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VIA EMAIL

Ontario Energy Board
2300 Yonge Street
27th Floor, Suite 2701
Toronto, ON, M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2011-0140: East-West Tie Line Designation Proceeding
Pic River First Nation Motion for Costs Reconsideration

We were counsel for the Métis Nation of Ontario ("MNO") in the abovementioned proceeding. We write in response to the recent motion filed by Pic River First Nation ("PRFN") requesting a review and variation of the Board's Phase II cost award decision in the designation proceeding.

The MNO takes no position with respect to PRFN's motion, however, it wants to address PRFN's statement that it was the only intervenor "in the proceeding with proven (not asserted) aboriginal rights along the project corridor…".

In *R. v. Powley*, [2003] 2 SCR 207, the Supreme Court of Court held the following,

> [21] The trial judge found that **a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century**, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. [**Emphasis added.**]

Since the Powleys lived and were hunting just outside of Sault Ste. Marie, the rights-bearing Métis community was defined in a manner that resolved the specific fact pattern and claim before the courts. In aboriginal rights claims that arise in the context of a regulatory prosecution it is standard practice to "re-characterize and narrow the claimed right to satisfy the forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming." (*Lax Kw'alaams Indian Band v. Canada (AG)*, [2011] 3 SCR 535, para. 44)

In *Powley*, the Supreme Court followed this standard practice and held,

> [12] The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.

Consistent with this approach, the Supreme Court defined the relevant community as the Sault Ste. Marie Métis community for the purposes of resolving the Powley's claim, however, this legal conclusion did not overturn the trial judge's findings that "a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850." This remains the state of the law in the "areas along the project corridor."

Based on the *Powley* case and other historical research, the Ontario Government negotiated and entered into a harvesting agreement with the MNO in July 2004. Consistent with the honour of the Crown and the advancement of reconciliation, this agreement accommodates Métis harvesting rights in identified areas, including, "areas along the project corridor." In *R. v. Laurin*, [2007] O.J. No. 2344, this harvesting agreement was upheld by the courts and recognized as a "highly principled" response to the *Powley* case. Moreover, the court noted the following which has relevance to the "areas along the project corridor."

> [28] There is some recognition on the part of the MNR that the MNO's claim of the existence of communities satisfying the *Powley* test south and east of Sudbury was at least arguable. On October 5, 2004 Mr. Dave Payne, MNR chief negotiator wrote to Mr. Gary Lipinski, chief negotiator for the MNO. He noted:
>
> > "... the four points need to be implemented to reflect the likely geographic limits of historic Métis communities and their harvesting areas in Ontario."
> >
> > **On the basis of historical research presently available to Ontario, if the four points are to be implemented in a manner consistent with *Powley*, MNR would generally recognize only those Métis subsistence harvesting activities occurring north of the Sudbury region.**
> >
> > In the interests of reaching agreement for the interim, the MNR is prepared to consider implementing the interim harvesting agreement on the basis of currently available information (emphasis added) and MNO's assertion of historic Métis communities in the Sudbury, North Bay, and Mattawa and Penetanguishene areas. This must, however, be accompanied by a commitment to immediately pursue collaborative research addressing these areas (and, in particular, agreement to give researchers access to sources that are uniquely accessible to the MNO and its members) so as to resolve uncertainties in respect to these areas. Ontario is of the view that this would serve as a reasonable and defensible basis (emphasis added) for extending the effective application of the Interim Enforcement Policy to these areas, until such time as the further research could be completed." [**Emphasis added.**]

The take away from the issues outlined above is that Métis harvesting rights in the areas "along the project corridor" have been accommodated based on the credibility of these rights claims. They are not mere rights "assertion" claims. In addition, as was outlined in the Thunder Bay sessions, the MNO has other asserted rights and outstanding claims in this region, but those should not be conflated with the accommodation of Métis harvesting rights "along the project corridor." While the MNO recognizes this may not be relevant to the Board's consideration of PRFN's motion, my client wanted to make sure the record was clear on this issue.

Yours very truly,

Jason Madden

c.c. All Parties in EB-2011-0140