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LETTER NO. L-7-10

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VIA E-MAIL

January 13, 2010

BCTC ILM CPCN – COURT OF APPEAL RECONSIDERATION EXHIBIT A-29

TO: British Columbia Transmission Corporation
BCTC ILM CPCN Registered Intervenors

Re: British Columbia Transmission Corporation
Project No. 3698550/Letter No. L-20-09
Interior to Lower Mainland (ILM) Transmission Project

Kwikwetlem First Nation
Application for Production of Confidential Information

Further to the Kwikwetlem First Nation's application for an order seeking the production of confidential information, enclosed are the Commission Panel's Reasons for Decision.

Yours truly,

Original signed by:

Constance M. Smith
for: Erica M. Hamilton

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Attachment

British Columbia Transmission Corporation
Reconsideration of the
Interior to Lower Mainland Transmission Project

Kwikwetlem First Nation
Application for Production of Confidential Information

REASONS FOR DECISION

1.0 INTRODUCTION

By letter dated January 10, 2008, BC Hydro filed a hard copy of its response to BCUC IR 1.115.1 ("IR 115") (Exhibit C1-4 in the original proceeding) on a confidential basis. The covering letter states:

> The disclosure of the Information Responses would very likely cause significant harm and prejudice to BC Hydro's negotiating position with not only the First Nations interested in this Project but also other First Nations interested in other BCTC and BC Hydro projects. The Information Responses contain sensitive financial information concerning BCTC and/or BC Hydro's expenditures and/or budgets for consulting and accommodating various First Nations. This financial information is confidential and is consistently treated as confidential by both BCTC and BC Hydro. The disclosure of this information could adversely influence BC Hydro's ability to negotiate potential capacity funding or accommodation agreements with First Nations and therefore adversely affect ratepayers, both on this project and future projects.

By letter dated January 7, 2010, counsel for Kwikwetlem First Nation ("Kwikwetlem") advised that he wished to cross-examine the BC Hydro/BCTC witness panel on their response to IR 115.

On January 11, 2010, the first day of the Oral Hearing, BC Hydro filed its response to IR 115 with BC Hydro's anticipated range of Aboriginal accommodation costs for the ILM Project redacted together with the January 10, 2008 covering letter (Exhibit C3-26).

The determination that the Commission Panel must make on this reconsideration is whether the Crown's duty to consult and accommodate First Nations had been met up to the point of the Commission's decision concerning the ILM Project [*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68**,** para 15 and 70 ("*Kwikwetlem*")].

The Kwikwetlem applies for an order seeking the production of:

(a) the estimate of the cost of accommodating First Nations that was redacted from Exhibit C3-26 (which was formerly filed as the response to BCUC IR 1.115.1 in the 2007 CPCN Application, Exhibit C1-4 ("IR 115")); and

(b) any information which may have subsequently particularized the consideration of impacts in formulating that estimate.

The Commission Panel has reviewed and considered the submissions of the parties. A failure to refer to a specific submission made by a party in these Reasons for Decision should not be construed as a failure by the Commission Panel to have considered that specific submission.

2.0 KWIKWETLEM FIRST NATION SUBMISSIONS

Kwikwetlem submits that with regards to the information sought, two questions arise. The first question relates to the relevance of the information, an onus which Kwikwetlem submits rests upon the Intervenors to demonstrate. The second question relates to whether confidentiality or privilege attaches to the information sought, which Kwikwetlem submits is a question to be justified by BC Hydro or BCTC.

Kwikwetlem submits that the accommodation estimate is highly relevant, particularly as it was the Commission itself who issued IR 115 and sought information relating to accommodation costs. Kwikwetlem submits that if the information is determined to be relevant, then absent some confidentiality or privilege attaching to the information, the estimate and how it is substantiated is a matter for exploration before the Commission.

Kwikwetlem submits that the information sought was clearly put in issue by BC Hydro and BCTC as a result of their evidence that avoidance, mitigation and benefits agreements were the means by which they were going to resolve in future the question of the duty of consultation and accommodation. According to Kwikwetlem, if BC Hydro and BCTC's intent was to enter into benefits agreements, what they intended those agreements to be and what planning they have done in that respect is put in issue. Further, Kwikwetlem notes that at the Oral Hearing, a BC Hydro/BCTC witness identified that the accommodation estimate was based upon on an assessment of impacts and accordingly, Kwikwetlem should have the opportunity to cross-examine on the accuracy of that assessment and the impacts taken into account, particularly as the question of impacts is a central question before the Commission in this hearing (T8: 968-69).

