



**Law Reform to Support Replacing Remote Community Diesel Generators
with Clean Energy**

A Report for:

Gitga'at First Nation

c/o David Benton, Clean Energy Project Manager

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Executive Summary

You have asked us to provide you with law reform proposals regarding replacing remote community diesel generators with clean energy. This project seeks to determine:

1. What changes to acts, regulations, policies and the BC Utilities Commission can compel BC, the federal government, or BC Hydro to support or provide clean energy to remote First Nations communities currently burning diesel for electricity, in particular the Gitga'at First Nation, and;
2. How the push for reconciliation and the implementation of the Declaration on the Rights of Indigenous Peoples Act can provide opportunity to ensure the delivery of clean energy solutions in remote First Nation communities.

The provincial government has made commitments towards reducing greenhouse gas emissions, reconciliation, and affirming the application of UNDRIP to British Columbia, and created laws to support those commitments. Unfortunately, British Columbia's current laws do not provide enough incentive for action or accountability, and also combine to create bureaucratic ambiguity that makes it difficult to achieve legislated objectives or empower First Nations communities.

This project outlines four recommendations which could improve First Nations energy sovereignty. It would give best effect to the Province's stated objectives in the *Clean Energy Act* and the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) if all four were adopted together. The recommendations can be summarised as follows:

- I. Delegation of Authority pursuant to *DRIPA* s. 7: Cabinet delegates the authority of the *Utilities Commission Act*, so that an Indigenous governing body (IGB) and the BCUC would have to work together on any energy project concerning the IGB.
- II. Reform of the *Clean Energy Act*, the *Utilities Commission Act*, and the *Hydro and Power Authority Act*: bringing the legislation into alignment with the stated goals in the *Clean Energy Act* and *DRIPA*.
- III. An entirely new piece of legislation, an *Indigenous Energy Act*: a single piece of legislation that contains all the reforms in Recommendations II and IV, while also creating a formal administrative body, an Indigenous Energy Board.
- IV. An overhaul of the existing First Nations Clean Energy Business Fund.

These proposals have been oriented to our client, Gitga'at First Nation. However, further work on these issues could be done at a bigger scale in consultation and co-operation with the BC First Nations Energy and Mining Council or other First Nations or Indigenous Leadership organisations.

The Gitga'at First Nation is a member of CleanBC's Remote Community Energy Strategy Working Group (RCES Working Group),¹ which will be submitting their final report to the government in the near future. While this memo will form part of the Gitga'at submission to the RCES Working Group, it has not been drafted as an RCES Working Group submission.

This is a rapidly evolving area of law and policy. In the time this report was being drafted British Columbia released their *Declaration on the Rights of Indigenous Peoples Act Action Plan*,² and the First Nations Leadership Council released its *BC First Nations Climate Strategy and Action Plan*.³ These recommendations are merely a step in the process towards just solutions, and further consultation with the First Nations Leadership Council and the First Nations Energy and Mining Council is recommended.

¹ CleanBC's Remote Community Energy Strategy (RCES), online: <<https://www2.gov.bc.ca/gov/content/industry/electricity-alternative-energy/community-energy-solutions/remote-community-energy-strategy-rces>>.

² British Columbia, "Declaration on the Rights of Indigenous Peoples Act Action Plan", March 2022, at Section 4.43, online (pdf): *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf>.

³ The First Nations Leadership Council, Spring 2022, *BC First Nations Climate Strategy and Action Plan*, online (pdf): <<https://www.bcafn.ca/sites/default/files/2022-04/BCFNCSAP%20Final%20Draft%20%2822April2022%29.pdf>> (FNLC Climate Strategy and Action Plan)

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Introduction

Many remote communities in Canada are heavily dependent on diesel-generated power. Although some First Nations have completed and operated clean energy projects, systemic barriers often make it difficult for First Nations to do so.⁴ These barriers include technical familiarity, access to financing, a fragmented policy approach, and the need for a community champion and skilled personnel.⁵ Because subsidized diesel is a cheap source of power, the business case for clean energy projects can be hard to make when focused solely on dollar values.⁶ Despite rapid and impending climate change, where a climate emergency has been declared by the Assembly of First Nations and supported by other First Nations or Indigenous Leadership organisations,⁷ the federal government,⁸ and hundreds of municipalities,⁹ Indigenous-led energy projects are still not supported at the pace and scale needed to effectively transition away from diesel.

At the same time, the federal and provincial governments have declared their commitment to reconciliation and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹⁰ In British Columbia (BC), the legislation of the *Clean Energy Act* and the policy framework of *CleanBC* pledge to “encourage” and “foster” transitions towards clean energy while empowering First Nations development. These laws and policies provide little incentive for action, and lack meaningful consequences for inaction. The provincial government oversees their own regulatory body, the British Columbia Utilities Commission (BCUC), and their Crown corporation power authority, BC Hydro, which means only the Province can hold them accountable for any regulatory uncertainty or any failure to meet the *Clean Energy Act*’s objectives. For the Gitga’at, not enough progress has been made towards cleaner energy projects.

Grand Chief Stewart Phillip, President of the Union of BC Indian Chiefs, stated “[a]ddressing the climate emergency must be an absolute priority for leadership. Any plan to address the

⁴ Zoë Yunker, “The Coming Indigenous Power Play, The Tye” (20 April, 2022), online: < <https://thetyee.ca/News/2022/04/20/Coming-Indigenous-Power-Play/> >; Dave Lovekin, Saeed Kaddoura “How B.C. can be a leader in economic reconciliation” (12 June 2020) Pembina Institute, online: <<https://www.pembina.org/blog/how-bc-can-be-leader-economic-reconciliation> >.

⁵ Liane Inglis, “Barriers to Renewable Energy Development in British Columbia’s Remote Communities” (Summer 2012), Master’s Thesis, Simon Fraser University School of Public Policy at 11, online: < <http://summit.sfu.ca/item/12427> >.

⁶ Dave Lovekin and Dylan Heerema “The True Cost of Energy in Remote Communities” (March 2019) online (pdf): *Pembina Institute* < <https://www.pembina.org/reports/diesel-cost-backgrounder-2019.pdf> >.

⁷ Leadership Council Welcomes Declaration of Global Climate Emergency Issued by AFN, News Release, (24 July, 2019), online: <https://www.ubcic.bc.ca/leadership_council_welcomes_declaration_of_global_climate_emergency_issued_by_afn >.

⁸ Hannah Jackson, “National climate emergency declared by House of Commons, Global News” (June 17, 2019) online: *Global News* < <https://globalnews.ca/news/5401586/canada-national-climate-emergency/> >.

⁹ Random Acts of Green, “517 Municipalities Have Declared A Climate Emergency In Canada” (January 18, 2022) online: < <https://raog.ca/climate-emergency-declarations-canada/> >.

¹⁰ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly* (2 October 2007), A/RES/61/295 (UNDRIP), Articles 3, 4, 18, 19, 23, 32, 38, and 39 are of particular relevance to this issue.

climate crisis must prioritize Indigenous rights, stop the further expansion of greenhouse gas-emitting projects and infrastructure and support the development of renewable energy and alternative energy economies. It is not enough to focus on adaptation and mitigation – emission reduction must be prioritized and actioned immediately by every level of government.”¹¹

This project examines what changes to laws, regulations, and institutions can compel the provincial government, the BCUC, or BC Hydro to support or provide clean energy to remote First Nations communities currently burning diesel for electricity, in particular the Gitga’at First Nation. As well, this memo considers how Indigenous communities can rely on commitments made regarding reconciliation and the *Declaration on the Rights of Indigenous Peoples Act* to ensure the delivery of clean energy solutions in remote First Nation communities.

This report will first review the facts including the Gitga’at experience in attempting to transition to renewable energy, the impacts of diesel subsidisation, the benefits of renewable energy, and the policy context. The policy context includes CleanBC, the BCUC Indigenous Utilities Inquiry, and the recent FNLC BC First Nations Climate Strategy and Action Plan and Urgent Calls for Climate Action. It will then review the current law, including UNDRIP, the new *DRIPA Act*, and the *Clean Energy Act*, the *Utilities Commission Act*, and the *Hydro and Power Authority Act*. It will then close with suggested law reform proposals to advance First Nations energy sovereignty and transition to renewable energy.

I. Background – Facts and Policy

The full scale of diesel dependency is complex, as fuel must be transported and stored before it can be burned to generate electricity. Transportation, storage, and burning of diesel all come with their own footprint, environmental risks, and negative impacts on community health and well-being.¹²

Diesel fuel is expensive and highly polluting, and its combustion pollutes local air, impacts residents’ health, creates noise pollution, and contributes to greenhouse gas emissions causing climate change. Aggregate data from 11 remote First Nations along BC’s coast indicates that they collectively transport, store and burn over 15.3 million litres of diesel fuel every year to supply their microgrids and produce electricity.¹³

¹¹ First Nations Leadership Council, News Release: LEADERSHIP COUNCIL WELCOMES DECLARATION OF GLOBAL CLIMATE EMERGENCY ISSUED BY AFN, July 24, 2019, online: <https://d3n8a8pro7vhm.cloudfront.net/ubcic/mailings/2631/attachments/original/07_24_2019_PressRelease_FNLC_Global_Climate_Emergency1.pdf?1563990490>.

¹² Shehin Rahemtulla, MEng, Sustainable Energy Manager, Coast Funds (personal communication, May 4, 2022).

¹³ *Ibid.*

1.1 The Gitga’at Experience in the Provincial Energy Context

Hartley Bay is a remote community on the north-west coast of British Columbia, and is home to the Gitga’at Nation. The community diesel generating station emits almost 2,000 tonnes of greenhouse gases per year,¹⁴ causing local pollution including diesel spills.¹⁵

In 2003, Hartley Bay commissioned the Pembina Institute to create a Community Energy Plan (CEP), to map out a pathway to cleaner, more reliable energy.¹⁶

In 2012 the Gitga’at stated vision, in negotiating an Electricity Purchase Agreement (EPA), was to make “Hartley Bay one of the greenest, most sustainable communities in Canada.”¹⁷ The Gitga’at entered into an EPA with BC Hydro in November 2012.¹⁸ They were their own electric utility until February 2014, when BC Hydro became their electric utility a service agreement.¹⁹

The Gitga’at First Nation’s experience of trying to get renewable energy is described by David Benton, former Band Manager, and current Clean Energy Project Manager, as follows:

After the CEP was written the Gitga’at Development Corporation began examining hydro-electricity options and eventually chose a particular configuration. The initial cost of the project was estimated to be \$7 million, but the cost continued to increase as the project developed and components became increasingly expensive.

Over decades, Indigenous Services Canada (formerly INAC, among other names) paid millions of dollars for diesel, diesel generator repairs, new generators, and contamination remediation from diesel spills in the community, but refused to pay for a hydro system in Hartley Bay.

It became clear that more funding was needed, and it would have to come externally, even though several government programs and departments collectively agreed to grant the project up to \$10 million.

In 2009, after a long struggle to obtain funding, the project’s working group was directed to BC Hydro’s Remote Community Electrification Program. BC Hydro and the Gitga’at First Nation negotiated an Energy Purchase Agreement (EPA) over an 18-month period. The concept of this EPA was that a Gitga’at First Nation energy company would sell clean electricity to BC Hydro which, in turn, would be used to supply

¹⁴ Hartley Bay Electricity Purchase Agreement, December 14, 2012, Appendix I - Letter from Arnold Clifton, Chief Councillor, Gitga’at First Nation, to BC Hydro, dated December 4, 2012 [hereinafter “Gitga’at Letter”].

