Deshkan Ziibiing
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March 25, 2024

Ontario Energy Board
Suite 2700, 2300 Yonge Street
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BY RESS

To the Attention of: **Ms. Marconi, Registrar**
Ontario Energy Board

Re: **EB-2024-0079: Invitation to comment on proposed revisions to the Indigenous consultation provisions of the Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario**

Further to your letter dated February 7, 2024 regarding the above-referenced matter, the Chippewas of the Thames First Nation ("**COTTFN**") welcomes the opportunity to submit comments to the Ontario Energy Board ("**OEB**") regarding the proposed revisions to the Indigenous consultation provisions of the Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario (the "**Proposed 3.2 Guideline**").

Please find attached CHIPPEWAS OF THE THAMES FIRST NATION COMMENTS regarding the Proposed 3.2 Guideline for the OEB's reference and consideration.

Please do not hesitate to contact Jennifer Mills at jmills@cottfn.com if you have any questions on the Nation's comments.

Sincerely,

Chief R. K. Joe Miskokomon

CHIPPEWAS OF THE THAMES FIRST NATION COMMENTS

Re: EB-2024-0079: Invitation to comment on proposed revisions to the Indigenous consultation provisions of the Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario

As noted in the Overview of the Environmental Guidelines, "*the Guidelines represent current knowledge and practice. . . "* "[1]and *"[t]he Guidelines are intended to provide direction to an applicant in preparing the Environmental Report for a proposed Hydrocarbon Project."*[2]

Despite this purpose and intention, the proposed revisions to the Indigenous consultation provisions of the Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario (the "**Proposed 3.2 Guideline**") are not reflective of the current state of the law or knowledge and practice with respect to the Crown's constitutional duty to consult with Aboriginal peoples as it arises from the Honour of the Crown and section 35 of the *Constitution Act, 1982*[3] ("**Section 35**").

For the OEB's reference and consideration, please find outlined below a listing of key relevant concepts, as well as Chippewas of the Thames First Nation's observations and suggestions for revision to the Proposed 3.2 Guideline.

1. The Duty to Consult

As recently as 2021, the Supreme Court of Canada has confirmed that:

> The duty to consult "arises when 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" (*Haida*, at para.35). In other words, three conditions must exist for the duty to arise: actual or constructive knowledge, contemplated Crown conduct and a potential adverse effect on an Aboriginal or treaty right. The requirement of actual or constructive knowledge was clarified in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para.40:
>
> > Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted. *Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community* ***or*** *an impact on rights may reasonably be anticipated.* [Citations omitted.][4] *(Emphasis added)*

There are two aspects of Section 35 that have substantively evolved in recent years: (a) the notion of reconciliation, and (b) the understanding of the breadth and scope of treaty and Aboriginal rights under

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[1] Ontario Energy Board – Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario, page 5 (https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2023-03/OEB-Enviromental-Guidelines-for-Hydrocarbon-Projects-8th-Edition-20230328.pdf).

[2] *Ibid*.

[3] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.35.

[4] *R. v. Desautel*, 2021 SCC 17 at para.72.

Section 35.

(a) The Notion of Reconciliation

The interpretation of section 35(1) must be led by the objective of reconciliation,[5] and the Supreme Court of Canada has stated that: "*reconciliation in a mutually-respectful long-term relationship is the grand purpose of s. 35(1)*."[6]

"As a matter of fact, reconciliation as evoked in *Van der Peet* has little to do with reconciliation as understood nowadays, for instance, by the TRC,[7] the *UNDRIP Act*[8] or Canadian society in general . . . In the view of the TRC, the [] notion of reconciliation, demands a new reading of s. 35(1):

