the Métis Nation of Ontario

INTERGRATED POWER SUPPLY PLAN REVIEW
SUBMISSION ON PROPOSED ISSUES LIST

Background on Intervenor

The Métis Nation of Ontario (MNO) represents the citizens of the Métis Nation living in Ontario as well as rights-bearing Métis communities located throughout the province. The MNO's governance structure includes: 30 Chartered Community Councils located across the province; local, regional and provincial leadership who are selected by ballot box elections; an Annual General Assembly of Métis citizens held every year in July; and; a centralized registry of Métis citizens. A map of the MNO's Chartered Community Council map is attached as Appendix A.

The Métis are one of the three constitutionally recognized Aboriginal peoples in s. 35(2) of the *Constitution Act, 1982*. In September 2003, in *R. v. Powley*,[1] the Supreme Court of Canada affirmed that the Métis are a full fledged rights-bearing people and that Métis communities have existing Aboriginal harvesting rights that are protected by s. 35 of the *Constitution Act, 1982*. In July 2004, the MNO and the Ontario Government entered into an interim Métis harvesting accommodation agreement based on credible Métis rights claims throughout the province in identified traditional territories. In July 2007, in *R. v. Laurin*,[2] the Ontario Court of Justice upheld this accommodation agreement as legally enforceable. A map outlining the Métis traditional harvesting territories covered by the MNO-Ontario accommodation agreement is attached as Appendix B.

Overview and Structure of Submission

The MNO has had the benefit of reviewing the submissions of Saugeen Ojibway Nations (SON), Nishnawbe Aski Nation (NAN), First Nations Energy Alliance (FNEA) and the National Chief's Office – Assembly of First Nations (NCO-AFN) in relation to the OPA's proposed issues list for the OEB's IPSP review. Consistent with the OEB's direction to intervenors with similar interests to avoid repetition and collaborate (where possible), the MNO refers to and attempts to build upon the submissions of the other Aboriginal intervenors in its submissions.

The MNO's has organized it submission in three parts: (1) the Crown's common law and constitutional duties to Aboriginal peoples, (2) the scope of the OEB's IPSP review, and, (3) the MNO's proposed issues.

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[1] *R. v. Powley*, [2003] 2 S.C.R. 207
[2] *R. v. Laurin, Lemieux and Lemieux*, [2007] O.J. No. 2344 (O.C.J.)

1. The Crown's Common Law and Constitutional Duties and Obligations to Aboriginal Peoples

The Common Law

The Canadian common law has long recognized the rights of Aboriginal peoples to access their territorial lands and resources in order to sustain their existence, cultures and way of life. This common law recognition demanded a process of honourable reconciliation, by way of negotiation, accommodation and treaty making, between the Crown and Aboriginal peoples.

In *Van der Peet*, McLachlin J. (as she was then) described this legal recognition of Aboriginal rights as fundamental to the formation of Canada:

> 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.[3]

Today, Aboriginal rights law "regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions."[4] Through reconciliation, these common law rights are given effect in Canada's modern day legal framework.

The Honour of the Crown

The honour of the Crown guides the reconciliation process that flows from the common law recognition of Aboriginal rights. The Supreme Court has held that in all of its dealings with the Aboriginal peoples, from the assertion of sovereignty to the accommodation of claims, to the implementation of agreements and treaties, the Crown must act honourably.

This constitutional duty governs the "trust-like" and "non-adversarial" relationship between the Crown and Aboriginal peoples.[5] It is an ongoing, positive obligation of the Crown. It is not a passive, permissive or arbitrary obligation. Governments cannot ignore, contract out of, define or alter this duty by legislation. It is a super-added duty that along with existing statutory and policy mandates in the legal regimes governs the allocation, development, alienation and management of lands and natural resources when Aboriginal interests are affected.

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[3] *R. v. Van der Peet,* [1996] 2 S.C.R. 507, paras. 272 and 275.
[4] Brian Slattery, "Understanding Aboriginal Rights" (1983) 66 *C.B.R.* 727 at p. 732.
[5] *R. v. Sparrow,* [1990] 1 S.C.R. 1075.

The Constitution Act, 1982

In 1982, the Aboriginal and treaty rights of the First Nation, Inuit and Métis peoples were recognized and affirmed in s. 35 of the *Constitution Act, 1982*. This provision now provides constitutional force to the recognition of the common law rights of Aboriginal peoples as well as other existing rights of the Aboriginal peoples of Canada.

