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**BY EMAIL**

June 17, 2011

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Board Staff Submissions**
**Union Gas Limited ("Union") – Red Lake Project**
**Board File Nos. EB-2011-0040, EB-2011-0041, EB-2011-0042**

Dear Ms. Walli:

Please find attached the Board staff Submissions for the above proceeding. Please forward the submissions to Union and all intervenors and observers in this proceeding.

Yours truly,

*Original Signed By*

Michael Millar
Board Counsel

/ attach.

**EB-2011-0040**
**EB-2011-0041**
**EB-2011-0042**

**IN THE MATTER OF** the Ontario Energy Board Act, 1998, S.O. 1998, c.l5, Schedule B, and in particular, Section 90 thereof;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora;

**AND IN THE MATTER OF** the Municipal Franchises Act, R.S.O. 1990, c.M.55, as amended; and in particular Sections 8 and 9 thereof;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order approving the terms and conditions upon which the Corporation of the Municipality of Red Lake is, by Bylaw, to grant to Union Gas Limited the right to construct and operate works; to supply gas to the inhabitants of the said municipality; and the period for which such rights are to be granted;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an Order directing and declaring that the assent of the municipal electors of the Municipality of Red Lake to the by-law is not necessary;

**AND IN THE MATTER OF** an Application by Union Gas Limited for a Certificate of Public Convenience and Necessity to construct works to supply gas to the inhabitants of the Municipality of Red Lake.

# Board Staff Submissions – Red Lake Project

## I. Background

Union Gas Limited ("Union") filed applications with the Ontario Energy Board (the "Board") on February 8, 2011 relating to proposed natural gas facilities and services in the Red Lake area. The applications were filed together and consist of requests for Leave to Construct a natural gas pipeline (the "Project"), a Municipal Franchise Agreement for the Municipality of Red Lake ("Red Lake") and a Certificate of Public Convenience and Necessity ("CPCN") for Red Lake. The Board has assigned to the Leave to Construct application file number EB-2011-0040; the franchise application file number EB-2011-0041; and the CPCN application file number EB-2011-0042.

The Board issued a Notice of Applications and Hearing ("Notice") on March 8, 2011. Union served and published the Notice as directed by the Board. The Board indicated its intention to proceed with this matter by way of a written hearing unless a party satisfied the Board that there is a good reason for holding an oral hearing. No party requested an oral hearing at that time.

On April 1, 2011 the Board issued its Procedural Order No. 1 which outlined the process for written interrogatories and submissions.

On May 5, 2011 the Board received a letter from the Grand Council of Treaty 3 ("Grand Council") outlining certain concerns with the Red Lake Project. On May 11, 2011 the Board requested that Union file a formal response to the letter. Union filed its response on May 12, 2011. On May 16, 2011, by way of letter, the Board invited the Grand Council to reply to Union's letter of response. The Grand Council filed its reply on May 30, 2011. The Grand Council's reply expressed concerns relating to the adequacy of the Crown's consultation efforts pursuant to the *Constitution Act, 1982* in respect of the Red Lake Project.

On June 9, the Board received a letter from Lac Seul First Nation ("LSFN") requesting intervenor status. The letter raised concerns with respect to the Crown's duty to consult.

In response to concerns raised concerning the Crown's duty to consult in this proceeding, the Board on June 7, 2011 issued its Procedural Order No. 2 in which it posed three (3) questions relating to duty to consult issues and scheduled written submissions and an oral hearing to address the questions. What follows are Board staff's submissions with respect to these three questions.

## II. Submissions

### *A. Staff submissions with respect to Question #1*

The first question posed by the Board in Procedural Order No. 2 is:

> The 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. In the current case, what is the conduct that the Crown has contemplated that has the potential to adversely impact an Aboriginal right or title? What is the Crown's responsibility with respect to this project, which is being undertaken by a private proponent?

In order to answer this question, it is necessary to provide some background regarding section 35 of the *Constitution Act, 1982* (the "Constitution Act") and the case law relating to the duty to consult.

