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File No. 1018-009

Delivered by: Email (hard copy to follow)
boardsec@ontarioenergyboard.ca

Ontario Energy Board
808 Robertson Street
Kenora, Ontario P9N 1X9

Attention: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Union Gas Red Lake Pipeline Project ("the Red Lake Project" or "the Project")
Board File Numbers: EB-2011-0040, EB-2011-0041 and EB-2011-0042

We are writing to follow up on our letter dated May 18, 2011. The purposes of this letter are threefold. First, we provide a response to Union Gas' ("Union") correspondence of May 12, 2011. Second, we explain the Grand Council of Treaty 3's (the "Grand Council") concerns regarding the adequacy of Crown consultation regarding the Red Lake Project. Third, we request that the Ontario Energy Board ("OEB") engage in a full review of whether the Crown has met its duty to consult and consider this as a factor in determining whether to approve the Project.

1. Background: The Interests of the Grand Council of Treaty 3

It may be useful to first provide some background information regarding the nature of the Grand Council's interests in the Red Lake area.

The Red Lake Project will be constructed entirely within the area subject to Treaty 3 and mostly in the areas subject to Treaty 3 that were added to Ontario in 1912 (the Keewatin Lands). The Anishinaabe communities represented by the Grand Council assert two broad types of interests in these lands. These include harvesting rights arising out of Treaty 3 as well as the Anishinaabe's assertion of Aboriginal title to the lands in question. We will discuss each of these in turn.

First, Treaty 3 includes harvesting rights that are applicable to the whole of the territory described in the Treaty. While the harvesting rights contained in Treaty 3 are described as relating to hunting and fishing, it is generally recognized that these rights extend to other forms of traditional harvesting, including trapping, plant gathering and tree cutting. Also, it should be noted that at the time that the Treaty was signed the Anishinaabe were engaged in the sale of animals for pelts and food and the sale of timber to government officials. These rights give rise to three classes of constitutional issues: (1) the issues related to the proper discharge of the duty to consult; (2) the issues related to ensuring proper respect for section 35 of the ***Constitution Act, 1982*** and (3) issues related to proper respect for the jurisdictional limits imposed on the province by section 91(24) of the ***Constitution Act, 1867***.

Second, the Anishinaabe have never accepted that there was a comprehensive surrender of all Aboriginal title in all lands described in Treaty 3. In the Anishinaabe's view, the surrender was confined both in terms of effect and geographic range. In particular, it should be noted that the land contained in Treaty 3 that is north of the English River (which includes Red Lake and most of the course of the Red Lake Project) was not originally part of Ontario but formed part of the District of Keewatin in Northwest Territories until it was added to Ontario in 1912. There is an ongoing controversy, which is before the courts, concerning whether or not Ontario (as opposed to the federal government) has the power to authorize any significant interference with the Treaty 3 rights in this area. This matter went to trial in 2009 and judgment is presently reserved but expected shortly. We have provided the Board with copies of the material filed with the Crown in the *Keewatin v. MNR* action (OSC Court File No. 05-CV-281875 PD) for further information on this issue. (Enclosed on DVD.)

As Ontario knows, the Anishinaabe of Treaty 3 deny that Ontario has any right to interfere with their treaty rights in any significant way in the Keewatin Lands. It is our client's view that in this area their treaty rights are protected not only by section 35 of the *Constitution Act, 1982* but also by section 91(24) and section 109 of the *Constitution Act, 1867*. Thus Ontario's rights and interests in this land remain burdened by the Anishinaabe's Section 35 rights.

2. The Grand Council's Concerns About the Project's Impacts

Our client is very concerned about the course and extent of land use and resourced development in Treaty 3 territory. When Treaty 3 was signed none of the parties could have imagined the extent of development in this area would be such that the Anishinaabe would be limited in their ability to meaningfully exercise their harvesting rights. Indeed, it is this very consideration that led Governor Morris to continue the practice starting with the Robinson Treaty of paying a very low annuity for the surrender contained in the treaty. It was anticipated that the Anishinaabe would, in fact, lose very little as a result of the treaty and the development of a modest part of their traditional lands.