> The road to reconciliation also includes a large, liberal, and generous application of the concepts underlying Section 35(1) of Canada's Constitution, so that Aboriginal rights are implemented in a way that facilitates Aboriginal peoples' collective and individual aspirations. The reconciliation vision that lies behind Section 35 should not be seen as a means to subjugate Aboriginal peoples to an absolutely sovereign Crown, but as a means to establish the kind of relationship that should have flourished since Confederation, as was envisioned in the Royal Proclamation of 1763 and the post-Confederation Treaties. That relationship did not flourish because of Canada's failure to live up to that vision and its promises. So long as the vision of reconciliation in Section 35(1) is not being implemented with sufficient strength and vigour, Canadian law will continue to be regarded as deeply adverse to realizing truth and reconciliation for many First Nations, Inuit, and Métis people[…] [The Court's emphasis]"[9]

(b) Treaty and Aboriginal Rights Under Section 35

It is not reasonable or appropriate for the Crown's identification of treaty and Aboriginal rights to continue to be limited to site-specific traditional practices e.g. hunting, fishing, trapping, etc. and culturally and archeologically significant locations. Re-enforcing the "*generous, purposive approach*" as prescribed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC,[10] the Federal Court decision of *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758 found that the "*social, economic and community benefits*" secured under an Impact Benefits Agreement were threatened with adverse impact to trigger a duty to consult[11] and in the 2023 decision of *R. c. Montour*, 2023 QCCS 4154, the Court recognized the treaty right to free trade.[12]

COTTFN Experience:

As outlined in COTTFN's Wiindmaagewin Consultation Protocol:[13]

> Deshkan Ziibiing edbendaagzijig's traditional territory was recognized and affirmed by Canada in the Big Bear Creek Land Claim Settlement Agreement (2013). Within this territory, we are also

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[5] *R. c. Montour*, 2023 QCCS 4154 at para.1231.

[6] See *R. c. Montour*, 2023 QCCS 4154 at para.592 citing *Beckman v. LittleSalmon/Carmacks First Nation* 2010 SCC 53 and *Daniels* v. *Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

[7] Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1-6, 2015, Winnipeg, Truth and Reconciliation Commission of Canada. (https://nctr.ca/records/reports/#trc-reports)

[8] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

[9] *R. c. Montour*, 2023 QCCS 4154 at para 1226.

[10] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para.43.

[11] *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758 at para.117.

[12] *R. c. Montour*, 2023 QCCS 4154.

[13] Deshkan Ziibiing/Chippewas of the Thames First Nation Wiindmaagewin – Consultation Protocol (Duty to Consult | Chippewas of the Thames (cottfn.com))

signatory to pre-Confederation Treaties with the British Crown. Traditional Anishinaabe territory in southwestern Ontario includes lands addressed in the McKee Treaty (1790), the London Township Treaty (1796), the Sombra Township Treaty (1796), the Longwoods Treaty (1822), and the Huron Tract Treaty (1827). Deshkan Ziibiing is party with other Anishinaabe nations to several of these treaties but is the sole Anishinaabe party to the Longwoods Treaty…

We who are Deshkan Ziibiing edbendaagzijig continue our commitment to protect the watersheds of the Thames River, Bear Creek, the Au Sable River, and the Erie and Huron lakeshores. We regard all of our ancestral lands as part of our consultation territory. Our treaties did not "surrender" our lands or waters…

The rights that Deshkan Ziibiing exercises in relation to our traditional lands, Treaty lands, reserve lands, and Addition to Reserve lands, are inherent - grounded most basically in the Creator's gift of lands, waters, and way of life to ndodeminaanig, "our clans." These rights are embodied in our historical and ongoing occupation of our territory, and in our practice of self-determination as a people. Our rights as a self-determining people are recognized in several instruments, including, the Royal Proclamation of 1763, our Treaties, s.35(1) of *Canada's Constitution Act* and the *United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)(2007*).

Despite the scope of what is included in COTTFN's treaty and Aboriginal rights, COTTFN continues to experience consultation engagement that is focused almost exclusively on the immediate and localized, physical environmental aspects of Hydrocarbon Projects, without recognition of it being a primary rights holder.