#### *i. Background: The Duty to Consult and Section 35(1) of the Constitution Act, 1982*

*The duty to consult*

The duty to consult was originally described in the Supreme Court's decision in *Haida Nation v. British Columbia (Minister of Forests)*.[1] The duty to consult arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right

[1] [2004] 3 S.C.R. 511 ("*Haida Nation*")

or title and contemplates conduct that might adversely affect it. In some cases, the duty to consult may lead to a duty to accommodate. The precise extent of the duty to consult and, possibly, accommodate will vary depending on the facts of each situation.[2]

*Section 35 of the Constitution Act*

In *Haida Nation*, the Court explained how section 35 of the Constitution Act gives rise to the duty to consult:

> 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*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).[3] (para. 20)

Section 35(1) of the Constitution Act provides as follows:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The duty to consult (which was first articulated in 2004, 12 years after the Constitution Act became law) is not the only duty which flows from section 35. The Supreme Court issued several pre-*Haida Nation* cases in which the nature and import of section 35 was described and clarified. In *R. v. Sparrow*[4], the Court held that s. 35 affirms all Aboriginal or treaty rights that were in place in 1982 (when the Constitution Act became law).[5] The Court found that the words "recognition and affirmation" demonstrate the government's responsibility to act in a fiduciary capacity with respect to Aboriginal peoples, and

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[2] *Haida Nation*, para. 35 and paras. 47-49.
[3] *Haida Nation*, para. 20.
[4] [1990] CanLII 104 (SCC) ("*Sparrow*")
5 The nature Aboriginal rights were themselves was discussed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, where it was held that to be considered an Aboriginal right a practice must have been integral to the distinctive nature of the particular Aboriginal culture prior to contact by Europeans. Hunting, fishing and traditional harvesting practices are generally found to be Aboriginal rights, and for the purpose of these submissions Board staff will assume that LSFN and the Grand Council have Aboriginal rights to these (and possibly other related) activities.

required the exercise of some restraint in its exercise of power. In that light, the Court held that the government must be required to justify any governmental legislation or activity that infringes on Aboriginal rights. The Court established a test in this regard: First, it must be determined if the legislation or activity in question has the effect of interfering with an existing Aboriginal right. If there has been an infringement, the analysis moves to a two part test of the Crown's justification for the infringement: first, is there a valid legislative objective?; and second, has the Crown dealt honourably with the Aboriginal peoples in question? Ensuring that there has been as little infringement as possible in order to affect the desired result is also considered as part of the justification portion of the test.[6] Note that the *Sparrow* test focuses on the actual impact of the legislation or action on Aboriginal rights, not necessarily on what (if any) consultation took place beforehand.

Section 35 and the *Sparrow* test apply to the decisions of tribunals. As the Supreme Court observed in the (pre-*Haida Nation*) Quebec v. NEB:

> 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*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).[7]

Even prior to *Haida Nation* and the articulation of the duty to consult, therefore, decisions of tribunals were required to abide by Section 35, and could not operate to unreasonably infringe on Aboriginal rights.

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[6] *Sparrow*, pp. 38-42.
[7] *Quebec (Attorney General) v. Canada (National Energy Board),* 1994 CanLII 114 (SCC), para. 40. See also *Standing Buffalo*, para 36, and *Paul v. British Columbia (Forest Appeals Commission)* [2003] 2 S.C.R. 585, paras. 23-24.

### *ii. The role of tribunals with respect to section 35 and the duty to consult*

The exact role of tribunals with respect to the duty to consult has been the subject of some debate. The Supreme Court's recent decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[8] has served to clarify certain issues. There now appears to be little doubt, for example, that tribunals that have the power to consider questions of law are thereby empowered to consider issues relating to the duty to consult: "The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power."[9] Section 19(1) of the *Ontario Energy Board Act, 1998* (the "Act") provides: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of fact and law." Although section 96(2) of the Act specifically limits the scope of the Board's jurisdiction with respect to electricity leave to construct applications, there are no similar restrictions for natural gas leave to construct applications. It is therefore the submission of Board staff that the Board does have the jurisdiction and the mandate to consider constitutional issues, including section 35 and the duty to consult, to the extent that they are engaged in the current proceeding (see discussion below).

*Rio Tinto* also confirmed that, absent specific statutory language to the contrary, tribunals are not responsible for conducting consultation themselves. The Court observed:

> A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. **The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.** Consultation itself is not a question of law; it is a distinct and often complex constitutional

[8] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43 ("*Rio Tinto*")
[9] *Rio Tinto*, para. 69.

> process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation.[10] [Emphasis added]

There are no provisions in the Act which expressly or impliedly provide the Board with the authority to undertake consultation itself; indeed this would run counter to its duty of fairness to all parties as a quasi-judicial tribunal.[11] In its letter to the Board dated May 30, 2011, the Grand Council is clear that it does not believe the Board itself has the duty to consult. This issue, therefore, does not seem to be in dispute.

