EB-2007-0707

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 25.30 and 25.31 of the *Electricity Act*

AND IN THE MATTER OF an Application by Ontario Power Authority
For review and approval of its integrated power system plan and approval
of its proposed procurement process

ANSWERS TO INTERROGATORIES FROM THE ONTARIO ENERGY BOARD OF THE INTERVENOR THE NISHNAWBE ASKI NATION DELIVERED ON AUGUST 15, 2008

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ANSWERS BY THE NISHNAWBE ASKI NATION ("NAN") TO INTERROGATORIES FROM THE ONTARIO ENERGY BOARD DELIVERED ON AUGUST 15, 2008

OEB Interrogatory #1

1. Ref: Exhibit L-18-1
   Issue: C1

The OPA has acknowledged that the Crown has delegated to it, its "procedural obligations" to consult with First Nations and Metis peoples. In light of that fact, why do you believe that the Crown has an ongoing requirement to ensure that the concerns of Aboriginal Peoples are accommodated in that consultation?

Answer by NAN to Interrogatory #1

The Supreme Court of Canada and other courts have, on the one hand, distinguished between the substantive obligation to ensure adequate consultation between the Crown and First Nations groups and, on the other hand, the "procedural aspects" of consultation, which can be delegated to proponents of projects that have the potential to affect existing treaty rights or other claims being asserted by First Nations groups.

In its own documentation, the OPA has recently confirmed:

> The Crown may delegate the procedural aspects of consultation to proponents, including day-to-day consultation activities. The Crown will carefully scrutinize these activities and their outcomes to ensure than any impacts of the project on established or asserted Aboriginal or treaty rights are appropriately addressed, mitigated and/or accommodated.[i]

The Ontario Crown's commitment that it "will carefully scrutinize" the activities of persons to whom the procedural aspects of consultation have been delegated indicates that the Crown must maintain a hands-on involvement in the dealings of the OPA or any third party proponent with Aboriginal communities.

The fact that the Ontario Government has a separate Ministry of Aboriginal Affairs underscores that consultation with First Nations communities is an ongoing process because of the myriad public policies which can affect existing treaty rights and other claims being asserted by Aboriginal groups. Curiously, the Ministry of Aboriginal Affairs has been absent from the process in which the IPSP was developed, including the current legal proceeding. The Ontario Crown has never offered an explanation for its absence from this process.

The Policy and Relationships Branch of the Ministry of Aboriginal Affairs is charged with developing and co-ordinating government-wide Aboriginal policy; providing business, corporate, and policy advice on Aboriginal matters; developing and maintaining positive relationships with Aboriginal leaders and organizations; liaising with other levels of government on Aboriginal issues; leading and co-ordinating the development of relationships with Aboriginal groups and other governments; and planning and organizing site visits by the Ministry and senior ministry officials.

In NAN's view, various consultation proposals by the OPA, such as that found in the draft RES III RFP, are improper and inappropriate because they purport to delegate the substantive obligation of consultation and accommodation to non-Crown entities.

The RES III RFP, as well as the process by which the IPSP was developed, actually leaves it to the OPA and to third party proponents of energy projects to draw to the Crown's attention Aboriginal issues which need to be addressed.

Such a delegation of responsibility is inconsistent with (a) the acknowledgment that the Crown will "carefully scrutinize" the activities of organizations such as the OPA and proponents of energy projects and (b) the Crown's ultimate legal responsibility to ensure adequate, meaningful, and effective consultation which results in the accommodation of Aboriginal interests.

As noted in the evidence filed by NAN on August 1, 2008, the Nishnawbe Aski Development Fund ("NADF") made specific recommendations directly to the Ministry of Energy concerning energy supply issues, consultation, and developing a better relationship between Aboriginal communities and the OPA. In doing so, the NADF attempted to liaise directly with the Crown, the very person responsible for consulting with and accommodating Aboriginal concerns.

Instead of becoming actively involved in the consultation process, however, the Crown, once again, purported to delegate substantive responsibilities in that area to the OPA, which in turn has attempted a further delegation to third party proponents of energy projects.

Judicial authority also makes it clear that third parties (i.e. non-Crown entities) cannot be held legally responsible for failing to consult and accommodate First Nations rights and interests because that responsibility ultimately rests on the Crown. The Crown's duty to consult and accommodate, therefore, cannot be delegated in a substantive sense to a third party, including organizations such as the OPA.

