BRITISH COLUMBIA

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DECISION NOS. 2016-WAT-002(a), 003(a) and 004(a) [Group file: 2016-WAT-G01]

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	West Moberly First Nations and Prophet River First Nation	**APPLICANTS (APPELLANTS)**
AND:	Clara London	**APPELLANTS**
AND:	Deputy Comptroller of Water Rights	**RESPONDENT**
AND:	BC Hydro and Power Authority	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 26, 2016	

APPEARING:	For the Applicants: West Moberly First Nations and Prophet River First Nation	 John Gailus, Counsel Matthew Nefstead, Counsel
	For the Appellant Clara London	Clara London
	For the Respondent:	Erin Christie, Counsel Anna Peacock, Counsel
	For the Third Party:	Mark Andrews, Q.C., Counsel Charles Willms, Counsel Bridget Gilbride, Counsel

APPLICATION TO POSTPONE THE HEARING

THE APPLICATION

[1] On February 29, 2016, two conditional water licences were issued by the Deputy Comptroller of Water Rights (the "Deputy Comptroller"), to BC Hydro and Power Authority ("BC Hydro"), allowing the diversion and storage of water in relation to the Site "C" Clean Energy Project (the "Project"), as follows:

a. Licence C132990 authorizes BC Hydro to divert and use water from the Peace River for power purposes; the power is to be generated at the Site C generating station. The works authorized by the licence include a dam, spillway and powerhouse.

b. Licence C132991 authorizes BC Hydro to store water from the Peace River in the Site C reservoir created by the dam.

[2] In March of 2016, three appeals were filed against the issuance of the water licences:

- Appeal No. 2016-WAT-002 was filed by Clara London against the storage licence; and
- Appeal Nos. 2016-WAT-003 and 004 were filed by the West Moberly First Nations and Prophet River First Nation (the "First Nations"), against the diversion and storage licences respectively.

[3] The Board joined Ms. London's appeal with the First Nations appeals for the purposes of a hearing and issued a group appeal number (2016-WAT-G01). The hearing of these three appeals has been scheduled for four weeks, commencing on April 3, 2017.

[4] On October 5, 2016, the First Nations applied to the Board for a postponement of the hearing schedule and the hearing until Monday, July 3, 2017.[1] They clarified their request by letter dated October 19, 2016, stating that they seek to postpone the pre-hearing exchange of evidence and submissions until July 3, 2017, with "the hearing to follow at a time set by the Board approximately six months thereafter." The First Nations submit that a postponement is appropriate as there are matters before the Federal and BC Courts of Appeal which, depending on their outcome, could render their appeals moot.

[5] The other Appellant, Clara London, does not object to the application.

[6] Both the Deputy Comptroller and BC Hydro object to the application. They ask for the application to be denied, for the hearing to proceed as scheduled, and for new pre-hearing submission deadlines to be set at the earliest possible time.

[7] This application has been heard by way of written submissions.

BACKGROUND

[8] The First Nations are beneficiaries of Treaty No. 8 with Treaty rights. Treaty No. 8 expressly grants all Treaty beneficiaries with hunting, trapping and fishing rights within the Treaty territory, which includes the area within which the Project is situated.

[9] The Project is situated seven kilometres southwest of Fort St. John, and is estimated to cost $8.335 billion. Its components are: an earthfill dam, a 1,100 megawatt hydroelectric generating station and spillways; substation and

[1] The First Nations originally applied for the postponement until Sunday, July 2, 2017 in error. The First Nations corrected the error in its submissions to the Board.

transmission lines; re-alignment of Highway 29; quarried and excavated construction materials; worker accommodation; road and rail access; and an 83 kilometre long reservoir. It would be the third dam and hydroelectric generating facility on the Peace River, downstream from the W.A.C. Bennett and Peace Canyon dams and their respective reservoirs.

[10] The water licences at issue in the appeals are only one part of the regulatory approvals related to this Project. BC Hydro also had to go through the Federal and Provincial environmental assessment process. The two levels of government agreed to conduct a cooperative environmental assessment by an independent Joint Review Panel appointed by the Federal and Provincial Ministers of Environment. The First Nations participated in the environmental assessment process, advising of the significant environmental effects of the Project and the corresponding impacts on their Treaty rights.

[11] On October 14, 2014, BC Hydro received:

a. an Environmental Assessment Certificate issued under section 17(3) of the BC *Environmental Assessment Act* (the "Provincial EA Certificate"); and

b. a Federal Order in Council issued under section 52(4) of the *Canadian Environmental Assessment Act, 2012* (the "Federal OIC").

[12] On December 16, 2014, the Province of British Columbia announced its final investment decision to proceed with the Project.

[13] Also during 2014, BC Hydro prepared and submitted its first bundle of applications to the Province for various authorizations to allow the initial construction activities. In July of 2015, the Province issued 36 authorizations.