COTTFN Proposed 3.2 Guideline Revision:

- **(a) Expand the scope of information required to be provided by the Hydrocarbon Project applicant to the Minister of Energy and Indigenous communities i.e. Robust proposed project description, including but not limited to project need and alternatives to address need, environmental footprint of the project and location/routing alternatives, social and community impacts, economic analysis (capital and operating costs, etc), Indigenous ownership in the project, all related applications; *See also #2 below*;**
- **(b) Require Hydrocarbon Project applicants to provide Indigenous communities with reasonable notice of the development of a proposed project and preparation of their OEB application for same <u>prior</u> to filing an application with the OEB, as well as particulars of the OEB process, regulatory steps involved and timelines for the proposed project; and**
- **(c) Require Hydrocarbon Project applications to include an allocation of project ownership to Indigenous primary rights holders or, alternatively, economic benefits equivalent to same;**
- **(d) Require Hydrocarbon Project applicants to obtain written confirmation from the rights holding Indigenous communities that these communities have had an opportunity to review and comment on all entries that relate to them in the applicant's Indigenous Consultation Report prior to its submission to the OEB and include this written confirmation with the Indigenous Consultation Report when it is submitted to the OEB.**

2. <u>Cumulative Effects of Hydrocarbon Projects and Facilities</u>

"[I]t may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, Native Law (loose-leaf), vol. 1, at pp. 5-107 to 5-108).

Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2011 BCCA 247, 18 B.C.L.R. (5th) 234, at para.117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (West Moberly, at para. 119)."[14]

As noted in the matter of *Yahey v. British Columbia*, 2021 BCSC 1287, a regulatory regime without effective and binding measures to ensure that constitutionally protected rights are taken seriously e.g. addressing concerns about the cumulative impacts of development on the exercise of treaty rights, does not meet the test of diligence required of the Crown.[15]

COTTFN Experience: The OEB's existing processes for authorizing the location, construction and operation of hydrocarbon projects and facilities, including the Environmental Guidelines, do not adequately consider COTTFN's treaty rights or cumulative effects and are therefore contributing to the meaningful diminishment of COTTFN's treaty and Aboriginal rights and territory.

COTTFN Proposed 3.2 Guideline Revision:

(a) Issue or require Hydrocarbon Project applicants to produce a cumulative effects analysis ("CEA") in relation to the proposed Hydrocarbon Project including all related applications e.g. easements, rights of way, etc, mapping of existing infrastructure within a given development region, anticipated further developments and impacts of same over specified time, and include same in its application to the OEB;

(b) Require written confirmation that all Indigenous communities, that are primary rights holders in the region identified in the CEA, have meaningfully participated in the development and finalization of the CEA, including the determination of adequate accommodation for any potential impacts on treaty and Aboriginal rights; and

(c) Ensure that Indigenous communities that have participated in the development of the CEA have been provided with sufficient resources to participate in a meaningful way e.g. have the opportunity to engage their own experts and analysts.

3. Crown Obligation to Provide Capacity to Indigenous Communities to Engage in Consultation

Saugeen First Nation v. Ontario (MNRF), 2017 ONSC 3456 states that:

> "*To have meaningful participation in consultations, a First Nation must have sufficient expertise and resources. . . . . [T]he issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'." Reasonable efforts should be made, on both sides, to avoid funding brinksmanship. Ultimately the decision on funding is the Crown's, as part of its design and implementation of a consultation process, . . .*[16]

Furthermore, "*the honour of the Crown does not oblige it to volunteer funds in the absence of a clear request and evidence of need*."[17]

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[14] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para.42.
[15] *Yahey v. British Columbia*, 2021 BCSC 1287 at para.1768.
[16] *Saugeen First Nation v. Ontario (MNRF)*, 2017 ONSC 3456 at paras.26-27.
[17] *Ignace v. British Columbia (Chief Inspector of Mines)*, 2021 BCSC 1989 at para.157.

