

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, 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.

**WRITTEN SUBMISSIONS OF UNION GAS LIMITED  
REGARDING DUTY TO CONSULT ISSUES**

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## WRITTEN SUBMISSIONS OF UNION GAS LIMITED REGARDING DUTY TO CONSULT ISSUES

1. On June 7, 2011, the Ontario Energy Board (the "Board") issued Procedural Order No. 2 in this proceeding and asked the parties to make submissions on three sets of questions regarding the appropriate scope of its enquiry into any duty to consult issues.
2. Union Gas Limited's (the "Applicant" or "Union") responses to the Board three questions are set out below.

***1. 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?***

3. The Crown is present numerous times at various stages of the approvals required for the proposed natural gas pipeline and ancillary facilities (the "Project").<sup>1</sup> The Crown (federal and provincial) will be making decisions regarding permits or approvals relating to archaeological resources, water, stream crossings and fisheries and fish habitat (the "Additional Approvals").<sup>2</sup> Union submits that these decisions may trigger the Crown's duty to consult aboriginal peoples and, as such, will provide aboriginal peoples with an opportunity to be consulted.
4. In addition to the Additional Approvals listed above, the Board's leave to construct application (the "LTC Application") process incorporates an environmental review process (the "ER Process") relating to the Project. As part of a LTC Application under section 90 of the *Ontario Energy Board Act* (the "OEB Act"), an applicant is required to submit an environmental report (the "Report"). The Report is based on the *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario*, 6th edition (the "Guidelines"), which Guidelines are published by the OEB. Pursuant to the Guidelines, the Report is developed in consultation with various government ministries, which are represented at the Ontario Pipeline Coordinating Committee ("OPCC").<sup>3</sup> The OPCC ensures that the interests and concerns of the member agencies are brought to the attention of the applicant. The approach is consultative rather than

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<sup>1</sup> The following provincial Ministries will be involved in decision-making required for the Project, among others, the Ministry of Natural Resources, the Ministry of Transportation and the Ministry of Tourism and Culture. At the federal level, the Department of Fisheries and Oceans has decision-making authority in respect of the Project.

<sup>2</sup> In addition to approval from the Board for a leave to construct, the Applicant has to obtain (1) Entrance and Encroachment Permits for Highways 105 and 125 (MTO); (2) sign off from the Ministry of Tourism and Culture ("MTC") regarding archaeological resources; (3) a Permit to take Water from the Ministry of Environment, (4) sign off from the Ministry of Natural Resources ("MNR") for certain stream crossings and other activities.

<sup>3</sup> The ministries/agencies currently represented at the OPCC for the Project include the Technical Standards and Safety Authority, Ministry of Environment, Ministry of Agriculture, Food and Rural Affairs, MTC, Ministry of Municipal Affairs and Housing, MNR, Ministry of Transportation, (the "OPCC Ministries") and affected local municipalities.

adversarial, and every attempt by the OPCC is made to resolve concerns prior to the Board hearing.<sup>4</sup>

5. The ER Process and Guidelines also contain specific requirements pertaining to aboriginal consultation. Pursuant to the Guidelines, an applicant is required to gather and record information pertaining to aboriginal consultation, including a description of the issues or concerns that have been raised by aboriginal peoples and how those concerns were considered and, if appropriate, will be mitigated or accommodated. The role of the OPCC Ministries is to provide an advisory role to the Board, and they may or may not carry out consultation. The OPCC Ministries do not render decisions or approvals in their role at the OPCC. While the Board will take OPCC recommendations into account, the Board has the final decision with respect to the LTC Application.
6. The Crown's responsibility is to ensure that where its decisions or actions may affect asserted or established aboriginal or treaty rights, such actions or decisions are carried out by the Crown in a manner consistent with the "honour of the Crown", which includes a requirement to ensure that reasonable consultation occurs in respect of such actions or decisions. The Crown is not required to develop special consultation measures to address aboriginal concerns where existing processes allow for reasonable and appropriate consultation with aboriginal peoples to occur.<sup>5</sup>
7. The Applicant submits that given the nature of the Project, the lack of project-specific concerns identified by aboriginal peoples regarding the Project, and the environmental review that has been conducted, including the associated proposed mitigation, the Project has little or no possible adverse effects on asserted or established aboriginal or treaty rights. Regardless, adequate and reasonable consultation has occurred respecting this LTC Application, and Crown consultation could occur regarding the Additional Approvals required for the Project.