[14] In addition to this bundle of applications, BC Hydro also applied to the Province for the subject water licences. The applications were formally referred to the First Nations for consultation on March 19, 2015.

[15] Construction commenced in late July, 2015, and is scheduled to be completed in 2024.

[16] On February 26, 2016, the Deputy Comptroller issued the two water licences to BC Hydro, and provided a 106-page Rationale for his decisions. There is no dispute that these water licences are crucial to the construction of the Project.

[17] On March 11, 2016, Clara London filed an appeal with the Board against the storage licence, raising concerns with the stability of the dam site, the impact of flooding on private property, and the risk to safety posed by the dam.

[18] On March 29, 2016, the First Nations appealed both water licences to the Board on the grounds that the water licences were issued in breach of the Crown's duty to consult and accommodate their Treaty rights, that the Deputy Comptroller had inadequate information regarding the groundwater regime when he issued the licences, and that there was no urgency to issue the water licences in light of the fact that "there is no foreseeable need for the power that would be generated by the Project", among other things. They ask the Board to quash the licences, with or without certain specified directions, and list a number of alternative remedies.

[19] No stay has been sought of the Deputy Comptroller's decisions by any of the Appellants.

[20] During a pre-hearing teleconference on August 16, 2016, the parties agreed that four weeks would be required for the hearing on the merits of the appeals, and agreed to the hearing taking place during the entire month of April 2017, with an additional week set aside in May 2017, should it be required.

[21] During that teleconference, the parties also agreed to a schedule for the pre-hearing exchange of affidavits, expert reports, documents and submissions. Of note, the First Nations' affidavit evidence was due on September 30, 2016, expert reports are due on November 15th, and the Deputy Comptroller's affidavit evidence is due on November 30th. The First Nations did not meet the agreed upon deadline for submitting their affidavits on September 30th, and did not request an extension of time. Instead, on October 5, 2016, the First Nations applied to the Board to postpone the appeal hearing on the grounds that there are currently matters before the courts which, depending on their outcome, could render their appeals moot.

[22] The Panel considers counsel for the Appellants' unilateral decision to ignore the September 30th deadline that had been agreed to by the Board and all of the parties, and frustrate the agreed upon hearing process, to be disrespectful to the Board and their colleagues who represent the other parties in these appeals. The Panel requests that such an incident not be repeated in the future.

Judicial reviews and appeals

[23] Shortly after the Provincial EA Certificate and the Federal OIC were issued in October of 2014, the First Nations filed applications for judicial review in the provincial and federal courts, respectively. The litigation that ensued from these applications forms the basis for the First Nations' application for a postponement (its mootness argument) now before the Board. As such, a brief description of the judicial proceedings is required.

[24] On November 4, 2014, the First Nations filed an application for judicial review of the Federal OIC in Federal Court. Their petition was amended in June of 2015.

[25] On December 22, 2014, the First Nations filed an application for judicial review of the Provincial EA Certificate in BC Supreme Court.

[26] BC Hydro sought expedited hearings of both matters, stating that it would suffer financial harm if construction was delayed past July 2015. In the BC Supreme Court, the judicial review was scheduled, and heard, in May, 2015. The Federal Court denied BC Hydro's application and scheduled the hearing for July of 2015.

[27] In the summer and fall of 2015, the judicial reviews filed by the First Nations were dismissed: see *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030; and *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682. The First Nations appealed both of these decisions.

[28] The First Nations appealed the Federal Court decision to the Federal Court of Appeal. The appeal was heard in September of 2016; the Court's decision was reserved, and has not been released as of the date of this decision.

[29] The First Nations appealed the BC Supreme Court decision to the BC Court of Appeal in October 2015, and that appeal is scheduled to be heard on December 5 to 8, 2016.

[30] Finally, it should be noted that the First Nations also filed judicial reviews of the 36 provincial authorizations on the grounds of failure to consult and sought an interlocutory injunction to prevent the authorized works from being constructed. The injunction application was dismissed (*Prophet River First Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, Docket 15-2987, Victoria Registry, August 28, 2015). The petition was also dismissed (*Prophet River v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2016 BCSC 2007).

THE PARTIES' POSITIONS ON THE APPLICATION

The First Nations' position

[31] In their application to the Board, the First Nations set out the basis for the application as follows:

> In the event that the First Nations are successful in either appeal [to the BC Court of Appeal or the Federal Court of Appeal] and the Environmental Assessment Certificate or Order in Council is quashed, the appeal of the water licences will be moot. The First Nations believe that proceeding with an appeal at this time may ultimately prove to be moot and would not be an appropriate use of the First Nations', the Crown or the Board's resources, and would not support the efficient and timely resolution of the issues at the heart of the appeals.

