EB-2007-0050

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an Application by Hydro One Networks Inc. filed an amended application pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a 180 kilometres of double-circuit 500 Kilovolt electricity transmission line adjacent to the existing transmission corridor extending from the Bruce Power Facility in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton (the "Leave to Construct Application").

ARGUMENT OF INTERVENOR MÉTIS NATION OF ONTARIO

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I Overview of Argument

1) Pursuant to s. 92 of the *Ontario Energy Board Act, 1998*, Hydro One Networks Inc. ("HONI") has applied to the Ontario Energy Board ("OEB") for leave to construct a 500 kV electricity transmission line, spanning from Kincardine to Milton (the "Project").

2) The Métis Nation of Ontario ("MNO") takes no position as to whether HONI has met its case in relation to its application for leave to construct the Project, pursuant to ss. 92 and 96 of the *Ontario Energy Board Act, 1998*. The MNO intervenes in this proceeding solely on the issue of whether adequate consultation and accommodation has occurred with the potentially affected rights-bearing Métis community, whose members live in, harvest throughout, and, extensively rely their traditional territory, which the Project passes through.

3) Based on the legal framework set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*[1], *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[2] and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*[3] the OEB, as a statutory Crown decision-maker, has a responsibility to assess whether the Crown's duty to consult and accommodate, which is owed to all Aboriginal peoples who have the potential to be affected by the Project, has been satisified, prior to granting the relief sought by HONI

4) This Crown's duty to consult and accommodate is a super-added duty that constitutional in character and force. It does not find its source in and is not constrained by the OEB's authorizing statutes. The duty flows from the honour of the Crown and s. 35 of the *Constitution Act, 1982*. In this proceeding, the duty does not require the OEB to directly consult with potentially affected Aboriginal peoples, but it demands that the OEB, as a Crown decision-maker, exercise its statutory authority in a manner that acknowledges, respects and promotes the duty. This is achieved by the OEB satisfying itself that this duty has been fulfilled in relation to the Project, based on the evidentiary record before the Board.

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[1] [2004] 3 S.C.R. 511 [hereinafter "*Haida*"]
[2] [2004] 3 S.C.R. 550 [hereinafter "*Taku*"]
[3] [2005] S.C.R. 388 [hereinafter "*Mikisew'*]."

5) In June 2007, in recognition of the significance of this new constitutional duty, the OEB released a proposed Aboriginal Consultation Policy[4] (the "ACP") in order to ensure proponents, making applications under ss. 90, 91 and 92 of the *Ontario Energy Board Act, 1998* (the "*Act*"), provide the Board with adequate information in order for it to assess whether adequate consultation and accommodation with potentially affected Aboriginal groups has occurred. Since June 2007, the OEB has applied the ACP in two leave to construct decisions.[5] In addition, in this application, a specific issue on Aboriginal consultation (Issue #6) was added to the Issues List.[6]

6) All parties within the proceeding were aware of, relied on, and, put forward evidence in order to address the requirements set out in the ACP as well as Issue #6. Specifically, the MNO participated in this proceeding based on its expectation that the OEB, as a statutory Crown decision-maker, would be following its own policy in considering whether the Crown's duty to consult and accommodate has been satisfied in relation to the Project.

7) Based on the framework set out in *Haida*, *Taku* and *Mikisew*, the Board's ACP, and, the proceeding's record, the OEB must satisfy itself that the Crown's duty has been fulfilled *prior to* granting a discretionary statutory authorization (i.e. leave to construct order) that has the potential to impact Aboriginal rights. Further, the OEB cannot delegate, defer or hand over its responsibility to assess whether the Crown's duty has been satisfied based on the mere suggestion that another Crown actor will address the duty in the future. As emphasized by the Supreme Court in the *Haida* decision, consultation must be "with the intention of substantially addressing the concerns of the aboriginal peoples whose land are at issue."[7] This point was also recently noted by the OEB itself in its decision on the Issues List for the Integrated Power System Plan.[8] As such, the OEB, as a statutory Crown decision-maker, potentially exercising a discretion that may affect Aboriginal rights, must assess whether the consultation and accommodation that has taken place to date has actually "substantially addressed" the concerns of the Aboriginal peoples appearing before the Board.

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[4] EB-2007-0617
[5] OEB Decisions EB-2007-0034 and EB-2007-0027.
[6] EB-2007-0050, Decision and Order, September 26, 2007, p. 11.
[7] *Mikisew, supra, par. 47.*
[8] EB-2007-0707, Decision with Reasons, March 26, 2008, at p.50.

8) While the proceeding's record demonstrates that the MNO and HONI are constructively working together in order to ensure adequate consultation and accommodation takes place, the uncontroverted evidence shows that consultation and accommodation on the Project with the potentially affected Métis community has not yet been completed. Further, the evidence shows that consultations between the MNO and the government in relation to the strategic planning and regional implications of the Project have not yet been engaged, but preliminary discussions have been initiated.

