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Aboriginal Consultation Policy

The Ontario Energy Board (the "Board") recognizes that, as an agent of the Crown, it has a duty to ensure that proper consultation with Aboriginal peoples is conducted where a project that is subject to Board approval may have an adverse effect on an existing or asserted Aboriginal or treaty right. The purpose of this Policy is to establish guidelines to be followed by both applicants and the Board to give effect to this duty.

Background

Although the duty to consult has long been a legal requirement in Canada, recent cases before the Supreme Court have helped to clarify the precise extent of this duty. The duty to consult is owed by the Crown to Aboriginal peoples.

The Board is informed in particular by three recent Supreme Court of Canada decisions: *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 ("Haida"), *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 ("Taku"), and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] SCC 69 ("Mikisew"). These cases confirmed that the Crown has a duty to consult with Aboriginal peoples both where there are existing treaty rights and where a land claim has only been asserted, and not proven. Those decisions also explain that the exact extent of this duty will vary based on the facts of each situation. The Court stated that the duty to consult and accommodate arises where the Crown has knowledge of the potential existence of an Aboriginal or treaty right, whether or not that right has been legally established, and where the Crown contemplates conduct that may adversely affect it. The scope of this duty will be proportionate to a preliminary assessment of the strength of the asserted Aboriginal or treaty right, and the seriousness of the potential impact on it. The duty to consult, however, does not mean that the project in question requires the consent of the affected Aboriginal community. The duty to consult and accommodate does not amount to a veto. The case law in this area continues to evolve, and the Board will consider the duty to consult and accommodate in light of the most recent case law.

Policy

In order to make a determination as to whether proper consultation has taken place, the Board will require all applicants in leave to construct applications under ss. 90, 91 or 92 of the *Ontario Energy Board Act, 1998* (the "Act") to complete certain filing requirements. These filing requirements will be incorporated into the Board's existing *Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario* and *Filing Requirements for Transmission and Distribution Applications, and Leave to Construct Projects* (for electricity transmission and distribution projects). In both cases, the filing requirements themselves are identical, and they are attached to this Policy as Appendix A. The Board has drawn upon the experience of the National Energy Board and its policy in this area in drafting these filing requirements. Although the ultimate responsibility to ensure that consultation and, where necessary, accommodation are conducted properly lies with the Board, the Board will require the proponent to demonstrate that it has conducted appropriate consultation and accommodation. The Board may also choose to require that these filing requirements be completed for any other application before the Board where there is the potential existence of an Aboriginal or treaty right and where an applicant or project could result in an adverse impact on that Aboriginal or treaty right.

In each case, the Board will make a determination regarding the adequacy of the consultation undertaken and any proposed accommodation for Aboriginal concerns as part of its review of the application. If the Board determines that the consultations undertaken by the applicant were not sufficient, it may require further consultation and/or accommodation. It is not practical in a Policy of this nature to set out exactly what additional consultations or accommodations may be required; that will have to be determined on a case by case basis. The Board will, however, be guided by the emerging jurisprudence in this area and will continue to update its guidelines and practices as the law evolves in this area.