In fact the Anishinaabe have witnessed the extensive development of their territory resulting in a significant erosion of their Treaty 3 rights and undermining their assertion of Section 35 rights in the area. The Grand Council is therefore greatly concerned about the Red Lake Project's potential to adversely impact their Section 35 rights. On a straight-forward, direct level, the Project will require additional lands for the extension of the pipeline and will further fragment the territory. But the Project's cumulative effects are of even greater concern. Our client worries about the further industrial and residential development that the pipeline will induce. As evidenced by letters of support the Board has received from GoldCorp, the Municipality of Red Lake and others, the pipeline is intended to facilitate the development and expansion of mining facilities, increased housing and settlement,

increases in non-aboriginal populations and other forms of industrial development. The Grand Council is determined to ensure that any further development is carried out in a lawful manner and in a way that properly respects the Section 35 rights of the Anishinaabe communities it represents. The Grand Council is very concerned that, to this point, the Project's adverse impacts on those rights have not been examined in a meaningful way.

3. The Grand Council's Concerns Regarding Consultation

As we indicated in our letter dated May 18, 2011, the Grand Council's main concern regarding consultation is with respect to the adequacy of Crown consultation. In our view, the various approvals Union requires from both the federal and provincial governments trigger the duty to consult. It is well-established that duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (***Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70 at para 35 (*Haida Nation*)**). As discussed above, Ontario and Canada are well aware of the existence of the Anishinaabe's rights, both established and potential, in the Project area.

It should also be remembered that the duty to consult encompasses not just site specific impacts of individual projects, but also the cumulative impacts, derivative impacts and any possible injurious affection that may result from the development of a project (see ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388** and ***Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354, [2006] F.C.J. No. 1677, (Dene Tha')*, aff'd *2008 FCA 20, [2008] F.C.J. No. 444***). We again wish to emphasize that the Grand Council is very concerned about the Red Lake Project's potential to encourage and facilitate further development within the Anishinaabe territory and that these cumulative or derivative impacts must be considered during consultation.

To date, Crown consultation regarding the impacts of the Red Lake Project has been virtually non-existent. This is despite the fact that the Supreme Court of Canada has consistently emphasized that consultation must take place early and before important decisions are made (see, ***Haida Nation*** and also ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650 (*Rio Tinto*)**).

We understand that Union will require approvals from the Department of Fisheries and Oceans ("DFO"), the Ontario Ministry of Natural Resources ("MNRO") and the Ontario Ministry of Transportation ("MTO") in addition to the Board's leave to construct. We further understand that the Grand Council was not contacted by anyone from the federal or provincial governments in respect of the Red Lake Project. To our knowledge, the only communication the Grand Council has had with the above departments has been in reply to requests from our law office, and those replies merely confirm receipt of our letters. Neither Canada nor Ontario has given our clients any substantive indication of whether and how they intend to engage in consultation regarding the Project. DFO alone has promised to prepare a reply. This was communicated to our office in emails from Tom Kleinboeck dated May 6 and 16, 2011. Copies of our correspondence to these Crown decision-makers are available on the enclosed DVD.

With respect, the Crown's lack of consultation in this case is disconcerting. We note that the federal and provincial governments are aware of Union's proposal. In both its initial application and in responses to

Board staff interrogatories, Union indicated when it provided the Crown with copies of Union's proposal:

- MTO received Union's proposal on January 21, 2011. On February 18, 2011 MTO replied indicating it had no comments to offer.
- On January 26, 2011, DFO received Union's proposal. DFO wrote to Union on March 10, 2011, granting its approval for the Project. We note that this approval was based on a series of communications with Union. DFO also waived the requirement that Union seek any formal approvals for the Project.
- Union spoke with the Ministry of Natural Resources regarding the project prior to filing its application on February 10, 2011 (see para 72 of Union's Application). The exact date of this conversation is not included.

Though the various Crown departments have yet to provide us with further information regarding the extent and timing of their knowledge of the Project, these dates indicate that the Crown has been aware of the Project for months at least. Given the rapid pace of the Board's approval process, we submit that it was incumbent on the Crown to communicate its intention regarding consultation to the Grand Council immediately. If the Crown intended to delegate the procedural aspects of consultation to Union or to use the Board's written hearing as a vehicle for consultation, it should have made this clear to our clients from day one. Currently, the Grand Council remains in the dark.