Kwikwetlem submits that from a ratepayer or system planning perspective, the information sought is relevant to the cost effectiveness of the ILM Project. From a First Nations perspective, Kwikwetlem submits that while the law does not require a Crown duty to agree with First Nations, there is a duty upon the Crown to accommodate and to discuss that accommodation in advance with First Nations. Kwikwetlem submits that this duty to discuss accommodation is the basis on which First Nations should be afforded an opportunity to examine the adequacy of the Crown's accommodation estimate (T8: 972).

On the issue of confidentiality, Kwikwetlem submits that a process of undertakings from counsel or proceeding *in camera* with respect to the information sought, will address confidentiality concerns while minimally impairing the public interest. This, it submits, is in accordance with the principles set out in paragraph 53 of *Joint Industry Electricity Steering Committee v. British Columbia Utilities Commission*, 2005 BCCA 330 ("*JIESC*"). To this end, Kwikwetlem submits that it is willing to work towards developing a process which minimally impairs the public process while still preserving the principles of natural justice.

3.0 NLAKA'PAMUX NATION TRIBAL COUNCIL SUBMISSIONS

The Nlaka'pamux Nation Tribal Council ("NNTC") supports Kwikwetlem's application and relies upon the Supreme Court of Canada decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 ("*Sierra Club*"). NNTC submits that *Sierra Club* at paragraph 53 outlines the test for granting a confidentiality order on information filed in an otherwise public tribunal or court:

> A confidentiality order under Rule 151 [*Federal Court Rules, 1998,* SOR/98-106] should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings (T8:984-985).

NNTC submits that BC Hydro fails on the first part of the test in that it has failed to demonstrate a serious risk to its commercial interests or interests generally from disclosure of this information. With regard to the estimate of accommodation costs, NNTC submits that there is no negotiation risk to the production of an estimate that is a preliminary range subject to further refinement. Further, NNTC submits that there is no advantage that any First Nation can gain against BC Hydro in negotiations by knowing the broad range. NNTC also submits that if the accommodation estimate is producible, then the analysis underlying the estimate, including the factors considered, are also relevant. Finally, on the first part of the test, NNTC submits that if the accommodation estimate was subsequently particularized on a nation by nation basis, then similarly, no confidentiality attaches to that information for the reason that such information will not advantage a First Nation at the negotiation table (T8: 985-987).

NNTC submits that having failed the first part of the *Sierra Club* test, consideration of the second part of the test is unnecessary. In any event, NNTC submits that the resulting prejudice to First Nations of maintaining the confidentiality of the information sought is severe. NNTC submits that such confidentiality would deprive First Nations of their opportunity to examine on an issue of central importance to this proceeding and that this will result in a deleterious effect upon a First Nation's right to fair participation within this proceeding. NNTC contrasts these alleged effects with what it submits are minimal impacts upon BC Hydro. NNTC notes that in *Sierra Club*, the determining factor outlined at paragraph 59 was the fact that the appellant there was contractually bound to keep the information at issue confidential and that a breach of such obligation would have compromised the appellant's future commercial prospects. NNTC submits that in contrast, those factors are nowhere near present in this proceeding (T8: 987-989).

The NNTC also submits that neither a negotiation privilege nor a settlement privilege attaches to the estimate (T8: 989).

Finally, in responding to a question from the Commission Panel, NNTC described the Crown as a fiduciary holding a constitutionally entrenched duty to honourably deal with Aboriginal peoples. As part of that, NNTC submitted that there was an obligation upon the Crown to make full disclosure of all relevant information, to receive input, enable meaningful input and take it into account (T8: 992).

4.0 COLDWATER, COOK'S FERRY, ASHCROFT and SISKA INDIAN BANDS SUBMISSIONS

Coldwater, Cook's Ferry, Ashcroft and Siska Indian Bands (collectively "Coldwater") supports Kwikwetlem's application and submits that as articulated in *JIESC* at paragraph 53, the public interest principles of openness and disclosure are germane to this application. Further, Coldwater submits that the Court of Appeal's approval at paragraph 53 of *JIESC* of the Commission's statement that it expects BC Hydro to use assessment models that can be made public so as to be tested by intervenors, applies equally to this proceeding, particularly when the honour of the Crown is at stake (T8: 993-995).