9) The MNO submits that based on the record currently before the OEB, the Board must conclude that the Crown's duty to consult and accommodate with respect to the Project has not yet been yet been satisfied. Therefore, at this time, the authorization sought by HONI from the OEB should be denied.

10) The MNO notes that is HONI is successful with respect to making out its case vis-a-vis ss. 92 and 96 of the Act, denying its requested relief at this time, does not mean HONI cannot reapply to the OEB in the future once adequate consultation and accommodation has been completed through the collaborative processes that have been established between HONI and MNO, combined with the results from the upcoming environmental assessment and bilateral discussions between the MNO, the Ministry of Energy and other relevant Crown agencies with respect to strategic planning as well as regional and cumulative impacts resulting from the Project.

II The Duty to Consult and Accommodate

The Context for the Duty

11) The modern law of Aboriginal rights finds its roots in the fundamental principle of fairness and in the common law. Long before Canada existed, Aboriginal peoples were on the land, in possession, as organized societies. The common law and the doctrine of Aboriginal rights provide the means to protect Aboriginal peoples' distinct culture and relationship to the land.

12) In her dissent in *Van der Peet* (on other issues), McLachlin J. (as she then was) recognized the importance of ongoing access by Aboriginal peoples to their territorial lands and resources in order to sustain their existence as the foundation for Aboriginal rights. This reliance demanded a process of honourable reconciliation, by way of accommodation and treaty making, between the Crown and Aboriginal peoples.

> The fundamental understanding – the *grundnorm* of settlement in Canada – was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them…
>
> …This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental Aboriginal right. It is supported by the common law and by the history of this country.[9]

13) More recently, in the *Mikisew* decision, Binnie J, for the majority of the Supreme Court of Canada, described the goal of Aboriginal and Treaty rights as follows:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.[10]

14) Prior to 1982, reconciliation was difficult. The playing field was extremely uneven between the Crown and Aboriginal peoples. Governments as well as the courts provided little regard or protection to Aboriginal peoples and their rights.

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[9] *R. v. Vander Peet,* [1996] 1 S.C.R. 207 at paras. 272 and 275.
[10] *Mikisew, supra,* par. 1.

15) The inclusion s. 35 in the *Constitution Act, 1982* was intended to reverse the prevailing pattern by which governments and the law virtually ignored Aboriginal rights. The significance of this achievement of s. 35 was set out by the Supreme Court of Canada in *R. v. Sparrow*:

> It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. [emphasis added][11]

16) The decision to include s. 35 in the Constitution was a solemn commitment that things would change. It provided constitutional recognition and affirmation of Aboriginal and Treaty rights. By elevating Aboriginal and Treaty rights to constitutional status, all levels of government were now under a new constitutional imperative to respect Aboriginal rights as well as ensure that their existing and future laws did not unjustifiably infringe these rights.

17) In *Sparrow* and *Van der Peet*, the Supreme Court set out that the basic purpose of s. 35 is to reconcile the pre-existence of distinct Aboriginal societies with the sovereignty of the Crown. Section 35 rights are to be understood as the means by which the Constitution recognizes the prior use and occupation of the land by Aboriginal people, and by which that prior occupation is reconciled with the assertion of Crown sovereignty. In *Van der Peet*, in addressing the Aboriginal rights of Sto:lo Indians, Lamer C.J.C. held that,

> The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.[12]

18) In order to achieve this basic purpose, the Supreme Court has confirmed that s. 35 operates in two ways:

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[11] *R v. Sparrow,* [1990] 1 S.C.R. 1075 at par. 53.
[12] *Van der Peet, supra*, at pp. 554-555 (para 60)

a. First, it provides constitutional recognition, affirmation and protection to Aboriginal peoples' distinct cultures and relationship to the land. This recognition and protection, through Aboriginal rights, are the means to secure the ongoing survival of Aboriginal culture and relationship with the land.

b. Second, it provides a solid constitutional base for negotiations. Negotiated settlements, accommodations, agreements or treaties are the mechanisms for achieving the basic purpose of s. 35, namely, the reconciliation of the prior existence of Aboriginal societies with the sovereignty of Canada.

19) Based on the tests for establishing a s. 35 right set out in *Sparrow* and elaborated on in *Vander Peet* much of the jurisprudence over the last two decades focussed on Aboriginal groups *first* having to establish an Aboriginal or treaty right and *then* whether a government could justify an infringement. Increasingly, over the last decade, the approach that Aboriginal groups *only* had protection against Crown actions and legislation *after* they had gone to court and established they had a right proved unworkable. It frustrated s. 35's central goal of reconciliation.