*Conduct Contemplated by the Crown*

As noted above, the duty to consult arises where the Crown contemplates conduct that may adversely impact an Aboriginal right or title. The question asked in Procedural Order No. 2 is essentially: what conduct has the Crown contemplated in this case that triggers the duty to consult?

The proponent of the Project and the applicant before the Board is Union. Union is a private corporation that is not affiliated with the Crown. Goldcorp, the owner of the mine that the Project is primarily intended to serve, is also a private corporation that is not to Board staff's knowledge affiliated with the Crown.

The Grand Council states in its letter of May 30 that "the various approvals Union requires from both the federal and provincial governments trigger the duty to consult." (p. 3). The Grand Council further suggests that the Crown should have commenced consultations when if first became aware of the project (p. 4 and p. 5). There has in fact been some Crown involvement with certain aspects of the Project: the Department of Fisheries and Oceans has granted its approval for certain required water crossings, an

[10] *Rio Tinto,* para. 60. See also para. 74.
[11] See *Quebec (Attorney General) v. Canada (National Energy Board),* [1994] 1 S.C.R. 159, paras. 32 and 34-35.

archaeological assessment is being completed in accordance with Ministry of Culture guidelines, the MTO has agreed to the proposed location of the pipeline within its road allowance, and Union has discussed the Project with the Ministry of Natural Resources ("MNR") and will continue to work with MNR to acquire any necessary permits. It appears, however, that any Crown approvals required by the Project relate largely to discrete elements (for example, water crossings) and that the Board is the only body that has authority for approving the Project as a whole. There is no separate environmental assessment for the Project, and environmental matters are considered by the Board.

As discussed above, both the authorities and the parties agree that the Board cannot itself conduct any required consultation. If this is the case, however, what conduct has the Crown contemplated that triggers the duty to consult? What Crown actor is responsible for conducting any required consultation?

Two recent Federal Court cases provide some guidance in answering these questions. *Brokenhead Ojibway Nation v. Canada (Attorney General)*[12] ("*Brokenhead*") is a decision of the Federal Court of Canada that involved applications for declaratory relief by several First Nations from three related National Energy Board ("NEB") decisions. TransCanada Keystone Pipelines GP Ltd. and Enbridge Inc. (which are both private companies) had sought approval from the NEB to construct and operate three lengthy natural gas pipelines. Several First Nations intervened in these proceedings, and argued before the NEB that the duty to consult had not been satisfied and the applications should not be approved. The NEB held that the exact nature of the alleged impacts on Aboriginal rights had not been clearly explained, and that the applicants had worked with Aboriginal groups to attempt to address their concerns. The projects were approved. The First Nations appealed these decisions to the Federal Court.

The Federal Court dismissed the appeal in a decision dated May 12, 2009.

[12] [2009] F.C.J. No. 608

The most relevant part of the decision with respect to the issues currently before the Board relate to the court's finding that, in some circumstances, a tribunal's ordinary hearing process can serve to satisfy the duty to consult:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated. The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB … were well received and largely resolved.[13]

The Court recognized, however, that the NEB's processes would not be adequate to deal with all potential situations relating to a project approval in which duty to consult issues might arise:

> These regulatory processes [i.e. the NEB's hearing] appear not to be designed, however, to address the larger issues of unresolved land claims. As already noted in these reasons, the NEB and the corporate respondents have acknowledged that obvious limitation. … It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.[14]

[13] *Brokenhead*, paras. 25-26.
[14] *Brokenhead*, paras. 27 and 29. The Court repeated this point at para. 44, where it stated that if the Projects crossed or significantly impacted areas of unallocated Crown land which formed part of an outstanding land claim, then an independent (i.e. something in addition to the NEB process) Crown obligation would almost certainly exist.

The Court continued:

> The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. **Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry**.[15]

The Court concluded as follows:

> I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief.[16]

The Federal Court of Appeal addressed a similar issue in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc*.[17] ("*Standing Buffalo*"), where three First Nations appealed pipeline approvals by the NEB. The facts in *Standing Buffalo* are similar to the facts currently before the Board. The proponents were all private corporations. The First Nations alleged that the NEB had erred in failing to assess whether or not the

[15] *Brokenhead*, para. 37.
[16] *Brokenhead*, para. 42.
[17] [2009] F.C.J. No. 1434

Crown (as separate from the NEB) had a duty to consult in relation to the Projects, and whether any such duty had been discharged. The court dismissed the appeal, and found that the NEB had no responsibility to ensure that Crown had discharged any duty to consult in these circumstances.

