Comments on the Draft *"Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application."*

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Submitted to: **Ministry of the Environment**

Submitted by: **The Ontario Bar Association**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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The Ontario Bar Association ("OBA") appreciates the opportunity to comment on the Draft *Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application* (the "Guidelines").

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 17,500 lawyers, judges, law professors and law students in Ontario. OBA members practice law in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and other policy makers with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

Our Aboriginal Law, Environmental Law and Natural Resources & Energy Sections have 900 members who represent every stakeholder in the renewable energy approval process – from Aboriginal groups to project proponents, to environmental organizations. This submission was formulated jointly by representative of these three sections.

Introduction

The OBA firmly supports the government's goals in developing these Guidelines - to ensure respect for Aboriginal and treaty rights and provide project proponents with assistance in building compliance into their projects at an early stage. The fulfillment of these goals is crucial for Aboriginal groups, project proponents and their investors, as well as for Ontarians who rely on new environmentally responsible generation coming on-line in a timely manner.

In order to ensure that the Guidelines achieve their important goals, there are three issues with the current draft that need to be addressed:

1. The extent of the delegation of the Crown's duty to consult and, where appropriate, accommodate;
2. A lack of any reference to this issue of Aboriginal consent; and
3. A lack of dispute resolution arrangements.

1. Crown Duties to Consult and Accommodate

Inappropriate Level of Delegation

There is no doubt that Aboriginal consultation and accommodation[1] are duties that inexorably belong to the Crown. In the leading case of *Haida Nation v. British Columbia (Minister of Forests)(2004)*[2], the Supreme Court of Canada held that the Crown may delegate only procedural aspects of its duty to consult.

Nominally, the Guidelines contain a recognition of the state of the law. The Guidelines expressly provide:

> This legal duty to consult rests with the Crown, and the Crown is ultimately responsible for ensuring that the duty has been met. However, through the REA process the Crown has delegated procedural aspects of consultation to applicants. (Guidelines, at p.5)

Despite the perfunctory, explicit recognition of these principles, the Guidelines, in fact, delegate all or almost all of the consultation responsibilities to proponents and, in doing so, go far beyond the Supreme Court of Canada's guidance on permissible delegation.

The over-delegation included in the Guidelines is evidenced by, *inter alia*, the following examples:

(a) The role of the Ministry of the Environment (the "Ministry") is expressly restricted to an "oversight function" (Guidelines, at p. 7);

(b) There is a potential for wholesale delegation to proponents of the responsibility for ongoing consultations for the entire life of the project. The Guidelines provide: "terms and conditions could also include a requirement that an applicant establish an appropriate vehicle to continue consultation throughout the lifecycle of the project." (Draft Guide, p. 18); and

(c) The section of the Guidelines, outlining the Ministry's "Decision" stage, implies an inappropriately passive role for the government at the consultation stage and in mitigation and accommodation efforts. Section 4.4 of the Guidelines seems to imply that the

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[1] Failure to deal with the duty to accommodate: While the Guide outlines the duty to consult, it does not adequately deal with the duty to accommodate. Where this duty applies, it could clearly have a fundamental impact on projects. Proponents should, therefore, received some guidance as to when the duty may arise and the constitutional imperative to discharge the duty. It is noted that the Guidelines deal with mitigation efforts in terms of how they will bear on the government's assessment of the sufficiency of consultation. However, the more extensive and constitutionally-mandated duty to accommodate is distinct and should be dealt with separately in the Guidelines. The comments with respect to delegation of the duty to consult apply equally to the duty to accommodate.

[2] [2004] 3 SCR 511

government is entering the process for the first time only after the consultation process and mitigation have been completed ***by the proponent*** alone. The Section provides:

> When assessing the adequacy of Aboriginal consultation the REA Director may ***ask the following questions***:
>
> - Has the mandatory consultation taken place, including the requirements outlined in Section 2 of the guide?
>
> …..
>
> - Did the applicant take any measures to mitigate any potential negative environmental effects of the project as well as any potential adverse impacts on the exercise of Aboriginal or treaty rights in question[3]?
>
> …..

The government is obliged to take an active role in consultation and accommodation. It is not sufficient to simply "ask questions" at the end of the process. Proponents should not be put in the position of having to answer, on their own, the incredibly complex constitutional and historical questions surrounding the appropriate level of consultation and accommodation. Neither proponents nor Aboriginal communities should face the uncertainty of waiting until the end of the process for government's determination of the adequacy of consultations. By then, both will have invested significant time, effort and resources in the process. Government must be involved from inception to assess the depth of consultation required and assist in determining the appropriate consultation plan.