A New Constitutional Duty

20) In 2004, in response to the dilemma identified above, the Supreme Court of Canada dealt with the issue of whether the Crown had any duty to recognize and protect Aboriginal and treaty rights *prior to* those rights being recognized by government or proven in a court of law in the *Haida* and *Taku* decisions.

21) The Supreme Court concluded that the very purpose of s. 35 and its objective or reconciliation would be undermined if every Aboriginal community had to first have to go to court to establish a right *before* the Crown had any duty or obligation to consult or accommodate asserted Aboriginal rights and claims. In response to government concerns about providing a remedy before the finding of a right or infringement, McLachlin C.J.C wrote the following:

> [30] The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

> [31] The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.
>
> [32] To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: Sparrow, supra, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.[13]

22) The Supreme Court set out a new, legally enforceable constitutional duty – the Crown's duty to consult and accommodate – to address the challenges created when s. 35 is solely looked at through a proof and infringement lens. The duty has a constitutional base and is grounded in the honour of the Crown and s. 35. As such, governments cannot ignore, define or alter it by legislation.

23) It is a super-added duty that runs parallel to existing statutory and policy mandates in the legal regimes that govern the allocation, development, alienation and management of lands and natural resources. It is also a legally enforceable duty owed to Aboriginal peoples by all persons and bodies authorized to exercise Crown powers. This duty is meant to protect and accommodate asserted Aboriginal rights or interests – by modifying or reconciling Crown actions with those Aboriginal interests.

24) In outlining the source of the duty, the Supreme Court elaborated on how the honour of the Crown guides and infuses into all aspects of the ongoing reconciliation process between the Crown and Aboriginal peoples. The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices."[14] As such, throughout the ongoing reconciliation process, this honour creates enforceable Crown duties and obligations that Aboriginal peoples can rely upon and that the courts have enforced.[15]

25) The Supreme Court reaffirmed that s. 35 was about "rights recognition"[16] and provides a "constitutional basis"[17] on which negotiations, accommodations and settlements can be

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[13] *Haida, supra*, at paras. 30-33.
[14] *Haida, supra,* par. 16.
[15] *Haida, supra,* at para. 22. For enforceable duties re: treaty interpretation see *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.); For enforceable duties re: fiduciary duties see *Guerin v. Canada*, [1984] 2 S.C.R. 335 and *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245.
[16] *Haida, supra,* par. 20.

reached. When combined with the honour of the Crown, s. 35 requires Aboriginal and treaty rights be "determined, recognized and respected."[18] Thus creating a constitutional imperative which requires governments to consult Aboriginal peoples and accommodate their interests whenever a Crown actor considers conduct that might adversely affect Aboriginal rights intended for protection by the Constitution.

> [26] Honourable negotiations implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claims? Or must it adjust its conduct to reflect the as yet unresolved claims by the Aboriginal claimants?
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> [27] The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[19]

The Duty's Application in Practice

26) In outlining how the duty is meant to operate in practice, the Supreme Court set out a framework which includes three stages. The first stage requires a determination of whether the duty has been triggered. The second stage requires a determination of the appropriate scope and content of the duty. The third stage assesses whether the duty has been satisfied.

27) The constitutional duty is triggered **(stage one)** when the Crown has real or constructive knowledge of the potential existence of Aboriginal rights or title that may be at risk from a course of action being contemplated by a Crown actor.

> [35] ... when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation, suggest that the duty arises when the Crown has

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[17] *Sparrow, supra,* par. 53.
[18] *Haida, supra*, par. 25.
[19] *Haida, supra*, paras. 24-27,

> knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. … [20]

28) Assigning the appropriate scope and content of the duty **(stage two)** varies with the circumstances, but "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and the seriousness of the potentially adverse effect upon the right of title claimed."[21] In *Haida*, in order to provide guidance on how the scope of the duty can be determined, McLachlin C.J.C wrote:

> [41] … While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. …
>
> [42] At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation.
>
> [43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. …
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> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. …[22]

29) Finally, if the duty has been triggered, the facts of the particular situation are then applied to the assessed content and scope of duty **(stage three)**. The Supreme Court notes that good faith required from all parties, that there is not an obligation to agree, and, the parties must not frustrate the Crown's efforts to consult.

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[20] *Haida, supra* at par. 35
[21] *Haida, supra,* par. 40.
[22] *Haida, supra,* paras. 41-45.

30) Most importantly, the Supreme Court stresses that throughout all stages "the common thread on the Crown's part must be the "intention of substantially addressing [Aboriginal] concerns" as they are raised, through a meaningful process of consultation."[23]

31) It is submitted that the above noted three stages are the appropriate framework upon which to assess whether the duty has been triggered, the content and scope of the duty and whether the duty has been fulfilled.

[23] *Haida, supra,* par. 42.