¹⁵ Gitga’at Community Energy and Emissions Plan 2019 (Gitga’at CEEP), at 3; Dave Lovekin and Dylan Heerema “The True Cost of Energy in Remote Communities” (March 2019) online (pdf): *Pembina Institute* < <https://www.pembina.org/reports/diesel-cost-backgrounder-2019.pdf> >, at 5.

¹⁶ Tim Weis, MSc, Andrew Pape-Salmon, PEng, MRM, Pembina Institute, 30 April, 2003, *Gitga’at First Nation Community Energy Plan*, Draft Report.

¹⁷ Gitga’at Letter, *supra* note 14.

¹⁸ Hartley Bay Electricity Purchase Agreement, December 14, 2012, *supra* note 14.

¹⁹ Christopher Pollon “Clean Power Remains a Major Challenge for Remote First Nations, the Narwhal”, (2 April, 2016) online: *The Narwhal* < <https://thenarwhal.ca/clean-power-remains-major-challenge-remote-first-nations/> >; Hartley Bay Electricity Purchase Agreement, December 14, 2012, *supra* note 14.

electricity to Hartley Bay. The flow of funds under the EPA would provide the basis for the Gitga'at First Nation to secure financing for its energy project.

As the EPA was being negotiated, BC Hydro's position was that it was indifferent to the source of electricity — diesel generated or clean energy — as there was no difference because the costs of acquiring the energy would be the same. No carbon benefits were available to the Gitga'at because BC Hydro's position is that the cost of carbon is built into diesel costs.

The constraints put on the small utility in Hartley Bay came with unpredictable spill over effects. Electricity was too expensive to produce, so many buildings relied on diesel systems for heating. Fuel spills were a regular occurrence, caused by a mixture of failing tank structures and a lack of training for workers. And Hartley Bay was under constant threat of power outages.

As so many isolated First Nations communities are, Hartley Bay is heavily dependent on freezers for their ceremonial and daily food storage needs. The constant threat of power outages was a worry in the community, especially for the elders.

BC Hydro was purely focused on cost and return on investment when establishing the relationship with the Gitga'at First Nation.

In 2022, after a decades-long struggle to achieve clean energy and energy security, Hartley Bay continues to rely on diesel generated power. Today, to power Hartley Bay, BC Hydro is paid Zone II rates and the Gitga'at First Nation pays a non-tariffed premium of \$85,000 annually from its Operations and Maintenance funding it receives from Indigenous Services Canada.

Focusing solely on cost and return on investment looks only at the net present value of funds, without considering difficult to quantify elements such as social considerations, oil spill avoidance, improved community health and well-being, food security, Indigenous empowerment, and environmental impacts such as greenhouse gas emissions reductions. The result is that projects are framed only in financial terms, rather than with an eye to the broader social, environmental, and cultural implications.

This approach does not support Indigenous energy sovereignty. Energy sovereignty is the right of individuals, communities and peoples to make their own decisions on energy generation, distribution and consumption in a way that is appropriate within their ecological, social, economic and cultural circumstances, including “decisions about the sources, scales, and forms of ownership that structure energy access.”²⁰ In order to better support the Gitga'at and allow them to exercise energy sovereignty, a more holistic view must be taken when assessing the true cost of diesel and renewables.

²⁰ El Ecologista, “Defining energy sovereignty” (2014), *Ecologistas en Acción Magazine* n° 81; Chelsea Schelly, et al, “Energy policy for energy sovereignty: Can policy tools enhance energy sovereignty?” *Solar Energy*, Volume 205, 2020, 109-112, ISSN 0038-092X, <https://doi.org/10.1016/j.solener.2020.05.056>, abstract.

1.2 The Impact of Diesel Subsidisation

Diesel subsidies are not inherently negative; they play an important role in reducing the costs of heat and electricity in remote communities to a reasonably affordable price. Without subsidies, energy costs could be between 10 to 30 times more expensive in remote areas.²¹ Even with the subsidies, consumers in remote communities pay on average six to 10 times more for energy than the rest of Canada.²² However, diesel subsidies are often hidden, and as a result, obscure the real cost of producing energy from diesel. This makes it challenging to compare the actual cost of diesel to the costs of implementing clean energy alternatives. When subsidies are fully accounted for, diesel energy will in many cases be more expensive than other sources of energy.²³

The federal and provincial governments, utilities, remote communities, and consumers from non-remote communities provide the financing that goes into diesel subsidies. This in turn subsidizes the cost of diesel power for provincial and territorial governments, utilities, Indigenous governments, remote communities, and end-use consumers who receive the subsidies as direct revenue or receive discounted pricing as a result.²⁴ These subsidies are different than those used for the production of oil and gas. In most cases, utilities serving remote communities are required to submit the cost per unit to provide electricity.²⁵ The rate submitted will be approved by a utilities commission, and this rate is then understood as the “cost of energy” or, in utilities terms, “the cost of service.”²⁶ This cost is expressed in dollars per megawatt hour ((\$/MWh). The cost of energy for utilities includes production with ongoing capital investments, operations and maintenance, distribution, and selling.²⁷

It is estimated that the year-over-year cost of direct subsidies required to maintain diesel for energy in remote communities is between \$300 million and \$400 million annually.²⁸ This is the cost for electricity alone, and it is an unrecoverable cost.²⁹ The retail price of diesel is forecasted to increase over time. It has been projected that the price will increase from \$1.00/L to \$1.68/L by 2050,³⁰ representing a 68% price hike over the next thirty years³¹ However, the current price of diesel as of March, 2022, is \$2.15 per litre. This reflects how abruptly these prices and concomitant costs can fluctuate.

²¹ Pembina Institute, *Diesel Subsidies Simplified* (June 2021) online: < <https://www.pembina.org/reports/diesel-subsidies-simplified-2021-06.pdf> >.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ British Columbia Utilities Commission, “Gas Prices BC” (March 2022) online: <<https://www.gaspricesbc.ca/>>.

³¹ U.S. Energy Information Administration, *Annual Energy Outlook 2020 with projections to 2050*, 2020.

There are broad deleterious environmental impacts of diesel use. The logistics of getting fuel to remote BC communities increase the risks of fuel spills and leakages, and once delivered, there is still a risk of inadequate storage, which can lead to further spills and contamination of the soil and groundwater.³² Significant resources are devoted to remediation, which could be avoided in a cleaner energy system.³³ In addition to the risks associated with transport and storage, burning diesel produces substantial greenhouse gas emissions. 11 diesel-reliant BC coastal Nations emit over 42,000 tonnes of CO₂ equivalent every year for electricity generation alone.³⁴

When framed purely in terms of economic cost, the cost of diesel, especially when subsidized, is hard to compete with.³⁵ In order to overcome this hurdle, the overlooked externalities associated with diesel must be internalized, which would increase the cost of supplying diesel energy. Fair and equitable energy rates should account for all social, environmental, and community health benefits as well as the quality-of-life benefits associated with clean energy projects. Fair pricing would also consider the savings achieved by using renewable energy instead of diesel fuel, including lower operations and maintenance expenses, mitigating fuel spill clean-up costs, and reducing reliance on diesel subsidies. The hidden costs of diesel need to be accounted for in making the business case for or against renewable energy projects.

1.3 The Benefits of Renewable Energy

In contrast to the use of diesel, renewable energy systems can reduce overall energy costs³⁶ as well as contribute directly and indirectly to the well-being of First Nations communities. They increase energy quality and reliability, improve air quality, support energy independence, create new jobs and learning opportunities, reduce pollution and risks of diesel spills, and support community activities, housing and food security.³⁷

Renewable energy systems can also build community resilience through employment and training opportunities for community members, contributing to family-supporting incomes.³⁸ They create economic prosperity by diversifying local economies and developing new assets, employing community members and supporting new and existing community centres and businesses. First Nations investment in communities attracts additional business and improves infrastructure, which provides positive feedback to diversify sources of revenue and build

³² Shehin Rahemtulla, MEng, Sustainable Energy Manager, Coast Funds (personal communication, May 4, 2022).

³³ Dave Lovekin and Dylan Heerema, *supra* note 6

³⁴ Shehin Rahemtulla, MEng, Sustainable Energy Manager, Coast Funds (personal communication, May 4, 2022).

³⁵ Dave Lovekin and Dylan Heerema *supra* note 6.

³⁶ Dave Lovekin and Dylan Heerema, “Diesel, renewables, and the future of Canada’s remote communities” (15 January 2019), online: *Pembina Institute* < <https://www.pembina.org/blog/remote-microgrids-intro>>.

³⁷ Government of Canada, Impact Canada, online: < <https://impact.canada.ca/en/challenges/off-diesel> >.

³⁸ *Ibid*; Shehin Rahemtulla, MEng, Sustainable Energy Manager, Coast Funds (personal communication, May 4, 2022).

resilient communities.³⁹ Renewable energy projects expand grid capacity and facilitate growth, creating energy sovereignty and security in remote communities. From an environmental conservation lens, renewable energy projects reduce noise pollution, risks of fuel spills, and greenhouse gas emissions, as well as improve air quality. They directly contribute to climate change mitigation and adaptation.⁴⁰ Moreover, renewable energy projects advance cultural vitality by connecting the community with the cultural values that emerge from developing and owning a self-sufficient energy system. In other words, they provide the community with greater energy sovereignty.⁴¹ If all these benefits could be accounted for in the return-on-investment calculation, the cost-effectiveness of renewable energy projects would be much higher.

1.4 Policy Context

1.4.1 CleanBC

The Government of British Columbia released its CleanBC plan in 2018, aimed at reducing climate pollution while supporting the creation of more jobs and economic opportunities for people, businesses and communities (“CleanBC Roadmap”). It was developed as a roadmap towards meeting the Province’s legislated climate targets of reducing greenhouse gas emissions by 40% by the year 2030, based on 2007 levels.⁴² CleanBC made three objectives a priority:

- (1) reducing pollution by transitioning homes, vehicles, industry and business away from fossil fuels and towards greater use of clean and renewable energies;
- (2) boosting energy efficient solutions, by making them more affordable and available; and
- (3), becoming a destination for investment looking to create more low-carbon products, services and technologies.

The CleanBC Roadmap was developed in consultation with Indigenous peoples, and is intended to serve as an opportunity to build stronger partnerships with Indigenous peoples by ensuring that they share in decision making and the economic and social benefits created in the low carbon economy. As well, CleanBC describes long-term actions needed to meet the objectives of UNDRIP generally.⁴³

³⁹ *Ibid*, Shehin Rahemtulla, MEng, Sustainable Energy Manager, Coast Funds (personal communication, May 4, 2022).

⁴⁰ Union of concerned scientists, “Benefits of Renewable Energy Use”, online: <<https://www.ucsusa.org/resources/benefits-renewable-energy-use>>.

⁴¹ Dave Lovekin and Saeed Kaddoura “How B.C. can be a leader in economic reconciliation” (12 June 2020), online: *Pembina Institute*, online: <<https://www.pembina.org/blog/how-bc-can-be-leader-economic-reconciliation>>.

