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February 17, 2022

SENT BY EMAIL

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Dear Mr. Murray:

Re: NATURAL GAS FACILITIES HANDBOOK DRAFT 5.5 ("Handbook")
OEB File Number: EB-2022-0081

Chiefs of Ontario ("COO") Comments

Please find enclosed the comments for the Chiefs of Ontario for the above-named file. Please note that Chiefs of Ontario may submit an amended version of the documents early next week.

Sincerely,
OLTHUIS, KLEER, TOWNSHEND LLP

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Re: NATURAL GAS FACILITIES HANDBOOK DRAFT 5.5 ("Handbook")
OEB File Number: EB-2022-0081

Chiefs of Ontario ("COO") Comments

SUMMARY

These comments are made by Olthuis Kleer Townshend LLP ("OKT Law") on behalf of COO. The comments focus on the particular legal rights and interests of indigenous peoples.

There are three major substantive comments about the Handbook, pertaining to indigenous rights and interests:

1. Needed is a reflection of the law in Canada in respect of free, prior and informed consent ("FPIC") of indigenous peoples for developments on their lands, in line with the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") and Canada's UNDRIP Act which implements this international law and makes it part of domestic law.

2. Needed is a much more robust description of the Duty to Consult and Accommodate ("Duty") in keeping with the current state of domestic Canadian law, to better reflect the grounding of the Duty in the Honour of the Crown, and to keep abreast of a more expansive interpretation of the Duty to be a means by which FPIC should be obtained (and in some cases at least, must be obtained). That is, the Duty is a means to achieve the end result of FPIC. They become married together.

3. Needed are much stronger reflections of the need for the natural gas sector, its proponents and its regulators to expressly prioritize climate change considerations, not merely by small incremental adjustments to the status quo, but by wholescale change – if humanity is to avoid a permanent and catastrophic climate change and extension event.

We recognize that the Handbook is itself a reflection of statue law and in particular the Ontario Energy Board Act ("OEB Act"). But the Handbook is itself policy of the OEB and where change can be made at the policy level, without changing the statute, it should be made to encompass the above requirements. In other cases, where changes are required in the statute as well, then the OEB should recommend such changes to the Minister of Energy.

SPECIFIC HANDBOOK SECTION COMMENTS

1. General

Much more guidance should be set out in policy and included in the Handbook as to what constitutes "cogent rationale" for departing from the Handbook.

First Nations have often found that it is in the spaces and gaps – where proponents and regulators are not always required to do something – that First Nations' rights and voices are not sought, ignored and left out. If the Handbook is itself a very good policy, the ability to depart from it opens up the opportunity for proponents to not be very good. As all land in Ontario is First Nation land, this will have some effect on First Nations.

1.1 OEB's Statutory Objectives

Section 2 of the OEB Act should be amended to reflect an additional and paramount purpose of meeting global, national and provincial climate targets, such purpose superseding others to the extent of any inconsistency. Subsections 2, 5 and 5.1 of section 2 continue to promote cost savings and viable (natural gas) industries as key objectives but these as priorities are likely both at odds with a strident plan to meet net zero emissions in 25 years. This is a glaring and unsupportable relic of the past that must be changed.

Section 2 of the OEB Act should be amended to reflect the objective of obtaining FPIC from directly affected indigenous peoples for developments on their lands, especially development that continues to contribute to harmful emissions or at least does not do much to reduce them (i.e.: natural gas). The effects on indigenous peoples from natural gas pipelines are not just the disruptions to surface lands, but the risk of worsening climate change: we all will suffer from this, but it is known that indigenous peoples will suffer more, as climate change causes severe effects to lands and waters and indigenous peoples depend on the land and water for their cultures, ways of life and their identities.[1]

Until the OEB Act is amended, the Handbook could at least encourage the above from proponents.

[1] *Greenhouse Gas Pollution Pricing Act,* SC 2018 c 12, s 186, Preamble; see also Environment and Climate Change Canada, "2020 Expert Assessment of Carbon Pricing Systems: A report prepared by the Canadian Institute for Climate Choices" at 81-86, online: <https://publications.gc.ca/collections/collection_2021/eccc/En4-434-2021-eng.pdf>.