III The Duty and the Board

The Board's Jurisdiction

32) In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court affirmed that Crown statutory decision-makers, such as administrative tribunals and boards, have the jurisdiction to consider Aboriginal rights related issues in the course of their decision-making.

> [39] I am of the view that the approach set out in *Martin*, in the context of determining a tribunal's power to apply the *Charter*, is also the approach to be taken in determining a tribunal's power to apply s. 35 of the *Constitution Act, 1982*. The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.[24] [emphasis added]

33) Section 19(1) of the *Act* confirms the OEB has the jurisdiction "to hear and determine all questions of fact and of law." Therefore, as set out by the Supreme Court of Canada in the *Paul* case, the OEB has jurisdiction to consider "questions of constitutional law" and "s. 35 or any other related constitutional provision" in its hearing and decision-maker processes.[25]

34) It is submitted that the OEB has the jurisdiction to consider the Crown's constitutional duty to consult and accommodate based on the framework set out by the Supreme Court of Canada in *Haida*, *Taku* and *Mikisew*.

The Nature and Obligations of the Duty

35) In order for the OEB to properly execute its role as a statutory Crown decision-maker in this proceeding, there are two interrelated points that are essential to understand in relation to the nature and obligations flowing from the duty: (1) the duty is not a s. 35 right and should not be looked at through a proof or infringement lens, and (2) the duty is constitutional in character and in force and cannot be ignored, narrowed or deferred.

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[24] *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, par. 39. [hereinafter "*Paul*"]
[25] *Paul, supra,* par. 40.

The Duty in Not A Section 35 Right

36) The Crown's duty to consult and accommodate is a *constitutional duty* that flows from the honour of the Crown and s. 35. It is *not* a s. 35 right. This is an important distinction because unlike the test for establishing a s. 35 right (as set out in *Sparrow*), which focuses on whether the Aboriginal claimant has established an identifiable right and whether there has been an infringement of that right, the duty to consult and accommodate focuses on whether the Crown has substantially addressed the issues and concerns of the potentially affected Aboriginal peoples based on whether the duty being triggered and by assigning the appropriate content and scope to the duty.

37) The importance of recognizing that the duty is not a s. 35 right can be seen in the challenges created from the Board Staff's proposed approach to the duty. Essentially, the Board Staff argues that the only way the OEB would ever find the Crown's duty to consult was not satisfied is if an Aboriginal group were able to demonstrate an Aboriginal right[26] infringement directly related to price, reliability or quality of service. This type of approach to the duty is not consistent with the framework set out in *Haida*.[27] It is also inconsistent with lower court decisions from across the country that have reviewed whether the duty has been satisfied based on the *Haida* framework.[28]

38) If the Board Staff's proposed approach was adopted by the OEB, it would essentially negate the very purpose of the duty and equates to a pre-*Haida* analysis focussed on proof and infringement, rather than following the framework set out by the Supreme Court of Canada in *Haida*, *Taku* and *Mikisew* for the duty (i.e. determine whether duty has been triggered and assigning appropriate scope and content to the duty). Instead of the OEB, as a Crown decision-maker, ensuring meaningful consultation has taken place, the Board would be solely looking at the proceeding through an infringement lens (i.e. proving an actual impact on a

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[26] At p. 21 of their submission the Board Staff argue that they are "by no means suggesting an Aboriginal group intervenors must demonstrate an Aboriginal or treaty right to make submission on the issues of price, reliability or quality of service. However, the Board should only specifically consider consultation issues as described in *Haida*, *Taku* and *Mikisew* if an Aboriginal or treaty right relating to price, reliability or quality of service is demonstrated." [emphasis added]

[27] See Intervenor's Argument at paras. 26-31.

[28] See *Musquem Indian Band v. British Columbia*, [2005] 37 B.C.L.R. (4th) 309 (B.C.C.A.); *Dene Tha' First Nation v. Canada*, [2006] F.C.J. 1677 (F.C.T.D.), affrm'd [2008] F.C.J. No. 444 (F.C.A.); *Ka'a'Gee To First Nation v. Canada*, [2007] F.C.J. No. 1006 (F.C.T.D.).

right related to price, reliability or quality of service), rather than focusing on the duty's "intention to substantial addressing Aboriginal concerns as they are raised through a meaningful process of consultation."[29]

The Duty Is Constitutional in Character and In Force

39) In *Haida*, the Supreme Court held that the Crown's duty to consult and accommodate flows from the honour of the Crown and s. 35, which are both constitutional in nature and scope.

40) Since the release of the *Haida* case, lower courts have also reiterated the constitutional nature of the duty. In discussing the standard of review for the Crown's consultation in *Dene The' First Nation v. Canada,* Phelan J., of the Federal Court Trial Division, stated, "[t]he law of aboriginal consultation thus far has no statutory source other than a constitutional one."[30]

41) More recently, in a decision from the British Columbia Court of Appeal (decided on a different jurisdiction issue), Finch C.J.B.C confirmed the constitutional nature of the duty and that it was not limited by statute.

