ONTARIO ENERGY BOARD

EB-2011-0040
EB-2011-0042
EB-2011-0042

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 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 to the inhabitants of the Municipality of Red Lake.

SUBMISSIONS OF LAC SEUL FIRST NATION

PART 1 OVERVIEW

1. Union Gas Limited applied to the Ontario Energy Board for leave to construct a natural gas pipeline, under section 90 of the *Ontario Energy Board Act*.

2. The Board's Procedural Order #2, dated June 7, 2011, directs the parties to make submissions on the following points:

   a. 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?

   b. 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)?

   c. Can the Crown impliedly delegate the duty to consult to a private proponent?

PART II ARGUMENT AND LAW

Crown Conduct Potentially Impacting Aboriginal Rights

3. The duty to consult is triggered when the Crown has knowledge, real or constructive, of the potential or actual existence of the Aboriginal right or title

"and contemplates conduct that might adversely affect it".[1] As a signatory to the Treaties, the Crown will always have knowledge of Treaty rights.[2]

4. The Crown is contemplating granting a leave to construct for a natural gas pipeline that will cross Lac Seul's traditional territory. The project has the potential to adversely impact Lac Seul's Aboriginal rights. The duty to consult is triggered.

5. Crown conduct or decisions that have the potential to adversely impact Lac Seul's rights include:

   a. Ministry of Transportation (MTO) encroachment authorizations and permits;

   b. Watercourse crossing approvals and work permits from the Ministry of Natural Resources (MNR) and the Federal Department of Fisheries and Oceans, where directional drilling is not possible;

   c. MNR Forest Resource Licences to harvest Crown owned merchantable timber outside of the MTO's right of way;

   d. MNR Work permits to authorize temporary workspaces adjacent to watercourses and outside of the right of way;

   e. Crown easements;

   f. Archaeological clearance from the Ministry of Tourism and Culture with respect to Cultural Heritage Resources; and

   g. Review of the project Environmental Report by the Ontario Pipeline Coordinating Committee (OPCC).

6. Leave to construct both phases of the project is required from this Board, in addition to Board approval for a Municipal Franchise Agreement with the

[1] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para. 48.
[2] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 [2005] 3 S.C.R. 388 at para 34.

Municipality of Red Lake, and a Certificate of Public Convenience and Necessity.

7. The project has the potential to adversely impact both proven and unproven Aboriginal rights. Those proven rights include Lac Seul's treaty rights to hunt, fish and harvest, while those unproven rights include Lac Seul's land claim to reserve lands at Bruce Lake.

Potential Adverse Impacts on Proven Rights

8. The proposed project entails a number of new physical disturbances and changes to the land, including:

   a. Bedrock blasting;[3]

   b. Disturbing the shoreline and waterbeds at 32 distinct water crossings;[4]

   c. Clearing of bushes, trees, and crops;[5] and

   d. Stripping of top soil.[6]

9. These activities have the potential to cause the following impacts to the proven treaty rights of Lac Seul in its traditional territory:[7]

   a. Disruption of terrestrial and aquatic ecosystems that support the wildlife for hunting and fishing;

   b. Destruction of medicinal plants for harvesting;

   c. Destruction or disruption of sacred grounds, burial grounds, and sites of traditional significance to Lac Seul; and

   d. Reduction of traditional territory lands throughout which the First Nation may continue to exercise it's treaty and Aboriginal rights.

[3] Union Gas Leave to Construct Application, page 12 at para 63.
[4] Union Gas Leave to Construct Application, page 14 at para 72.
[5] Union Gas Leave to Construct Application, schedule 10, page 1 at para 7.
[6] Union Gas Leave to Construct Application, schedule 10, page 1 at para 7.
[7] Attached as **Appendix A** is a map of Lac Seul's Traditional Territory.

Potential Adverse Impacts on Unproven Rights

10. Lac Seul claims that Canada promised a reserve at Bruce Lake at the time of the treaty. The reserve was never granted.[8]

11. Construction of a pipeline in the vicinity of Bruce Lake may adversely affect Lac Seul's unproven right to reserve lands by:

    a. Making part of the claim lands unfit for reserve status due to the presence of a pipeline;

    b. Reducing the amount of Crown lands that are potentially available to satisfy the claim; and

    c. Introducing the interests of third parties into the resolution of the claim, which will inevitably complicate settlement.