⁴² British Columbia, Clean BC, *Roadmap to 2030*, online: <https://www2.gov.bc.ca/assets/gov/environment/climate-change/action/cleanbc/cleanbc_roadmap_2030.pdf>.

⁴³ *Ibid* at 12 and 15.

Notably, CleanBC adopts a “100% Clean Electricity Delivery Standard,” which pledges a commitment to getting 100% of electricity from renewable sources.⁴⁴ BC Hydro will have to meet this standard by ensuring it has produced or acquired sufficient clean electricity to meet the needs of its domestic customers and must phase out the remaining gas-fired facilities on its integrated grid by 2030. The problem with this pledge, for remote and off-grid communities, is that the policy only applies to “integrated grid.” Many remote communities in BC are in non-integrated areas, and thus are not captured by the policy.

Under CleanBC, BC Hydro has a mandated Electrification Plan, which aims to incentivize a shift to cleaner energy. The plan states that subject to the approval of the BCUC, BC Hydro plans to invest over \$260 million to advance electrification, including more than \$190 million to promote fuel switching in buildings, transport and industry.⁴⁵ A shortcoming in the CleanBC Roadmap is that it does not seem to address switching remote communities off of diesel, which is important because this switch would achieve environmental mitigation goals, and also promote goals in relation to UNDRIP and reconciliation.

On February 22, 2022, the provincial government released its new budget, which pledges “fighting climate change with CleanBC” as one of its three pillars. The new budget builds on \$2.3 billion in funding for CleanBC to date and “invests in the fight against climate change” with more than \$1 billion in new funding for CleanBC. Finally, in this budget, the government states that “helping local governments take action to reduce their emissions with a new Local Government Climate Action program” will be a priority. The Local Government Climate Action Program, which will start with \$76 million, is designed to help local governments take action to reduce emissions and prepare for and adapt to climate change.⁴⁶ The new budget also promises to invest \$9 million to expand the Low Carbon Fuel standard and to develop a new emissions cap on natural gas utilities.

As part of the 2022 budget, Crown agencies also released their own service plans, including BC Hydro. BC Hydro states, under their objective 5.1, that they will advance reconciliation by continuing to invest in and build mutually beneficial and stronger relationships with Indigenous communities.⁴⁷ Under this banner, there are three key strategies that stand out: (1) “implement BC Hydro’s UNDRIP plan to demonstrate our commitment to reconciliation”; (2) “as part of the CleanBC plan, partner with the Province and the federal government to develop a plan to help remote communities, with a focus on Indigenous communities, reduce or eliminate diesel generation and replace it with energy from cleaner sources”; and (3), “increase opportunities

⁴⁴ *Ibid.*, at 14.

⁴⁵ *Ibid.*, at 30.

⁴⁶ British Columbia Ministry of Finance, “BACKGROUNDER 2: Building a stronger environment for our future, 2022”, online:

<https://www.bcbudget.gov.bc.ca/2022/accessibility/2022_Backgrounder_2_Environment.htm>.

⁴⁷ British Columbia, BC Hydro and Power Authority, “Service Plan 2022/23 - 2024/25, 2022”, at 20 online (pdf): *BC Hydro* <<https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/regulatory-planning-documents/service-plans/bchydro-service-plan-2022-23-2024-25.pdf>>.

for Indigenous Nations to participate in BC Hydro’s planning decisions at a regional level, including co-designing approaches to minimize impacts on the land base.”⁴⁸

BC Hydro links performance to objective, by an Indigenous Procurement measure, which represents the total cumulative dollar value of procurement at BC Hydro done with Indigenous Nations beginning in 2014. This measure demonstrates BC Hydro’s support for the long-term economic interests of Indigenous peoples in British Columbia by committing to directed procurement opportunities. It is forecasted currently at \$760 million, with a 2024/25 target of \$970 million.⁴⁹ This is a positive step towards facilitating the transition towards cleaner energy in First Nations communities, but requires clarity regarding implementation.

All of these steps by CleanBC, including budgetary commitments and commitments of principle, make this moment ripe for positive change.

1.4.2 BCUC Indigenous Utilities Inquiry

In March of 2019, the Lieutenant Governor in Council directed the BCUC to provide recommendations to the Minister responsible for the *Hydro and Power Authority Act* regarding the regulation of Indigenous energy utilities in BC. The BCUC Indigenous Utilities Regulation Inquiry explored and sought feedback on a number of questions about the potential for and characteristics of an “Indigenous Utility,” such as the ownership, the services provided, to whom and by whom, and how they should be regulated.⁵⁰ The BCUC Inquiry held over ten community input sessions, included 18 interested parties and 21 registered interveners, considered 2,163 pages of evidence and 12 letters of comment.⁵¹ Evidence was submitted for review from Indigenous groups, representatives and individuals from over 50 different First Nations groups across the province.

In the creation of a draft report to the Minister, the BCUC heard that owning a utility is important to many First Nations to promote economic development on their land and that strict government regulation of a First Nations owned public utility can impede the economic benefits.⁵² Comments included: having the flexibility to structure a utility and set rates in a manner that generates benefits to communities; extending jurisdiction for Band-owned and operated utilities beyond reserve boundaries onto traditional territory; the evaluation framework for Energy Purchase Agreements involving Indigenous utilities; and, lifting the prohibition on retail access for Indigenous utilities. The Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalcow First Nation and B.C. First Nations Clean Energy Working Group stated in their submissions to the inquiry that:

⁴⁸ *Ibid* at 20.

⁴⁹ *Ibid* at 20.

⁵⁰ British Columbia, British Columbia Utilities Commission, “BCUC Indigenous Utilities Inquiry Final Report Summary” (April 2020) online: <
<https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/470256/1/document.do> > (BCUC Inquiry).

⁵¹ *Ibid* at 3.

⁵² *Ibid*.

Self-determination means that First Nations will regulate their own activities. Which they develop in their own way in their own time frame. There should not be oversight of their utilities by another body when First Nations can do so themselves. The time for paternalism is over.⁵³

Beecher Bay First Nation and Adams Lake First Nation released a joint submission, in which they wrote that:

Indigenous governments should be supported in developing an Indigenous utility system. By providing support without imposition, BCUC would be laying the groundwork for an authentic demonstration of reconciliation and working with Indigenous Nations on a government-to-government basis.⁵⁴

All of these comments were considered in light of commitments to reconciliation and the *Declaration of the Rights of Indigenous Peoples Act (DRIPA)*, and previous recommendations were revised.

The Inquiry made several recommendations illustrating the forms an Indigenous utility may take and provided a copy of the final report to the Minister for the *Hydro and Power Authority Act*, for its review and consideration, in the hopes that the government of BC may use the recommendations to inform future changes to legislation or policy. Of the recommendations, there are some that are relevant to this project.

The Inquiry defined an Indigenous utility as a “public utility” for which, as the owner or operator, an Indigenous Nation has *de facto* or *de jure* control. Therefore, the definition of “Indigenous Utility” is not limited to the types of services provided, and includes the provision of public utility services to persons in its service area.⁵⁵ This definition was meant to ensure that non-Indigenous proponents could not exploit an Indigenous groups’ ability to control or influence the utility’s decisions or actions.⁵⁶

Indigenous utilities could be used in situations where a remote, off grid, Indigenous community wished to develop a clean energy project to replace diesel generated electricity. The electricity generated from the project could be distributed by the Indigenous utility or sold to another existing utility for distribution to the community.

The report places a great emphasis on empowering Indigenous groups to regulate themselves, affirming alignment with UNDRIP, and using the expertise of the BCUC to build capacity and

⁵³Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalcow First Nation and B.C. First Nations Clean Energy Working Group, *British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry*, October 4, 2019 [Final Argument], at 5, online (pdf): <https://docs.bcuc.com/Documents/Arguments/2019/DOC_55812_2019-10-04-CollectiveFirstNations-Final-Argument.pdf>.

⁵⁴Beecher Bay (S’cianew) First Nation and Adams Lake First Nation, *British Columbia Utilities Commission Indigenous Utilities Regulation Project No. 1598998*, October 4, 2019 [Final Written Argument], at 8, online (pdf): <https://docs.bcuc.com/Documents/Arguments/2019/DOC_55798_2019-10-04-BeecherBay-AdamsLake-Final-Argument.pdf>.

⁵⁵ BCUC Inquiry, *supra* note 50, at 6.

⁵⁶ *Ibid.*

guide the implementation of the recommendations. Part of this includes changing aspects of the BCUC in order to facilitate progress and better address reconciliation. The changes proposed to the BCUC are rooted in capacity building and include: (1) increasing the role that Indigenous peoples would have in BCUC proceedings by hiring Indigenous staff and commissioners; (2) developing a strategy to build capacity in Indigenous-led utilities regulation; and (3), changes to BCUC policies to better reflect reconciliation and alignment with UNDRIP.⁵⁷ The recommendations made by the Inquiry support the recommendations in this project to bring the *Utilities Commission Act*, the *Clean Energy Act*, and the *Hydro and Power Authority Act* into harmony with UNDRIP, reconciliation, and the push for cleaner energy outlined in BC’s energy objectives. At the BC Hydro Revenue Requirements proceeding before the BCUC, BC Hydro was asked how they took account of the recommendations of the Inquiry.⁵⁸ Their answer was that “BC Hydro has not specifically considered the recommendations from the Commission’s Indigenous Utilities Inquiry.”⁵⁹ This is another example of how progressive policies are breaking down before they trigger any meaningful action. While the province may set ambitious targets or make progressive commitments, BC Hydro puts the policies into action.

BC Hydro’s discretionary role in considering or implementing efforts towards reconciliation and climate goals represents a disconnect in the regulatory scheme which this report seeks to address.

1.4.3 Spring 2022 - BC DRIPA Action Plan

The *Declaration on the Rights of Indigenous Peoples Act Action Plan* is a five-year plan created to advance the goals of the BC *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), which was passed in 2019.⁶⁰ The DRIPA Action Plan is the first of its kind in Canada, and was created through “intensive consultation” with Indigenous Peoples in the province.⁶¹ It lays out 89 steps and contributions that each ministry in BC will be taking in order to implement DRIPA and, in turn, uphold the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶²

The DRIPA Action Plan emphasizes self-determination and self-government for Indigenous Peoples, and is interwoven with commitments to clean energy and sustainability. These

⁵⁷ *Ibid* at i.

⁵⁸ British Columbia Hydro and Power Authority, 16 December, 2021 “Exhibit B-8 Responses to Interveners IRs (Public Version)”, December 2021 at 1273, online (pdf): <https://docs.bcuc.com/Documents/Proceedings/2021/DOC_65128_B-8-BCH-responses-to-Interveners-IR-No1-Public.pdf>.

⁵⁹ *Ibid*.

⁶⁰ British Columbia, “Declaration on the Rights of Indigenous Peoples Act Action Plan”(March 2022) online (pdf): *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf>.

⁶¹ British Columbia, “Historic action plan guides UNDRIP implementation in B.C.” (30 March 2022), at para 3 online: *BC Gov News* <<https://news.gov.bc.ca/releases/2022IRR0018-000457>>.

⁶² British Columbia, “Declaration on the Rights of Indigenous Peoples Act Action Plan”(March 2022) online (pdf): *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf>.

important aspects of the plan should be used to advance energy sovereignty for the Gitga'at First Nation.