Coldwater agrees with Kwikwetlem that steps can be taken, including hearings *in camera*, to accommodate confidentiality concerns (T8: 995).

5.0 STÓ:LŌ TRIBAL COUNCIL SUBMISSIONS

Stó:lō Tribal Council ("STC") supports the Kwikwetlem application and adopts the submissions of the Kwikwetlem, NNTC and Coldwater. In addition, on the issue of relevance, STC submits that it is of use to return to the opening statements made at the Oral Hearing and particularly to the comments offered by British Columbia Old Age Pensioners' Organization ("BCOAPO"), as to whether the Commission Panel is looking to give direction to future cases. STC submits that while consultation must be assessed on the facts present in this proceeding, the Commission Panel will inevitably have to consider the question of how much consultation is necessary to grant a CPCN (T8: 998).

STC submits that in going forward, the accommodation estimate is more of an issue for the Commission Panel and ratepayers as they will need to determine in the future whether such estimates are reasonable and how much certainty is required of such estimates. STC submits that an exploration of that reasonableness in this proceeding will also ultimately assist the Commission in determining how much consultation is necessary to grant a CPCN application (T8: 998-999).

6.0 HWLITSUM FIRST NATION SUBMISSIONS

The Hwlitsum First Nation ("Hwlitsum") support Kwikwetlem's application and the submissions of other First Nation Intervenors (T8: 1001).

7.0 BRITISH COLUMBIA OLD AGE PENSIONERS' ORGANIZATION SUBMISSIONS

BCOAPO submits that the disclosure of the information sought depends upon how the question directed to the Commission from the Court of Appeal in *Kwikwetlem* is understood. As BCOAPO understands it, BC Hydro and BCTC take the position that *Kwikwetlem* directs the Commission Panel to consider whether satisfactory progress with regards to consultation had been made at the time of the CPCN application. In the case of this view, BCOAPO submits that the Commission must satisfy itself that enough progress had bee n made and that the intended future course of the journey would be relevant, including the nature of the information sought.

In contrast, BCOAPO says that it understands the First Nation Intervenors take the position that the Commission Panel must decide whether the obligations of the Crown had been fulfilled at the time of the CPCN application. With regards to their position, BCOAPO submits that any future intended action, such as that contemplated within the information sought, would be irrelevant (T8: 1007-09; 1012).

BCOAPO submits that in the absence of resolution as to the determining question before the Commission Panel, the information sought should be heard *in camera* and a determination as to its admissibility be made at the end of the proceeding (T8: 1013).

8.0 BC HYDRO SUBMISSIONS

BC Hydro submits that IR 115 was filed in accordance with section 42 of the *Administrative Tribunals Act,* S.B.C. 2004 (the "*ATA*") and the Commission's Confidential Filings Practice Directive ("Practice Directive"). BC Hydro submits that with respect to the accommodation estimate sought by Kwikwetlem, section 42 of the *ATA* provides the Commission Panel with the discretion to receive evidence in confidence to the exclusion of other parties if the Commission Panel determines it to be necessary. BC Hydro also relies upon the Practice Directive which states at paragraph 4 that a party may object to a request for confidentiality by filing an objection with reasons in a timely manner. BC Hydro notes that the Practice Directive was formed in response to *JIESC* which in turn, adopted the factors set out *Sierra Club.*

In its written Submissions, BC Hydro provides a short procedural history of the November 2007 CPCN application and this proceeding and submits that Kwikwetlem failed to act in a timely manner in seeking production of IR 115 and failed to provide reasons for its objection as required by the Practice Directive (BC Hydro Submissions, para 7-31; T8: 1017-1025).

BC Hydro submits that the real issue is that of prejudice – "prejudice to B.C. Hydro's legitimate interests, prejudice to BCTC's legitimate interest, prejudice to the ratepayer interest, and prejudice to this process" (T8: 1026). BC Hydro refers to section 7 of the Practice Directive which provides as follows:

> In determining whether the nature of the information or documents require a confidentiality direction, the Commission will have regard to matters that it considers relevant, including,
>
> (a) whether the disclosure of the information could reasonably be expected to result in:
>
> i. undue material financial loss or gain to a person, or
> ii. significant harm or prejudice to that person's competitive or negotiating position,
>
> and
>
> (b) whether the information is financial, commercial, scientific or technical information that is confidential and consistently treated as confidential by the person,
>
> (c) whether the person's interest in confidentiality outweighs the public interest in the disclosure of the information or documents in the hearing, and
>
> (d) whether it is practicable to hold the hearing in a manner that is open to the public.