Crown's Responsibility Vis-a-vis Projects Undertaken By a Private Proponent

12. Ultimately, the onus is on the Crown to discharge the duty to consult and accommodate First Nation interests.[9] It is logical that the responsibility lies with the Crown:

    a. The Crown has real and constructive knowledge of Lac Seul's traditional territory and rights associated with that territory; it cannot be presumed that a private proponent has that knowledge.[10]

    b. In fulfilling the duty to consult, the honour of the Crown is at stake; such a responsibility could not be delegated to a private proponent.

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[8] Attached as **Appendix B** is a copy of Lac Seul's claim for a reserve at Bruce Lake.
[9] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 at para 53.
[10] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para 40.

Crown Must Ensure Proper Timing of Consultations

13. The Crown must ensure that consultation and accommodation has been properly undertaken ***before*** the Crown even contemplates authorizing any development activity that has the potential to adversely affect Aboriginal or treaty rights. [11]

14. Each Crown approval facilitates the advancement of this project. These approvals are therefore linked to a precise activity, but also to the project as a whole. Each approval then carries the same potential to adversely affect Aboriginal interests.

15. With respect to this project, all Crown grants, approvals, or authorizations are subject to proper consultation and accommodation. A private proponent may engage the First Nation in consultation and accommodation, but the First Nation must confirm, and the Crown must ultimately assess, the adequacy of the consultation before approvals are granted.

Crown Must Ensure Consultations are Meaningful

16. Engaging in consultation before Crown decisions are made ensures that consultation and participation is meaningful, and also influential in how decisions are arrived at. That is not to say that First Nations have a veto over Crown decisions,[12] but that there must be some real purpose to consultation, beyond paying lip service to Aboriginal concerns.

17. Where First Nation interests are not accommodated, the Crown decision should provide a satisfactory, reasoned explanation as to why the First Nation position was not accepted.[13]

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[11] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para. 32; see also *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management),* [2004] B.C.J. No. 2143.
[12] *Haida Nation* at para 48.
[13] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, para 148.

Crown Must Ensure Scope of Consultations is Adequate

18. Consultation and accommodation must, of course, take account of the direct and indirect impacts of the contemplated conduct.

19. The duty to consult "is [also] *prospective*, fastening on rights yet to be proven"[14] – including, for example, the claim for a reserve at Bruce Lake.

20. More than that, consultation and accommodation may also be retrospective, taking into account past impacts. The BC Court of Appeal recently stated:

> I do not understand *Rio Tinto* to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant…the historical context is essential to a proper understanding of the seriousness of the potential impacts…
>
> To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.[15]

21. In this case, significant portions of Lac Seul's traditional territory have been taken up for development, largely as a result of mining. Much of Lac Seul's reserve has been flooded to generate hydroelectric power, again, primarily for the mining industry in Red Lake. The Crown has provided no replacement lands for the thousands of acres now under water.

22. This is not a wrong that can be redressed through consultation process on the construction of a gas line to Red Lake. It is, though, a relevant consideration in assessing the adequacy of the scope of the consultation process, in light of the development that has already taken place and serious impact on Lac Seul's

[14] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650 at para 35.
[15] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, paras 117 & 119.

rights. The Crown – not a private proponent – is best positioned to make this evaluation.

The Crown's Delegation of the Duty to Consult to a Private Proponent

23. The Crown may delegate ***procedural*** aspects of the duty to consult to a third party. The Crown "may set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision – making process with respect to a resource".[16] As such, the Crown can rely on the actions of others in assessing whether the duty to consult had been discharged, as is often done with environmental assessments.[17]

24. The Crow can delegate the responsibility to take certain consultative steps to third parties. The third parties are akin to a limited purpose agent for the Crown, but not its delegate. These third party actors, or even government bureaucrats, cannot avoid consultation by claiming lack of authority:

> The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations' concerns by saying the necessary assessment of proposed "taking up" of areas subject to treaty rights is beyond the scope of their authority.[18]

25. In addition, the Crown cannot "simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance".[19] Rather, the Crown must ensure that any delegation is appropriately structured to discharge the requirements for the particular case at hand. Thus, the underlying duty lies with the Crown not only to ensure consultation is

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[16] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para 56.
[17] *Haida Nation,* 2004 SCC 73, [2004] 3 SCR 511 at para 53.
[18] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359 at para 55.
[19] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 at para 51 citing *R v. Adams*, [1996] 3 S.C.R. 101 at para 54.

undertaken,[20] but also to ensure the adequacy of consultation in any particular case.[21]

26. To ensure the consultations are completed before a decision is taken, to ensure the consultations are meaningful, to ensure that the scope of the consultations is adequate, and to provide a reasoned explanation of the decision in light of the consultations, the Crown must have substantive knowledge of the consultation process that was undertaken.