The substantive role of the Crown is to decide *when and how* consultation and accommodation should take place; that necessitates continuous and active involvement on the part of the Crown.

The Crown's central role in deciding when and how consultation should occur means that the Crown needs to examine, *on an ongoing basis*, the substance which forms part of any delegated consultation process as well as the results to be achieved through consultation. There is a reason why the courts have tied consultation to accommodation, consultation focuses on the *process* and accommodation focuses on the *results* achieved through the process. These concepts are therefore two sides of the same coin.[ii]

The OPA itself has described the consultation role of the Crown in energy matters as involving "the preliminary and ongoing assessment of the depth of consultation required with the Aboriginal communities identified" and "oversight of the proponent's consultation with Aboriginal communities."[iii]

The OPA has also acknowledged that, "upon request by the proponent and/or Aboriginal community, representatives of the Ministry of Energy and Infrastructure may attend consultation meetings between the parties and include other provincial ministries and agencies as appropriate."[iv]

Because the Crown's duty to consult is based on the honour of the Crown, the duty is owed to Aboriginal communities even in the absence of a proven treaty right or land claim or its actual infringement.[v]

In other words, there need not be an actual operational decision by the Crown or persons under its control to trigger the duty to consult. In *Huu-Ay-Aht Nation v. British Columbia (Minister of Forests),*[vi] there was a challenge to the government policy regarding Forest Range Agreements in British Columbia. In deciding whether it could hear a challenge to part of the provincial forestry revitalization plan in a judicial review application, the Court stated:

> It is apparent that the Courts have not been pedantic or overly restrictive in the type of action which it regards as a "decision" when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations.
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> ***
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> In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forestry Act*, which enable the Province to make specific agreements with First Nations regarding forest tenure. The FRA is a vehicle that the Ministry chose to deliver those specific agreements. The concept of "decision" should not be strictly applied when there is legislative enablement for government initiative that directly affects the constitutional rights of First Nations... The petitioners are entitled to seek declaratory relief

> under the JRPA that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.[vii]

Commentary on the distinction between substance and procedure

In their article entitled "The Crown's Duty to Consult Aboriginal People", the authors note that:

> [C]onsultation in the aboriginal context can be said to possess both procedural and substantive elements. Procedurally, Aboriginal people must be given an opportunity to have their views heard and considered in a manner similar to that required by the law relating to procedural fairness. Substantively, Aboriginal people must have their rights accommodated, which may include mitigation of harmful impacts on Aboriginal rights, minimal impairment of Aboriginal rights or attempting negotiated solutions, as the case may be. [viii]

Another important player in the energy field-- the oil and gas industry –has, in recent years, begun to acknowledge the impact which its short and long-term *plans* can have on Aboriginal rights and interests. Consultation must necessarily contemplate accommodation because consultation would not be initiated in the absence of a plan, proposal or actual project which, by its very nature, did not require some form of accommodation of Aboriginal rights and interests.[ix]

Duty to consult is not the same as the duty to ensure procedural fairness

It has been observed that it is the accommodation part of the Crown's duty to consult and accommodate which distinguishes that duty from the administrative obligation to ensure procedural fairness. The duty to consult, therefore, is not about guaranteeing procedural fairness, although such fairness may play an important role in ensuring that the duty to consult is properly discharged.

The substantive requirement of accommodation imposes on the Crown (rather than on third parties, such as energy project proponents) the obligation to incorporate Aboriginal concerns into wide-reaching plans and proposals, and the Crown must also be in a position to demonstrate that such incorporation has actually occurred. The duty to consult is not to be a forum for "blowing off steam" or simply a mechanism by which information is delivered; it must involve meaningful consultation because it contemplates accommodation at the end of the process.[x]

In the case involving the IPSP, and the hearing before the OEB, the fact that (a) consultation with First Nations communities has been required by the Minister of Energy, and (b) the OEB has identified it as an issue to be scrutinized, confirms that accommodation of Aboriginal interests must be part of the OEB review and approval process.

Consultation is not meaningful unless it contemplates and ultimately results in accommodation. Further, neither consultation nor accommodation can occur, as mandated by the Supreme Court of Canada, in the absence of substantive and ongoing involvement by the Crown itself.

Unfortunately, the process during the development of the IPSP, and since the IPSP was filed with the OEB, has been marked by the virtual absence of the Crown.