[32] The First Nations submit that their appeals of the water licences are still in their early stages, as the parties have not yet exchanged documents or legal arguments. They submit that significant resources will have to be expended over the coming months to have their appeals ready for an April 2017 hearing. These resources would be unnecessarily expended if the Courts of Appeal decide in favour of the First Nations. They submit that, while the water licences are crucial to the construction of the Project, a decision by the Board confirming the licences does not guarantee the future of the Project. Rather, the future of the Project lies with the final resolution of the judicial appeals of the Provincial EA Certificate and the Federal OIC.

[33] The First Nations further submit that BC Hydro will not be flooding the reservoir until 2023 at the earliest; therefore, a "short delay in the present appeal" will allow additional time to explore some of the other environmental issues raised by the First Nations in relation to the reservoir filling, such as groundwater contamination and methylmercury.

[34] Further, the First Nations note that any prejudice to BC Hydro from a short delay is a prejudice of its own making: BC Hydro took a calculated risk by proceeding with the Project despite the lack of support by the First Nations, and despite the outstanding litigation. The First Nations submit that this risk will persist for BC Hydro whether the Board's hearing proceeds as scheduled or not.

Clara London's position

[35] Ms. London advised that she does not object to the requested postponement.

The Deputy Comptroller's position

[36] The Deputy Comptroller opposes the postponement. He submits that the First Nations were aware of the outstanding court proceedings when they agreed to the hearing dates and the timeframes for delivery of documents, affidavits and expert reports at the pre-hearing teleconference in August, 2016. No new circumstances have arisen to justify now postponing the agreed upon hearing schedule.

[37] The Deputy Comptroller submits that one of the key factors to consider in this case is the length of the postponement. The Deputy Comptroller states:

> The Appellants have arbitrarily selected a postponement until Sunday, July 2, 2017 [amended to Monday, July 3, 2017] for the resumption of the hearing schedule (i.e., delivery of affidavit materials, statement of points, and hearing dates). There is, however, no guarantee that the proceedings involving the EA Certificates will be resolved by July 2017. It is probable that even if both the Federal Court of Appeal and the BC Court of Appeal deliver Reasons for Judgment by then (which is wholly speculative) an appeal to the Supreme Court of Canada may ensue. The indeterminate duration of the EA Certificate proceedings creates uncertainty and militates against a postponement.

[38] The Deputy Comptroller further notes that, unless the Courts of Appeal quash the Federal OIC and/or the Provincial EA Certificate, a postponement of the appeals results in needless delay. The Deputy Comptroller submits that the outcomes of these judicial appeals are completely speculative and ought not to be the basis for a postponement.

[39] Further, as the Deputy Comptroller is retiring in January of 2017, an indeterminate postponement will compromise the Province's ability to obtain information in a timely manner from him in order to respond to the First Nations' evidence and argument when the water licence appeals are eventually heard. In *Fort Nelson First Nation v. British Columbia (Ministry of Environment, Lands and Parks)*, [2000] B.C.E.A. No. 9 (QL), the Board refused a postponement on similar grounds, stating at page 5:

> The Panel notes that MOF [Ministry of Forests] and the Deputy Administrator could be prejudiced by an adjournment to August 2000, because several of their witnesses are unavailable at that time, or

> would be taken away from their work duties during an especially busy time of year.

[40] The Deputy Comptroller also relies upon the Board's decision in *Northwest British Columbia Coalition for Alternatives to Pesticides v. British Columbia (Ministry of Environment, Lands and Parks)*, [2001] B.C.E.A. No. 5 (QL). In that case, the Board denied a postponement application in an appeal involving joined appeals. The Board noted that some of the Appellants and their witnesses in the joined appeals were unavailable for the alternate dates and that a postponement would thus "unfairly prejudice the other Appellants". In the present case, the Deputy Comptroller submits that the Province will face a similar prejudice in the event of a postponement given his impending retirement.

[41] The Deputy Comptroller submits that, in this case, there is also a public interest in a timely hearing. This was referred to by the BC Court of Appeal in *Turnagain Holdings Ltd. V. British Columbia (Environmental Appeal Board)*, 2002 BCCA 564 [*Turnagain*]. In that case, the Court of Appeal endorsed the following quote from the House of Lords in *O'Reilly v. MacKinnon*, [1983] 2 A.C. 237 at 280-1:

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[42] The Deputy Comptroller argues that the public interest in determining the legal validity of the licences at issue in the present case is "pronounced". He states:

> The licences represent a part of an interconnected array of administrative approvals and investment decisions by BC Hydro, a Crown Corporation. The outcome of the appeal may, therefore, impact a broader array of decisions, and could have economic impacts upon British Columbians. As in the *Turnagain* case, the Province should not be kept in suspense as to the legal validity of the licences in question for any longer than is absolutely necessary.