BC Hydro notes that its reasons for seeking confidentiality of IR 115 have been clearly set out since January 10, 2008 and refers to its letter of that date (Exhibit C1-4 in the original proceeding) (BC Hydro Written Submissions, para 33; T8: 1020-1021).

First, BC Hydro submits that disclosure will result in "significant harm or prejudice to… [its] negotiating position". BC Hydro refers to its response to Kwikwetlem IR 1.4 (Exhibit B-10) where BC Hydro and BCTC stated that they would like to attempt to negotiate an accommodation agreement with Kwikwetlem and that while negotiations are ongoing, they do not believe it is appropriate to disclose what they might be prepared to agree to in an accommodation agreement with Kwikwetlem and are not prepared to do so. Further, BC Hydro says that it is

negotiating with Kwikwetlem on possible accommodation arrangements or agreements in respect of the 5L83 Project (BC Hydro Written Submissions, para 34-35; T8: 1026-1028).

In addition, it says it is negotiating with other First Nations represented by Kwikwetlem's counsel or his firm, in respect of accommodation agreements in the 5L83 Project, including on behalf of other intervenors in this proceeding and other First Nation's that have not intervened. Further, BC Hydro submits that given the practice area of the firm of Kwikwetlem's counsel, it is reasonably foreseeable that BC Hydro may in the future find itself negotiating with First Nations represented by that firm in relation to BCTC and/or BC Hydro projects (BC Hydro Written Submissions, para 36-37; T8: 1028).

In such circumstances, BC Hydro submits that this is not a situation where potential prejudice can be overcome by limiting disclosure only to counsel (with an undertaking not to disclose to clients). BC Hydro also notes that Kwikwetlem would likely object to disclosing its internal information regarding its bottom line negotiating position, or the accommodation it may find acceptable in relation to a particular project, nor, BC Hydro submits, should a party be put in a position of negotiating with a counter party that has been given access to the parties' internal cost estimates (BC Hydro Written Submissions, para 34-40; T8: 1028-1029).

Second, BC Hydro submits that the information is confidential and has been consistently treated as confidential by BC Hydro and BCTC. It points to the limited number people who knew the cost estimate and the fact that it was not even known to the BCTC Project Manager. In addition, it says it has taken extra-ordinary steps to protect the confidentiality of the estimate including filing the estimate in hard copy only "in order to reduce any chance of inadvertent or accidental disclosure" (BC Hydro Written Submissions, para 41-43; T8: 1030-1031).

On the issue of relevance, BC Hydro acknowledges that the cost estimate for accommodation is clearly relevant to the capital cost of the project; however, it notes that the capital cost issue was fully canvassed in the original CPCN proceeding, the Commission made an order in respect of capital costs in that proceeding and no appeal was taken from that decision. BC Hydro further notes that the information provided in IR 115 was not used to defend the adequacy of its consultation process with First Nations nor did its existence constrain the steps taken by BC Hydro and BCTC (BC Hydro Written Submissions, para 48-49; T8: 1034-1036).

BC Hydro submits that the question the Commission has to consider as to whether the consultation efforts up the point of its decision were adequate is not informed by BC Hydro's estimate of accommodation costs for the completion of the ILM Project. Accordingly, BC Hydro submits that there is no probative value to the information sought when considering the adequacy of consultation. To the extent that any marginal value is found by the Commission Panel, it submits that it is greatly outweighed by the prejudice to be suffered by BC Hydro, BCTC and/or the ratepayers (BC Hydro Written Submissions, para 47, 56; T8: 1037).

On the issue of prejudice relating to the disclosure of cost estimates for individual First Nations, BC Hydro relies on the submissions that it made with respect to the global estimate. It observes that "any estimate would essentially become the starting position or floor for any negotiated agreement" (BC Hydro Written Submissions, para 58-59; T8: 1038-39).