OEB Interrogatory #2

2. Ref: Exhibit L-18-1
Issue: C1

Are any proven or asserted Aboriginal or treaty rights of the Nishnawbe Aski Nation potentially adversely affected by the proposed IPSP and procurement process? If the answer to (a) is yes, please describe the Aboriginal or treaty right or rights in detail, and explain how the Aboriginal or treaty right may be adversely affected by the proposed IPSP.

NAN respectfully reminds the OEB that the duty to consult arises when the Crown has *real or constructive* knowledge of the *potential* existence of an Aboriginal right or title which might be adversely affected by conduct *contemplated* by the Crown or a third party under the Crown's control.[xi]

"Constructive knowledge" is a low threshold.

Similarly, the potential existence of an Aboriginal right or title which might be adversely affected by Crown activity, or activity authorized or licensed by the Crown, requires that consultation begin in the initial stages of government-sponsored action. That would include a comprehensive planning process such as the IPSP. Thus, consultation must begin once conduct is *contemplated* by the Crown or a third party under the Crown's control.

As noted above, consultation must necessarily encompass accommodation; otherwise, the consultation will not be meaningful.

It should be recalled that, in the mid to late 19th century, the Crown itself realized that negotiating a treaty with Aboriginal communities was necessary because contact between First Nations communities and new settlement pushing north and west was causing the two communities to come into contact with each other-- sometimes only on an intermittent and superficial basis. Even under conditions of minimal contact, however, the substantive framework of a treaty was considered by the Crown to be necessary.

In the modern environment, the actual range of commercial, industrial and government activities affecting the lives of Aboriginal communities is both more significant and intense than it was in the mid to late 19th century.

As a result, it is NAN's position that the Crown's duty to consult arises in almost every aspect of human activity regulated by government. That duty must obviously be discharged during the planning stage of public policies such as the IPSP because of the extensive temporal and geographic reach of such policies and because they involve the allocation of public goods and services to consumers throughout Ontario.

In this respect, NAN need not show an existing and present adverse impact on its treaty or other rights to call into play the Crown's duty to consult and accommodate. That duty arises because the plan being promoted in the IPSP contemplates changes which could and will undoubtedly impact the treaty and other rights of NAN communities during the life of the IPSP itself.

The tentacles of the IPSP, particularly as it relates to the ongoing supply of electricity to all consumers in Ontario, and the future development of additional energy resources-- be it the generation, transmission or distribution of electrical power --will be far-reaching during the next two decades.

The IPSP contemplates conduct which could potentially affect NAN treaty and other rights, thus giving rise on the part of the Crown to become actively involved in discharging its duty to consult and accommodate.

Indirect and cumulative impacts on Aboriginal rights, whether existing or contemplated, including potential impacts on the exercise of Aboriginal rights as they have evolved over time, all trigger the Crown's duty to consult.[xii]

Background to (James Bay) Treaty No. 9

NAN is an organization representing 49 First Nations located in northern and northwestern Ontario, forty-two of which are signatories to Treaty No. 9. The remaining seven NAN communities are signatories to Treaty No. 5.

Treaty No. 5 was entered into between certain Aboriginal communities, many of which did not reside in Ontario, in 1875. Other First Nations groups subsequently signed adhesion agreements to be included in the same Treaty.

Although the comments below focus on the issues which arise in the interpretation and application of Treaty No. 9, they are equally applicable to Treaty No. 5.

The geographical area covered by Treaty No. 9 includes "most of northern Ontario north of the height of land; to James and Hudson Bays in the north; to the boundary of Quebec to the east; and is bordered on the west by Manitoba."[xiii] Treaty No. 9 covers a huge area which is approximately 128,000 square miles in size, that is, approximately two-thirds of Ontario.

The total area covered by Treaty No. 5 and Treaty No. 9 is approximately 210,000 square miles.

The provisions outlined in the written version of Treaty No. 9, as recorded by Canadian and Ontario Commissioners at the time, described certain Aboriginal rights as follows:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Treaty No. 9 was the first "tripartite" agreement between Aboriginal people, the Crown in right of Canada, and the Crown in right of a province (i.e. Ontario)

Treaty No. 9 is one of the eleven numbered treaties made between the federal government and various Indian bands between 1871 and 1923. Unlike the other numbered treaties, however, the Province of Ontario nominated one member of the Treaty Commission for Treaty No. 9 under the provisions of clause 6 of the Statute of Canada, 54-55 Vic., chap. V.