[43] Finally, while the First Nations cite the unnecessary expenditure of resources as a reason for the postponement, the Deputy Comptroller notes that they cite no actual prejudice.

[44] Regarding the First Nations' statement that reservoir filling will not be completed until 2023, the Deputy Comptroller notes that activities under the licences that may potentially affect groundwater will start as early as 2019, with the commencement of river diversion.

BC Hydro's position

[45] BC Hydro opposes the postponement on the grounds that it creates "a real risk of irreparable harm to BC Hydro" and denies BC Hydro the right to an expeditious determination of whether there is any defect in the water licences –

licences which are crucial to the construction of the Project. BC Hydro submits that it needs to know whether there are problems with the licences' validity, and to take expeditious action to resolve those problems if they can be resolved. It provided lengthy submissions in support of its position, along with an affidavit from Alan Le Couteur, BC Hydro's Team Leader for the "Contract Scheduling and Estimating" group for the Project, sworn on October 19, 2016.

[46] First, BC Hydro argues that the ongoing appeals in the courts do not justify a postponement of these proceedings, because:

- The potential outcome of the judicial appeals is highly speculative, and it is unclear whether the outcome in those appeals will, in fact, render the water licence appeals moot.
- To be moot, at least one of the lower court decisions would have to be set aside. Until that happens, the current judicial determinations have found that the Provincial EA Certificate and the Federal OIC were validly issued.
- Even if one of the First Nations' judicial appeals is successful, it does not automatically follow that the appeals to the Board will be moot, for the following reasons:
    - The First Nations ask the Federal Court of Appeal to direct the Governor in Council to "consider and satisfy itself that its statutory decision would not unjustifiably infringe the Appellants' Treaty rights." Therefore, even if the First Nations are successful at the Federal Court of Appeal, the Governor in Council may determine that it should, nonetheless, uphold the issuance of the Federal OIC.
    - In the BC Court of Appeal, the First Nations seek an order quashing the Provincial EA Certificate but, similar to the Federal proceedings, they also seek an order that the matter be sent back to the Ministers for reconsideration. Therefore, even if successful in the BC Court of Appeal, the Ministers may, nonetheless, uphold the issuance of the Provincial EA Certificate.
- Further, even if the Provincial EA Certificate and the Federal OIC were suspended or quashed, it would not invalidate the water licences: "While BC Hydro would not be entitled to undertake work pursuant to the licences, the water licences themselves remain validly issued unless the Board rules otherwise."

[47] Second, BC Hydro submits that the First Nations' estimate that the judicial appeals will be decided by July 3, 2017, is speculative. If they are not decided by that date, the Board will likely be faced with another postponement application by the First Nations.

[48] Third, BC Hydro submits that the First Nations logic is problematic. BC Hydro points out that, in a project like Site C, there are many layers of governmental approvals, permits, licences and authorizations that are required to move forward, and that, "If the Appellant's logic is correct, a challenge to any of these

authorizations may be put forward as a reason not to proceed with a challenge to any other authorization since, if the first challenge is successful, the other challenges may (it can be speculated) become moot."

[49] BC Hydro further submits that the hearing ought to proceed expeditiously, and that the First Nations' application be dismissed, for the following reasons:

- The First Nations filed their judicial appeals in the Fall of 2015, well before the appeals were filed with the Board. Further, their appeals to the Board were filed six months before their application for a postponement was made. If the First Nations thought that it was appropriate for the Board to await the outcome of the judicial appeals, they should have made their wishes known much earlier. They should not have agreed to the hearing dates at the August 2016 teleconference, or they should have brought this application in a more timely manner – not when their affidavits were due.
- Given the late application, BC Hydro is prejudiced as it has foregone other opportunities to expedite the judicial appeals. Further, it has taken steps in the present appeals and incurred costs in doing so.
- If the postponement is granted and the hearing is not held for an additional nine months, or longer if the judicial proceedings are not completed, then BC Hydro will incur substantial financial harm. According to the affidavit sworn by Mr. Le Couteur, this delay could amount to an additional $600 million.
- In contrast, the First Nations have not attempted to specify or quantify any prejudice to them should the appeal proceed as scheduled. Any resources that will have to be expended to proceed as scheduled, is dwarfed by the cost of further delay in construction to BC Hydro.
- The Province made its final investment decision on the Project in December 2014 and BC Hydro has kept the First Nations apprised of its intentions to commence construction in July of 2015 (15 months ago), of the anticipated course of that construction, and of the implications of delay. It has tried to move the judicial review applications along to a speedy resolution.
- If the First Nations are correct and there are defects in the licences that need to be remedied, it is in the public interest that this be determined as early as possible. If corrective adjustments are required by the Board, the time lost in knowing and undertaking these corrective measures will have additional negative consequences for BC Hydro, such as: additional cost, disruption to the Project, risk to the scheduled completion date in 2024, and interference with the employment of more workers.
- If the Board decides that there is a defect in the water licences that cannot be fixed, it is also in the public interest that this be

> known as early as possible in order to avoid the very significant additional costs that will otherwise be unnecessarily sunk into the Project.