1.4 General Filing Requirements

The handbook should hyperlink to Rules 26 and 27 of the Rules of Practice and Procedure here.

1.5 Indigenous Consultation

This heading is not highlighted or in the table of contents, and needs to be.

This section refers to the OEB's Environmental Guidelines for Hydrocarbon Pipelines and facilities and to the OEB's Consultation with Indigenous Peoples webpage.

The Duty is framed far too weakly and narrowly in both documents, and not in keeping with the correct purposive description of the Duty in current Canadian law and certainly not with its next evolution mandated by the UNDRIP Act.[2]

In the webpage, the Duty is described thusly: "The goal is to listen to the views and concerns of affected indigenous peoples and, when required, modify the proposed action or decision to avoid or mitigate adverse impacts on these rights."

The correct description of the Duty has been part of Canada's law since 1997,[3] and was confirmed in the seminal Haida decision in 2004,[4] and has not been derogated from since. It is that the Crown must always consult in good faith with the intent to substantially address the concerns of the affected Aboriginal peoples.

"Substantially" addressing concerns, in good faith, means to take all good faith steps to substantially accommodate all concerns of the affected indigenous peoples. This does not mean merely preventing some impacts and mitigating others. As long as there are any impacts that remain, and concerns of the First Nations about them, then more must be done – and this generally means to compensate, in order to make whole. Otherwise, the threshold of "substantially" addressing or accommodating of concerns cannot be met.

It seems that these initial and still extant pronouncements on the Duty have been forgotten from time to time by Crown governments when apparently weaker language has appeared in some later cases. But these pronouncements are and remain the law in Canada.

The webpage description suggests that modifications of the original proposal are likely enough, when in fact there will be proposals that cannot proceed at all if legitimate concerns cannot otherwise be substantially addressed.

The Guidelines document is also too narrow and weak, and in section 3.3 refers to "discussing" accommodation options, rather than having to negotiate them and to provide them. Further, this document confuses what accommodation means. It says "mitigating, avoiding or accommodating concerns". Accommodation measures are *all* measures required to substantially address concerns, and

[2] SC 2021, c 14.
[3] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168.
[4] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at paras 24, 40.

include avoidance, mitigation, compensation. That is, avoidance and mitigation are types of accommodation measures. And so too is compensation – but as is typical in Canadian instruments, compensation to First Nations is not directly referenced. This is a racist paradigm. Landowners and other settlers are entitled to compensation as a matter of course, but First Nations who have constitutionally-protected rights, are not?

4.2.2 Leave to Construct – Legislation

This section refers to section 95 of the OEB Act and the application for an exemption from LTC. An application for exemption should have to include not just information on indigenous consultation, but information on which affected indigenous peoples consented to the exemption from LTC and the project, and which did not and why not.[5]

4.4.2 Standard LTC Issues List – Project Alternatives (and Appendix A)

In Project Alternatives, proponents should have to account in a robust manner for climate impacts and compare the project option with other options on this criterion. This should be made explicit here.

4.4.4 Standard LTC Issues List – Ontario Pipeline Coordinating Committee

COO should be invited to have a paid representative on the OPCC.

4.4.6 Standard LTC Issues List – Indigenous Consultation (and Appendix D)

This section must have more explicit direction to proponents of a more robust Duty and the need to seek FPIC from affected indigenous peoples. The definition of the Duty, as set out in the comments for section 1.5, should be reflected here as well.

Further to a corrected description, the Handbook should add more detailed requirements for proponents on how they are to meet the delegated aspect of the Duty.

> First, they should be directed to fund the reasonable costs of the First Nations to participate in the engagement around the Duty and FPIC in a fully informed way.
>
> Second, and related to the first point, they should be directed to fund research undertaken by the First Nations sufficient for them to understand where and how they exercise rights and interests that could be affected and how these would be affected, and how such effects can be addressed. First Nations are entitled to the same level of professional fact-based research and analysis as any other party and yet often are expected to casually ask a few members what they know. Much information has been lost or distorted due to the trauma of residential schools and other aspects of colonialism.
>
> Third, proponents should be directed to take all good faith measures to acquire FPIC from the affected First Nations through legally binding accommodation agreements (agreements that bind

[5] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 at art 28.1.

the proponent to provide all types of accommodation measures to substantially address the First Nations' concerns, and by which the First Nations consent to the project). If any First Nation does not consent, the proponent should be directed to obtain written reasons from such First Nations as to why.