1.4.4 Spring 2022 - The FNLC BC First Nations Climate Strategy and Action Plan and Urgent Calls for Climate Action

The *BC First Nations Climate Strategy and Action Plan*, created by the First Nations Leadership Council, puts forward recommendations for acting on climate change and mitigating the disproportionate threat faced by First Nations and their lands. It contains 143 strategic actions that center the “values, worldviews, and priorities” of Indigenous Peoples, using a First Nations climate lens to guide decision-making.⁶³ The plan includes “20 Urgent Calls for Climate Action”, which are intended to push the provincial and federal government to strengthen their response to the climate crisis, as well as support the climate actions of First Nations.⁶⁴

1.5 Examples of Indigenous Administration & Authority

This section reviews a number of examples of First Nations assuming greater decision-making authority over their own community programs. While this is only a cursory view of these other entities or regulatory designs, they can be explored in greater detail if requested.

In Saskatchewan, the First Nations Power Authority (FNPA) was established in 2011 as a not-for-profit corporation to create Indigenous inclusion in the power sector.⁶⁵ The FNPA’s mandate is to assist in the development and creation of First Nations energy projects, and to encourage Indigenous partnership with Saskatchewan’s Crown utility, SaskPower. The FNPA and SaskPower negotiated a long-term Master Agreement, which outlines how the two corporations will work together to “share information and identify opportunities.”⁶⁶ The FNPA works to build and provide knowledge and expertise, and to foster relationships between First Nations business interests and industry.⁶⁷ First Nations power producers use the FNPA as their primary point of contact when working in partnership with SaskPower to advance their power generation projects. Although providing power to the prairies is a different situation in many ways, this example is already serving as inspiration for a First Nations Power Authority in British Columbia.⁶⁸

There are also some examples in the USA of First Nation power authorities, such as the Gila River Indian Community Utility Authority in Arizona.⁶⁹ However, it should be noted that they

⁶³ FNLC Climate Strategy and Action Plan, *supra* note 3, at i.

⁶⁴ The First Nations Leadership Council, Spring 2022, *BC First Nations Climate Strategy and Action Plan*, 20 *Urgent Calls for Climate Action (Excerpt)*, online: < <https://www.bcafn.ca/sites/default/files/2022-04/20%20Urgent%20Calls%20for%20Climate%20Action.pdf> > Call to Action #1 (hereinafter FNLC 2022 Calls to Action).

⁶⁵ First Nations Power Authority, “About Us”, online: < <https://fnpa.ca/about-us/> >.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ See Zoë Yunker, *supra* note 4.

⁶⁹ Gila River Indian Community Utility Authority, online: <<https://gricua.net/>>.

operate in a significantly different legal context, and also vary greatly in size, scope and design.⁷⁰ Some of these power authorities are under federal authority, where an express goal is also “as a development tool for tribal self-determination.”⁷¹

A positive British Columbia example of First Nations reclaiming authority to control their destiny is the First Nations Health Authority (FNHA). Health care provision is an area of policy where BC’s First Nations have faced similar challenges to those at issue in this project. The ongoing impacts of colonialism, remoteness factors, jurisdictional gaps and similar bureaucratic barriers combine to make it difficult to access health care, and contributed to disparities in health outcomes between Indigenous peoples and other residents of BC.⁷²

Jurisdiction over health care is also complex, especially for First Nations on and off reserve. To overcome these jurisdictional gaps, and address the unresolved health inequities, First Nations leadership in BC worked with federal and provincial governments to create the *BC Tripartite Framework Agreement on First Nations Health Governance* (“*the Framework Agreement*”) in 2011.⁷³

The *Framework Agreement* is legally binding and ensures that BC First Nations will have a major role in administering health services by First Nations, for First Nations. It outlines how the federal transfer of programs and services would take place and includes a transfer of approximately \$380 million of federal funding per annum.⁷⁴ The governance structure created by the *Framework Agreement* includes roles and responsibilities for administering, coordinating, and providing health services to BC’s First Nations. The First Nations Health Council provides political representation and advocacy, the First Nations Health Directors Association provides technical support and capacity development (the first of its kind in Canada), and the FNHA plans, designs, manages, and funds the delivery of First Nations health programs and services in British Columbia.⁷⁵

The FNHA has played an instrumental role in achieving better health outcomes for BC’s First Nations, while also advancing Indigenous self-determination and reconciliation. According to a 2020 evaluation by an external consultant, the FNHA has been successful in building organizational capacity to take on an expanded role and implement new programs and services.⁷⁶ This includes taking over federal administration of programs with minimal disruption, using the dedicated funds to build strong strategic planning and organizational functions, bringing services closer to communities and establishing a strong governance

⁷⁰ For instance, the Aha Macav Power Service describes itself as “one of only a handful of tribes in the United States that have established a tribally owned-and-operated electric and natural gas utility” and was created under a charter passed by the Indigenous government - Fort Mojave Tribal Council, in July 1991. See Aha Macav Power Service, “About”, online: < <https://ahamacav.com/about/> >.

⁷¹ Colorado River Agency Electrical Services, US Department of the Interior, Indian Affairs, online: < <https://www.bia.gov/programs-services/utilities/colorado-river-agency-electrical> >.

⁷² First Nations Health Authority, “Our Story: The Made-in-BC Tripartite Health Transformation Journey” (2013).

⁷³ *Ibid* at 25.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ Goss Gilroy Inc., *Evaluation of the First Nations Health Authority*, 2020.

structure.⁷⁷ The FNHA has achieved important progress in First Nations healthcare by advancing excellence in programs and services, and championing the BC First Nations perspective on health and wellness.⁷⁸ According to the report, going forward “the FNHA has positioned itself to continue to make significant improvements in healthcare delivery,”⁷⁹ as it has the necessary capacity, aspirations and plans to continue to advance health care delivery and transformation. The next five years of the FNHA should see more resources, more holistic approaches to health, and better integration of First Nations perspectives into the provincial health care systems.

The FNHA is a tremendously successful example of Indigenous administration and sovereignty over programs. It provides a strong example of the transfer and evolution of administrative authority in a way that meets a broad set of goals, including reconciliation and improved service delivery, while overcoming a similar set of obstacles.

The above examples of Indigenous authority are non-exhaustive. Recommendations I and III, which are discussed further in this report, recommend an expanded role for Indigenous administrative bodies. This suggestion is in line with the work of Indigenous peoples around the world who are reclaiming their authority to govern themselves, a movement which is enshrined in UNDRIP but started long before UNDRIP was signed (discussed in the next section).

II. The Law

2.1 Utilities Regulation in Canada & Constitutional Dimensions

Indigenous peoples’ legal authority existed long before the colonial State asserted its own authority and it continues to exist in what is now called Canada.⁸⁰ After years of colonial rule, Aboriginal rights were recognised in the Canadian Constitution in 1982, in s. 35 of the Constitution Act, 1982, which stated that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada is hereby recognized and affirmed.”⁸¹ However, the section has been narrowly interpreted, and according to Aboriginal law scholar John Borrows has “further embedded Aboriginal peoples in colonial relationships” including a “failure to recognize rights to meaningful self-government” and decision-making authority.⁸² Within the context of that failure to recognise decision-making authority, the following is how decision-making authority

⁷⁷ *Ibid* at 5.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* at 7.

⁸⁰ John Borrows, *Indigenous Legal Traditions in Canada* (2005) 19 Wash. U. J. L. & Pol’y 167 at 175 [Borrows].

⁸¹ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, s. 35. For key history in relation to Aboriginal rights and governance authority see Borrows, John. "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism." *The Canadian Historical Review* 98.1 (2017): 114-35, at 119 – 121.

⁸² *Ibid.*, Borrows (2017) at 121.

is divided up between the federal and provincial governments, in relation to electric power generation and distribution. This is an evolving area of law and policy.

Jurisdiction over utilities in Canada is shared between the federal and provincial governments. The *Constitution Act, 1867* provides that the provinces have jurisdiction over “development, conservation and management of sites and facilities in the province for the generation and production of electrical energy” in the province.⁸³ The provinces have jurisdiction over the land and resources within their borders under s. 92(10), “Local Works and Undertakings.” However, s. 92(10) excludes “Lines of Steam or other Ships, Railways, Canals, and other Works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province,” (which includes inter-provincial projects) as well as nuclear facilities from provincial jurisdiction, which fall under exclusive federal jurisdiction under s. 91(29).⁸⁴ This also does not include all federal lands within provincial borders. In applying sections 92(10) and 91(29) together, courts have created a set of general principles to help determine jurisdiction of projects, but the key ones are as follows:⁸⁵

- Activities conducted entirely within a province are *prima facie* under provincial jurisdiction(excluding nuclear power);⁸⁶
- The party claiming federal jurisdiction has the onus of showing that the project falls under federal jurisdiction.⁸⁷

The provinces are responsible for electricity generation, intra-provincial electricity transmission, electricity distribution, and market structure within their borders.⁸⁸ The federal government is responsible for Aboriginal and federal lands, and interprovincial utilities projects that cross provincial borders. The provinces control and own much of Canada’s energy assets, which has resulted in a more limited role for the federal government.⁸⁹

2.2 Current Legal Framework

The current legal framework within the Province can be viewed this way (an alternate structure will be similarly pictured in the next section on law reform proposals):

⁸³ *Constitution Act, 1867*, s. 92A(1)(c).

⁸⁴ *Constitution Act, 1867*; Ian Blue, *Off the Grid: Federal Jurisdiction and the Canadian Electricity Sector* (2009) 32:2 Dal LJ 339.

⁸⁵ Ian Blue, "Off the Grid: Federal Jurisdiction and the Canadian Electricity Sector" (2009) 32:2 Dal LJ 339.

⁸⁶ *Northern Telecom Ltd. v. Communications Workers*, [1980] 1 S.C.R. 115 at 132.

⁸⁷ *Re Ontario Energy Board* (1986), 57 O.R. (2d) 281 (Div.Ct.) at 291.

⁸⁸ Jeff Christian and Lana Shipley, “Electricity regulation in Canada: overview”, (August 2020), Thompson Reuters Practical Law, online: < [https://uk.practicallaw.thomsonreuters.com/5-632-4326?_lrTS=20170919161029839&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-632-4326?_lrTS=20170919161029839&transitionType=Default&contextData=(sc.Default)&firstPage=true) >.