That statute reads in part: "That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said Statutes surrendered their claim aforesaid shall be deemed to require the concurrence of the government of Ontario." Furthermore, the terms of the treaty were fixed by the governments of the Dominion and of Ontario.[xiv]

It is the position of NAN that the Ontario Crown cannot accept the benefits of requiring its concurrence to any changes to the treaty rights which are part of Treaty No. 9 without also acknowledging that it has a significant duty to consult with NAN communities in matters of public policy which may affect the exercise of their treaty rights and other claims.

Interpretation, application, and content of Treaty No. 9 is itself the subject of considerable debate

It is beyond the scope of NAN's answer to the OEB's interrogatory to identify in an exhaustive way the treaty rights which are or, alternatively, which would be adversely affected by the implementation of the IPSP. Nor can NAN provide, in this forum, an exhaustive interpretation of Treaty Nos. 5 and 9.

The IPSP is a living document in the sense that its boundaries and content have yet to be determined because it is subject to an approval process being supervised by the OEB. Further, whether the IPSP as filed with the OEB will be approved in that form remains to be seen.

NAN would also point out that the terms and proper interpretation and application of Treaties No. 5 and No. 9 are *not* the subject of unanimous agreement between the Crown and NAN communities. For example, from NAN's perspective, the written versions of the two Treaties do not constitute the *entire* agreement between the federal and provincial Crown on the one hand, and the Aboriginal communities named in that document on the other hand.

The document entitled "Treaty No. 9", which is not a lengthy document, is the *written version* of the Treaty created by Commissioners from the federal and Ontario governments who obtained the signatures of various Aboriginal community leaders at the time.

There is no *verbatim* record of the actual representations made to Aboriginal community leaders prior to their execution of the written version of the Treaty, including the precise terms which were explained to them.

Nor is there any *verbatim* transcript of the interpretation services provided to translate the terms of the treaty from English into the native languages used by each Aboriginal community. The background documents relating to the written version of Treaty No. 9 make it clear that Crown officials relied heavily on religious organizations and the Hudson's Bay Company to act as interpreters in the brief meetings held between the Treaty commissioners and Aboriginal community members. Thus, not only did the

Treaty involve the interface of two very different cultures and traditions, it was further complicated by the need to communicate in different languages.

Based on the supporting documents to Treaty No. 9, it is obvious that, far from being presented with the text of the Treaty for review and consideration by Aboriginal representatives having access to independent advice, the terms of the Treaty were "explained" to Aboriginal representatives and assurances were given that their lives and rights would not be affected by their entering into the Treaty. In fact, the execution of the Treaty appears to have been induced by the Commissioners repeatedly extolling the benefits which would be conferred upon Aboriginal communities under the Treaty.

The written version of Treaty No. 9 refers to the Aboriginal communities being able to "know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence." Apart from an initial payment of $8.00 to each Aboriginal community member and a $4.00 annual stipend thereafter, the Treaty is, for the most part, silent on any other allowances they are to count upon and receive from the Crown's "bounty and benevolence."

The supporting document to Treaty No. 9, dated November 6, 1905, confirms that the Treaty was *not* the subject of meaningful discussion and actual negotiation between the federal and provincial Commissioners on the one hand, and Aboriginal communities on the other hand. In fact, the document confirms the following:

> It is important also to note that under the provisions of clause 6 just quoted, *the terms of the treaty were fixed by the governments of the Dominion and Ontario; the commissioners were empowered to offer certain conditions, but were not allowed to alter or add to them in the event of their not being acceptable to the Indians* [emphasis added].

Nor is there independent confirmation from Aboriginal sources that the persons in various Aboriginal communities who executed the written version of Treaty No. 9 were acting on behalf of any and all members of their communities at the time, or that such persons were duly authorized representatives. Indeed, the supporting documentation to Treaty No. 9 confirms that election of Aboriginal representatives often took place *after* the ostensible agreement of members of the community was obtained based on the Commissioner's explanation of the terms and benefits of the Treaty.

Differences of opinion relating to the proper interpretation and application of Treaty No. 9 are simply one more reason why there is a substantive obligation on the part of the Ontario Crown to consult with NAN communities about matters relating to public policies such as the IPSP.