Again, the Crown's delay in this case goes against the case law regarding Crown consultation as courts have held that timing of consultation is critical. In ***Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2004] B.C.J. No. 2143** Justice Koenigsberg expalined that postponing consultation can undermine its effectiveness. At paragraph 75 she writes:

> 75 [74] The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project. This case illustrates the importance of early consultations being an essential part of meaningful consultation. At this point, and for some time, GAS [Garibaldi at Squamish, the proponent of a proposed four season mountain resort] has asserted legally enforceable rights to pursue the expansion agreement even though it is aware that there has been no consultation. There is thus, the clear appearance of bias in favour of GAS's expansion plans, as GAS has issued a warning of legal proceedings against the Crown should rights they believe they now have not be realized. (emphasis added)

The timing of Crown consultation was also the subject matter in ***Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354, [2006] F.C.J. No. 1677, (Dene Tha')*, aff'd *2008 FCA 20, [2008] F.C.J. No. 444.*** In *Dene Tha'* the Crown breached its duty to consult with the Dene Tha' First Nation in failing to consult with the First Nation prior to making important strategic decisions regarding the regulatory process for the Mackenzie Gas Pipeline. Justice Phelan noted that "[b]y depriving the Dene Tha' of the opportunity to be a participant at the outset, concerns specific to the Dene Tha' were not incorporated into the environmental and regulatory process" (at para 114). He went on to say:

> 116 Even if one were to take the view that the duty to consult arose when the JRP [Joint Review Panel] process was being created and finalized, the duty was not met. The

> duty to consult cannot be fulfilled by giving the Dene Tha' 24 hours to respond to a process created over a period of months (indeed years) which involved input from virtually every affected group except the Dene Tha'. It certainly cannot be met by giving a general internet notice to the public inviting comments. (emphasis added)

Finally, in ***Rio Tinto*** the Supreme Court of Canada held that it is not necessary for government actions to have an immediate impact on lands and resources to trigger the duty to consult. All that is required is the *potential* for adverse impacts. "Thus," as Chief Justice McLaughlin writes, "the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights" (para 44.).

The Crown's failure to engage in meaningful consultation with the Grand Council when it first became aware of Union's proposal has resulted in a practical problem for our clients. Each year the Grand Council is sent a number of notices of applications and proposals for development of varying types and sizes. Had there been any Crown consultation at the early stages of the approval process for the Red Lake Project, staff in the Grand Council's office would have better understood the nature of the Project and what the regulatory process entailed. As it was, when the Grand Council was served with the Notice of Application on March 25, 2011 there was no information from the Crown to indicate the significance of the Project or the urgency of the application. Thus, the notice was not immediately brought to the attention of the Grand Chief and the Grand Council missed the 10 day window to apply for intervenor status at the written hearing.

Union's delay in contacting the Grand Council also complicated the matter. Though a public meeting was held on November 25, 2010, Union did not contact the Grand Council until December 13, 2010. As a result, the Grand Council missed a key opportunity to get early information from the proponent about the Project and remained unaware of the significance of the rapidly approaching Board hearing. Neither the approval process nor the tight timelines for the hearing were explained. The Grand Council expected that Crown consultation regarding the Project would follow, however, that did not occur.

It is critical that the Red Lake Project not be approved without due consideration of its impacts on the Anishinaabe communities' Section 35 rights. There has been no meaningful accommodation of our client's concerns related to the Project's direct and cumulative adverse effects or any other concerns related to Treaty 3. Indeed, it is difficult to see how these concerns could have been brought to the attention of the Board without proper Crown consultation to allow for their identification and articulation. The Board risks making an uninformed and potentially unconstitutional decision if it approves the Red Lake Project without first considering its potential impacts on our client's rights and whether the Crown as met its duty to consult.