⁸⁹ *Ibid.*

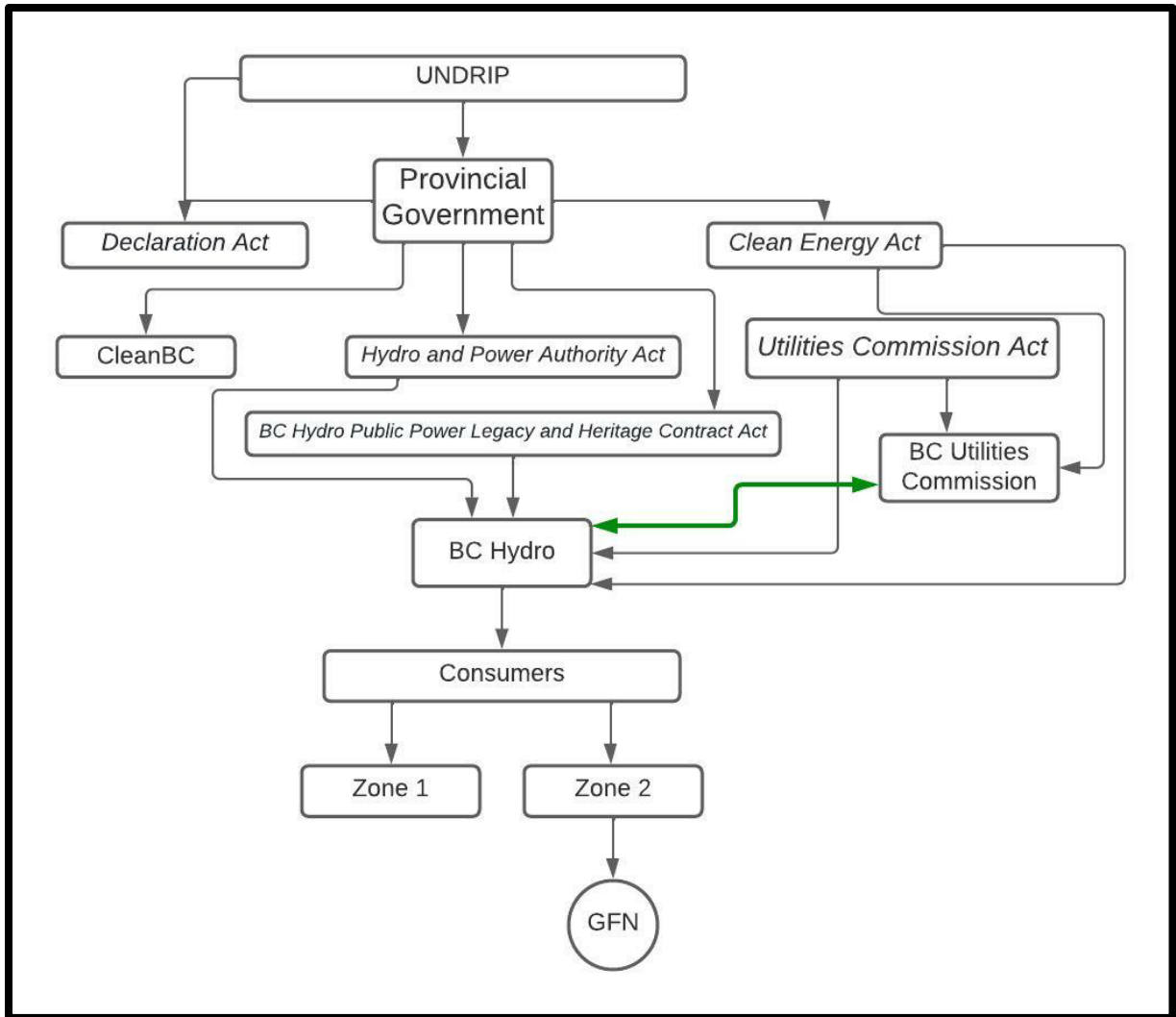


Figure 1.

2.2.1 UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples*, or UNDRIP, is an international instrument adopted by the United Nations in 2007. Its purpose is to enshrine the rights that constitute, as stated in Article 43, the “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”⁹⁰ UNDRIP contains 46 articles that guarantee the rights of Indigenous peoples to enjoy and practice their cultures, customs and languages, and to develop and strengthen their economies along with their social and political institutions.⁹¹ UNDRIP is the product of almost 25 years of UN and Indigenous groups’ deliberation and negotiation.⁹²

⁹⁰ UNDRIP, *supra* note 10.

⁹¹ *Ibid.*

⁹² Erin Hanson, *UN Declaration on the Rights of Indigenous Peoples* (2009) UBC First Nations & Indigenous Studies.

Notably, Article 3 of UNDRIP recognizes Indigenous peoples' right to self-determination. Article 4 confirms a right to "autonomy or self-government," and Article 5 protects the right "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions."

UNDRIP was adopted by 144 countries, with four countries, including Canada, voting against. Canada has since changed their position, and in 2021, the federal government's *United Nations Declaration on the Rights of Indigenous Peoples Act* came into force. According to the federal government, the act is to provide a roadmap for "the Government of Canada and Indigenous peoples to work together to implement the Declaration based on lasting reconciliation, healing, and cooperative relations."⁹³ The provincial government has its own legislation implementing UNDRIP, which is covered in the next section. The articles of UNDRIP which are most relevant to this project are attached as Appendix A.

2.2.2 British Columbia's *Declaration on the Rights of Indigenous Peoples Act*

The *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), was passed in 2019. Its purpose, as outlined in s. 2, is: (a) to affirm the application of the Declaration to the laws of British Columbia; (b) to contribute to the implementation of the Declaration; and (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.⁹⁴ Implementation of UNDRIP is an imperative first step for Crown governments towards "unwinding centuries of colonialism."⁹⁵

Section 7 is the key section of DRIPA for the purposes of this analysis:

Decision-making agreements

7 (1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

- (a) the exercise of a statutory power of decision jointly by
 - (i) the Indigenous governing body, and
 - (ii) the government or another decision-maker;
- (b) the consent of the Indigenous governing body before the exercise of a statutory power of decision.

⁹³ Government of Canada, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act" (updated 19 April, 2022), online: < <https://www.justice.gc.ca/eng/declaration/index.html> >.

⁹⁴ *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] Chapter 44.

⁹⁵ Minister David Lametti remarks, Indian Residential School History and Dialogue Centre Forum on the UN Declaration (February 4, 2021).

2.2.3 The *Clean Energy Act*

BC's *Clean Energy Act* came into force in 2010 and outlined BC's energy objectives. There is a specific focus on: (1) taking demand-side measures and conserving energy; (2) reducing BC Hydro's expected increase in demand by 66% through demand-side measures by 2020; and (3), reducing B.C. greenhouse gas emissions to 33% below 2007 levels by 2020 and 80% by 2050.⁹⁶ The provincial government missed the 2020 emission reduction target⁹⁷ and it was subsequently adjusted in the *Climate Change Accountability Act* under s. 2 (a.1) to reflect a more manageable target (by 2030 and for each subsequent calendar year, BC greenhouse gas emissions will be at least 40% less than the level of those emissions in 2007).⁹⁸

The Act contains a commitment to generating at least 93% of BC's electricity from clean or renewable resources (s. 2(c)). Despite this, other objectives such as switching from one energy source to another to decrease emissions (s. 2(h)) and developing First Nations and rural communities through the use and development of clean or renewable resources (s. 2(l)) are "encouraged" instead of mandatory. The commitment to generate 93% renewable electricity has been modified to a 100% standard by the CleanBC Roadmap to 2030, though this is policy, not law.

Part 6 of the Act creates a new account within the provincial government's budget for a First Nations Clean Energy Business Fund. Although it states that the "initial balance of the special account is an amount, not to exceed \$5 million, prescribed by Treasury Board" it gives no other direction as to how much money will be in the account over time, where it will come from, or how it will be shared with First Nations.⁹⁹

Section 19 of the Act states that the authority or prescribed public utility, in this case BC Hydro and the BCUC, must pursue actions to meet the prescribed targets in s. 2(c) of deriving at least 93% of BC's electricity from clean or renewable resources, and must use the prescribed guidelines in planning for the construction of new energy generation facilities or energy purchases.

Pursuant to s. 35, the Lieutenant Governor in Council (i.e. BC Cabinet or the LGIC) may make regulations to modify or add to BC's energy objectives outlined in s. 2, with the exception of s. 2(g), meaning that the objective to reduce BC's greenhouse gas emissions cannot be modified.

The relevant provisions of the Act for this analysis are attached as Appendix B.

⁹⁶ *The Clean Energy Act*, [SBC 2010], Chapter 22.

⁹⁷ In 2019 BC's emissions were 5% higher than in 2007. British Columbia, Provincial greenhouse gas emissions inventory, online: < <https://www2.gov.bc.ca/gov/content/environment/climate-change/data/provincial-inventory#:~:text=In%202019%2C%20British%20Columbia%27s%20gross,for%20our%20emission%20reduction%20targets>>.

⁹⁸ *Climate Change Accountability Act*, [SBC 2007], Chapter 42.

⁹⁹ Matt Horne, "Pembina Institute Assessment of the B.C. Clean Energy Act" (2010), The Pembina Institute. Pembina Institute, *Diesel Subsidies Simplified*, June 2021.

2.2.4 The *Utilities Commission Act*

The *Utilities Commission Act* (the “UCA”) is the enabling legislation for the BCUC, an administrative body that regulates BC’s energy utilities by reviewing rate applications, construction plans for new facilities, energy supply contracts, and the issuance of securities. The *UCA* sets out the roles and responsibilities for the BCUC and the framework that regulated energy utilities must follow.

In the *UCA*, a “public utility” is defined in s. 1.¹⁰⁰ An entity that meets the definition of a “public utility” is subject to regulation under the *UCA*. Under the *UCA* definition, most utilities with an existing connection to an Indigenous community are regulated as public utilities.

Section 3(2) of the *UCA* allows the LGIC to give directions instructing the BCUC on how to exercise its powers, perform its duties, or refrain from doing either, under the *UCA*. These directions are provided through an Order in Council (OIC), which directs the BCUC to take action or not take action on a specific task and can include a variety of directions.

Under s. 5 of the *UCA* the LGIC can issue an OIC for an inquiry to explore public policy issues that require technical expertise and public input. The OIC may contain terms of reference that define the scope and require that the BCUC hold public hearings and report its findings and recommendations to the BC government. This provision is what enabled the BCUC Indigenous Utilities Inquiry.

Notably, the expression “public interest” is used 31 times in the Act, but never defined. In the utility regulation context, the “public interest” has tended to mean a combination of the lowest cost service, consistent with law, in a way that is safe and reliable.

The test of what constitutes a “cost effective demand-side measure” (DSM) is found in the DSM Regulation.¹⁰¹ Under this regulation, “cost effectiveness” is defined as:

Cost effectiveness

4 (1) Subject to subsections (1.5), (4) and (5), the commission, in determining for the purposes of section 44.1 (8) (c) or 44.2 (5) (d) of the Act the cost-effectiveness of a demand-side measure proposed in an expenditure portfolio or a plan portfolio, may compare the costs and benefits of

- (a) the demand-side measure individually,
- (b) the demand-side measure and other demand-side measures in the portfolio, or
- (c) the portfolio as a whole.

This definition only applies to sections 44.1(8)(c) and 44.2(5)(d) of the *Utilities Commission Act*.

The relevant provisions of the *UCA* are attached as Appendix C.

¹⁰⁰ *Utilities Commission Act*, [RSBC 1996], Chapter 473.

¹⁰¹ *Demand-Side Measures Regulation*, B.C. Reg. 326/2008.

2.2.5 The *Hydro and Power Authority Act*

The *Hydro and Power Authority Act* is the legislation that governs the British Columbia Hydro and Power Authority, or ‘BC Hydro,’ and its roles and duties as an agent of the BC provincial government. It falls under the Ministry of Energy, Mines, and Low Carbon Innovation.

