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VIA EMAIL

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

Dear Ms. Walli:

Re: EB-2013-0321 – 2014/15 Payment Amounts Application

Please accept this correspondence as the initial application of the Haudenosaunee Development Institute (HDI) acting on behalf of the Haudenosaunee Confederacy Chiefs Council (HCCC) to seek intervenor status in the hearings to be conducted further to OPG's application to raise its payment amounts.

Overview

As you may be aware the Haudenosaunee have inherent and treaty rights over that area of land where many of OPG's generation facilities are currently operating.

We have advised OPG that the generation facilities have and will continue to impair and infringe upon Haudenosaunee rights and interests including the right to free and undisturbed harvesting.

OPG and its sole shareholder (the Province of Ontario) have failed to undertake any process of engagement and/or reconciliation with respect to Haudenosaunee rights and interests in relation to OPG facility operations despite knowledge, both real and constructive, of the Haudenosaunee rights and interests impacted and interfered with by OPG facility operations.

OPG's ability and/or obligation to provide payments in the nature of justifications for treaty right impairment is a necessary consideration in terms of the costs and contingent liabilities of generation at OPG's operating facilities which to date has not been addressed by OPG and/or its sole shareholder.

The HDI submits that the failure to consider the real costs of its operations and the failure to provide the HCCC with input to that cost structuring constitutes a breach of fiduciary duties, a failure to uphold the honour of the Crown, and a breach of the obligation to engage and accommodate all of which can be remedied through the OEB's statutory authority in relation to the setting of rates where the OEB has the authority to hear and determine all questions of law and fact within its jurisdiction.

In these circumstances there is a clear nexus between the matter before the OEB and the circumstances giving rise to the duty to engage.

HDI also submits that the remedial relief¹ to be requested by the HDI is well within the Authority of the OEB to grant further to *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* where the court said (at para. 37) that:

the remedy for a breach of the duty to consult . . . varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, **to an order to carry out the consultation prior to proceeding further with the proposed government conduct** [citing *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 SCC 73 (CanLII), 2004 SCC 73, at paras. 13-14]

¹ By way of example if the following two answers are answered in the negative:

Did OPG and/or the Province of Ontario undertake a meaningful engagement process with the Haudenosaunee which properly reflects the cost to consumers of producing electricity in Haudenosaunee treaty territory?

Did OPG and/or the Province of Ontario undertake a meaningful engagement process with the Haudenosaunee which properly reflects the cost to consumers of producing electricity in Haudenosaunee treaty territory?

Did OPG and/or the Province of Ontario breach fiduciary obligations owed to the Haudenosaunee in failing to consider the costs of treaty impairment justifications in its current application to raise payment amounts?

then the OEB would be in a position to order OPG to undertake a meaningful engagement process with the HDI that upholds Honour of the Crown and further order that the outcome of the engagement process be considered in terms of amending the amount by which the payment amount is raised.

Haudenosaunee Confederacy Chiefs Council

The HCCC is the government of the Haudenosaunee people over an area that includes what is now referred to as Ontario. The HCCC is comprised of five (5) distinct nations the Onondaga, the Mohawk, the Seneca, the Oneida and the Cayuga. A number of other nations, including the Tuscaroras are currently represented by the HCCC. The HCCC itself is comprised of fifty (50) chiefs who are appointed by their respective clanmothers.

The fifty chiefs govern by way of consensus through the process set down in the Kaianere'kó:wa (Great Law of Peace).

The Province of Ontario has recently recognized that the HCCC is an entity with which engagement must be undertaken in relation to Renewable Energy Projects. The HCCC is currently a recognized body for the purposes of section 14 of O.Reg 359/09 made under the *Environmental Protection Act*.

We would be pleased to provide you with a more detailed description of the HCCC at your request.

Haudenosaunee Development Institute

The HDI was legislated into existence by the HCCC to deal with the use of Haudenosaunee lands by the non-Haudenosaunee where the use of the land would impair and/or infringe upon Haudenosaunee rights and interests.

While the HCCC does not regard United Nations instruments as determinative of its rights and applicable processes the HDI was created consistent with the *Declaration on the Rights of Indigenous Peoples* which states that:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The HDI has been provided with full authority from the HCCC to proceed on this matter.

Treaty Relationship

As the old and faithful allies of the Crown the HCCC have an on-going relationship with the Crown, the origin of which predates Confederation. The treaty relationship includes the 1768 Treaty of Fort Stanwix which recognized Haudenosaunee authority, jurisdiction and title over those lands lying to the west and north of the territorial limits of the Crown established by the Royal Proclamation of 1763. To date there has been no surrender of the lands or the interests in those lands prescribed by the 1768 Treaty of Fort Stanwix which includes most if not all of OPG's operating facilities.

We would also like to take this opportunity to confirm that the 1701 Treaty of Fort Albany (at times referred to as the Nanfan Treaty) was also considered in relation to the 1768 Treaty of Fort Stanwix whereby those lands described in the 1701 Treaty were recognized as not having been surrendered.

This position in relation to Haudenosaunee title over the 1701 treaty lands was later confirmed by the Crown in the 1755 commissioning of several maps setting out Haudenosaunee land holdings which includes those areas of land where OPG have significant facility operations. These maps are generally referred to as the Mitchell Maps and we would be pleased to share them with you at your request should it be necessary in terms of granting the HDI intervenor status at the subject hearing.

The HCCC understand that the treaty rights and interests which have been briefly set out herein establish that the HCCC has a real interest in land which will be affected by this process.

Costs Eligibility

The HDI also makes a request for costs eligibility.

Interest in Land

As noted above the HCCC have interests in land which will be affected by this process.

Public Interest

HDI, on behalf of the HCCC, submits that it is always within the public interest to ensure that the honour of the crown is upheld in relation to governmental action (either by way of OPG action and/or OEB) which will impact upon treaty rights and relationships. HDI submits that it can never be in the public interest to ignore treaty rights and relationships.

HDI submits that providing a meaningful opportunity to hear from the treaty rights holders is specifically within the OEB's mandate on a plain reading of the applicable statutory and regulatory framework (including the OEB's Aboriginal Consultation Policy) and on the application of recent developments in the law relating to engagement.

We would submit that the consideration of treaty rights and Crown engagement obligations are always within the mandate and authority of the OEB where the OEB has the authority and jurisdiction to read in those obligations to its enabling legislation.

We are not making any specific submissions with respect to the remedy which may be provided by way of a Notice of Constitutional challenge but that it is open to the HDI to put this argument to the OEB.

Conclusion

HDI submits that the granting of intervenor status is appropriate and lawful in the circumstances.

We would also be pleased to provide further information either in writing or in person to set out and clarify Haudenosaunee rights and interests to the OPG and/or to the Board.

Yours truly,



R. Aaron Detlor
RAD/heh

cc: Colin Anderson
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Charles Keizer
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