BC Hydro submits that the suggestion that the Crown is obligated to begin negotiations with First Nations by disclosing its maximum accommodation amount upon first request by a First Nation is without merit. Instead, it submits that in accordance with *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 ("*Haida*"), the Crown is permitted to engage in hard bargaining without offending the duty to consult. It refers to paragraph 42 of *Haida* where the Court states:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted (BC Hydro Written Submissions, para 62-63; T8: 1040-1041).

In BC Hydro's submission, the process of give and take as described by the Supreme Court of Canada in *Haida* would hardly be possible if one party was bound to provide the other with its internal estimate of what it may ultimately offer to conclude negotiations. BC Hydro submits that its approach is entirely consistent with the approach described by the Supreme Court of Canada and the honour of the Crown (BC Hydro Written Submissions, para 65; T8: 1041-1042).

To further support its position, BC Hydro relies upon section 40 of the *ATA* which it submits provides the Commission with the discretion to order the production of evidence which it considers to be "relevant, necessary and appropriate". BC Hydro submits that the information sought is not relevant as it did not guide or influence BC Hydro or BCTC's conduct during the relevant time period nor did it arise during consultation with First Nations. The information sought, it submits, is also not necessary as the adequacy of the consultation process can be examined in the absence of the information sought. Finally, BC Hydro submits that disclosure of the information is not appropriate as the prejudicial effect greatly outweighs any limited or marginal probative value (BC Hydro Written Submissions, para 67-71; T8: 1043-1044).

BC Hydro submits that it meets the overarching test set out within *Sierra Club* and that in this case, there are significant interests in terms of the ratepayers of both BC Hydro and BCTC which are at stake in the production of the information sought. BC Hydro paraphrases the factors set out in paragraph 60 of *Sierra Club* as criteria determinative of whether the commercial interest [of the applicant] was "sufficiently important":

- the information in question has been treated [by the applicant] at all relevant times as confidential;
- on a balance of probabilities, the [applicant's] information's [sic] commercial and propriety [sic] interests could reasonably be harmed by disclosure [of the information]; and
- the information is of a "confidential nature" in that it has been "accumulated with a reasonable expectation of being kept confidential" (BC Hydro Written Submissions, paragraph 74; T8: 1046).

In response to the factors above, BC Hydro submits that access to the information sought was extremely narrow and that special measures were taken to ensure that the Commission received the response to IR 115 confidentially. BC Hydro submits that as indicated above, on a balance of probabilities, its position in negotiating accommodation agreements with First Nations will be seriously damaged by disclosure of the information sought. Finally, BC Hydro submits that the limited number of senior staff who had access to the information sought undoubtedly supports a reasonable expectation that the information would remain confidential. Therefore, BC Hydro submits that the potential prejudice resulting from disclosure of the information sought is entirely disproportionate to the potential probative value (BC Hydro Written Submissions, para 74-76; T8: 1046).

BC Hydro submits that Kwikwetlem's motion should be dismissed in its entirety. It submits that the proposal for an *in camera* session is not an appropriate mechanism to apply in this proceeding and does not meet the objectives found in the Practice Directive ((BC Hydro Written Submissions, para 77; T8: 1047).

9.0 BCTC SUBMISSIONS

BCTC adopts the submissions of BC Hydro and further agrees with Kwikwetlem that in regards to the information sought, the two questions at issue are the relevance of the information and whether confidentiality or privilege attaches to the information sought. With respect to the latter question, BCTC submits that it does not rely upon any argument of privilege over the information sought to bar its disclosure (T8: 1052-1054).

On the issue of relevance, BCTC submits that the information sought has virtually no relevance to the case of the Intervenors, nor will they be prejudiced by its absence. BCTC disagrees with NNTC that the lack of disclosure concerning the information sought deprives the First Nation Intervenors of a fair hearing as there is no indication in the evidence that the information had any impact. In contrast, BCTC submits that disclosure of the information sought would be highly prejudicial to BC Hydro, BCTC and ratepayers. In support of its position, BCTC relies upon both sections 41(3) and 42 of the *ATA* to protect the confidentiality of the information sought. In response to NNTC's submissions as to the application of *Sierra Club* to this proceeding, BCTC disputes any suggestion that the interest at stake here is specific solely to BC Hydro and BCTC as discussed in paragraph 55 of *Sierra Club*. Rather, BCTC submits that there are significant interests here in terms of the ratepayers of both BC Hydro and BCTC which are also at stake in this application (T8: 1054; 1057; 1063-63).