III. Proposed Law Reform

This section outlines four recommendations that could improve First Nations energy sovereignty and assist the transition to renewable energy. The recommendations aim to give full effect to the Province’s stated commitments to climate change mitigation, greater cleaner and renewable energy generation, and reconciliation with First Nations, as outlined in the *Clean Energy Act* and the *DRIPA*.

The recommendations aim to put into effect both commitments made by the provincial and federal governments, and also calls to action put forth by the First Nations Leadership Council (FNLC) through the BC First Nations Climate Strategy and Action Plan.¹⁰² One of the 20 Urgent Calls for Climate Action within the Action Plan is to:

Support First Nations to rapidly transition to reliable and affordable renewable, non-combustible and/or low carbon energy sources by establishing Indigenous utilities, diversifying clean energy sources, aligning legislation, regulations, policies and programs with the UN Declaration and Declaration Acts, and increasing Crown government support and investments.

The following recommendations will prioritize putting this call into action, and can be summarised as follows:

- V. Delegation of Authority pursuant to *DRIPA* s. 7: Cabinet delegates the authority of the *Utilities Commission Act*, so that an IGB and the BCUC would have to work together on any energy project concerning the IGB.
- VI. Reform of the *Clean Energy Act*, the *Utilities Commission Act*, and the *Hydro and Power Authority Act*: bringing the legislation into alignment with the stated goals in the *Clean Energy Act* and *DRIPA*.
- VII. An entirely new piece of legislation, an *Indigenous Energy Act*: a single piece of legislation that contains all the reforms in Recommendations II and IV, while also potentially creating a formal administrative body, an Indigenous Energy Board.
- VIII. A complete overhaul of the existing First Nations Clean Energy Business Fund.

¹⁰² FNLC Climate Strategy and Action Plan, *supra* note 3, Executive Summary.

3.1 Recommendation I: Delegation of Authority pursuant to *DRIPA* s. 7

Section 7 of *DRIPA* allows the Provincial Cabinet to enter into an agreement with an Indigenous governing body (IGB) to exercise statutory power jointly between the IGB and the government or another decision maker. In this scenario, Cabinet could delegate authority of the *Utilities Commission Act*, so that the IGB and the BCUC would have to work together on any energy project concerning the IGB. This could be done on a small, regional scale (such as between the Gitga'at First Nation and the BCUC), or a provincial scale, and could also be done through an *Indigenous Energy Act*, as suggested in Recommendation III. This aligns with the Province's recent *DRIPA* Action Plan recommendation 1.3, to use *DRIPA* ss. 6 and 7 to "complete and implement government-to-government agreements that recognize Indigenous self-government and self-determination."¹⁰³

Furthermore, one of the goals stated within the *DRIPA* Action Plan is to encourage BC to "[c]o-develop recommendations on strategic policies and initiatives for clean and sustainable energy. This includes identifying and supporting First Nations-led clean energy opportunities related to CleanBC, the Comprehensive Review of BC Hydro, and the BC Utilities Commission Inquiry on the Regulation of Indigenous Utilities."¹⁰⁴ These opportunities should promote full participation of Indigenous peoples in BC's policies as they pertain to clean energy and climate change mitigation.

In the *BCUC Indigenous Utilities Inquiry*, two First Nations, Beecher Bay and Adams Lake, suggested an incremental approach to jurisdiction as a starting point, which would enable First Nations that wish to do so to use the BCUC's existing regulatory structures as they develop capacity to regulate utilities.¹⁰⁵ They submitted that these recommendations must be reframed to affirm the rights of Indigenous peoples to self-determination and proposed a collaborative process to develop substantive regulatory and legislative changes beyond the *Inquiry*.

Creating a shared governance regime between the BCUC and IGBs would provide a number of benefits. The BCUC's role is to regulate BC's energy utilities by reviewing rate applications, construction plans for new facilities, energy supply contracts, and issuance of securities. By sharing these duties, the IGB that has jurisdiction over projects would have the ability to approve plans for new energy projects in their community. Part of the problem with the current framework is that governmental bodies are being held accountable by other governmental bodies, and there is no outside enforcement mechanism by which to hold them accountable for not reaching their objectives (for example, the objectives outlined in s. 2 of the *Clean Energy Act*). If authority is shared, the IGB could circumvent this problem by making their own decisions, aligned with their own objectives. Shared decision-making brings greater accountability and opportunity for additional oversight, from both the BCUC and the IGB. This

¹⁰³ British Columbia, "Declaration on the Rights of Indigenous Peoples Act Action Plan"(March 2022) at 11, online (pdf): <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf>.

¹⁰⁴ *Ibid.*, at Section 4.43.

¹⁰⁵ BCUC Inquiry, *supra* note 50.

would give effect to the recommendations noted from the submissions of Beecher Bay and Adams Lake in the *BCUC Indigenous Utilities Inquiry*.

Section 7 of *DRIPA* states:

Decision-making agreements

7 (1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

- (i) the exercise of a statutory power of decision jointly by
 - (1) the Indigenous governing body, and
 - (2) the government or another decision-maker;
- (ii) the consent of the Indigenous governing body before the exercise of a statutory power of decision.

The framework would look like this:

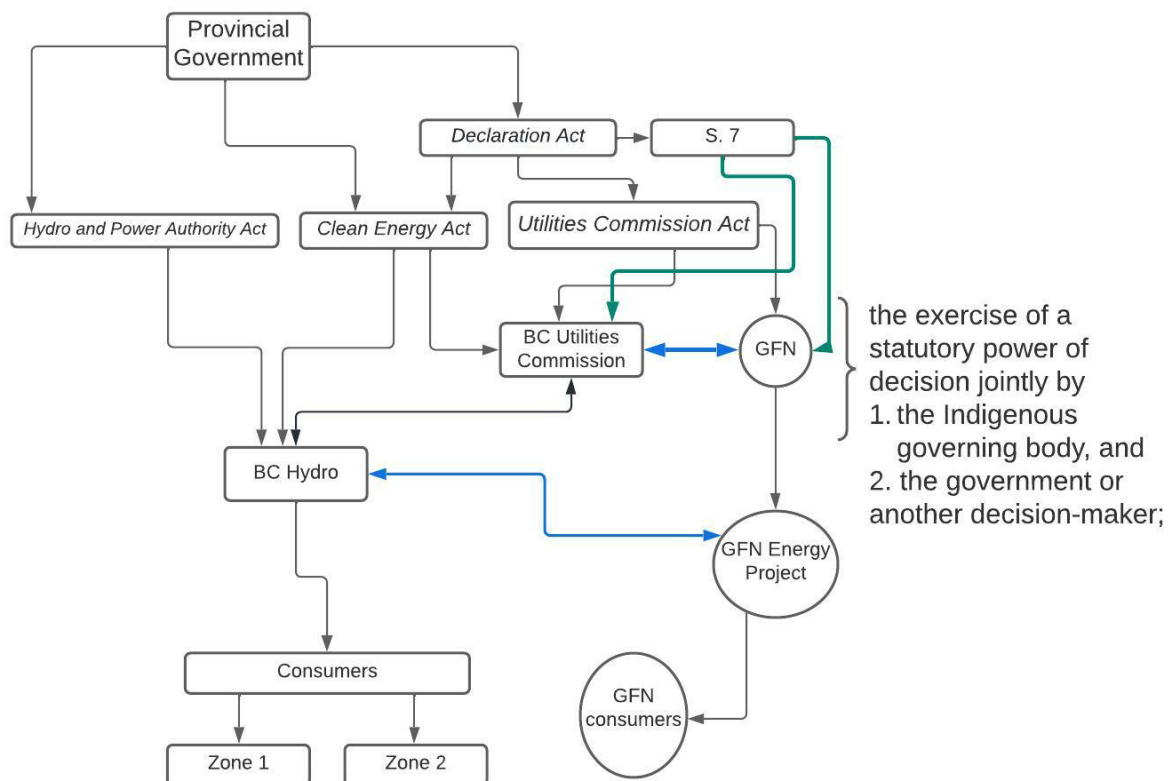


Figure 2.

This recommendation could also be coupled with the changes to the *Clean Energy Act*, the *Utilities Commission Act*, and the *Hydro and Power Authority Act*, for full force and effect. This would make it congruent with commitments to reconciliation and obligations under *DRIPA*, including articles 4, 18, 38, 39 and particularly 19 of UNDRIP, which states that:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹⁰⁶

It is important to note, however, that some First Nations reject the jurisdiction of the BCUC over their activities.¹⁰⁷ Recommendation III gives an alternative solution that could address this issue.

3.2 Recommendation II: Reform of Legislation and Regulations

This recommendation to reform existing pieces of BC legislation builds upon one of the FNLC’s “20 Urgent Calls for Climate Action”, which states that “all provincial and federal climate-related legislation, regulations, policies, programs, and engagement frameworks” must be reviewed and reformed to recognize First Nation jurisdiction in climate planning and response.¹⁰⁸

This recommendation addresses the three pieces of legislation that govern the province’s utility regulation: the *Clean Energy Act*, the *Utilities Commission Act*, and the *Hydro and Power Authority Act*. The changes to legislation would aim to bring BC’s laws into greater alignment with their stated objectives in the *Clean Energy Act* and *DRIPA*, advance reconciliation with First Nations, and consider the external, unaccounted, costs of diesel.

The *Clean Energy Act*

The *Clean Energy Act* outlines British Columbia’s energy objectives regarding energy and is the legislation that could have the greatest impact if reformed. The energy objectives presently outlined are a good first step towards cleaner energy in BC, however the wording in the Act is not forceful enough to compel the government, BCUC or BC Hydro to give effect to the objectives. As such, the *Clean Energy Act* should include language that would compel the province to act in alignment with its goals. BC Hydro’s current definition of “cost effective” does not seem to account for social, environmental and reconciliation objectives.¹⁰⁹ By including a definition that encompasses these factors, it forces the government, BCUC and BC Hydro to price reasonable externalities. That is, when weighing the costs versus the benefits of an undertaking, costs and benefits that can be measured in monetary terms must be balanced with "non-cash" factors like health, protection of social values, the environment, and reconciliation. Further, the calculation must account for the price of diesel before subsidies,

¹⁰⁶ UNDRIP, *supra* note 10.

¹⁰⁷ British Columbia Utilities Commission, *Beecher Bay and Adams Lake Comments on Draft Report*, at 1, 5. CFN-GBI Comments on Draft Report, at 2.

¹⁰⁸ FNLC 2022 Calls to Action, *supra* note 64, at 1.

¹⁰⁹ British Columbia Hydro and Power Authority, 16 December, 2021, “Exhibit B-8 Responses to Interveners IRs (Public Version)”, December 2021 at 1252, online (pdf): <https://docs.bcuc.com/Documents/Proceedings/2021/DOC_65128_B-8-BCH-responses-to-Interveners-IR-No1-Public.pdf>.

given that subsidies substantially lower the cost of diesel. If subsidies are taken out, (ie. before subsidies, as is reflected in the reformed law), the price of diesel is higher in the “cost-effectiveness” calculation, making it a heavier factor to account for when balancing with external costs. If the price of diesel is lower (ie. after subsidies), it is easier for governments to justify the deleterious external impacts because of the low cost of energy. Redefining “cost-effective” and giving it the force of law would cause BC Hydro and the BCUC to price these externalities when deciding whether or not to go ahead with a project.