[50] Finally, although it has proceeded with construction activities despite the court proceedings and the appeals to the Board, BC Hydro maintains that it is simply doing what it has legal authority to do. It obtained the Provincial EA Certificate and the Federal OIC, both of which have been the subject of judicial reviews, and both of which have been confirmed by the lower courts. It has obtained other provincial authorizations that have been the subject of unsuccessful judicial reviews by the First Nations, and it holds the two water licences which have not been stayed, and are presumed valid unless, or until, the Board finds otherwise.

[51] BC Hydro submits that, in consideration of all the circumstances, any benefits from the postponement are speculative and, in any event, they are insignificant when compared with the potential prejudice to BC Hydro by the postponement.

The First Nations' reply to the Deputy Comptroller's submissions

[52] The First Nations deny that the requested postponement will result in prejudice to the Province because of the Deputy Comptroller's retirement in January of 2017. They note that, even if the hearing proceeds in April of 2017, arrangements would have to be made for the Deputy Comptroller to attend the hearing. The First Nations also submit that the authorities relied upon by the Deputy Comptroller are distinguishable; there is no indication that the Deputy Comptroller "is unavailable" for a later hearing, simply that he is retiring.

[53] The First Nations also reject the applicability of *Turnagain* to the present case. They note that the Court's statements in *Turnagain* were made in the context of a seven year delay in filing a judicial review. The Court exercised its discretion to dismiss the application on the basis of delay. In any event, on the facts of the present case, the First Nations note that they filed their appeals in time, and, as the appeals on the Provincial EA Certificate and the Federal OIC are before appellate courts, and may end up in the Supreme Court of Canada, the "certainty" referenced by the Court in *Turnagain*, and sought by the Deputy Comptroller, may take "some time". The public interest in determining the validity of the water licences in a timely way will not provide the desired certainty until the validity of the environmental assessment authorizations are determined.

The First Nations' reply to BC Hydro's submissions

[54] In response to BC Hydro's submissions that the "mootness" claim is speculative, and that BC Hydro should be entitled to proceed with construction on the basis of the issued approvals and licences, the First Nations submit that:

> It is not necessary that the mootness of the first proceeding be guaranteed; indeed, if that were the case, no proceeding would be required in the first place. If the ongoing proceedings in the BC and Federal Courts of Appeal are decided in the Appellants' favour, the present appeal would become academic, at the cost of several months

> of preparation, over one month of hearings, and the associated legal and expert fees and disbursements for all parties.

[55] Regarding prejudice to BC Hydro, the First Nations reiterate that BC Hydro has chosen to proceed with construction despite its knowledge that the authorizations upon which it relies, may be overturned. They note that BC Hydro has "never been deterred from carrying out its construction activities by the prospect of wasted construction costs in the event the various approvals for the Project are overturned by the ongoing litigation between the parties and others."

[56] The First Nations further submit that, even if BC Hydro will spend $600 million as a result of the postponement sought by the First Nations, this is relatively insignificant given the overall Project budget. Moreover, when evaluating prejudice, the First Nations submit that the Board ought to consider the impact of the losses, not the quantum. Being small First Nations with limited budgets, they lack the substantial financing available to the Deputy Comptroller and BC Hydro. They submit that a cost that is small to the Deputy Comptroller and BC Hydro, is significant for them.

[57] The First Nations submit that, if the Board refuses their application for a postponement, and they are ultimately successful in their judicial appeals, they would suffer substantial prejudice.

ISSUES

1. Whether a postponement ought to be granted in the circumstances?

RELEVANT LEGISLATION

[58] There is no legislation governing postponements. When considering an application to postpone a hearing, the Board's July 2016 *Practice and Procedure Manual* states as follows at page 40:

> When deciding whether to grant this request, the Board will apply the general factors in section 39 of the *Administrative Tribunals Act* with respect to adjournments; that is, it will consider the reasons for the postponement, whether the postponement will cause unreasonable delay, the impact of both refusing and granting the postponement on the parties, and any impact on the public interest. In furtherance of, and/or in addition to, consideration of these general factors, the Board will specifically consider the following:
>
> - the proposed or anticipated length of the postponement;
> - the adequacy of the reasons provided and the adequacy of any objections to the postponement;
> - the number, length and causes of any previous postponements that have been granted;
> - whether the postponement will needlessly delay or impede the conduct of the hearing;

- whether the purpose for which the postponement is sought will contribute to the resolution of the matter;
- whether the postponement is required to provide a fair opportunity to be heard;
- the degree to which the need for the postponement arises out of the intentional actions or the neglect of the applicant for the postponement;
- the prejudice to the other parties if a postponement is granted, balanced against the prejudice to the applicant if the postponement is not granted;
- any environmental impacts that may result from a postponement of the hearing;
- any public interest factors, such as the public interest in the efficient and timely conduct of the appeal; and
- any other factors which may be relevant.