Scope of the Board's Power to Review Duty to Consult Issues on this Project

27. Section 19(1) of the *Ontario Energy Board Act*[22] empowers the Board's ability to determine questions of law and fact. "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".[23] Because it has this power, the Board has a concomitant power to consider constitutional questions, including questions that measure the adequacy of Crown consultation,[24] as in this case. However, this Board does not have the jurisdiction to undertake Crown consultation, as there is no clear statutory mandate to do so.[25]

28. The *Ontario Energy Board Act* bestows on the Board the jurisdiction to grant the Union Gas application for leave to construct, if the Board is of the opinion (after considering the application) that the proposed project is in the public interest. [26] However, the constitutional dimension of the duty to consult gives

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[20] *Yellowknives Dene First Nation v. Canada (Attorney General)*, [2011] 1 C.N.L.R. 385 at para. 93.
[21] *Yellowknives Dene First Nation v. Canada (Attorney General*), [2011] 1 C.N.L.R. 385 at para. 93.
[22] 1998, c. 15, Sched. B.
[23] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para 69.
[24] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para. 55, 66-73.
[25] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para 60.
[26] *Ontario Energy Board Act*, 1998, c. 15, Sched. B, s. 96

rise to a special public interest, surpassing the primarily economic focus of the review under the prevailing legislation.[27]

29. The public interest in this instance is broader than a sum of benefits to energy consumers in the Red Lake area. This Board must assess the sufficiency of Crown consultation efforts made, given the degree of potential impact that will affect Aboriginal interests from the authorization of this project. The ultimate question that this Board must answer is this: *is it in the public's interest to grant Union Gas' applications, if the Crown's duty has not be properly met with respect to this project?*

30. In answering this question, the Board's task is two-fold. First, the Board must consider the strength of the right asserted and the seriousness of the potential impact on this right. These are the critical factors that determine the content of the duty to consult.[28] Second, the Board must assess if the Crown met its duty (a) to consult, and (b) to ensure that any delegation of consultation was appropriately designed to address the consultation requirements associated with this project—including the larger issue of unresolved land claims.[29]

Scope of Potential Impacts Enabled by the Pipeline

31. The Board's review should include all reasonably foreseeable impacts—both direct and indirect. The Board must consider adverse impacts that may prejudice a pending Aboriginal claim or right, even if the state-authorized activity has no "immediate impact on the lands and resources."[30] The duty to consult arises with respect to specific physical impacts. But it also arises

[27] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para. 70.
[28] *Haida Nation* at para 37.
[29] *Brokenhead Ojibway First Nation v. Canada (Attorney General),* 2009 FC 484 at para 25.
[30] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para. 47.

where high-level managerial or policy decisions have the potential to affect the future exploitation of a resource, to the detriment of Aboriginal claimants.[31]

32. While there needs to be a meaningful linkage between the project and the pending claim,[32] a potential for adverse impact suffices. In this case, there are both —particularly with respect to Lac Seul's land claim at Bruce Lake. The potential for impact is direct through industrial development on the Lac Seul's claim lands. But the impacts also extend to future impacts. Namely, the increased industrial and residential development that even project supporters acknowledge this pipeline will induce.[33]

33. As mentioned above, the "public interest" consideration in this case is broad, meaning that the benefits of development must be considered in light of the costs. The costs here include an increasing reduction of traditional lands that may satisfy any prospective claims that Lac Seul must make, and on which the First Nation is entitled to exercise its proven treaty and Aboriginal rights.

34. This development may be inevitable – even welcomed by First Nations in some measure – but its inevitability does not negate the legal necessity that adequate consultation must always take place ***before*** any decision is made.

PART III CONCLUSION

35. If the consultation is not evaluated at the Ontario Energy Board, the final stop en route to full approval of the project, then there will be, at best, a haphazard, *ad hoc* approach to enforcement of the Crown's duty to consult. First Nations will be left mounting court challenges just to have some type of hearing of their concerns. Such an improvised administration of the duty to consult will

[31] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* [2010] 2 S.C.R. 650, at para. 87.
[32] *Brokenhead Ojibway First Nation v. Canada (Attorney General),* 2009 FC 484 at para 38.
[33] Letter from Phil Vinet to Kristen Walli. 5 Jan. 2011. Letters_MoRL and OPP_Red Lake Project Support_20110328.

leave both industry and First Nations living with a high degree of uncertainty. That cannot be in the public interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF JUNE 2011.

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