> [47] The learned chambers judge held that the duty to consult was a "constitutional issue". Counsel for the Attorney General vigorously contested the constitutional nature of the duty to consult. He conceded that the duty is a "legal duty" which has as its source "the honour of the Crown" but argued that ".... it is not a constitutional right or obligation."
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> [48] I do not accept that as a sound proposition. The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. <u>That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed.</u>[31] <u>[emphasis added]</u>

42) Based on s. 52 of the *Constitution Act, 1982*, a constitutional right, duty or obligation cannot be constrained, limited or minimized by provincial or federal statute or regulation, unless the government has established a legitimate justification for the limitation (i.e. the *Sparrow* test for a s. 35 right infringement, the *Oakes* test for a *Charter* right infringement). In the *Paul* case, the Supreme Court explicitly discussed the applicability of these constitutional supremacy principles in the context of administrative boards and tribunals.

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[29] *Haida, supra,* par. 42.
[30] *Dene Tha' First Nation, supra,* par. 91.
[31] *Tzeachten First Nation v. Canada,* 2007 BCCA 133, paras. 47-48.

> [24] The facts and arguments in this appeal and those in *Martin, supra*, have presented this Court with an opportunity to review its jurisprudence on the power of administrative tribunals to determine questions of constitutional law. As Gonthier J. notes in *Martin*, at para. 34, the principle of constitutional supremacy in s. 52 of the *Constitution Act, 1982* leads to a presumption that all legal decisions will take into account the supreme law of the land. "In other words", as he writes , "the power to decide a question of law is the power to decide by applying only valid laws" (para. 36). One could modify that statement for the present appeal by saying that the power of an administrative board to apply valid laws is the power to apply valid laws only to those factual situations to which they are constitutionally applicable, or to the extent that they do not run afoul of s. 35 rights. [emphasis added][32]

43) Based on the nature of the duty outlined above, it is submitted that the OEB, as a Crown statutory decision-maker, must satisfy itself that the constitutional duty at issue has been fulfilled *prior to* granting an authorization which has the potential to make breach the duty. More simply put, the OEB must exercise its powers and authorities in a manner that is consistent with and upholds the Constitution.

44) Contrary to the submissions of HONI and the Board Staff, the OEB cannot narrow, compartmentalize or constrain a constitutional duty in order to avoid having to assess whether an overarching obligations has been satisfied (i.e. an assessment of the duty solely based on ss. 92 and 96 of the *Act*). If such an approach was to be used, the Crown could inevitably delay dealing with the duty by offering the hope that the next Crown decision-maker down the line would ensure the duty was fulfilled, with the Aboriginal group having no certainty or comfort that their outstanding issues and interests would ultimately be addressed by the time they get to the last Crown decision-maker. Such an approach is not consistent with the intent and purpose of the duty. The Crown and its representatives should embrace the duty, not attempt to avoid or delay dealing with it. By refusing to grant the relief sought by HONI until the OEB had evidence before it that adequate consultation and accommodations were achieved, the duty would be embraced and promoted, rather than deferred to the next Crown decision-maker, with the Aboriginal people hoping the next wicket would be willing to substantially address the concerns they have put forward.

45) It is submitted that the OEB, as a statutory Crown decision-maker, whose discretionary authorization (i.e. a leave to contract order) has the potential to adversely affect Aboriginal peoples is accountable and responsible to ensure the constitutional duty has been discharged

[32] *Paul, supra,* par. 39.

in relation to its authorization. Clearly, the completion of other regulatory processes (i.e. environmental assessment) will inform and contribute to whether the duty being satisfied, but ultimately the OEB must have certainty that the constitutional duty has been fulfilled, since it is the Crown decision-maker authorizing the activity that has the potential to adversely affect the Aboriginal people who the Crown owes the duty to.

The Board's Aboriginal Consultation Policy

46) While HONI and the Board Staff submit that the constitutional duty should be interpreted narrowly through a ss. 92 and 96 lens, it is important to note that the OEB has already issued and applied its own policy (the ACP), which correctly sets out the OEB's role in ss. 90, 91 and 92 applications. Specifically, the ACP states,

> 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. …
>
> 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 it has conducted appropriate consultation and accommodation. …
>
> 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.[33]

47) No where in the ACP does the OEB state that a review of whether the duty has been satisfied will be limited to issues related solely to price, quality and reliability of service. Instead, the focus is rightly on ensuring proper consultation has occurred on projects that are subject to Board approval.

48) Since releasing the ACP, the OEB has considered and applied its policy in two separate leave to construct applications, with HONI being the applicant in one of those two cases.

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[33] EB-2007-0617, pp. 1-2.