If a hearing is postponed, the Board will consider whether to order any terms and conditions that may assist with the fair and efficient conduct of the appeal such as conditions respecting rescheduling, attendance at a pre-hearing conference, or production of documents or reports.

DISCUSSION AND ANALYSIS

[59] The Board has considered the factors set out in its *Practice and Procedure Manual*. In some cases, the factors have been consolidated for ease of review.

The reasons for the postponement & adequacy of the reasons

[60] The First Nations submit that the appeal may become moot if the respective Courts of Appeal agree that the Provincial EA Certificate and the Federal OIC are quashed or set aside.

[61] BC Hydro agrees that, if the environmental assessment authorizations were quashed or set aside, it could not undertake the work pursuant to the water licences. However, it points out that the licences themselves would remain valid unless the Board orders otherwise. It further notes that the First Nations have asked the appellate courts for alternative remedies that may not have the same impact on the water licences.

[62] Even though the Panel agrees with BC Hydro's analysis of the possible alternative outcomes, and that the licences would remain valid even if the environmental assessment authorizations were quashed, the fact is that quashing the environmental assessment authorizations would render the water licences unusable, and would likely eliminate the need for a hearing before the Board; i.e., if the First Nations are successful in their judicial appeals, this could render the appeals of the water licences moot or academic.

[63] The Panel accepts that a court decision that renders an appeal moot or academic *can* be a reasonable basis for postponing an appeal. However, this does not mean that it always will be. The interest in judicial economy and the efficient operation of the judicial system, which includes administrative tribunals, are factors that ought to be considered, but may not be determinative. It depends on the circumstances.

[64] Accordingly, the Panel will carefully consider the other factors to determine whether they "tip the scale" in favour of denying the postponement and holding the hearing as scheduled.

The degree to which the need for the postponement arises out of the intentional actions or the neglect of the applicant for the postponement

[65] As noted by BC Hydro and the Deputy Comptroller, the hearing dates were set, by consent, during the pre-hearing teleconference in August of 2016. Despite the First Nations' full knowledge of the outstanding litigation, they agreed to the hearing dates and the schedule for the pre-hearing exchange of evidence and submissions. The First Nations provided no explanation for the delay in raising their "mootness" concerns with the other parties and the Board. The First Nations cannot claim ignorance of the outstanding litigation since they are directly involved in that litigation: they are, in fact, the "drivers" of that litigation. In the Panel's view, the First Nations could have, and should have, raised this issue during the August 2016 teleconference, if not earlier, instead of agreeing to the April 2017 hearing dates, and the pre-hearing evidence and submission schedule.

[66] Moreover, the First Nations did not make their postponement application to the Board until *after* their affidavits were due on September 30, 2016, and failed to request an extension of that deadline before it passed. The subsequent application to the Board does not automatically "stay" all pre-existing schedules.

[67] The Panel finds that the need for this postponement is, in part, a result of the First Nations' intentional actions or neglect.

The proposed or anticipated length of the postponement

[68] The First Nations seek a three-month postponement (to July 3, 2017), at which time the exchange of affidavits and expert reports would resume, and the hearing would "follow at a time set by the Board approximately six months thereafter." However, the basis for their timelines is unclear. The Federal Court of Appeal hearing took place in September, 2016, and its decision is reserved. There is no indication in the First Nations' materials that the Federal Court of Appeal has provided a time frame or release date for its decision. The appeal to BC Court of Appeal will not be heard until next month, and there is no evidence regarding an expected release date. The release of both appellate decisions is completely speculative, as is the potential for additional appeals to the Supreme Court of Canada.

[69] Although the First Nations seem to believe that the appellate court decisions will not be released until sometime after April 2017, when the Board's hearing is

scheduled to commence, it is also possible that one or both of the decisions may be released earlier. This uncertainty highlights the arbitrariness of the First Nations' time estimate.

[70] Given that the entire basis for the First Nations' application is one of potential "mootness" (i.e., if they are successful on the appeal(s), there may be no need for the appeals to the Board), a more rational request would be for the current hearing dates to be cancelled, and the appeals to be held in abeyance, until both of the appellate courts have released their decisions. By asking for this arbitrary three-month postponement of the pre-hearing evidence and submissions, and then suggesting the hearing be scheduled six months later, the First Nations' seem to be trying to give the Board a false sense of certainty and the appearance of a "short delay" when, in fact, there appears to be no certainty and there could be a fairly lengthy delay (scheduling a one-month hearing involving multiple parties and witnesses generally requires booking several months in advance).