It appears that the key consideration for the court was the fact that, as the proponents were private corporations, the Crown had had essentially no role with respect to the projects. The First Nations argued that the NEB was required to undertake a *Haida Nation* type analysis: in other words to determine if the Crown's conduct had the potential to infringe Aboriginal rights or title, and if so to determine if consultation and (possibly) accommodation had been adequate. The Court firmly rejected these arguments, on the basis that the Crown had no material role in the projects:

> In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation*[18] does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.[19]

The court did find, however, that other underlying Section 35 protections (which are discussed above) continued to apply to the cases before the NEB:

> …[T]he decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates[20]. Each of those

[18] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, [2009] B.C.C.A. 68, was a case in which the British Columbia Utilities Commission was found to have the responsibility to assess the adequacy of Crown consultation efforts where the proponent itself was the Crown or an agent of the Crown.
[19] *Standing Buffalo*, paras. 31-32. The court distinguished *Rio Tinto* on identical grounds – see para. 33.
[20] Section 52 Certificates are similar to the Board's s. 92 leave to construct approvals.

> applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard to existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision making function in accordance with the dictates of subsection 35(1) of the Constitution.[21]

The court held, therefore, that although the duty to consult principles described in *Haida Nation* do not apply to this case, a separate underlying section 35 duty remains, which in this case had been adequately discharged by the NEB through its ordinary hearing process. Where the Crown is not the proponent or active participant in a project, therefore, the duty to consult is not engaged, and a tribunal need not undertake a *Haida Nation* type analysis. Instead, the issue should be considered through the lens of s. 35 and the *Sparrow* case: Will the project give rise to an infringement of Aboriginal rights? If so, is the infringement justified? How can any infringements best be mitigated or minimized?

The court was clear that if an Aboriginal group had concerns regarding the Crown's duty to consult that were not addressed in the NEB proceeding, it could seek to have these issues addressed through the courts:

> …[A] determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making the Decisions does not preclude the adjudication of those matters by a court of competent jurisdiction. … I would add that the ability if an Aboriginal group to have recourse to the courts to adjudicate matters relating to the existence, scope and fulfillment of a *Haida* duty in respect of the subject matter of an application for a Section 52 Certificate should not be taken as

[21] *Standing Buffalo*, para. 40.

> suggesting that the Aboriginal group should decline to participate in the NEB process with respect to such an application. … [The Certificate process] provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it. While the Aboriginal group is free to determine the course of action it wishes to pursue, it would be unfortunate of the opportunity afforded by the NEB process to have Aboriginal concerns dealt with in a direct and non-abstract matter was not exploited.[22]

The First Nations sought leave to appeal the court's decision to the Supreme Court, however leave was denied.

Although *Standing Buffalo* and *Brokenhead* apply different legal reasoning to the question of Aboriginal rights where a tribunal is considering an application of a private proponent, they arrive at essentially the same place. Both cases agree that the requirement to address Aboriginal rights can in some cases be addressed through a tribunal's ordinary hearing process. No separate "Crown" consultation may be required, and there is no requirement for the Board to consider the adequacy of any "Crown" consultation in these circumstances.

Board staff submits that the current case is a good example of a situation where the ordinary hearing process can be used to address any infringements to s. 35 rights associated with the proposed gas pipeline. The Board has broad authority over "environmental" matters in a gas leave to construct proceeding. To the extent that the Project could negatively impact hunting, fishing, tree harvesting, or other Aboriginal rights, the Board has the authority to require amendments to the Project, or other mitigation. This is very similar to the situations in both *Brokenhead* and *Standing Buffalo*.

[22] *Standing Buffalo*, paras. 43-44.

In conclusion, it is Board staff's submission that the Board need not consider whether the Crown (in whatever guise) has adequately discharged in the duty to consult in this case. The Crown is not the proponent, and does not appear to have contemplated any conduct at all with respect to Aboriginal rights or title. The *Standing Buffalo* precedent states that in such circumstances there is no requirement for a tribunal to undertake a *Haida Nation* type analysis. That is not to say, however, that the Board should not consider whether any Aboriginal rights may be infringed by the Project. To the extent the parties choose to pursue this, the Board should examine these issues through the course of its ordinary hearing processes. Indeed the Board's process includes a thorough review of the types of issues that are likely to be of concern to LSFN and the Grand Council, and provides a natural forum to address these issues. To the extent any Aboriginal rights are found to be potentially infringed by the Project, the Board may order whatever remediation or accommodation it finds appropriate, or even deny approval of the Project. All of this can be accomplished through the Board's ordinary hearing process.