On the relationship between the honour of the Crown and the information sought, BCTC submits that full transparency is not consistent with the concept of "hard bargaining" as approved by the Supreme Court of Canada in *Haida.* BCTC submits that while it is clear that the Crown cannot engage in bad faith, paragraphs 47 to 50 are replete with references to accommodation being resolved through consultation and negotiation, compromise, give and take and the balancing of interests. In response to NNTC's submission that the honour of the Crown is fiduciary in nature, as referred to above, BCTC refers to paragraph 18 of *Haida* where the Court states:

> Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title (T8: 1065-68).

BCTC agrees with Coldwater that there is a public interest at stake regarding the openness of tribunal processes and that section 41(2) of the *ATA* is clear that an *in camera* session may occur. However, it submits that under that model, the prejudice has already occurred by disclosing the information sought to First Nations counsel involved in direct negotiations that are the subject matter of the ILM Project. It submits that it would be impossible for counsel to disabuse themselves of the information sought. Further, BCTC disagrees with the broad application of the principles within *JIESC* as suggested by Coldwater. Instead, it submits, that in contrast to the situation in *JIESC,* when BCTC filed its CPCN application, it did not rely upon the information sought in support of its application and only filed it in response to a Commission information request (T8: 1055-1056; 1078-79).

BCTC submits that Kwikwetlem's application should be dismissed (T8: 1079).

10.0 KWIKWETLEM FIRST NATION REPLY

Kwikwetlem submits in reply that it could not have been expected of Kwikwetlem to have challenged the confidentiality of the information sought on a matter that the Commission ultimately determined was not relevant in the original proceeding. It submits that the scoping decision of the Commission effectively precluded the participation of Kwikwetlem and other First Nations on issues relating to consultation and accommodation. Kwikwetlem further clarifies that its intent is not to focus upon the documents themselves, but upon the area for the purpose of cross-examination (T8: 1081-1082).

Kwikwetlem denies that its intention behind seeking disclosure is to enhance its negotiating position. Rather, it says its intent is to demonstrate that there were a number of impacts which were never seriously considered at all by BC Hydro. Kwikwetlem supports the proposal for an *in camera* hearing and says counsel would be prepared to undertake to not be engaged in negotiations for Kwikwetlem or to share any information with other negotiating counsel (T8: 1084-1085).

Kwikwetlem submits that if BC Hydro and BCTC are asking the Commission to rely upon some future intention then an examination must be conducted on that assertion, in addition to their confidence that they could enter into benefits agreements with First Nations (T8:1087-1088).

Finally, Kwikwetlem submits that, in its view, the present proceeding represents the end of the consultation process and not the beginning. Accordingly, it submits that within an appropriate consultation process there would have been discussion regarding the information sought with the First Nation and the Crown should justify any accommodation estimate it had contemplated (T8: 1088-1089).

11.0 COMMISSION DETERMINATION

The Commission Panel determines that Kwikwetlem's application for production of confidential information engages three primary questions:

1. Is the information sought relevant?
2. Will BC Hydro, BCTC and ratepayers suffer prejudice through disclosure of the information sought?
3. If there is prejudice, can the prejudice be overcome through reasonable alternative measures?

The Practice Directive references sections 41 and 42 of the *ATA* which provide as follows:

> **41** (1) An oral hearing must be open to the public.
>
> (2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that
>
> (a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or
>
> (b) it is not practicable to hold the hearing in a manner that is open to the public.
>
> (3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.
>
> **42** The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

The Commission Panel finds that it has the discretion to receive evidence in confidence as set out in sections 41 and 42 of the *ATA*. The Commission Panel also finds that it has the authority to order reasonable alternative measures as referred to in paragraphs 40 and 46 of *Sierra Club* and subsequently adopted by the B.C. Court of Appeal in *JIESC* at paragraph 49.

With respect to BC Hydro and BCTC's submission that Kwikwetlem has failed to act in a timely manner as required by the Practice Directive, the Commission Panel agrees with Kwikwetlem that it would have been unreasonable to expect First Nation Intervenors to have contested the confidentiality question when the scoping of the original hearing was focused upon the question of whether the duty of consultation should be considered at all.

On the issue of relevance, the Commission Panel adopts the test found in *R. v. Korol,* 2009 BCCA 118 at paragraph 34:

> Evidence is relevant if it is probative of either a fact in issue or a fact which itself is probative of a fact in issue.