[71] The Panel finds that the requested length of postponement does not accurately reflect the true purpose of the request, which is to have the results of the judicial appeals in order to determine whether the appeals to the Board should proceed. It is unclear whether the anticipated length of postponement is shorter or longer than necessary to achieve its purpose.

The impact and/or prejudice of both refusing and granting the postponement on the parties, and any impact on the public interest

[72] The First Nations submit that if the postponement is refused and the environmental assessment authorizations are quashed or set aside, significant resources will have been spent by all parties unnecessarily. They submit that any financial consequences to BC Hydro, in particular, will be minor in the context of the entire Project, whereas the financial consequences to the First Nations are disproportionately large.

[73] Although the First Nations' did not estimate the financial impact that they would suffer should the postponement be refused, nor did they address other potential consequences, the Panel accepts that the cost of a month long hearing, in addition to the cost of pre-hearing preparation, will be significant for any party, let alone these First Nations.

[74] In contrast, the other parties submit that, if the First Nations' postponement is granted, they will suffer harm/prejudice, including harm to the public interest.

[75] The Deputy Comptroller submits that, given his impending retirement, the Province's ability to present its case and respond to the First Nations' case in a timely manner will be compromised. The Panel disagrees. Given that the Deputy Comptroller's retirement will occur before the currently scheduled hearing in April of 2017, the Province will have to make arrangements with the Deputy Comptroller to deal with the case in any event. Whether the hearing is in April, or later, the Province will have to deal with the issue of the Deputy Comptroller's availability.

[76] Further, unlike the cases cited by the Deputy Comptroller, in the present case there is no indication that he will be "unavailable" if the hearing is postponed.

Moreover, if the hearing ultimately becomes moot, his retirement and future availability will not be an issue at all.

[77] The Deputy Comptroller also argues that there is a public interest in determining the validity of statutory decisions in a timely way. The Deputy Comptroller submits that the outcome of the appeals to the Board may "impact a broader array of decisions, and could have economic impacts upon British Columbians".

[78] While the Panel agrees generally that it is important to determine the legal validity of a statutory decision in a timely way, in the present case, the legal validity of the water licences is overshadowed by the question before the appellate courts regarding the validity of the environmental assessment authorizations. The First Nations' appeals of the lower court decisions, like the appeal of the water licences to the Board, leads to uncertainty in the ultimate outcome of the provincial and federal environmental assessment authorizations. Therefore, the Panel finds that, even if there is a public interest in determining the validity of the water licences, there is an even greater public interest in determining the validity of the environmental assessment authorizations for the Project, as a whole.

[79] One concern raised by the Deputy Comptroller that resonates with the Panel is that there is no guarantee that the litigation over the environmental assessment authorizations will end at the Court of Appeal level. However, even if the Board's hearing is postponed until the Courts of Appeal render their decisions, it does not necessarily follow that the Board's hearing must be delayed until all possible appeals are completed. Delaying the Board's hearing requires a balancing of factors and, in particular, a balancing of the impacts/prejudice to the parties which may change with the passage of time.

[80] BC Hydro also addresses the potential impacts/prejudice that it will suffer if the postponement is granted. Its impacts are mainly financial. It submits that the requested delay in concluding this proceeding would amount to an estimated $600 million in additional costs. However, based upon BC Hydro's affidavit evidence, it appears that the assessment of financial impact is premised upon delays in construction activities. The only reference to this amount in Mr. Le Couteur's affidavit relates to the amount of money he anticipates that BC Hydro will spend in the period between October 2017 and July 2018 (paragraph 9 of his affidavit) - a period of time which is primarily unrelated to the postponement request.

[81] Mr. Le Couteur also states that the cost impacts of delays, or suspensions of construction work, generally arise out of direct cost impacts (e.g., suspending active construction contracts, care and maintenance of facilities during a suspension of construction, extended contractor overheads associated with an extension of the contract, etc.), additional inflation impacts due to shifting spending into future periods (expected to have higher prices), and increased interest costs due to carrying costs through a longer construction period. He also describes other impacts of delay as a result of missing key Project milestones, especially ones that are seasonally-constrained, and described harm to third party contractors and their employees from delays.

[82] However, to date, there are no stays or injunctions in place and BC Hydro is proceeding with construction of the Project in accordance with any and all valid authorizations, whether or not the authorizations are subject to judicial reviews and/or appeals. Therefore, the Panel finds that the basis for BC Hydro's claim of $600 million in financial harm is questionable.

