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VIA EMAIL & DELIVERY

Peter H. O'Dell
Assistant Board Secretary
Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear O'Dell:

RE: File No. EB-2007-0617
Ontario Energy Board ('OEB') Aboriginal Consultation Policy ('ACP')

On behalf of the **Atikameksheng Anishnawbek ('AA')** I make the following submissions with respect to the ACP.

i. Executive Summary

The ACP is fatally flawed by way of an approach that attempts to delegate the obligation to consult and accommodate. Further the ACP does not respect the Nation-to-Nation relationship between First Nations in Ontario and the Crown

ii. Delegating the Duty to Consult

The ACP states that the OEB has a duty to make sure that proper consultation takes place.

AA submits that this position does not meet the obligations imposed by the courts on the OEB. The courts have stated that the obligation is not to ensure that consultation takes place but to ensure that the Crown (in this case the OEB) consults.

In the ACP the OEB states that consultation and accommodation are to be undertaken by a proponent with the OEB then determining whether the consultation has been adequate. The AA submits that this is a wholesale attempt to delegate the OEB's obligation to consult. The AA submits that this is contrary to the approach mandated by the courts and in particular the Supreme Court of Canada (SCC) in the case of *Haida*[1]. In this case the court stated as follows:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, *Haida* Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. **The honour of the Crown cannot be delegated.**

In the ACP there is not a limited delegation of procedural or technical aspects of consultation as the Supreme Court of Canada contemplated in *Taku*[2]. Rather there is a

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[1] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73
[2] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74

complete off-loading of the obligation to consult from the OEB to third party proponents. The AA submits that this aspect of the ACP fails to meet the legal obligations imposed upon the OEB and fails to uphold the honour of the Crown.

iii. Consultation as a Process/Relationship

The Supreme Court of Canada has stated very clearly in *Haida* and *Taku* that consultation is a process that is to assist with the reconciliation of First Nation and Crown interests. Properly formulated consultation should allow for a relationship to develop where First Nations can address how policy is developed and implemented. Proponents cannot meet this consultation obligation as they are not in control of policy and may have no interest in amending policy. A proponent's interest is to make as much money as possible in the quickest time possible.

iv. Delegating the Duty to Accommodate

The ACP states that it is to be left to proponents to accommodate First Nations. While the Supreme Court of Canada has recognized that the duty to consult may have limited procedural or technical aspects, which may be delegated, it has stated that the duty to accommodate is a distinct and separate Crown obligation, which cannot be delegated.

By off-loading the duty to accommodate to a proponent there is a wrongful assumption that accommodation must mean money or financial compensation (like jobs). In some cases a First Nation may wish to only receive financial accommodation, however in many cases a First Nation may wish to have accommodation address a deeper relationship between the First Nation and the land, water and living things (as well as the 'unliving' things) on the land and in the water. This could take the form of some input or control in the process of development instead of simply being reactive to development initiatives that are brought to a First Nations doorstep with 'financial compensation'.

This is normally referred to as the stewardship aspect of accommodation. The other component of accommodation that is undermined by way of delegation of accommodation to proponents is land itself. If a proponent wishes to engage in a certain activity on land parcel A, then a First Nation may say, "yes go ahead and develop parcel A, however, by way of accommodation we would like to have parcel B". In many situations the only 'party' with the ability to give parcel B is the Crown and this is taken off the table by the OEB approach.

iii. Confusing the Case Law - First Nation Veto

In the ACP the OEB takes the position that the duty to consult means that the First Nation will never have a veto over an energy project. They appear to take this position as the Supreme Court of Canada in *Haida* and *Taku* has stated that where a claim is asserted yet not proven that the First Nation will not have a veto.

At paragraph 48 of the *Haida* decision the court states that:

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.

This is to be contrasted with the obligation to consult where there is a proven claim or right. For example, the right to hunt and fish as set out in a Treaty. **In these cases there may be a veto by the First Nation**. The Supreme Court of Canada recognized this in *Haida* at paragraph 40 where they stated:

> In *Delgamuukw*, supra, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:
>
> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of

> course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. **Some cases may even require the full consent of an aboriginal nation**...

The AA submits that the OEB has made a significant error in its interpretation of the law and its obligations in terms of possibility of a project requiring First Nation consent. It is not reasonable (or legal) for the OEB to say that there is never a First Nation veto.

v. Undermining the Nation to Nation Relationship

Treaties between First Nations and the Crown were entered into on a Nation-to-Nation basis.

If consultation is to occur between First Nations and proponents, with the OEB sitting in final judgment of those agreements then a First Nation is not consulting on a Nation-to-Nation basis.

The AA also submits that there is a paternalistic and patronizing sub-text to the ACP in that the OEB has said that it will sit in judgment on whether consultation and accommodation are adequate. The Treaties do not recognize that one party sits in judgment of another.

All of which is respectfully submitted.

Yours truly,

Aaron Detlor
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