### *B. Submissions with respect to Question #2*

The second question articulated by the Board in Procedural Order No. 2 was:

> To the extent that there are duty to consult issues associated with the project, what is the scope of the Board's power to review them? In particular, should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself (over which it has approval authority), or indirect impacts such as potential expansions to the mine or the town that may be enabled by the pipeline (over which it has no approval authority)?

It is Board staff's submission that any consideration of impacts to Aboriginal rights be limited to those impacts arising directly from the proposed gas pipeline itself. The potential "cumulative" impacts of the pipeline as described by the Grand Council (such as possible expanded operations at the mine or increased development in the District of Kenora) are beyond the power of the Board to assess or address in any meaningful way.

The Board's power to approve gas pipeline leave to construct applications is found in the Act. Section 96(1) states: "If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out that work." Clearly, the Board's authority lies over the "proposed work" itself. There is no indication in the legislation that the Board is permitted to consider the public interest (which includes environmental matters for natural gas pipelines) for anything broader than the proposed work itself.

As discussed above in Board staff's submissions under question 1, it is not clear that the duty to consult applies at all in the current case (though Board staff does not question that underlying section 35 protections are engaged). Under either framework, however, Board staff submits that it is not the role of the Board to consider any impacts beyond those arising directly from the Project itself.

The Supreme Court considered this very issue in *Rio Tinto* (which is a duty to consult case), where it held:

> [The Respondent Carrier Sekani] argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. […] I cannot accept this view of the duty to consult. Haida Nation negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration. [Emphasis in original]

Board staff submits that the Board's consideration of this issue should therefore be limited to any impacts directly associated with the current proposal – i.e. the gas pipeline itself.

Similarly, if the Board determines that the duty to consult does not apply in this case, a section 35 analysis would similarly only be appropriate for the impacts arising directly from the pipeline itself. The Board has no jurisdiction over any of the mine's operations, nor of any economic or other activity on the District of Kenora. It has no power to order any remedies that might impact any of these possible developments. To the extent the pipeline ultimately facilitates any new potential impacts on Aboriginal rights, additional approvals from other agencies may well be required. The Board's review should be limited to the direct impacts of the application before it.

### *C. Submissions with respect to Question #3*

The third question posed by the Board in Procedural Order No. 2 is: Can the Crown impliedly delegate the duty to consult to a private proponent?

As described above, it is Board staff's position that the duty to consult is not engaged in the current application, and even if it is then the Board's ordinary hearing process can serve as a form of consultation. Under either scenario, it is not necessary to consider whether the Crown can make an implied delegation to a private proponent as the Board can ensure that any section 35 rights are protected through its hearing process.

In the interest of completeness, however, Board staff will provide submissions on this question.

All of the cases on the duty to consult are clear that the duty to consult resides with the Crown, and not with any private entity. The ultimate responsibility is always that of the Crown, and that responsibility cannot be delegated at all (whether expressly or

impliedly). The Crown can, however, delegate procedural aspects of the duty to consult to private proponents. In *Haida Nation*, the Court stated:

> 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. … However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[23]

The question, then, is can the Crown impliedly delegate procedural aspects of the duty to consult to private proponents? In other words, can the Crown be considered to have delegated these procedural aspects to a private proponent in the absence of an express indication that it has done so?

Board staff has been unable to find any cases that directly address this question. It is Board staff's submission, however, that the answer to the question is likely "no".

An implied delegation gives rise to a number of possible problems. For example, absent an express delegation, it would be clear to neither the proponent (here Union) nor the First Nations in question that such a delegation was in effect. Proponents routinely consult with a variety of stakeholders (including First Nations). It would be confusing to all parties if it was not clear whether such consultation were meant to serve as ordinary proponent stakeholdering or the arguably more stringent requirements arising from the legal doctrine of the duty to consult. Further, the duty to consult arises from the "honour of the Crown". It seems reasonable to assume that the honour of the Crown would require that the Crown make clear its intentions if procedural aspects of the duty to consult are to be delegated.

Finally, although procedural aspects of the duty can be delegated, the ultimate responsibility to ensure the duty to consult is met lies with the Crown. It is difficult to

[23] *Haida Nation*, para. 53.

imagine that the Crown could be considered to meet that standard without some express involvement in a project.

All of which is respectfully submitted.