of the view that the application does not warrant filing certain information, reasons supporting its conclusion should be provided to the Commission. Unless otherwise justified, the following information should be filed:

1. First Nations Identification

- (i) Identify the First Nations potentially affected by the application or filing, including the information considered to identify these First Nations; and
- (ii) Provide an overview of the linguistic, cultural or ethnographic affiliations of each of the First Nations.

2. Assessment of the Scope of the Duty to Consult

For each potentially affected First Nation identified in section 1:

- (i) Identify the Aboriginal or treaty rights, within the meaning of section 35 of the *Constitution Act, 1982*² that are potentially adversely affected by the application or filing. Specify whether the rights are treaty rights or are asserted, established, or otherwise recognized by the Province of British Columbia. Where claims to rights and title are asserted, identify the *prima facie* strength of the claim. Indicate the source of information used in assessing the strength of claim, including whether any advice was sought from another Crown agency;

² Section 35 of the *Constitution Act, 1982* states: (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

- (ii) Discuss the potential adverse impact(s) of the application or filing on the First Nation's Aboriginal or treaty rights; and
- (iii) Assess where the scope of the duty to consult falls on the *Haida* spectrum.

3. Consultation Process

For each potentially affected First Nation identified in section 1, summarize the consultation to date, including:

- (i) Identify any group, body, specific band or specific person(s) that have been consulting on behalf of the First Nation in connection with the application and provide confirmation that the group, body, specific band or specific person has the authority to consult. Identify the specific member bands represented by any group or body.
- (ii) Provide a chronology of meetings, other communications and actions;
- (iii) Provide any relevant, non-confidential written documentation regarding consultation, such as notes or minutes of meetings or phone calls, or letters received from or sent to the First Nation;
- (iv) Identify specific issues or concerns raised by the First Nation, irrespective of whether those issues or concerns are based on the Aboriginal rights in section 35 of the *Constitution Act, 1982*;
- (v) Identify whether funding was provided to the First Nation and the purpose of the funding;
- (vi) Identify whether other Crown agencies have consulted the First Nation in respect of the application or filing, and if relevant, the issues raised by the First Nation in these consultations and how these issues were addressed;

- (vii) Identify where procedural aspects have been delegated to or undertaken by private sector proponents and provide a description of the proponent's efforts;
- (viii) Describe how the specific issues or concerns raised by the First Nation, as well as any other potential adverse effects on Aboriginal rights or treaty rights, were avoided, mitigated or otherwise accommodated. Describe how these actions incorporated feedback from the First Nation. Provide an explanation where no action was taken in response to the First Nation's concern;
- (ix) Provide copies of any documents which confirm that the First Nation is satisfied with the consultation and accommodation to date; and
- (x) Provide evidence that the First Nation has been notified of the filing of the application with the Commission and has been informed on how to raise outstanding concerns with the Commission.

4. Conclusion

Provide the Crown utilities overall view as to the reasonableness of the consultation process with respect to the application or filing and whether the consultation duty has been adequately fulfilled to the point of the Commission's decision. In preparing the Crown utility's view, consider the evidence along with the following questions:

- (i) Whether the consultation process been carried out in good faith and whether it was appropriate and reasonable in the circumstances;
- (ii) Whether final approval is being sought on the application or filing or whether further approvals are required from the Commission;

- (iii) Whether approvals have been obtained from provincial and federal agencies. If so, identify to the extent relevant, any issues raised by First Nations during consultations related to these approvals;
- (iv) Whether further provincial government and/or federal government approvals are required where there would be opportunities for further Crown-First Nation consultation; and
- (v) Where there are unmitigated potential effects on Aboriginal or treaty rights, what is the broader societal value of the project?³

³ The Supreme Court of Canada observed in *Haida* (para. 50) that “where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decisions on the asserted right or title and with other societal interests.”