Pursuant to s. 35, the LGIC can change the wording of section 2 subsections (h), (i) and (l) from “encourage” and “foster” to stronger language that would compel Cabinet, BC Hydro and the BCUC to support cleaner energy projects and First Nation and rural communities’ development of their own clean or renewable resources. These changes would both bring the laws into greater alignment with the objectives set out in s. 2 (c), (d) and (g), and support reconciliation and *DRIPA* goals. If the changes made by this regulation are beyond the regulation-making power of the LGIC, then the legislature will have to act to adjust the legislative intent accordingly.

The following are proposed to changes to the *Clean Energy Act* (changes to legislation have been added in **bold**):

Definitions

1 “cost-effective” means **having regard for all social, environmental, and economic costs associated with the activity, including:**

- (a) greenhouse gas mitigation;**
- (b) community health and well-being;**
- (c) environmental and ecosystem impacts;**
- (d) commitments to reconciliation; and**
- (e) financial costs before subsidies.**

British Columbia's energy objectives

2 The following comprise British Columbia's energy objectives:

(h) to **facilitate, including financing and administrative support,** the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia, **in all cases where it is cost-effective to do so;**

(i) to **require** communities to reduce greenhouse gas emissions and use energy efficiently, **and to support communities in this;**

[...]

(l) to **expedite** the development of first nation and rural communities through the use and development of clean or renewable resources, **by approving,**

financing, and supporting any cost-effective clean energy initiatives those communities pursue, having regard to commitments of reconciliation and in the public interest;

The First Nations Clean Energy Business Fund could also be expanded, and given greater clarity (this is dealt with in more detail in Recommendation IV) with the following change:

20 (3) The initial balance of the special account is ~~an amount, not to exceed~~ \$5 million, prescribed by Treasury Board.

The Utilities Commission Act

Changes to the *Utilities Commission Act* should involve bringing it into alignment with BC's energy objectives as outlined in the *Clean Energy Act*. The following are proposed changes to the *Utilities Commission Act* (changes to legislation have been added in **bold**):

Definitions

1 (1) In this Act:

“cost-effective” means having regard for all social, environmental, and economic costs associated with the activity, including:

- (f) greenhouse gas mitigation;**
- (g) community health and well-being;**
- (h) environmental and ecosystem impacts;**
- (i) commitments to reconciliation; and**
- (j) financial costs before subsidies.**

44.1 (2) Subject to subsection (2.1), a public utility must file with the commission, in the form and at the times the commission requires, a long-term resource plan including all of the following:

- (a) how the plan is cost-effective, having regard for all social, environmental, and economic costs associated with the activity, including:**
 - (i) greenhouse gas mitigation;**
 - (ii) community health and well-being;**
 - (iii) environmental and ecosystem impacts;**
 - (iv) commitments to reconciliation; and**
 - (v) financial costs before subsidies.**
- (b) an estimate of the demand for energy the public utility would expect to serve if the public utility does not take new demand-side measures during the period addressed by the plan;**

- (c) a plan of how the public utility intends to reduce the demand referred to in paragraph (a) by taking **cost-effective** demand-side measures;
- (d) an estimate of the demand for energy that the public utility expects to serve after it has taken **cost-effective** demand-side measures; [...]
- (e) any other information required by the commission.

[...]

(8) In determining under subsection (6) whether to accept a long-term resource plan, the commission must consider

- (a) **all** of British Columbia's energy objectives, **and take account of them,**
- (b) the extent to which the plan is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,
- (c) whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures, and
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility.

Discrimination in rates

59 (5) In this section, a rate is "unjust" or "unreasonable" if the rate is

- (a) **based on a calculation that does not account for the full cost-effectiveness of the service, having regard for all social, environmental, and economic costs associated with the activity,**
- (b) more than a fair and reasonable charge for service of the nature and quality provided by the utility,
- (c) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or
- (d) unjust and unreasonable for any other reason.

Regulations

In order to ensure that there is no fuel surcharge for energy purchase agreements with communities that rely on diesel generated power, the LGIC could issue an Order in Council or Regulation under s. 59(1)(b), pursuant to s. 125(1) of the *Utilities Commission Act*, discontinuing fuel surcharges. This would address the \$85,000 premium that the Gitga'at First Nation pays to BC Hydro annually.

Furthermore, it is important to note that while "cost effectiveness" is already defined in the DSM Regulation, that definition only applies to sections 44.1(8)(c) and 44.2(5)(d) of the *Utilities Commission Act*. The changes proposed above would only apply to other parts of the regulation, and so the term "cost effective" in s. 44.1(8)(c) will retain its existing definition.

As previously explained, this current definition compares the costs and benefits of the demand-side measures proposed with other demand-side measures individually, with other demand-side measures in the portfolio, or with the portfolio as a whole. Once other parts of the Act have been modified as they relate to cost-effectiveness the meaning of “with the portfolio as a whole” should be interpreted in a holistic way, in which the Commission must consider the broader impacts a project will have as part of its portfolio.

The Hydro and Power Authority Act

Pursuant to s. 38 of the *Hydro and Power Authority Act*, the Lieutenant Governor in Council could make a regulation to bring BC Hydro’s purpose into alignment with the provincial energy objectives outlined in s. 2 of the *Clean Energy Act*. This would give full effect to the objectives by compelling BC Hydro to ensure that all their activities are congruent with these goals. This small change within the Act would force BC Hydro to ensure that any energy project undertaken would have to consider greenhouse gas mitigation, clean and renewable energy sources, and commitments to reconciliation, including empowering First Nations energy sovereignty and implementing UNDRIP articles 3, 4, 23, 32 and 38.¹¹⁰

The following are proposed changes to the *Hydro and Power Authority Act* (changes to legislation have been added in **bold**):

Powers

12 (1) Subject to this Act and the regulations, the authority has the capacity and the rights, powers and privileges of an individual of full capacity and, in addition, has

- (a) the power to amalgamate in any manner with a firm or person, and
- (b) any other power prescribed.

(1.1) The authority's purposes are

- (a) **to give full authority and effect to British Columbia’s energy objectives as set out in the *Clean Energy Act*, s. 2,**
- (b) to generate, manufacture, conserve, supply, acquire and dispose of power and related products,
- (c) to supply and acquire services related to anything in paragraph (a), and
- (d) to do other things as may be prescribed.

Regulations

The LGIC could issue a regulation pursuant to s. 38 (1) to the effect that “Where BC Hydro has a certificate of public convenience and necessity to provide electricity service to a non-

¹¹⁰ UNDRIP, *supra* note 10.

integrated First Nations Community they must phase out diesel as a primary source of electricity generation by 2028.”

3.3 Recommendation III: *Indigenous Energy Act*

A third solution is that the provincial government pass an entirely new piece of legislation, taking the form of an *Indigenous Energy Act*. The new Act would include the reforms outlined in Recommendation II, and thus could enhance efficiency of the law reform process. The new Act could also include the creation of a new administrative body, such as an Indigenous Energy Board (IEB). This body could have similar functions and powers as the IGB-BCUC model outlined in Recommendation I, however would not require the same cooperation with the BCUC. Instead, the IEB would have the authority to approve energy projects, control rates and surcharges for customers, and ensure cost-effectiveness, having regard for all social, environmental, and economic costs, as it saw fit within the scope of the legislation. This recommendation serves a dual purpose of supporting energy sovereignty for BC’s First Nations, and also serving to address the administrative gap that present models have. By having a permanent administrative body, paid for by the provincial or federal government, there would be a permanent staff and administration for oversight of Indigenous energy projects. This would draw on the existing capacity of Indigenous stakeholders while also fostering their continued expertise and engagement.

This model could mirror the well-developed organizational precedent set by the First Nations Health Authority. In that model, the FNHA is empowered by the federal and provincial governments to have jurisdiction over health service provision, and receives funding from the federal government. The *Framework Agreement* created roles and responsibilities for administering, coordinating, and providing health services, and has achieved great success both in organizational structure and capacity, and improved health outcomes for BC’s First Nations. This demonstrates that there is precedent in BC for a successful model that has achieved its objectives.

This recommendation would give full effect to UNDRIP, particularly Article 18, which states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions;” and Article 39, which states that “Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.”

This recommendation would also help to implement a number of the FNLC’s 20 Urgent Calls for Climate Action. This includes Call #17, to support Indigenous communities in their “Nation-specific climate-related strategies and action plans based on their own needs, priorities, and self-determined processes.”¹¹¹ It would put Free, Prior, Informed Consent into

¹¹¹ FNLC 2022 Calls to Action, *supra* note 64.

action by allowing communities to make decisions, and integrating their knowledge and laws into decision-making.¹¹² Importantly, it would also “Strengthen the incorporation of Indigenous Knowledge in climate change initiatives,” improving the potential for intergenerational knowledge to be shared and elevated.¹¹³

Another benefit of this recommendation is that it would create an accountability mechanism which is lacking in the current legislative landscape. Currently, governmental bodies are accountable to other governmental bodies, and consequently there has been no meaningful action towards achieving the objectives of the *Clean Energy Act*, particularly sections 2 (h) and (l) (to encourage the switching from one kind of energy source, or to foster the development of First Nation and rural communities through the use and development of clean or renewable resources). By delegating administrative oversight directly to the proposed IEB, the IEB would become accountable for achieving their own clean energy objectives. It is critical to note that if an IEB is to be accountable they must be empowered to actually meet their objectives.

An IEB could be held to all of the same energy objectives outlined in the section 2 of the *Clean Energy Act*, however they may wish to set additional objectives. Should they wish to diverge from the current objectives, they should be able to seek approval from the LGIC.

3.4 Recommendation IV: The First Nations Clean Energy Business Fund

Revamping the existing First Nations Clean Energy Business Fund is one way to provide needed funding to First Nations, but there are others discussed herein as well. This is not strictly a legal recommendation, but one potential pathway to addressing the issue of funding.

The First Nations Clean Energy Business Fund (FNCEBF) was created by the *Clean Energy Act* (s. 20) and is designed to promote increased Indigenous community participation in the clean energy sector within their asserted traditional territories and treaty areas.¹¹⁴ The fund

¹¹² FNLC 2022 Calls to Action, *supra* note 64.

Call to action #10:

“Transform resource extraction (logging, mining) and other urban/industrial development processes and tenure systems to ensure:

- FPIC is obtained from all First Nations whose territories (lands, waters, environments, and all beings) may be impacted by a proposed project.
- FPIC is fully informed through honest, transparent, and independent representations of all projected impacts, including those compounded as a result of climate change.
- Early and ongoing engagement throughout the entire scope of a project with early and sufficient notice to review data and information received as well as the ability for First Nation-led assessments and research on a particular issue.
- Appropriate integration of First Nations knowledge and laws into project work, including permitting and decision-making.”

¹¹³ FNLC 2022 Calls to Action, *supra* note 64.

¹¹⁴ Government of British Columbia, *First Nations Clean Energy Business Fund*, online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-clean-energy-business-fund#:~:text=The%20First%20Nations%20Clean%20Energy,traditional%20territories%20and%20treaty%20areas>>.

provides agreements between the B.C. Government and successful applicants for Capacity funding and Equity funding. It also provides revenue-sharing agreements between the B.C. Government and eligible First Nations.