The inconsistencies between the supporting documents (dated November 6, 1905 and October 5, 1906) and the written version of Treaty No. 9 demonstrate that, on the basis of available documentation alone, there is no single interpretation of Treaty No. 9, nor is there uniformity in the manner in which individual Aboriginal communities view and understand the Treaty.

Many NAN communities have long maintained that the proper understanding and application of Treaty No. 9 involves much more than a review of the general language in the few written documents produced by Crown officials a century ago and the subsequent written Adhesions to the Treaty in 1929 and 1930.

Canadian courts appear to agree that a restrictive view of the terms of *written* versions of treaties should not be taken in determining their content and application. In *Halfway River,* [xv] Justice Finch articulated general principles to interpret treaties between the Crown and Aboriginal communities, and other courts have elaborated on these principles, as follows:

- A treaty should be given a fair, large and liberal construction in favour of the Aboriginal communities involved;
- Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by members of the Aboriginal communities;
- Since the Honour of the Crown is always involved in the negotiation and application of a treaty, no appearance of "sharp dealing" should be sanctioned;
- Any ambiguities or doubtful expression in the wording of the treaty or document must be resolved in favour of the Aboriginal community. A corollary to this principle is that any limitations which restrict Aboriginal rights under treaties must be narrowly construed;[xvi]
- Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content. "In particular, [Courts] must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration..."[xvii]

the role of the Courts or similar judicial bodies (e.g. the OEB) in understanding the terms of a treaty is, in part, to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the [Aboriginal] interests and those of the British Crown. That role was outlined by the Supreme Court of Canada in *R. v. Marshall,*[xviii] which cited *R. v. Sioui*[xix] with approval.

The Courts have long acknowledged that "treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement [between the parties]."[xx]

As is obvious from the written version of Treaty No. 9, the Commissioners sent by the federal and provincial governments *purported* (a) to identify what Aboriginal representatives gleaned from the explanations provided to them initially in English and (b) to identify the significance ascribed to Treaty by Aboriginal representatives.

In the *Halfway River* decision, in order to interpret a treaty, Justice Fisher admitted as part of the evidence a Commissioner's Report on negotiations in 1899 to put the treaty into historical context (at least from the point of view of the Commissioners).

Existing treaty rights of NAN communities

Since 1982, existing treaty rights have enjoyed constitutional protection under section 35 of the *Constitution Act, 1982.*[xxi] The broad rights to fish, hunt, and trap outlined in Treaty No. 5 and Treaty No. 9 were not created by those treaties. Such rights and practices predated the execution of the two Treaties.

As a result, NAN views the two Treaties as being a confirmation on the part of the federal and provincial Crowns of the pre-existence of those rights within the large geographical area (i.e. 210,000 square miles) covered by the Treaties, and a commitment by the Crown that such rights would not be disturbed or adversely affected in that area.

NAN also takes the position that Treaty No. 5 and Treaty No. 9 were agreements between the Crown and the various Aboriginal communities who executed the Treaties to *share* the land and resources covered by those agreements.

As Treaty No. 9 indicates, there was a desire on the part of the Crown to "open for settlement, immigration, trade, mining, lumbering, and such other purposes as to His Majesty may seem meet [sic], a tract of country, bounded and described as hereinafter mentioned, and to obtain the *consent thereto of His Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and His Majesty's other subjects...*"

This provision in Treaty No. 9 confirms for NAN communities that the Treaty was not a treaty under which rights to the territory covered by the Treaty were being surrendered, restricted, or extinguished, but rather a commitment by the parties to the Treaty that they would *share* the benefits of the territory.

To the extent that the IPSP contemplates any works within NAN territory, there is a duty on the part of the Crown to initiate and participate in meaningful consultation with NAN communities.

To the extent that any contemplated action could have an impact on the traditional rights of NAN communities, such as hunting, fishing, trapping, and similar activities, there should be a formalized process by which consultation can take place. No such process was established during the development of the IPSP and no such process has been instituted since the IPSP was filed with the OEB.

The development of the IPSP should have involved direct consultation between the Crown and NAN as to how NAN communities view and understand relevant aspects of Treaty No. 9 and how that understanding informs the approach which should be taken in evaluating the IPSP.

In the supporting document to Treaty No. 9, dated November 6, 1905, it was acknowledged that the Treaty was not going to involve the provision of agricultural implements, seed-grain, and cattle, as had been the case with certain other treaties.