One other comment about this section: the Minister's determination of which indigenous communities must be engaged can be flawed, as it can be based on the location of a First Nation's reserve and not its entire homeland territory where it exercises rights and jurisdiction. Reserves are often not the lands that First Nations were most closely attached to, as Crown representatives took such lands for themselves or settlers and left some First Nations with less "valuable" lands. Reserves are a small fraction of an indigenous people's homeland, and we caution the over-reliance on reserves to define who is consulted and the scope. The proponents should be directed to make direct enquiries of the indigenous communities on the Minister's list as to the homeland territories and as to whether other First Nations should be included.

4.5 Leave to Construct Filing Requirements

Exhibit E is Environmental Impacts. Indigenous Consultation is included here. Indigenous peoples' rights and interests are not just environmental rights and interests. While indigenous peoples have inherent and embedded ties to their homelands, and have had for millennia, they are peoples – with governments, societies, laws, norms, economies etc. It is reductionist to subsume any people into "environmental impacts".

Exhibit G is Indigenous Consultation. As stated above, here the proponent should be required to indicate which affected indigenous peoples consented through accommodation agreements, and which did not and why not.

5.4 Designated Storage Areas Filing Requirements

Nothing in this entire section references indigenous peoples or the need to meet the Duty or acquire FPIC. All of that should be here.

RATIONALE FOR THE ROBUST DUTY, FPIC AND CLIMATE ACCOUNTABILITY

The Duty, and the need to acquire FPIC, is grounded in Canada in the recognition that the Crown merely asserted sovereignty and had no legal right to take it from the Nations who were here and who only permitted the Crown to share what was here. These First Nations did not agree to be conquered and were not conquered. They did not agree to be subjugated but were – by the sheer force of the Crown. Courts are recognizing these facts more frequently these days – they can no longer be denied.[6]

[6] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at paras 187-197, see also *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185.

In order to "make good" on this historic wrong, Canadian law created the concept of the Honour of the Crown, and made it a requirement of the Crown to act honourably to First Nations as part of the Crown's section 35 Constitutional duty.

The Duty to Consult and Accommodate is one manifestation or duty of the Honour of the Crown mandate.

Four seminal Supreme Court of Canada cases explain the Honour of the Crown: Van der Peet, Haida, Manitoba Metis Federation, Mikisew II.[7]

Indigenous nations were here in what is now Canada (including Ontario), governing themselves and the land. The Crown, and settlers governed by the Crown, came here. Indigenous peoples had known lands, laws, governments, cultures, economies here. They were in here. Their rights were and are "in-herent". The Crown was not in here. It came here. And then it asserted sovereignty here: supreme power and authority.

By the Royal Proclamation of 1763, Britain took control of France's colonies in North America, but also asserted some control over indigenous nations.

> "And whereas it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under *our Protection*, should not be molested or disturbed in the Possession of such Parts of *Our Dominions* and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds."

This was an assertion of sovereignty. The Honour of the Crown was birthed from the assertion of Crown sovereignty over indigenous peoples.

The act of asserting this supreme power and authority, when there was no conquest, and no discovery over lands terra nullius (as acknowledged in Haida[8]) instead, says Canadian law, is made legitimate by a corresponding Crown obligation.

The obligation must match or befit the supreme level of power and authority asserted, or else it cannot legitimatize the mere assertion of that supreme power and authority. This is especially so when, based on that assertion, the Crown took and imposed so much.

> The Honour of the Crown arises from or was born out this assertion of sovereignty. Why? Because that assertion led to de facto control over the lands and peoples here: de facto, not necessarily de jure. Indigenous peoples had their own sovereignty and governed over their own lands.
>
> This asserted sovereignty created a "tension", which mandated a special relationship governed by the Honour of the Crown – the obligation of the Crown to act honourably to

[7] *R v Van der Peet*, [1996] 2 SCR 507; *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14; *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40.
[8] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 25.