49) In the OEB's decision on the matter of an application by the Canadian Renewable Energy Corporation for an Order granting leave to construct transmission facilities on Wolfe Island, released October 12, 2007, the Board concluded:

> The Applicant also provided evidence of its consultations with Aboriginal Peoples, including a letter of support from the Mohawks of the Bay of Quinte, and advised that no Aboriginal Peoples had expressed an objection to the project. The Board accepts the Applicant has concluded its consultation with Aboriginal People appropriately. [emphasis added][34]

50) In a decision in the matter of an application by HONI for an Order granting leave to construct transmission facilities in the Woodstock Area, released October 11, 2007, the OEB concluded:

> The Board accepts Hydro One's evidence that is has taken appropriate steps in keeping with the Board's proposed Aboriginal Consultation Policy. The Board notes Hydro One's commitment to continue to work with Aboriginal Peoples should any concerns about the Project arise in the future. [emphasis added][35]

51) Clearly, in the Canadian Renewable Energy Corporation application, based on the evidence before the Board, adequate Aboriginal consultation had taken place *prior to* the OEB issuing its authorization. Further, in the HONI application, the OEB applied the ACP and concluded the applicant had taken appropriate steps to meet the conditions of the policy. Neither of these decisions limited the Board's consultation assessment to those suggested by HONI and the Board Staff.

52) It is submitted that the OEB should once again apply the ACP to ensure that adequate consultation has occurred *prior to* the Board issuing an authorization. Of course, what is different about this proceeding is that the Board has the benefit of evidence and submissions from the potentially affected Aboriginal peoples directly.

Ministerial Directives to the Ontario Power Authority

53) With respect to the OEB ensuring adequate consultation has taken place in relation to the Project *prior to* granting a Crown authorization, the MNO notes two Ministerial directives provided to the Ontario Power Authority ("OPA") in relation to the OPA's role in authorizing various hydroelectric and wind power projects on behalf of the Crown.

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[34] EB-2007-0034, Decision and Order, dated October 12, 2007, at p. 7.
[35] EB-2007-0027, Decision and Order, dated October 11, 2007, at p. 12.

54) In the Minister of Energy's directive to the OPA dated December 20, 2007, the OPA is instructed to negotiate and authorize a series of hydroelectricity projects on behalf of the Crown. With respect to the duty to consult and accommodate Aboriginal peoples, the directive states,

> With respect to the duty of the Crown to consult Aboriginal peoples where initiatives may affect their rights, the Ministry has reviewed the conduct of OPG of procedural aspects of the Crown's duty to consult for all the projects covered in this direction. For those projects where the consultative process with First Nations is ongoing, I direct the OPA, together with OPG, to work with the Ministry and to report back at regular intervals. Guidelines and procedures developed by the OPA pursuant to the Direction dated August 27, 2007 should be applied, as appropriate, to the projects covered by this Direction. At the conclusion of each project's consultative process the Ministry or representatives of the Crown will consider the adequacy of the Aboriginal consultation including any necessary accommodation measures before the project can proceed. In addition, the terms of previous approval relating to each project must be observed.[36] [emphasis added]

55) In the Minister of Energy's directive to the OPA dated August 28, 2007, the OPA is instructed to procure up to 2,000MW of Renewable Energy Supply on behalf of the Crown. With respect to the duty to consult and accommodate Aboriginal peoples, the directive states,

> In the course of the consultation process on the Integrated Power Supply Plan, the OPA heard from First Nations and Métis peoples their desire to be consulted in the planning of electricity projects.
>
> It is my view that First Nation and Métis peoples should be consulted early in the planning and development stages for the new renewable energy projects under this 2,000 MW direction. As such, I direct that the OPA develop guidelines and processes to ensure that inappropriate consultation with First Nation and Métis peoples takes place. The Crown will continue to assess the adequacy of the consultation, including whether there is accommodation, where appropriate, for impacts that the specific projects may have on Aboriginal or treaty rights.[37] [emphasis added]

56) While it is recognized the Ministry of Energy, the OEB and the OPA all have very different roles, it is clear from the Ministerial directives provided to the OPA that consultation and accommodation should occur with potentially affected Aboriginal people before a project proceeds (i.e. before they receive a Crown authorization). Specifically, the Minister refers to an assessment occurring "[a]t the conclusion of each project's consultation process."

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[36] Ministerial Directive, December 20, 2007, pp. 2-3. Copy of Directive available at www.powerauthority.on.ca/Storage/61/5625_December_20%2C_2007_Hydro_Electric_Agreements_with_OPG.pdf

[37] Ministerial Directive, August 27, 2007, p. 2, paras. 3-4.

57) It is submitted that there is no reason why the same standard should not apply to the Project in this proceeding. The OEB as a "representative of the Crown" should ensure that the consultations are completed, prior to making a determination that a "project can proceed."