Since 1982, in a series of cases, the Supreme Court of Canada has articulated the basic purpose and principles of s. 35 of the *Constitution Act, 1982*. Most recently in *Mikisew, v. Canada*, Binnie J, for the majority of the Supreme Court of Canada, summarized the objective 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.[6]

Section 35 provides a "constitutional base"[7] for negotiations and reconciliation between the Crown and Aboriginal peoples. In order to achieve s. 35's purpose, governments must work with Aboriginal peoples, in the spirit of reconciliation, to recognize and protect Aboriginal rights, interests and way of life. Naturally, the honour of the Crown, as an additional, but complimentary Crown duty, guides the implementation of s. 35.

> Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfill its promises"… This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.[8]

The Duty to Consult and Accommodate

In *Haida*, *Taku*[9] and *Mikisew*, the Supreme Court set out a new legal framework – the Crown's duty to consult and accommodate – that is based on the honour of the Crown and s. 35. This new duty requires governments to consult Aboriginal peoples and accommodate their interests whenever a Crown actor considers conduct that might adversely affect Aboriginal rights or interests.

The duty applies 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.

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[6] *Mikisew Cree First Nation v. Canada*, [2005] S.C.R. 388, par. 1.
[7] *Sparrow, supra*, par 53.
[8] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, par. 20.
[9] *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550.

This Crown duty is an ongoing duty as the relationships between governments and Aboriginal peoples evolve. In *Haida*, the Supreme Court described this as follows:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.[10]

An important component of this new duty is that it is not necessary for an Aboriginal people to obtain a judicial determination of their rights before they can invoke it.

> … The potential rights embedded in these [unresolved but asserted] claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[11]

Overall, the purpose of the duty is to promote the transformation of the relationship between the Crown and the Aboriginal peoples to a new relationship based on consultation, just settlement, and, reconciliation.

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. … Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. … This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.[12]

A liberal and purposive approach is required to decide the content of the duty to consult and accommodate. This is a duty to protect and accommodate asserted Aboriginal rights or interests – by modifying or reconciling Crown actions to address Aboriginal interests in a real and substantive way. In *Haida*, the Supreme Court recognized that the duty has both procedural and substantive aspects, both of which will be defined so as to achieve the purpose of the duty in particular circumstances.

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[10] *Haida, supra*, par. 32.
[11] *Haida, supra*, par. 25.
[12] *Haida, supra*, par. 20.

The Content and Scope of the Duty to Consult and Accommodate

Since *Haida*, *Taku* and *Mikisew*, lower courts have added to the understanding of the content and scope of the duty to consult and accommodate, including:

- The duty does not find its source in legislation or regulations. It is a stand alone, super-added duty that is "a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps define the relationship between government and the governed."[13]

- The duty cannot be constrained or confined to legislation or regulations. The "Crown's duty to consult cannot be boxed in by legislation."[14]

- The duty is an ongoing duty that is triggered when the Crown is engaged in planning, development, implementation, evaluation and monitoring of activities that have the potential to affect Aboriginal rights and interests.[15] The Crown cannot unilaterally change, modify or exclude Aboriginal groups from decisions that dramatically affect consultation outcomes.[16]

- The duty cannot be fulfilled through public notices or general public-at-large consultation processes. There must be an intent to consult. Consultations cannot be "inadvertent" or "de facto."[17]

- The duty demands reasonable and fair timelines for Aboriginal peoples to respond to information and proposals.[18]

- There should be accountability for the duty within governments (i.e. someone within government must be responsible for ensuring consultation occurs).[19]

- When the Crown has breached or ignored the duty to consult and accommodate, courts have been willing to fashion real and novel remedies that address these breaches, including, ordering consultation to take place,[20] setting aside land sales,[21] overturning Ministerial decisions,[22] granting injunctions[23] and maintaining a supervisory role in order to ensure consultation occurs.[24]

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[13] *Chief Joe Hall v. Canada*, 2007 BCCA 133 (B.C.C.A.) at par. 48.
[14] *Ka'a'Gee Tu First Nation v. Canada*, 2007 FC 763 (F.C.T.D.), par. 121.
[15] *Dene Tha, supra,* paras. 98 - 110.
[16] *Ka'a'Gee, supra,* paras. 120, 123-124.
[17] *Dene Tha, supra,* paras. 113 - 115.
[18] *Dene Tha, supra,* par. 116.
[19] *Dene Tha, supra,* par. 127.
[20] *Chaeslatta Carrier Nation v. British Columbia,* [1998] B.C.J. No. 178 (B.C.S.C.).
[21] *Musquem Indian Band v. British Columbia,* 2005 BCCA 128 (B.C.C.A.).
[22] *Dene Tha, supra*; *Ka'a'Gee, supra*.
[23] *Platinex Inc. v. Kitchenuhmaykoosib First Nation,* [2006] O.J. No. 3140 (O.S.C.).
[24] *Platinex, supra,* par. 138; M*usquem Indian Band v. Canada,* [2007] F.C.J. No. 1379 (F.C.T.D.).