The government may, of course, refuse the REA application of a project where any necessary accommodations are not feasible or where the proponent is not willing to make the necessary changes. However, it is crucial to remember that, where it applies, the duty to accommodate continues to rest with the Crown. The government, not the proponent, is ultimately responsible for determining the appropriate level of consultation and accommodation and for ensuring that it has been completed. Some proponents may undertake voluntary mitigation measures and may also, with the proper direction from government, build into their project costs both the *necessary* mitigation of issues raised in consultations and any constitutionally-required accommodation. References to "mitigation" and accommodation in the Guidelines should account for all of these possibilities. However, as outlined below (in section (c)), the Guidelines should also recognize that there are going to be circumstance in which attracting the right Green-Energy proponents will necessitate the crown shouldering the cost of consultation (including mitigation steps arising therefrom) and accommodation efforts, at least upfront.

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[3] See footnote 1 at page 3 above. The failure to deal with accommodation and to distinguish it from mitigation is particularly apparent and critical in the Ministry's analysis proposed in section 4.4.

The Detrimental Effects of the Over-Delegation

The inappropriate level of delegation has a detrimental or fatal impact on the ability to achieve the goals of the Guidelines in the following ways:

(a) Vulnerability to Constitutional Challenge

The Ministry's approach is vulnerable to constitutional challenge as not being in compliance with the guidance of the Supreme Court of Canada, which held in *Haida*:

> Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown.

A constitutional challenge would, at a minimum, make necessary future cooperation between the parties less likely, delay required generation capacity for Ontarians, cause investor uncertainty and have other negative financial impacts on proponents.

(b) Inefficiencies

By essentially removing the Crown from active participation in the consultation process, the Guidelines also articulate an inefficient and questionable assignment of roles and responsibilities.

A proponent is arguably best placed to know the engineering, physical site location and environmental impacts of a proposed renewable energy project. It is, therefore, appropriate for proponents to engage with First Nation or Métis communities on those issues. However, determining the scope of treaty or aboriginal rights for a specific community is a key part of the analysis required to meet the consultation and accommodation tests laid out by the Supreme Court of Canada in the three leading cases on consultation and accommodation (*Haida*, *Taku*, and *Mikisew Cree)*. The government, not the proponent, is, or should be, the responsible and knowledgeable party in relation to treaty and Aboriginal rights, which often depend on historical and legal research. The Crown is in the best position to acquire and provide this information and, accordingly, to ensure consultations and accommodations conform to the applicable legal requirements of a given circumstance. This requires their active involvement not simply an over-sight function.

Similarly, the Guidelines refer to consultation based on two distinct criteria: (i) potentially affected Aboriginal or treaty rights; and (ii) environmental impacts in which affected Aboriginal groups would be interested. These distinct bases for consultation are another factor to consider in determining the appropriate level of consultation. If the government is not involved in guiding the proponent regarding which consultation category it falls into, the proponent may spend significant resources on a more extensive consultation process than is required. Aboriginal communities should also know, from the outset, which category the Crown has identified for the purposes of consultation requirements.

A consideration of cumulative effects is another area in which the Crown's extrication from the process raises the possibility of an inefficient and inappropriate outcome. While an experienced proponent may have a good sense of the appropriate level of consultation and accommodation for its project, even this

sophisticated proponent will not have all of the information necessary to determine the cumulative effects of its project viewed together with prior or other pending projects. The government is in the best position to make these determinations. Without initial government involvement in the design of a consultation plan, cumulative effects may be overlooked by a proponent and an otherwise adequate consultation process may be challenged as inadequate or may be rejected at the end of the process, putting the parties in the expensive and demoralizing position of having to begin again.

(c) Project Funding

The assignment of roles and responsibilities also has funding implications where Aboriginal parties require financial support. The *Green Energy Act* (the "Act") seeks to attract proponents that are not necessarily large enterprises. They are unlikely going to be able to shoulder significant consultation, mitigation, compensation and, where applicable, accommodation costs, particularly upfront. In order to fulfill the very purposes of the Act, therefore, the Government's involvement in consultation and, where applicable, accommodation is going to be necessary.