58) In addition, the MNO notes that similar to the Project in this proceeding, many of the projects that have the potential to be authorized under the abovementioned directives will be subject to an environmental assessment. However, it is clear from the Minister's directive that these assessments is not the panacea for ensuring all Crown consultation and accommodation requirements are satisfied, since he instructs the OPA to develop guidelines and processes (outside of an environmental assessment) to ensure the duty is fulfilled.

IV The Duty and the Project

The Duty and the Evidence in the Proceeding

59) Based on framework set out in *Haida*, there are three questions for the OEB to consider in relation to the duty to consult the Métis community in this proceeding. The first is to determine if and when the duty was triggered. The second is to determine what is the appropriate scope and content of the duty. The third is to determine whether the duty has been satisfied.

When Was The Duty Triggered for this Project?

60) In *Haida*, the Supreme Court held that the duty is triggered when the Crown has constructive knowledge of the potential existence of the Aboriginal right or title that may be at risk from a course of action being contemplated by the Crown.

61) The evidence shows that the duty has been triggered in relation to the Project. In its filed evidence, HONI acknowledges that the Crown provided it with information on potentially affected Aboriginal groups and that a number of First Nation and Métis groups "who may have an interest in, or may be potentially affected by, the project"[38] were contacted.

62) The MNO makes no submissions on exactly when the duty was triggered, but notes that consistent with the *Haida* decision, the duty would have been triggered at the "strategic planning stage."[39] Clearly, the implications that will likely flow from the Project (i.e. procurement of up to another 1000MW of wind power generation from Bruce region, potential refurbishment or new build at Bruce Power, cumulative impacts, etc.) are issues of great importance to the Métis community, which required consultation.

What Is the Scope and Content of the Duty for the Project?

63) In *Haida*, the Supreme Court outlined situations where the scope and content of the duty required "deep consultation", including, cases where "a strong prima facie case for a claim is established", "potential infringement is of high significance to the Aboriginal peoples" and

[38] Exhibit B, Tab 6, Schedule 7, p. 1 (lines 11-20).
[39] *Haida, supra,* paras. 75-76.

"risk of non-compensable damage is high."[40] Contrary to HONI's submissions, the MNO submits that based upon the evidence before the Board the Project attracted the need for substantial and meaningful consultation.

64) The evidence shows that the MNO has clearly made its claims and concerns known to HONI as well as the government with respect to the Project, starting in November 2007.[41] More specifically, in a letter to HONI and copied to the government dated March 31, 2008,[42] the MNO made the following concerns known:

a. There are a significant number of MNO members (well over 3,000) living in the region as well as a significant number Métis traditional resources users (over 300) that harvest within the Georgian Bay Métis traditional harvesting territory,

b. The MNO has never been provided support to undertake Métis traditional land use mapping in the region so the full extent of the potential impacts on Métis harvesters, Métis land use, etc., is not known at this time,

c. Métis communities are regional in size and scope and there are Métis rights-holders that are represented by the MNO, but who are not represented through a MNO Community Council,

d. HONI's communication efforts on the Project have not reached the Métis community,

e. Métis have limited funding and capacity to participate within consultation and accommodation activities with HONI.

65) The evidence shows that Métis harvesting rights in the area, where the Project passes through (i.e. the Georgian Bay Métis harvesting territory),[43] are not merely asserted rights, but have actually been accommodated by the Crown based on credible claims.[44]

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[40] *Haida, supra,* paras. 75-76.
[41] Exhibit K 9.6, Tab 9.
[42] Exhibit K 9.6, Tab 10.
[43] See map of Georgian Bay Métis traditional harvesting territory at Exhibit K 9.6, Tab 5.
[44] See information related to MNO accommodation agreement with Ontario Ministry of Natural Resources at Exhibit K 9.6, Tabs 4-6. See also *R. v. Laurin,* 2007 ONCJ 265, which upholds agreement.

66) The importance of the survival of Aboriginal peoples, through maintaining their connections to their traditional lands and living of the land, has been continually emphasized by Aboriginal peoples.

> Aboriginal peoples have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but one of community and indeed of the continuity of their cultures and societies.
>
> … The use of the lands and resources has formed a central part of Aboriginal economies from time immemorial. For most Aboriginal communities, natural resources are the key to making a living, whether this takes the form of traditional subsistence activities to profit-seeking, wage-providing enterprises.[45]

67) Courts have also recognized the fundamental importance of Metis access to and use of their traditional territories. In *Powley*, on appeal to the Ontario Superior Court, O'Neill J, succinctly described the central purpose of s. 35 to the Métis as follows:

> [16] Surely, at the heart of s. 35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Métis have aboriginal rights, as people, based on their prior use and occupation as a people. It is a matter of fairness and fundamental justice that the aboriginal rights of the Métis which flow from this prior use and occupation, be recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.[46]

68) The Supreme Court has also recognized the fundamental importance of harvesting rights to Aboriginal peoples. These rights enable Aboriginal peoples to practice their culture and maintain their relationship to the land. In *Delgamuukw v. B.C.*, Chief Justice Lamer set out the high standard imposed on the Crown with respect to potential of adversely affecting Aboriginal harvesting practices.