COTTFN Experience: Due to the resources required and the limited human and financial capital that is available within COTTFN to optimally participate in consultation and OEB hearings, COTTFN has not participated in any OEB proceedings in the last few years. Furthermore, without regulatory requirements to compel the requisite resources and support to be provided to Indigenous communities to ensure meaningful engagement and participation, it is common for Hydrocarbon Project applicants to make their own determination, at their discretion, as to what resources they consider as reasonably necessary for an Indigenous community to participate in consultation, often relying on dated perceptions of Section 35 and failing to acknowledge the importance of capacity for an Indigenous community to engage appropriate expertise i.e. technical, financial, legal, other to ensure a meaningful engagement.

COTTFN Proposed 3.2 Guideline Revision:

(a) Develop an OEB Direction to ensure that either the Ministry of Energy and/or Hydrocarbon Project applicants are required to provide requisite resources and support to Indigenous communities for consultation in relation to Hydrocarbon Projects;

(b) It is inappropriate and arguably a conflict of interest to require a Hydrocarbon Project applicant to submit the outstanding concerns of Indigenous communities to the OEB. Thus, the OEB Practice Direction on Cost Awards should be amended to ensure that there is a mechanism available for Indigenous communities to request capacity funding to participate in the OEB process to be able to present their outstanding concerns to the OEB directly, with an initial amount payable prior to the commencement of the OEB proceeding to ensure that Indigenous communities have the requisite resources to engage in the OEB proceeding in a meaningful and timely way; and

(c) If the OEB is unable to facilitate capacity funding for Indigenous communities' participation within the OEB process itself, an alternative mechanism needs to be developed to ensure that Indigenous communities are provided with the requisite resources and support to be able to bring any outstanding concerns to the attention of the OEB for its consideration with respect to a Hydrocarbon Project.

4. Inherently Flawed Process re: Determination of Duty to Consult Prior to Conclusion of a Regulatory Process

A Section 35 consultation process whereby a Minister made a determination as to whether or not the duty to consult was triggered prior to a regulator's determination of the impact of a development that would directly inform whether or not a duty to consult was triggered was reviewed in the recent decision of *Waterhen Lake First Nation v. Saskatchewan (Parks, Culture and Sport)*, 2023 SKKB 230, and the Court concluded that this approach was out of proper sequence, illogical, and flawed.[18]

COTTFN Experience: COTTFN's current experience with proposed Hydrocarbon Projects is ongoing contact/engagement with the Ministry of Energy over the course of a Hydrocarbon Project's entire regulatory process, whereby the goal of the Ministry of Energy appears to be to facilitate the necessary exchange of information as between the Hydrocarbon Project applicant and COTTFN to promote meaningful consultation, even when COTTFN is not an intervenor in the proceeding. The revised guidelines suggest that the OEB would assess the adequacy of consultation solely based on the information provided by the Hydrocarbon Project applicant and the intervenors in the proceeding.

[18] *Waterhen Lake First Nation v. Saskatchewan (Parks, Culture and Sport)*, 2023 SKKB 230 at paras.83-90.

COTTFN Proposed 3.2 Guideline Revisions:

(a) Concurrent with providing the Minister of Energy with project information in the early stages of the Hydrocarbon Project planning process, the Hydrocarbon Project applicant and/or the Minister of Energy shall provide all potentially impacted Indigenous Communities with a project description of the proposed Hydrocarbon Project, including but not limited to project need and alternatives to address need, environmental footprint of the project and location/routing alternatives, social and community impacts, economic analysis (capital and operating costs, etc), Indigenous ownership in the project, all related applications, and a cumulative effects analysis (*See #2 above),* and require Indigenous Communities to provide written agreement that the Minister of Energy's Determination that the Duty to Consult is NOT Triggered, such written agreement to be attached to the letter of the Ministry of Energy to a Hydrocarbon Project applicant confirming that the Duty to Consult has not been triggered; or

(b) Maintain the status quo i.e. Ministry of Energy continues to maintain contact/engagement with Indigenous Communities for a Hydrocarbon Project's entire regulatory process.