The funding capacity is currently re-set to a maximum of \$50,000 per eligible applicant. The government website states that, as the clean energy landscape in BC has evolved since the Fund's inception, "many of the capacity building projects and feasibility studies funded through the [fund] *may no longer align effectively* with the current clean energy landscape" (emphasis added).¹¹⁵ In this the province seems to be recognizing that the funding is inadequate.

As such, a final recommendation, and necessary to all the previous recommendations, is a complete overhaul of the FNCEBF. This is in line with a recommendation by The First Nations Leadership Council (FNLC) to support the New Relationship Trust in developing an Indigenous Clean Energy Legacy Fund,¹¹⁶ which has also been supported by resolution by the UBCIC.

This proposed overhaul of the FNCEBF could be done alongside the establishment of a BC First Nations Climate Fund, as proposed by the FNLC in their new Strategy and Action Plan,¹¹⁷ or one could be chosen over the other. The BC First Nations Climate Fund is one of 20 Urgent Calls for Climate Action laid out in the Action Plan, and is intended to provide capacity for communities to "develop their own self-determined climate response."¹¹⁸ The FNLC classify this fund as being of "immediate" priority, and recommend for it to be managed collaboratively between First Nations and the provincial and federal governments.¹¹⁹

The greatest barrier to any development project will be investment, and while government law reforms can create change through legislative "musts" and "shalls," First Nations must have the financial capacity to take on clean energy projects and realise reconciliation objectives.

A new and expanded FNCEBF would need a clear mandate to pursue clean energy projects, aligned with BC's energy objectives and UNDRIP. It could include specific instructions as to how First Nations wishing to pursue clean energy projects can access the fund, and provide support in any administrative processes needed to access the funds. The fund would have to be open to all First Nations communities in the Province.

Where the funding comes from is a stickier issue, and perhaps beyond the scope of the project.

The BC First Nations Climate Fund proposed by the FNLC sets out a plan to gather adequate funding for the program. This includes an agreed-upon portion of funds that are collected

¹¹⁵ *Ibid.*

¹¹⁶ FNLC Climate Strategy and Action Plan, *supra* note 3 at 43, Objective 4.8.2, Strategy and Action (a).

¹¹⁷ FNLC Climate Strategy and Action Plan, *supra* note 3.

¹¹⁸ FNLC Climate Strategy and Action Plan, *supra* note 3, at 21.

¹¹⁹ *Ibid.*

through BC's carbon tax, as well as a portion of funds that are collected through other related taxes, levies, and fees.¹²⁰

BC Hydro has affirmed in their most recent service plan that they will advance reconciliation by continuing to invest in and build mutually beneficial and stronger relationships with Indigenous communities.¹²¹ As part of the CleanBC plan, BC Hydro is to partner with the Province and the federal government to develop a plan to help remote communities reduce or eliminate diesel generation and replace it with energy from cleaner sources. This will include increased opportunities for Indigenous Nations to participate in BC Hydro's planning decisions at a regional level, including co-designing approaches to minimize impacts on the land base.¹²² As part of this service plan, BC Hydro has set an Indigenous Procurement measure to support the long-term economic interests of Indigenous peoples by committing \$760 million currently, with a 2024/25 target of \$970 million.¹²³ BC Hydro states that their goal is to reach \$1 billion in the fund by 2025/26.¹²⁴ In theory, this money should go towards their objective: that of developing a plan to help remote communities, with a focus on Indigenous communities, reduce or eliminate diesel generation and replace it with energy from cleaner sources.

The federal government has also pledged its own sources of funds. Natural Resources Canada's *Clean Energy for Rural and Remote Communities* program affirms a \$220-million investment to reduce reliance on diesel in rural, remote and Indigenous communities through renewable energy technologies, encouraging energy efficiency and building local skills and capacity.¹²⁵ The federal government's new climate plan, *A Healthy Environment and a Healthy Economy*, affirms that Canada will be investing an additional \$300 million over five years to help rural, remote and Indigenous communities, currently reliant on fossil fuels, to transition to clean, reliable energy by 2030.¹²⁶

The FNLC's Strategy and Action Plan also provides recommendations for building capacity of First Nations looking to implement climate strategies. The Plan suggests that there is space to improve communication about funding opportunities, so that communities can be better equipped to apply for funding on time. This includes a recommendation that Crown governments assume responsibility for "effectively and continuously communicat[ing] relevant funding information," including opportunities, upcoming deadlines, application requirements, and more.¹²⁷ The Plan also recommends creating or improving webpages that

¹²⁰ *Ibid.*

¹²¹ British Columbia, BC Hydro and Power Authority, *Service Plan 2022/23 - 2024/25* (2022).

¹²² *Ibid.*

¹²³ British Columbia, BC Hydro and Power Authority, *Service Plan 2022/23 - 2024/25*, (2022) at 20.

¹²⁴ *Ibid.*

¹²⁵ Environment and Climate Change Canada, "A Healthy Environment and a Healthy Economy Plan" (2020) online (pdf): *Government of Canada* < https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf>..

¹²⁶ *Ibid.*

¹²⁷ FNLC Climate Strategy and Action Plan, *supra* note 3, at 22.

consolidate information about accessing provincial and federal climate-related funding and opportunities.¹²⁸

Both the federal and provincial policies suggest that funding is available for making the clean energy transition, however navigating access to these funds is complicated. Combining these provincial and federal investment promises into one fund, accessible to First Nations wishing to pursue clean energy projects, could provide the financial support for a fund that is actually effectively aligned “with the current clean energy landscape.”¹²⁹ This recommendation, coupled with an Indigenous Energy Board which would provide competency building, accountability and oversight, along with administrative ease for First Nations wishing to access it (Recommendation III), could significantly expedite the transition away from diesel in many First Nations communities. This recommendation is aligned with all of BC’s energy objectives, as well as Articles 32(3) and 39 of UNDRIP, which mandate states to provide financial and technical assistance for the enjoyment of the rights contained in the Declaration.¹³⁰

¹²⁸ *Ibid.*

¹²⁹ British Columbia, “First Nations Clean Energy Business Fund” (2022), online: *Government of British Columbia*

<<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-clean-energy-business-fund>>.

¹³⁰ UNDRIP, *supra* note 10.

Appendix A

Key Sections of UNDRIP

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Appendix B

Key sections of the Clean Energy Act

British Columbia's energy objectives

2 The following comprise British Columbia's energy objectives:

(a) to achieve electricity self-sufficiency;

[...]

(c) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity;

(d) to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources;

[...]

(g) to reduce BC greenhouse gas emissions

[...]

(h) to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia;

(i) to encourage communities to reduce greenhouse gas emissions and use energy efficiently;

[...]

(l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources;

Clean or renewable resources

19 (1) To facilitate the achievement of British Columbia's energy objective set out in section 2 (c), a person to whom this subsection applies

(a) must pursue actions to meet the prescribed targets in relation to clean or renewable resources, and

(b) must use the prescribed guidelines in planning for

(i) the construction or extension of generation facilities, and

(ii) energy purchases.

(2) Subsection (1) applies to

(a) the authority, and

(b) a prescribed public utility, if any, and a public utility in a class of prescribed public utilities, if any.

First Nations Clean Energy Business Fund

20 (1) In this section:

"first nation" means

(a) a band, as defined in the *Indian Act* (Canada), and

(b) an aboriginal governing body, however organized and established by aboriginal people;

"power project" means an electricity generation or transmission project

[...]

"special account" means the special account, as defined in section 1 of the *Financial Administration Act*, established under subsection (2) of this section.

(2) A special account, to be known as the First Nations Clean Energy Business Fund special account, is established.

(3) The initial balance of the special account is an amount, not to exceed \$5 million, prescribed by Treasury Board.

Regulations

35 Without limiting section 34 (1), the Lieutenant Governor in Council may make regulations as follows:

(d) modifying or adding to British Columbia's energy objectives, except for the objective specified in section 2 (g);

Appendix C

Key sections of the *Utilities Commission Act*

Definitions

1 (1) In this Act:

"**authority**" means the British Columbia Hydro and Power Authority;

"**British Columbia's energy objectives**" has the same meaning as in section 1 (1) of the *Clean Energy Act*;

"**commission**" means the British Columbia Utilities Commission continued under this Act;

[...]

"**costs**" includes fees, counsel fees and expenses;

"**public utility**" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or

radiocommunications if that service is offered to the public for compensation,

but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,

(d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others,

(e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

(f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the *Geothermal Resources Act*, or

(g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the *Hydro and Power Authority Act*, in respect of anything done, owned or operated under or in relation to that agreement;

Commission subject to direction

3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.

(2) The commission must comply with a direction issued under subsection (1), despite

(a) any other provision of

(i) this Act, except subsection (3) of this section, or

(ii) the regulations,

(a.1) any provision of the *Clean Energy Act* or the regulations under that Act, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

Commission's duties

5 (1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

Long-term resource and conservation planning

44.1 (2) Subject to subsection (2.1), a public utility must file with the commission, in the form and at the times the commission requires, a long-term resource plan including all of the following:

(a) an estimate of the demand for energy the public utility would expect to serve if the public utility does not take new demand-side measures during the period addressed by the plan;

(b) a plan of how the public utility intends to reduce the demand referred to in paragraph (a) by taking cost-effective demand-side measures;

(c) an estimate of the demand for energy that the public utility expects to serve after it has taken cost-effective demand-side measures; [...]

(g) any other information required by the commission.

[...]

(6) After reviewing a long-term resource plan filed under subsection (2), the commission must

(a) accept the plan, if the commission determines that carrying out the plan would be in the public interest, or

(b) reject the plan.

(8) In determining under subsection (6) whether to accept a long-term resource plan, the commission must consider

- (a) the applicable of British Columbia's energy objectives,
- (b) the extent to which the plan is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,
- (c) whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures, and
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility.

Discrimination in rates

59 (1) A public utility must not make, demand or receive

- (a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or
- (b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

- (a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or
- (b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

(3) The commission may, by regulation, declare the circumstances and conditions that are substantially similar for the purpose of subsection (2) (b).

(4) It is a question of fact, of which the commission is the sole judge,

- (a) whether a rate is unjust or unreasonable,
- (b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or

(c) whether a service is offered or provided under substantially similar circumstances and conditions.

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

Regulations

125 (1) The Lieutenant Governor in Council may make regulations as referred to in section 41 of the *Interpretation Act*.

Appendix D

Key sections of the Hydro and Power Authority Act

Definitions

1 In this Act:

"**authority**" means the British Columbia Hydro and Power Authority continued under this Act;

"**commission**" means the British Columbia Utilities Commission continued under the *Utilities Commission Act*;

Agent of government

3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

(2) The Minister of Finance is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

Powers

12 (1) Subject to this Act and the regulations, the authority has the capacity and the rights, powers and privileges of an individual of full capacity and, in addition, has

(a) the power to amalgamate in any manner with a firm or person, and

(b) any other power prescribed.

(1.1) The authority's purposes are

(a) to generate, manufacture, conserve, supply, acquire and dispose of power and related products,

(b) to supply and acquire services related to anything in paragraph (a), and

(c) to do other things as may be prescribed.

Power to make regulations

38 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations

(a) prescribing powers for the purposes of section 12 (1),

(b) prescribing purposes of the authority for the purposes of section 12 (1.1), and

(c) for the purposes of section 12 (1.2), prescribing activities, classes of activities and approval requirements.