2. The Scope of the IPSP Review

The Legislative Framework and the Reviews Proposed

Currently, none of the legislation, regulations or Ministerial directives relevant to the IPSP's development or review include any provisions or direction on how the Crown's duties and obligations to Aboriginal peoples will be fulfilled.

As well, within the OEB's *Guidelines for the IPSP Review*,[25] the OEB does not address or specifically deal with how it will review the IPSP, in light of the Crown's common law and constitutional duties to Aboriginal peoples. Further, based on the language of the OEB's draft *Aboriginal Consultation Policy*[26] that was released for comment in June 2007, the OEB's proposed policy is only applicable to "leave to construct applications under ss. 90, 91 and 92 of the *Ontario Energy Board Act, 1998*,"[27] which is clearly not relevant to the IPSP review.

Finally, within the OPA's analysis of the scope of the OEB review, the OPA considers the IPSP review to be based on "a precise allocation of responsibility among the Minister, the OPA and the OEB"[28], as set out in the *Electricity Act, 1998*, and, that "[t]he IPSP hearing process is focused on the important, but narrow issues of ensuring that the IPSP complies with the Directive and is economically prudent and cost effective."[29] The OPA does not address or articulate its position with respect to whether it has fulfilled the Crown's super-added duties owed to Aboriginal peoples in the IPSP's development or whether it considers these matters within the scope of the OEB's review of the IPSP.

The OPA's Obligations to Aboriginal Peoples

The MNO submits that the OPA in undertaking a "core statutory function of planning"[30] planning function for the Crown, was under a duty to consult, and, if appropriate, accommodate affected Aboriginal communities, in the development of the IPSP. This consultation obligation required more than just notice, general information or high-level engagement. It required consultation with Aboriginal communities who would be directly affected by the OPA's planning decisions, since the IPSP sets out a course of action that will not be easily changed, modified or altered, if approved by the OEB. Moreover, the OPA's consultation obligations to some Aboriginal communities in specific geographic areas were significant in light of the IPSP not being just an abstract plan, but a clear road map on how Ontario's energy needs will be met, and, more specifically, where energy generation, conservation and transmission initiatives will be pursued (*e.g.*, wind power generation in southern Ontario, nuclear refurbishment, etc.).

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[25] Ontario Energy Board, *Report on the Review of, and Filing Guidelines Applicable to, the Ontario Power Authority's Integrated Power System Plan and Procurement Processes* (December 27, 2006).
[26] EB-2007-0617
[27] The MNO is unaware of the exact status of the OEB's Aboriginal Consultation Policy, but provided its submissions on the proposed policy to the OEB on August 16, 2007
[28] EB-2007-07-07, Exhibit A, Tab 2, Schedule 2, p. 1 (lines 11-12)
[29] EB-2007-07-07, Exhibit A, Tab 2, Schedule 2, p. 6 (lines 2-4)
[30] EB 2007-0707, Exhibit A, Tab 2, p. 7 (line 11)

The MNO notes that there are some interesting parallels between the development of the IPSP and the situation addressed by the Federal Court of Canada in *Dene Tha' First Nation v. Canada (Minister of Environment)*. In that case, the Dene Tha' people were not consulted in the development of a "Cooperation Plan", which set out a framework for how environmental and regulatory processes would be managed with respect to the Mackenzie Valley Pipeline (MVP). In finding that the Crown failed to fulfill its duty to consult the Dene Tha' in the planning stages for construction of the pipeline (i.e. the development of the Cooperation Plan), the Federal Court held:

> … the conduct contemplated here is the construction of the MGP. It is not, as the Crown attempted to argue, simply activities following the Cooperation Plan and the creation of the regulatory and environmental review processes. These processes, from the Cooperation Plan onwards, were set up with the intention of facilitating the construction of the MGP. It is a distortion to understand these processes as hermetically cut off from one another. The Cooperation Plan was not merely conceptual in nature. It was not, for example, some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be exposed to the public. Rather, it was a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of MGP.
>
> …
>
> The Cooperation Plan in my view is a form of "strategic planning". By itself it confers no rights, but it sets up the means by which a whole process will be managed. It is a process in which the rights of the Dene Tha' will be affected.[31]

Similar to the *Dene Tha'* situation, the IPSP sets out a "blue print" for future actions by the Crown on specific energy related projects. In the development of the IPSP, the OPA has made planning decisions that direct the Crown's actions and will limit the consideration or adoption of alternatives in the future (if the IPSP is approved).[32] This planning by the OPA required consultation and, if appropriate, accommodation, with affected Aboriginal communities.