The Commission Panel finds that the information for which disclosure is sought is of marginal relevance to the question of whether the Crown's duty to consult and accommodate was met at the time of the CPCN decision. The record contains numerous documents including minutes of meetings with First Nations and briefing documents which are relevant to the identification and consideration of impacts upon First Nations by BC Hydro and BCTC, and which provide reasonably alternative means whereby First Nations Intervenors can obtain evidence of BC Hydro and BCTC's assessment of the Project's impacts on First Nations.

Having concluded that there is some marginal relevance to the information, the Commission Panel next turns to the question of whether BC Hydro, BCTC and their ratepayers will suffer prejudice through the disclosure of the information sought.

The Commission Panel finds that *JIESC* can be distinguished from the present proceeding as in that case, the contested document was clearly relevant, whereas in this case, the information sought is only marginally relevant. In addition, *JIESC* was not a case where the information for which access was sought would provide

one of the parties to a negotiation or a future negotiation with information on the opposite party's potential floor and ceiling for negotiation purposes.

Kwikwetlem submits that the honour of the Crown is not being met in preventing disclosure of the information sought. The Commission Panel notes that no authority has been cited for the proposition that a First Nation is entitled to know the anticipated Aboriginal accommodation costs for a project. The Commission Panel agrees with BCTC that accommodation is to be resolved through "consultation and negotiation", "give and take", "settlement or compromise" and the "balancing of competing societal interests with Aboriginal and treaty rights" as articulated within *Haida* from paragraphs 47 to 50.

As stated in paragraph 42 of *Haida*: "[m]ere hard bargaining, however, will not offend an Aboriginal people's right to be consulted". The Commission Panel agrees that the disclosure of the information requested is inconsistent with *Haida's* approval of hard bargaining.

Further, the Commission Panel finds that any probative value in the information sought is outweighed by the potential prejudice to BC Hydro, BCTC and ratepayers. The Commission Panel agrees with BCTC and BC Hydro that the criteria set out in *Sierra Club* at paragraph 60 and referred to above are of assistance in assessing the Kwikwetlem application. The Commission Panel finds that these determinative criteria as to whether a commercial interest is sufficiently important are met in relation to the information sought.

First, the Commission Panel notes that special measures were taken to ensure the confidentiality of the information sought and even the BCTC Project Manager was not aware of the information sought. In this regard, the Commission Panel agrees that the information has been treated at all relevant times as confidential.

Second, the Commission Panel agrees with BC Hydro that the disclosure of the information sought would cause serious prejudice to BC Hydro and BCTC's negotiating position with not only the First Nation's interest in the ILM Project but also with First Nations interested in other BC Hydro and BCTC projects. The Commission Panel accepts BC Hydro's submission that on a balance of probabilities, the information sought is commercially sensitive information.

Third, the Commission Panel finds that, as submitted by BC Hydro, prejudice would also be suffered by the ratepayers and that this factor constitutes a public interest in confidentiality as discussed in *Sierra Club* at paragraph 55.

Having found that there is prejudice to BC Hydro, BCTC and ratepayers; the Commission Panel now considers whether the prejudice can be overcome through reasonable alternative measures. In this instance, the measures proposed by Kwikwetlem include an *in camera* session and appropriate undertakings.

BC Hydro and BCTC submit that an *in camera* session is not an appropriate mechanism for this proceeding and does not meet the objectives found in the Practice Directive. In addition, BC Hydro has expressed its concerns relative to its counterparty having knowledge of BC Hydro's "negotiating floor". BCTC submits that it would be impossible for counsel to disabuse themselves from knowledge of the information sought if disclosed. The Commission Panel agrees with BCTC and BC Hydro that the potential prejudice to be suffered cannot be prevented through reasonable alternative measures such as the proposed *in camera* process and Kwikwetlem's suggestion to undertake to not be involved in negotiations for Kwikwetlem or to share any information with those negotiating counsel.

For the above reasons, the Commission Panel denies Kwikwetlem's application for production.

DATED at the City of Vancouver, in the Province of British Columbia, this 19th day of January 2010.

Original signed by:
A.J. (TONY) PULLMAN
COMMISSIONER

Original signed by:
A.A. RHODES
COMMISSIONER

Original signed by:
P.E. VIVIAN
COMMISSIONER