Instead, the Treaty was *premised* on hunting and fishing proving to be "lucrative sources of revenue" for the Aboriginal communities committing themselves to the Treaty. To the extent that such activities have not proven to be adequate to meet the needs of Aboriginal communities, there would be an obligation on the part of the Crown to ensure that such communities receive and enjoy a level of public services, including electrical power, which is enjoyed elsewhere in the Province.

Consultations which should have taken place prior to the IPSP being filed with the OEB

The IPSP contemplates changes to the generation and transmission system in Ontario which can affect NAN communities. Decisions by the OPA to develop renewable energy resources within NAN territory (and not simply on reserves) will necessarily affect traditional rights such as hunting, fishing, and trapping.

Similarly, decisions by the OPA *not* to choose electrical generation options within NAN territory, or *not* to extend a given transmission line to connect NAN communities to the provincial grid are also decisions which can affect NAN communities, including the manner in which traditional rights confirmed by Treaties No. 5 and 9 can be exercised.

Persons living in NAN communities have a right to expect a basic level of public services, including reasonably priced and reliable electricity, in the same way that other Ontarians expect such services.

The *context* in which any traditional rights, such as hunting, fishing and trapping, are exercised, never remains the same.

Aboriginal communities have a right to expect that they will receive adequate levels of public services, such as health care, electrical power, sewage treatment, housing, etc. because such services constitute the modern context in which traditional rights such as hunting, fishing, and trapping will be exercised.

Further, to the extent that traditional rights have not proven to be a "lucrative source of revenue" for Aboriginal communities, their expectation under Treaties No. 5 and 9 that they would "share" the land with the Crown and its other subjects assumes special significance. It means that the development of resources such as renewable energy projects, and broader public policy decisions about electrical generation and transmission within NAN territory, should be the subject of ongoing direct consultation between the Crown and NAN communities. The OPA and proponents of energy projects definitely have a role to play in that consultation process, but the principal obligation of liaising with NAN communities must be assumed by Crown officials.

The very fact that the IPSP is a 20-year plan and it contemplates changes which will impact NAN communities triggers the duty to consult with such communities from the outset. As noted above, as soon as the Crown "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it"[xxii] the duty to consult is called into play.

The Supply Mix Directive which instructed the OPA to create a plan which increases renewable energy resources, including hydro-electric, wind energy, solar, and biofuels (to assist the government to meet its goal of increasing the installed capacity of new renewable energy sources by 2,700 MW from the 2003 base by 2010, and to have a total capacity of 15,700 MW by 2025)[xxiii], has the potential to adversely impact all of the traditional rights confirmed by Treaties No. 5 and 9.

Figure 5 of IPSP – Planned Development of Renewable Resources – Stage 1, sets out a plan for development of 260MW in the Northwest, of which 200MW would be hydroelectric; and 710 MW in the Northeast, of which 550MW would be hydroelectric; between 2010 and 2015. The other Figures show the development of such resources in later periods.

Each of the development stages is associated with the installation of additional transmission lines running through lands that fall within the scope of Treaties No. 5 and 9 (See Figures 5, 6 and 7). Hydroelectric, wind, and new transmission lines will reduce the territory over which NAN territories can exercise the traditional rights confirmed under

the two Treaties, and potentially cause harm to the exercise of those rights in surrounding areas.

The Report from SENES, Exhibit G-3-1, discusses some of those impacts.

The Environmental Screening Report for the proposed Trent Rapids Hydroelectric Generating Station, a 8.0 MW run-of-the-river hydroelectric facility on the Otonabee River, identifies a number of impacts on aquatic and terrestrial habitat, including:

- Negative impacts on spawning habitat for some species;
- The possibility of increasing dry areas, resulting in fish stranding at such locations;
- The potential loss of the horsetail community.

Regardless of the ultimate natural heritage impact of a particular hydroelectric project, each project will carry the threat of the loss of aquatic and terrestrial habitat, with attendant impacts on fishing and hunting.

Further, adverse impacts on one activity, such as fishing, put pressure on other traditional activities, such as hunting and trapping, to compensate for shortfalls. The connection between all of these activities simply underscores the reality of operating in any ecosystem and the interconnection between the development of one natural resource and its impact on others in the process.