> indigenous peoples. The underlying purpose of the Honour of the Crown is to facilitate reconciliation between the two.
>
> The Honour of the Crown is a requirement. It is not a mere objective or lofty ideal, not a mere incantation. It imposes a heavy obligation on the Crown of the highest order -- it is a constitutional principle.
>
> It binds the Crown *qua* sovereign, applying when the Crown acts either through legislation or executive conduct.

Its content varies with the circumstances. What the Honour of the Crown requires may vary according to the circumstances, but the basic test to determine whether it was fulfilled does not. **The test is whether reconciliation was effected.** Reconciliation is the purpose of section 35 of the Constitution.[9] The Honour of the Crown is tested or evidenced by whether it effects reconciliation.

> Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.[10]
>
> The controlling question in all situations is what is required to maintain the honour of the Crown and **to effect reconciliation** between the Crown and the Aboriginal peoples with respect to the interests at stake.[11]

The Duty to Consult and Accommodate arises from the obligation of the Honour of the Crown and is assessed on the same standard – did the Duty effect reconciliation.

The Honour of the Crown is a constitutional obligation. Section 35 of Canada's constitution was explicitly *enacted* because the Crown had taken and imposed so much for the past 150 years, leaving indigenous peoples harmed with few rights or remedies. Section 35 was explicitly *interpreted* as having the primary purpose of reconciliation[12]: making amends and making space for two sets of worldviews and laws and peoples to co-exist, rather than one being allowed to continue to run roughshod over the other.

In Van der Peet paragraph 21, the Supreme Court of Canada states: …. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers"….[13]

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[9] *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at paras 21-24, 58.
[10] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 32.
[11] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 45.
[12] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 17.
[13] *R v Van der Peet*, [1996] 2 SCR 507 at para 21.

Then in paragraph 23, that Court states: "In *Sparrow, supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples."[14]

This constitutional obligation (and its subset the Duty to Consult and Accommodate) should be interpreted today as grown to meet the new realities that have occurred even since Van Der Peet was decided in August 1996. The OEB should consider realities made known by the following:

- RCAP Report Nov 1996
- Residential Schools apology by Canada June 2008
- Justice Iacobucci's report on FNs' Representation on Ontario Juries Feb 2013
- Truth and Reconciliation Commission report May and Dec 2015
- Missing and Murdered Indigenous Women and Girls National Inquiry report June 2019
- UNDRIP Sep 2007 passed by 144 nations at UN; May 2016 adopted by Canada in full without qualification
- UNDRIP Act 2020

Today we have the UNDRIP Act in Canada and a clear growing pressure for the Crown and its agencies to apply it in a way that does not just stop the colonialism project for the future, but unravels the colonialism web that has stuck to all of us from the past into the present, so we can begin to be free of its white supremacist, Eurocentric, linear-worldview presumptions. It is this linear worldview – hierarchical, exploitative, dominance-based, "more is better" paradigm – spread through most of the world over a few hundred years of colonialism – that has likely led humanity to the edge of the cliff when it comes to climate change.

Aggressively dealing with the climate change crisis to avoid an outright catastrophe, is something regulators must do. Decolonialization is part and parcel of the same mandate.

[14] *R v Van der Peet*, [1996] 2 SCR 507 at para 23.

Natural gas might be a fuel that finds a much narrower market and acceptability in the future as a result of what has to be a significant global about-face and restructuring in the fuel and electricity sectors if net zero targets are to be met. It is beyond doubt that such targets *must* be met if humanity is to avoid causing its own extinction event; it is still in doubt whether such targets *will* be met. Regulators must step up the plate to force serious action in this regard, to the extent that proponents, investors and consumers fail do so, having their own economic circumstances in the fore.[15]

Sincerely,
OLTHUIS, KLEER, TOWNSHEND LLP

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[15] *Greenhouse Gas Pollution Pricing Act,* SC 2018 c 12, s 186, Preamble; see also Environment and Climate Change Canada, "2020 Expert Assessment of Carbon Pricing Systems: A report prepared by the Canadian Institute for Climate Choices" at 1-2, online: <https://publications.gc.ca/collections/collection_2021/eccc/En4-434-2021-eng.pdf>; see also United Nations Climate Action, "COP26: Together for Our Planet", online: <https://www.un.org/en/climatechange/cop26>.