4. The Board's Jurisdiction to Determine the Adequacy of Crown Consultation

We acknowledge that the deadline to apply for intervenor status at the written hearing for the Red Lake Project has long passed. Indeed, we realize the hearing is very nearly complete and appreciate that the Board has provided this time for the Grand Council to provide a response to Union's most recent correspondence. However, we also submit that the Board has the jurisdiction to determine whether the Crown has met its duty consult and that the Board should consider it as a factor of significant weight prior to approving Union's application. If the Grand Council had intervened in the written hearing, it would have raised the following arguments regarding the Board's jurisdiction to consider Crown

consultation and the Project's impacts on the rights of the Anishinaabe communities the Grand Council represents.

The Supreme Court of Canada recently discussed the various jurisdictional roles of tribunals dealing with questions involving the Crown's duty to consult with First Nations in ***Rio Tinto.*** At paragraphs 55-58 Chief Justice McLaughlin writes

> *The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.* Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22 (CanLII), 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
>
> The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.
>
> Alternatively, *the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process.* In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
>
> Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. *Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: Conway. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all* (Emphasis Added).

In this case, we submit that since the Board has been empowered to hear and determine all questions of law and fact (***Ontario Energy Board Act*, S.O. 1998, C15 s.19(1))**, the Board is required to consider the adequacy of Crown consultation as this is a question of constitutional law. To be clear, we are in no way suggesting that the Board itself has a duty to consult with the Grand Council.

The reality here, as explained above in part 3 of this letter, is that there has been no Crown consultation at all. What is worse is that since the Board's decision does not require any further approval from the Lieutenant Governor in Council, there will be no further opportunities for consultation regarding Project's impacts on the Anishinaabe's rights and interests prior to its final approval. For this reason, it is essential that the Board asses whether the Crown has met its duty to consult before approving the Red Lake Project, and if necessary, delay its approval to allow for consultation and any required accommodation. We would urge the Board to consider all avenues of relief it may provide if it believes

that the Crown has breached its duty to consult. The Supreme Court of Canada addressed the issue of boards' remedial powers in ***Rio Tinto*** as follows:

> 61 A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

The final decision the Board makes must also be constitutional. Long before ***Rio Tinto***, the Supreme Court of Canada had confirmed this principle in the context of section 35(1) of the ***Constitution Act, 1982*** in the case ***Quebec v. Canada (NEB)*, [1994] 1 S.C.R. 159**:

> 32 It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*.

We submit that in this case the Board faces a genuine risk of breaching the *Constitution* for two main reasons.

First, the Red Lake Project and the cumulative effects of its induced development is more than an insignificant interference with treaty rights. Therefore, it offends the doctrine of interjurisdictional immunity for the reasons described in the *Keewatin v. MNR* litigation. (A copy of these arguments is included on the enclosed DVD.)

Second, to the extent that there may not be a question of interjurisdictional immunity, the Red Lake Project's interference (including induced development) is of such an extent that, when considered together with the cumulative impacts of other development such as forestry and mining, it would constitute an unjustifiable infringement of the Anishinaabe communities' Treaty 3 rights.

If the Board is to approve the Red Lake Project without giving due consideration to the issues raised in this letter and, if necessary, taking the appropriate steps to ensure adequate Crown consultation and accommodation occurs, the Board itself will fall short of the goal of protecting Aboriginal rights and interests and promoting the ongoing reconciliation described in ***Rio Tinto***. In other words, the Board's approval in these circumstances would itself be unconstitutional.

5. Conclusion

This is the Grand Council's only real opportunity to raise their concerns regarding the Red Lake Project. It appears from the rapid pace of the regulatory process that approval of the Project is a foregone conclusion. We are concerned that the Project's momentum will undermine our client's ability to engage in meaningful consultation with federal and provincial government decision-makers. Again, meaningful consultation requires that the Crown be prepared to alter its plan of action based on the information it receives (***Haida Nation***). We cannot see how this would be possible after the Board approves Union's application.

The Grand Council therefore respectfully requests that the Board postpone its decision to allow time for the gathering of evidence regarding the Project's potential impacts on the Anishinaabe's ability to meaningfully exercise their Section 35 rights now and into the future. It also requests that the Board assess the Crown consultation regarding those impacts, and, if necessary, delay the approval pending the completion of adequate Crown consultation and accommodation.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:

Robert J.M. Janes
RJMJ/et

Enclosures:
DVD of documents
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GRAND COUNCIL OF TREATY #3
Re: Union Gas

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