(d) Failure to Foster Relationships between the Crown and Aboriginal Groups

The OBA supports the government's goal in trying to foster a solid, cooperative relationship between proponents and affected Aboriginal groups. However, it is equally crucial for the Crown to be involved in these relationships. To the extent that the duty to consult is part of a the process of reconciliation between the Crown and Aboriginal Peoples, the goals of consultation will not be fulfilled by the limited Crown involvement outlined in the Guidelines as they are now drafted. A sector as crucial as green energy should provide an opportunity for the government to build relationships rather than to extricate itself.

Recommendation

The Ontario Bar Association recommends that the Guidelines better reflect the need for active government involvement in consultation and accommodation – it is both a constitutional and practical imperative.

2. Aboriginal Consent

There is disagreement among governments about the existence and extent of a requirement that affected aboriginal groups consent to a project. The Supreme Court of Canada has yet to give specific guidance on the subject, notably in relation to treaty areas.

Without taking a specific position on the issue of if and when consent is required, the OBA suggests that, in order to give proponents an appropriate, full picture of the way in which their projects may be affected by Aboriginal claims, it is necessary for the Guidelines to include some explanation of "consent".

The 2006 Ontario Ministry of Aboriginal Affairs Draft *Guidelines for Ministries on Consultation with*

Aboriginal Peoples Related to Aboriginal and Treaty Rights states at p. 8:

> Accommodation involves a process of balancing of interests. Responsiveness is a key requirement. Accommodation, where required, may involve a ministry taking steps to avoid irreparable harm or to minimize the adverse effects of a proposed government action or decision on Aboriginal or treaty rights.
>
> The process does not generally provide the affected Aboriginal community with a veto over a proposed decision or action. But in some limited circumstances — for example, involving serious infringements of Aboriginal title — an Aboriginal community's consent may be required.

These comments also highlight the need for the government to be involved in the consultation process. It will be the government's clear responsibility to help identify and disclose when a consent requirement exists. If the government attempts to step in at the "Decision" stage, all parties could be adversely impacted - a proponent may have expended significant resources only to discover that consent is required and not forthcoming and time will have been wasted with negotiations that have taken place without the appropriate information. The government cannot leave to the proponents the burden of trying to determine if and when a consent requirement may exist – the Guidelines should highlight the topic and the government should be sufficiently involved in each case to flag any existing or potential consent issue as early in the consultation process as possible.

3. Dispute Resolution

Without question, consultation and negotiation are the preferred method to reconcile government, Aboriginal and proponent interests. However, recent cases illustrate that governments, Aboriginal parties or proponents may advance inappropriate positions that are not supported by the law and do not adequately recognize the public interest or the interests of the other parties. Issues such as the extent of required accommodation have given rise to seemingly intractable positions that halted negotiations but were later found to be inappropriate[4]. In such a case, a project may be unnecessarily derailed. The delay

[4] The decisions of the Supreme Court of Canada in *Haida* and *Mikisew Cree* illustrate inadequate consultation and accommodation on the part of a provincial and the federal Crown, respectively. The 2010 decisions of a federal environmental assessment panel and the Minister of the Environment on the Taseko Prosperity Mine tailings pond proposal in British Columbia illustrates a deficient approach by a proponent.

In *Louis v. British Columbia (Energy, Mines and Petroleum Resources), 2011 BCSC 1070 (CanLII)* and in *West Moberly First Nations v. British Columbia* (Chief Inspector of Mines), 2011 BCCA 247 (CanLII), First Nations insisted on accommodations for impacts of past projects. The courts in both cases held the First Nation

inherent in waiting for a court decision to determine the rights of the parties may slow a project to the point where it is no longer desirable or feasible for the proponents or may effectively negate the rights of Aboriginals if the project continues pending the court decision.

In the view of the OBA, the Guidelines need to include guidance on how the Ministry will approach and provide dispute resolution assistance should the need arise in an REA application process.

Other Issues

While the Guidelines provide helpful information to applicants, the step-by-step process outlined on page eight may generate confusion and fails to provide all the necessary information. Practitioners working in the field and their clients have found that a flow chart illustration of the process is of more assistance. An example can be taken from the "Consultation Requirement for Renewable Energy" flowchart provided by the Ministry at:

http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/documents/nativedocs/stdprod_085128.pdf

It would be helpful to have the proponent's obligations under these Guidelines inserted into a similar chart.

Conclusion

The Ontario Bar Association congratulates the government on this enormous and complex undertaking and we appreciate the opportunity to comment on the Guidelines in draft form. We would be pleased to meet with you to discuss these issues, to advance further suggestions or to comment on revised Guidelines.

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position contradicted the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 (CanLII), 2010 SCC 43, [2010] 2 S.C.R. 650.