

ONTARIO POWER GENERATION INC.  
2014-2015 PAYMENT AMOUNTS  
ISSUES LIST

EB-2013-0321

**HAUDENOSAUNEE DEVELOPMENT  
INSTITUTE**

**SUBMISSIONS**

January 24, 2014

## INTRODUCTION

HDI makes the request to have a number of issues added to the issues list which address obligations arising from the established rights and interests of the Haudenosaunee. The Haudenosaunee have advised OPG that its operations constitute an impairment and infringement upon Haudenosaunee rights and interests.

The issues that the Haudenosaunee wish to have added have been categorized under general issues dealing with engagement followed by a breakdown of added issues that address specific issues as reflected in the Draft Issues List attached as Appendix C to Procedural Order No. 1 dated December 20, 2013.

## GENERAL

1. Does the Board have the jurisdiction to make a decision which may result in an interference and/or impact upon what are referred to as Aboriginal and Treaty rights?
2. If the Board does have jurisdiction, has the Board discharged its duty to engage further to, *inter alia*, the OEB Aboriginal Consultation Policy EB--2007-0617 with respect to the subject application?
  - a. Has the Board undertaken the necessary steps to determine what established rights and interests will be impacted by any Board decision on the subject application?
  - b. Can the Board delegate engagement obligations in the face of impacts and infringements upon established treaty rights which give rise to fiduciary obligations?
  - c. If the Board can delegate engagement obligations in the face of fiduciary obligations has the Board delegated any of the engagement to the applicant?
    - i. If the Board has delegated procedural aspects of engagement what substantive aspects of engagement has it retained and how will those obligations be discharged?
    - ii. Has the Board provided the treaty rights holder the opportunity to set out and clarify rights which may be impacted by any decision arising from the subject application?
3. Has the Board arrived at any *prima facie* assessment of the established and constitutionalized rights and interests such that the nature, scope and content of engagement can be determined?
  - i. Has the Board provided the treaty rights holder the opportunity to set out and clarify rights further to the *prima facie* assessment

4. If the Board concludes that it does not have legislative capacity to undertake engagement obligations can the Board read in those obligations to its enabling legislation as a question of law?
5. If the Board does not have any engagement obligations with respect to the subject application does the applicant and/or its shareholder, the Province of Ontario have the obligation to undertake an engagement process that upholds the Honour of the Crown and/or fiduciary obligations where the Province of Ontario has knowledge, both real and constructive, of the assertion that OPG operations are impairing, infringing and interfering with Haudenosaunee rights and interests.
6. If the applicant and/or its sole shareholder does have an obligation to uphold the Honour of the Crown and/or fiduciary obligations have those obligations been discharged and in particular has OPG and/or the Province of Ontario undertaken the following in advance of its application:
  - a. Providing specific notification to the Haudenosaunee;
  - b. Undertaking a prima facie assessment of the rights and interests;
  - c. Offering the Haudenosaunee the opportunity to set out and clarify rights and interests;
  - d. Determining the nature, scope and content of an engagement process; and
  - e. Providing the Haudenosaunee with the opportunity to comment meaningfully on the proposed engagement process
7. If either of the Board, OPG and/or the Province of Ontario have not undertaken the necessary steps to uphold the Honour of the Crown can the Board order HDI, OPG and the Province of Ontario into a mediated engagement process run that runs in parallel to the current application.
8. Is there a conflict of interest either real or perceived in having the Board make decisions in relation to the sufficiency of engagement required by OPG and/or its sole shareholder the Province of Ontario where the members of OEB have been appointed by the Province of Ontario without any prior engagement or consultation with the Haudenosaunee and where there is no Haudenosaunee representation on the Board.
9. Is there structural bias with respect to the Board making decisions in relation to the sufficiency of engagement required by OPG and/or its sole shareholder the Province of Ontario where the members of OEB have been appointed by the Province of Ontario without any engagement or consultation with the Haudenosaunee and where there is no Haudenosaunee representation on the Board.
10. Has the applicant and/or its sole shareholder considered the contingent liability for potential justifications that may be owed to the Haudenosaunee by way of infringement and impairment of Haudenosaunee treaty rights caused by the applicants' operations where the Supreme Court of Canada

in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 169 has stated that:

**Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: Guerin.**

#### **WITH REFERENCE TO DRAFT ISSUES LIST**

- 3.1. Does the capital structure and rate of return on equity consider costs associated with infringements upon Haudenosaunee rights and interest?
- 4.1 Are the costs associated with regulated hydroelectric projects subject to section 6(2)4 of O. Reg. 53/05 (including the Niagara Tunnel Project) prudent if the costs did/do not consider costs associated with infringements upon Haudenosaunee rights and interest and in particular the potential costs associated with infringing the 1764 Treaty which allowed His Majesty sole use of four miles on each side of the Niagara River but not as private property.
- 4.2 Have the proposed regulated hydroelectric capital expenditures and/or financial commitments considered payments for accommodation and/or justification which may be owed to the Haudenosaunee.
- 4.5 Have the proposed regulated nuclear capital expenditures and/or financial commitments considered payments for accommodation and/or justification which may be owed to the Haudenosaunee.
- 4.10 Has the OPG's nuclear refurbishment process considered Haudenosaunee rights and interests and upheld the Honour of the Crown.
- 4.10 Has the Government of Ontario's Long Term Energy Plan issued on December 2, 2013 considered Haudenosaunee rights and interests and upheld the Honour of the Crown.
- 8.1 Does the revenue requirement methodology for recovering nuclear liabilities in relation to nuclear waste management and decommissioning costs properly consider Haudenosaunee rights and interests.
- 8.2 Does the revenue requirement impact of the nuclear liabilities properly consider Haudenosaunee rights and interests.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**