CONCLUDING COMMENTS

In summary, to ensure that the duty to consult is fulfilled, the OEB must ensure that First Nations obtain complete project information, receive adequate time and funding to fully participate, and have meaningful involvement in cumulative effects analysis. Without better support for participation, the current OEB process improperly places the burden on Indigenous communities to intervene in OEB proceedings to ensure that their rights, concerns and perspectives are properly reflected in the process. COTTFN is not the same as other intervenors in OEB proceedings – we have inherent rights and jurisdiction over our territory and the Ministry has a unique responsibility and a constitutional obligation to ensure that those rights are upheld.

As affirmed in the COTTFN's Chi-Inaakonigewin:[19]

> Niinwe Deshkan Ziibiing Anishinaabe Aki, Anishinaabek, ndo m'shkowi m'jigonaanaa Anishinaabe zhitwaawin miinwaa geh gwanda kchi-nshinaabek gaa bi-biitamowad, eko-nsing noogshkaang eshinikaadek; Ndanwendaaswinaanik gwanda kchi-nshinaabek miidash gwa maampii dbendaagoziiyaang;
>
> > *Whereas, we, the Peoples of Deshkan Ziibiing Anishinaabe Aki uphold our relationship to our Anishinaabe Creation Story and to our Ancestors who migrated to what we know is the third stopping place; We are the descendants and we call this territory our home;*
>
> Niinwe Deshkan Ziibiing Anishinaabe Aki, Anishinaabek na mzoo-gaabweyaad, Nsi-Shkoden ezhi-waawiisjik, ndebendaagozimi Ojibway (Genwendagik zhitwaawin), Pottawatomie (Genwendagik Shkode) miinwaa Odawa (Genwendagik Meshtoongewin);
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> > *Whereas, we, the Peoples of Deshkan Ziibiing Anishinaabe Aki belong to the Three Fires Confederacy, Ojibway (Keepers of the Faith), Pottawatomie (Keepers of the Fire), and Odawa (Keepers of the Trade);*

[19] *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* (Deshkan-Ziibiing-Chi-Inaakonigewin-FINAL-7.24.18-WO-Crop-Marks.pdf (cottfn.com))

Niinwe Deshkan Ziibiing Anishinaabe Aki Anishinaabek, pane nbi-dabendaagozimi M'shiikeh M'nising, niiwe maanda ndo akiimnaa, ndo nbiishminaa, ndo zhi-bmaadziwninaa. Niinwe dash gwa ndinendaagozimi wii ginowenmangid maaba shkakamik kwe gwanda nji niigaan waa ni-bmaadazijik;

> *Whereas, we, the Peoples of Deshkan Ziibiing Anishinaabe Aki have inherent rights to our land, our water, our culture, our language, our traditions and the responsibility to preserve our inherent rights for future generations;*

Niinwe Deshkan Ziibiing Anishinaabe Aki Anishinaabek ndo noojagitoonaa iyaawayaang ezhi nakaaziyaang aki, nbiish miinwaa gwa kina ezhi-bmaadaziiyaang, enweyaang miinwaa enaagadadowaang;

> Whereas, we, the Peoples of Deshkan Ziibiing Anishinaabe Aki grow our identity through *nurturing our relationship with land, water and through the respect we hold for our culture, language, and traditions;*

Niinwe Deshkan Ziibiing Anishinaabe Aki Anishinaabek kaawiin wiikaa ngii bagidnaziinaa'aa do akiimwaa miinwaa waazhi maakonidzowang maage gwa waazhi makonidiyaang nwiiji Anishinaabenaanik…

> *Whereas, we, the Peoples of Deshkan Ziibiing Anishinaabe Aki have never surrendered our sovereignty or our inherent right to govern ourselves or the authority to enter into agreements with other Nations…*