[83] Nevertheless, the Panel accepts that BC Hydro would benefit from knowing whether any or all of the water licence appeals will be successful, in whole or in part. Uncertainty is difficult for any business. Depending on the outcome of the water licence appeals, BC Hydro is correct that it could try to resolve any defects in a timely manner. It is only if the environmental assessment certificates are quashed or set aside that BC Hydro would not be entitled to undertake work authorized by the water licences, and any decision by the Board on the appeals of the water licences would be of limited value.

[84] The Board appreciates that a postponement of the Board's hearing pending decisions by the appellate courts (or the Supreme Court of Canada, should that court be the ultimate arbiter), will delay BC Hydro's ability to make decisions on its Project with any certainty. However, given that there have been judicial reviews of other provincial authorizations so far, and given the evidence before the Board that there will be other authorizations required during the course of the Project, resolution of the validity of the water licences, while crucial to the Project, may not be as urgent as alleged.

Whether the postponement will needlessly delay or impede the conduct of the hearing

[85] If the decisions of the courts ultimately render the appeals of the water licences moot, then it cannot be said that the delay is "needless". There is no credible evidence at this point that the delay would impede the conduct of the hearing.

Whether the purpose for which the postponement is sought will contribute to the resolution of the matter

[86] If the decisions of the courts ultimately render the appeals of the water licences moot, then it may be said that the purpose of the postponement might contribute to the resolution of the appeals. Further, even if the courts uphold the environmental assessment authorizations, the courts may provide useful comments and conclusions for the Board to consider when deciding the validity of the water licences.

Any environmental impacts that may result from a postponement of the hearing

[87] There is no evidence that a postponement will have any environmental impacts. The environmental impacts of the Project will continue as there are no stays or injunctions in place.

Any public interest factors, such as the public interest in the efficient and timely conduct of the appeal.

[88] As stated above, the Panel agrees that there is a general interest in the efficient and timely conduct of appeals. This case is no different. However, there is also a public interest in avoiding unnecessary expenditure of public money, and the thoughtful and careful use of public resources.

Conclusion on the Issue

[89] The First Nations stated reason for the postponement of the scheduled hearing is to avoid an unnecessary appeal hearing before the Board. They submit that, should the appellate court(s) quash or set aside the environmental assessment authorizations, the appeals of the water licences may be moot.

[90] After balancing all of the factors, and despite the Panel's finding that the First Nations' request for a postponement is due, in part, to its own neglect and/or intentional conduct, the Panel finds that the impacts of proceeding with, what may ultimately be an unnecessary appeal hearing, are not justified. The one-month hearing will be at significant expense to the First Nations and to the Provincial taxpayer, who will be funding the Deputy Comptroller, BC Hydro and the Board in these proceedings. In contrast, the Deputy Comptroller and BC Hydro have not established a compelling case that they will be impacted/prejudiced by the postponement given that construction is ongoing.

[91] However, as stated above, there is no rational basis for the duration of the requested postponement. The Panel agrees with the Deputy Comptroller and BC Hydro in this regard. As such, the First Nations' request ought to be modified to properly reflect its true purpose. The postponement ought to be until the Courts of Appeal have issued their decisions.

[92] When evaluating the impacts and prejudice to the Deputy Comptroller and BC Hydro, the Panel has considered them in terms of a three-month delay before commencing the pre-hearing exchange of evidence and documentation, as well as a longer delay to await the appellate courts' decisions. The Panel has also considered the possibility that these matters may be appealed to the Supreme Court of Canada.

[93] While the Panel agrees that, having to wait until the appellate courts' decisions in order to determine whether a hearing of the water licence appeals is necessary creates uncertainty, and may increase some costs, the Panel finds that the advantages of doing so outweigh those costs.

[94] In all of the circumstances, the Panel orders as follows:

1. The hearing scheduled to commence on April 3, 2017 is hereby cancelled.
2. The deadlines established in the Board's letter dated August 17, 2016, are also cancelled.
3. The First Nations must provide the Board with a copy of the appellate court decisions as they are released.

4. Sixty one (61) days after the last of the two appellate court decisions is released, or if leave to appeal to the Supreme Court of Canada has been granted, whichever is earlier, the First Nations must advise the Board whether, in light of the appellate decisions, its appeals are moot, or should proceed to a hearing. The other parties will be given an opportunity to be heard on this matter.

[95] Given that the Panel has modified the First Nations' application, unanticipated issues or impacts may arise which have not been contemplated or addressed in this decision. If there is a change in the circumstances upon which this postponement is granted, an application may be made to the Board to set the matter down for a hearing.

DECISION

[96] In making this decision, the Board has considered all of the evidence and submissions before it, whether or not specifically reiterated herein.

[97] For all of the reasons set out above, the Board grants the application for a postponement for the length of time, and on the terms, set out above.

[98] The application is granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

November 17, 2016