***2. 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)?***

8. The Board is empowered under subsection 19(1) of the OEB Act to consider "all questions of law and of fact" regarding matters coming within its jurisdiction. Subsection 96(1) of the OEB Act empowers the Board to determine whether a proposed work is within the public interest, thereby providing the Board with a broad range of authority.<sup>6</sup> There is no prohibition in the OEB Act preventing the Board from considering questions associated with section 35 of the *Constitution Act, 1982*. The Supreme Court of Canada has confirmed that boards and tribunals with the authority to consider questions of law, and absent an express

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<sup>4</sup> Guidelines, p. 10.

<sup>5</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 ("Taku River"), para. 40

<sup>6</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 ("Rio Tinto"), at para.70.

prohibition from considering questions of a constitutional nature or in relation to section 35 of the *Constitution Act, 1982*, possess the authority to consider the adequacy of Crown consultation.<sup>7</sup> The Applicant submits that, in the present circumstances, the Board possesses the authority to consider the adequacy of any Crown consultation required regarding any Crown decisions that may adversely affect aboriginal or treaty rights **within the context of the LTC Application**. This foregoing position is consistent with the Board's recent decision in EB-2011-0065 regarding ACH Limited Partnership.<sup>8</sup>

9. The Board's role in assessing the adequacy of Crown consultation in the present circumstances is therefore limited given the limited role of Crown decision making within the ER Process combined with the fact that the proponent is a private entity. The Applicant further submits that consultation in the context of the ER Process, if any was required, has been carried out, which consultation was appropriate to any adverse affect the Project may have on any aboriginal or treaty rights. This is particularly given that the Project is situated primarily on either existing road right of way lands or private property.
10. Regarding the issue of "indirect impacts", the Crown's duty to consult is only triggered in instances where there is "a causal relationship between the proposed governmental conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights."<sup>9</sup> The burden of proof rests with the aboriginal peoples claiming an adverse effect. Speculative impacts are not sufficient to trigger the Crown's duty to consult.<sup>10</sup>
11. Counsel to the Grand Council claims that the Board must address the broader, future impacts the Project may have on the surrounding area. The Applicant respectfully submits that the Board is restricted to considering those matters within its jurisdiction and relevant to the LTC Application, including, if appropriate, potential impacts arising **directly** from the Project itself and over which it has approval authority. The Applicant submits that the Board does not have authority to consider indirect impacts associated with the Project. The consultation must be focused on the decisions at hand,<sup>11</sup> linked directly or in some reasonable way to the Project, and within the jurisdiction of the Board. The Board confirmed this focused treatment of cumulative and ancillary effects of projects before the Board in its Greenfield Energy Centre LP decision, a decision that was confirmed on appeal by the Ontario Divisional Court.<sup>12</sup>

### **3. Can the Crown impliedly delegate the duty to consult to a private proponent?**

12. The Crown's duty to consult aboriginal peoples cannot be delegated, either impliedly or expressly, to private parties. It is a duty that solely rests with the Crown.<sup>13</sup>

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<sup>7</sup> *Ibid.*, para. 69.

<sup>8</sup> EB-2011-0065/EB-2011-0068, Decision and Order dated May 27, 2011 at pp. 5–6.

<sup>9</sup> *Rio Tinto*, para. 45.

<sup>10</sup> *Ibid.*, para. 46.

<sup>11</sup> *Rio Tinto*, para. 49.

<sup>12</sup> RP-2005-0022; EB-2005-0441/0442/0443/0473, (January 26, 2006), as confirmed by the Ontario Divisional Court in *Power Workers Union et al. vs. Ontario Energy Board et al.*, 2006 CanLii 25267, (On SCDC).

<sup>13</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*") paras. 53–55.

13. The Supreme Court of Canada has confirmed that the procedural aspects of consultation may be delegated to third parties.<sup>14</sup> The Applicant submits that the case law regarding aboriginal consultation clearly demonstrates that such delegation of the procedural aspects of consultation can either be implied or express.
14. The Applicant submits that if any consultation was required in respect of the LTC Application, it was adequately and reasonably carried out. Further, given the nature of the Project, the lack of any project-specific concerns identified by any aboriginal peoples regarding the Project, and the environmental review that has been conducted, including the associated proposed mitigation, the Project has little or no possible adverse effects on their asserted or established aboriginal or treaty rights.
15. The LTC Application process has provided a full opportunity for aboriginal peoples to raise specific issues or concerns regarding their aboriginal interests and how they would be specifically affected by the Project. Given this, the Applicant respectfully submits that the issue of consultation is not a live issue for the purposes of the LTC Application and requests that the Board give timely consideration to its LTC Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*signed in the original*

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Thomas Isaac  
Union Gas Limited  
June 17, 2011

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<sup>14</sup> *Ibid.*