

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

EB-2013-0321

**HAUDENOSAUNEE DEVELOPMENT
INSTITUTE**

SURREPLY

February 11, 2014

HDI submits that Board Staff have improperly characterized the issues raised by HDI in the subject application.

Specifically, HDI is not raising an issue relating to the Crown's duty to consult as was raised in *Rio Tinto*. There is an important distinction as between *Rio Tinto* and the present facts. In *Rio Tinto* the Carrier Sekani Tribal Council (CSTC) did not have treaty rights. CSTC was claiming rights that were not established and unproven and therefore the analysis in *Haida* was applied.

The Supreme Court of Canada dealt with the distinction in *Haida* between established rights versus asserted and unproven rights where it was stated that the honour of the Crown was invoked where rights and title "have been asserted but have not been defined or proven"¹

The Supreme Court went on to clarify the distinction between the Crown obligations flowing from asserted yet unproven rights versus the obligations flowing from established and proven treaty based rights where it stated:

However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests.²

On the present set of facts we have a particular cognizable interest where the 1701 Treaty of Albany specifically sets out that the Haudenosaunee are to enjoy, at a minimum, free and undisturbed use of the **lands forever to be protected therein by the Crown.**

We are asking the Board to consider as a legal question - whether it has jurisdiction to consider whether OPG and/or the Crown have breached fiduciary duties owed to the Haudenosaunee arising from infringements and impairments to the Haudenosaunee treaty

¹ *Haida* at para 19

² *Haida* at para 54

rights occasioned by OPG and/or Crown conduct in bringing the subject application.

If the Board does have jurisdiction to hear the issue relating to breaches of fiduciary duties then we are asking the Board to determine if OPG³ has breached fiduciary duties owed to the Haudenosaunee arising from infringements and impairments to the Haudenosaunee treaty rights occasioned by OPG operations and OPG conduct in bringing the subject application.

If OPG has breached fiduciary obligations owed to the Haudenosaunee can the Board set a payment amount further to section 78 where the Board is obligated to ensure that the rate is just and reasonable. In other words, is the Board capable of setting a “just and reasonable” rate where the process for determining the rate gives rise to a breach of fiduciary duties and offends section 35 of the *Constitution Act*, 1982.

The Board Staff have also made reference to ‘structural capacity’. We wish to note that the Board does have the structural capacity to resolve these issues where it is specifically empowered to “fix such other payment amounts as it finds to be just and reasonable, on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable”.⁴

We are submitting that the amount applied for is not legally just and reasonable and must include an amount that is reflective of the treaty rights and interests of the Haudenosaunee. We have further proposed that this amount be negotiated as between OPG, the Crown and the Haudenosaunee through a mediated process with the Board taking an oversight role to fulfill its obligations to ensure that the process and outcome is just and reasonable for those holding treaty rights which are recognized as “sacred and solemn obligations”.

Our submissions fall directly into line with the goals of reconciliation and the need to properly interface treaty rights, Crown engagement obligations, and the legal and

³ Where OPG is mentioned alone please include “and/or the Crown”

⁴ Act s. 78.1(5)(a)

regulatory framework in which the Board operates. Notably the Supreme Court of Canada has stated in *Haida* that where the honour of the Crown is invoked that

The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, **tribunals** and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.⁵

Niagara Tunnel Project Example

We would again submit that the Board Staff have erred in characterizing our issues in relation to the example presented involving the Niagara Tunnel Project (NTP).

We are not claiming that the Board is capable of providing approvals in relation to the construction of the NTP or that the Board should determine the sufficiency of the ‘consultation’ in terms of the approvals that were granted. We are claiming that the OPG and/or the Crown owe a fiduciary duty to the Haudenosaunee to address with the Haudenosaunee the impacts of those operations and how they should be reflected in OPG’s rate application. We have submitted that OPG and/or the Crown have failed to determine the real capital and operations costs and that this failure constitutes a breach of fiduciary duty.

We are submitting that OPG and/or the Crown should have engaged with the Haudenosaunee to say:

- what are the levels of treaty impairment occasioned by our operations;
 - please set out and clarify your rights and interests and assist us determining how and if those rights can be compensated;
 - if possible what is the model for reflecting the fungibility of those rights;
- and

⁵ *Haida* at para 37 emphasis added

- how do we reflect those costs as part of the capital and/or operating costs to be reflected in our rates application.

We are not submitting that the Board take a unique or unprecedented move as compensation for impairment of treaty rights is a clear and established aspect of the law of fiduciaries as it applies to treaty rights with the Supreme Court stating in *Delgamuukw* (in the context of Aboriginal title) that lands with indigenous rights have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when rights are infringed.⁶

HDI is submitting that it is legally impossible for the setting of the rate to be just where the rate does not reflect a process that upholds the honour of the Crown which in this case requires the Crown to fulfill its fiduciary duties. Likewise the rate can not be reasonable if it does not consider that a forecast revenue requirement must consider, as a function of the honour of the Crown, the costs associated with treaty rights impairment.

Board Staff have made reference to the failure of the HDI to set out with particularity rights and interests. We are submitting that OPG and/or the Crown have failed to provide the Haudenosaunee, through its representative institutions, with the opportunity to set out and clarify rights and interests which, in and of itself, constitutes a breach of fiduciary duty to be considered by the Board in the subject application.

⁶*Delgamuukw v. British Columbia* [1997] 3 SCR 1010 at para 166 full quote below:

166. The manner in which the fiduciary duty operates with respect to the second stage of the justification test -- both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take - will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

Structural Bias, Conflict of Interest and/or the Appearance of a Conflict of Interest

This issue requires examination by the Board if treaty rights are to be respected as solemn and sacred obligations and in particular if reconciliation is to be taken seriously. Simply because the matter was not raised in *Rio Tinto* does not mean that there is no basis to raise it as a distinct issue for consideration by the Board where to the Haudenosaunee observer there is a strong nexus between market participants and the composition of the Board and the Board's Executive Management Team with a complete absence of any Indigenous representation. The issue of representation and structural bias has been addressed most recently by His Honour Justice Frank Iacobucci in the context of the criminal justice system where he made the following comments in the Introduction and Executive Summary:

First Nations peoples are significantly underrepresented, not just on juries, ***but among all those who work in the administration of justice in this province***, whether as court officials, prosecutors, defence counsel, or judges. This issue is made more acute by the fact that Aboriginal peoples constitute the fastest-growing group within our population, with a median age that is significantly lower than the median age of the rest of the population.⁷

HDI submits that the Board is obligated to consider all issues of procedural fairness and examine whether it is capable of making decisions free from a reasonable apprehension of bias.

We are simply asking the Board to consider whether its decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-

⁷ First Nations Representation on Ontario Juries, Report of the Independent Review Conducted by the Honourable Frank Iacobucci at:

maker.⁸

We are not submitting that OPG can never be regulated. We are stating that the regulation should proceed with a view to the legitimate expectations of treaty rights holders in the particular context where the rights being determined are of serious importance and where Board has significant latitude to determine its own process and procedures.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

⁸ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para 22