A proposal on the scale of the IPSP, which sets out a policy encouraging the development of as many as 25 projects the size of Trent Rapids in the Northeast alone, will necessarily affect the livelihood of NAN communities.

The extension of transmission lines necessitates the construction of roads and the maintenance of transmission corridors. Although roads can bring benefits to Aboriginal communities, they can also reduce trapping yields, fragment wildlife habitat, disrupt migration patterns, and reduce vegetation.[xxiv]

Although the land use directly affected by transmission lines may be small, the long-term effects can be serious if the lines and transmission corridors affect a hunting ground or trap line. The "meaningful right to hunt"[xxv] is not ascertained by looking at the brief language in a treaty, but rather by considering the territory over which an Aboriginal community traditionally hunted, fished and trapped, and continues to do so today.

How the Aboriginal or treaty rights may be adversely affected by the proposed procurement process.

The Procurement Process strongly favours "competitive procurement", in which "value competition" determines the selection of a project.[xxvi]

Value competition refers to various methods generally based on the evaluation of one or more of the following:

- Price;
- Combination of price and other price-related factors; or
- Combination of price, economic factors and/or feasibility-related criteria (e.g. status of all necessary approvals, demonstrated technical and financial ability to deliver project/program).[xxvii]

Nowhere in the Procurement Process, which emphasizes issues such as "technical and financial ability", is there consideration of the interests and values of Aboriginal communities.

In NAN's view, the OPA and the OEB must consider whether the principle of choosing the lowest bid for an energy project, and an emphasis on "technical and financial feasibility" is always consistent with the proper discharge of the Crown's duty to consult and accommodate Aboriginal interests. The narrow criteria of technical and financial feasibility are based on economic notions of a market economy, while the Crown's duty to consult and accommodate is based on the precept that two nations with different traditions and cultures are interacting.

The suggestion that the OEB's consideration and approval of the IPSP is to be evaluated on the basis of "cost effectiveness" alone underscores the need for the proper discharge of the Crown's duty to consult and accommodate because it is only through that process that the different values and interests of NAN communities can be ascertained, considered, and ultimately accommodated.

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[i] "Consulting with First Nation and Metis Communities: Best Practices, Good Business." OPA document, July 11, 2008, at p. 3
[ii] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, at para. 54.
[iii] "Consulting with First Nation and Metis Communities: Best Practices, Good Business", *supra* at p. 6.
[iv] "Consulting with First Nation and Metis Communities: Best Practices, Good Business", *supra* at p. 7.
[v] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, at para. 16.
[vi] [2005] B.C.S.C. 697
[vii] *Ibid.*, at paras. 99 and 104.
[viii] Thomas Isaac and Anthony Knox, (2003) 41 Alta. L. Rev. 49-77 at para 44.
[ix] Veronica Potes, Monique Passelac-Ross, and Nigel Bankes, "Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice" (Paper No. 14 of the

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Alberta Energy Futures Project, University of Calgary Institute for Sustainable Energy, Environment and Economy, November 2006) at pp. 11 to 12.

[x] *Ibid.*

[xi] *Haida, supra,* at para 35.

[xii] Mikisew, *supra,* at paras 44, 47, 55.

[xiii] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation,* [2007] 3 C.N.L.R. 181 at para 43.

[xiv] James Bay Treaty, Treaty No. 9, Ottawa, November 6, 1905.

[xv] *Halfway River First Nation v. British Columbia (Ministry of Forests),* [1999] B.C.C.A. 470 at paras. 89-91.

[xvi] *R. v. Badger*, [1996} 1 S.C.R. 771 at para. 41.

[xvii] *R. v. Sioui,* [1990] 1 S.C.R. 1025 at para. 16.

[xviii] *R. v. Marshall,* [1999] 3 S.C.R. 456 at para. 14.

[xix] *R. v. Sioui, supra.*

[xx] *R v. Badger, supra*, at para. 52.

[xxi] *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982 (U.K.),* 1982, c. 11.

[xxii] *Haida, supra,* at para 35.

[xxiii] Supply Mix Directive of the Minister of Energy (June 13, 2006), section 2.

[xxiv] *Mikisew, supra*, at para 44.

[xxv] *R. v. Badger, supra*, at para 18.

[xxvi] EB-2007-0707, Exhibit B, Tab 2, Schedule 1, Section 3.I

[xxvii] *Ibid.*