> [168] Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulation in relation to aboriginal lands.[47]

69) Further, the expected and interconnected initiatives and developments that will likely flow from the Project with respect to future energy related developments in the region (i.e. wind power, Bruce refurbishment, cumulative impacts, etc.) and the potential impacts of those initiatives on Métis land use and harvesting in the area also add to the case for "deep consultation" related to the Project.

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[45] *Report of the Royal Commission on Aboriginal Peoples*, 1996, Vol. 2, Part 2, pp. 448, 850; Vol 1, pp. 490-491.
[46] *R v. Powley,* [2000] O.J. No. 99 (O.S.C.J.) at par. 16.
[47] *Delgamuukw v. British Columbia,* [1999] 1 S.C.R. 1075 at p. 1113 (para. 168).

70) It is submitted that based on the evidentiary record, the scope and the content of the duty required deep and meaningful consultation with the potentially affected Métis community.

Has the Duty Been Fulfilled for the Project?

71) The evidence shows that consultations on the Project with the Métis community are in their early days and ongoing. HONI's panel witnesses on Land and Aboriginal Consultation Issues witnesses acknowledged that this consultation work was in its "infancy."[48]

> Ms. Cameron: Well, accommodation has legal implications, but you are right, we're just starting down a road to discover how the line might impact Métis communities.[49]
>
> Ms. Cameron: … we're at the very onset of our relationship, and, no that hasn't been undertaken yet. We're still in the infancy stages. Our protocol agreement has not yet been finalized, and I assume that as we move forward and understand the potential impacts that it may have on Métis communities, that we may discuss mitigation measures, and maybe avoidance and other issues.[50]
>
> Ms. Cameron: Yes. We're still looking for some the facts with respect to potential impacts on traditional territories and Métis rights.[51]

72) The evidence also demonstrates that MNO and HONI are constructively working together to ensure adequate consultations take place, but that this work is not yet completed and more time is required. As well, the MNO is actively engaging the government in order to address Métis concerns and ensure adequate consultation and accommodation takes place with the Métis community.[52]

73) With respect to HONI and the Board Staff's submissions that all outstanding consultation and accommodation issues will be address in the upcoming environmental assessment, the MNO notes that the evidence indicates that there are outstanding strategic planning and regional consultation and accommodation discussions that will not be addressed within the environmental assessment process, but through discussions between the MNO and the Ministry of Energy and other relevant Crown agencies. Therefore, the premise that the environmental assessment will address all outstanding consultation and accommodation issues is unsound and incorrect based on the evidence before the Board.

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[48] Transcripts, Volume 9, May 13, 2008, p. 132 (line 6).
[49] Transcripts, Volume 9, May 13, 2008, p. 129 (lines 17-20)
[50] Transcripts, Volume 9, May 13, 2008, p. 132 (line 6).
[51] Transcripts, Volume 9, May 13, 2008, p. 132 (lines 18-20).
[52] Exhibit K 9.6, Tab 9.

74) It is submitted that based on the evidence before the Board, the consultation and accommodation required in relation to the Project based on the content and scope of the duty owed to the Métis community, has not yet been fulfilled.

V The Duty of Fairness

75) The MNO participated within the proceeding on the basis of the OEB's ACP and Issue #6. Based on this, the MNO put forward evidence to address the questions the Board indicated it would direct itself to within the ACP (which the OEB has applied in previous proceedings) as well as the clear and plain language of the proceeding's Issue #6.

76) In HONI and the Board Staff's submissions, they propose a dramatically different approach to Aboriginal consultation, rather than what has been set out by the Board in the ACP and applied by the Board in its previous decisions.

77) As discussed above, nowhere within the ACP does it indicate that the Board will only assess Aboriginal consultation requirements in relation to price, reliability and quality of service only. The clear and plain language of the ACP and past practices of the OEB with respect to Aboriginal consultation do no limit the Board's Aboriginal consultation assessment to such narrow confines, as proposed by HONI and Board Staff.

78) It is submitted that the MNO has a legitimate expectation based on the duty of fairness that the OEB will follow and apply its own ACP in a manner consistent with the language of that policy and past applications of the policy to leave to construct applications.[53]

[53] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

VI Conclusion

79) It is submitted that based on the evidence before the Board, consultation and accommodation related to the Project with the potentially affected Métis community is not yet completed.

80) Therefore, HONI's request relief should not be granted at this time.

All of which is respectfully submitted, this 4th day of July 2008.

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