Further, if the IPSP's approval "provides direction for subsequent regulatory decisions to be made by the OEB" and "it triggers the authority of the OPA to commence procurement processes without Ministerial direction,"[33] the OPA's consultation obligations to affected Aboriginal communities were not general or minimal. To paraphrase the Federal Court in the *Dena Tha'* decision, the IPSP sets out a process in which the rights of Aboriginal communities in Ontario will be affected. As such, its creation triggered the duty to consult.

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[31] *Dene Tha', supra*, paras. 100 and 108.
[32] For future reliance on approved IPSP see *OEB IPSP Filing Guidelines*, pp. 10, 26-27, 29.
[33] EB-2007-07-07, Exhibit A, Tab 2, Schedule 2, p. 3 (lines 12 - 15)

The OEB's Duties to Aboriginal Peoples

In its draft *Aboriginal Consultation Policy*, the OEB has already recognized that "as a 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."[34] The OEB also confirmed that "[t]he ultimate determination as to whether consultation and, where necessary, accommodation are conducted properly lies with the Board."[35] The MNO submits that the IPSP should be subject to no less than the same scrutiny applied to other OEB reviews. Further, the MNO's reaffirms its concerns vis-à-vis the OEB's draft *Aboriginal Consultation Policy* that were provided to the Board in August 2007.

The MNO notes that none of the duties and responsibilities the OEB sets out in its draft *Aboriginal Consultation Policy* find their source in the OEB's legislative base. Similarly, the MNO submits the OEB has responsibilities to review the IPSP, in light of the Crown's duties to Aboriginal peoples, that are not found in the *Electricity Act, 1998*, Ministerial directives or regulations. These Crown duties to Aboriginal peoples cannot be ignored or narrowed by the OPA's interpretation of legislative provisions. The OEB must ensure it exercises its responsibilities, as an agent of the Crown, in a manner that fulfills the legal and constitutional it has to Aboriginal peoples in reviewing the IPSP. Moreover, the need for a full consideration of these issues is heightened by that fact that the IPSP as more than just a traditional power supply plan. In the words of the OEB, it goes "beyond simply ensuring that supply is adequate to meet demand," [36] as the OPA was to assess and consider issues such as environmental protection, sustainability, societal acceptance, socio-ecological civility and democratic governance etc., in the IPSP's development. As such, within the OPA's planning, the affects of the IPSP on the rights, interests and way of life of Aboriginal peoples in Ontario needed to been assessed and considered. Through the OEB's review, Aboriginal peoples should have the opportunity to know whether this was done, and, if it was done, how it was done.

The MNO's Submission on the Scope of the IPSP Review

The MNO submits that the current IPSP legislative framework and the scope of reviews proposed by both the OPA and the OEB do not adequately address or capture the significant duties and obligations the Crown has vis-à-vis consultation and or accommodation with Aboriginal peoples. The MNO's further submits that the OEB is in no way limited to the scope of the IPSP review authorized by s. 25.30(4) of the *Electricity Act* or the interpretation proposed by the OPA, as it relates to the Crown's discharge of its common law and constitutional obligations to Aboriginal people (*e.g.,* the duty to consult and accommodate). In fact, it is the MNO's position that if the OEB did not fully review the IPSP in light of the Crown's duties to Aboriginal people, the IPSP would be legally and constitutional vulnerable in its implementation.

[34] EB-2007-0617, p. 1.
[35] EB-2007-0617, p. 2.
[36] *OEB IPSP Review Guidelines, supra,* p. 4.

Further, the MNO submits that in addition to reviewing whether the OPA fulfilled it duties to consult and accommodate affected Aboriginal communities in the development of the proposed IPSP, the OEB must review the IPSP based on the following issues: (1) does the IPSP identify how Aboriginal communities will be consulted and accommodated in the implementation of a approved IPSP, and, (2) does the OPA identify how Aboriginal peoples will be consulted in future IPSP iterations? The MNO grounds this submission on the following factors:

- If the IPSP is approved, the OEB is mandated to facilitate the implementation of it. The Crown's consultation and accommodation obligations to Aboriginal communities are ongoing. In order to be legally and constitutionally sound, the IPSP must include processes and mechanisms that ensure ongoing consultation, as issues arise, can take place. Simply put, an approved IPSP cannot be used as a means to foreclose or negate the Crown's ongoing duties. As such, it must include provisions for ongoing consultation to take place.

- The OPA has an obligation to design and implement processes and mechanisms that will ensure effective consultation and accommodation with Aboriginal communities in future iterations of the IPSP. These processes and mechanisms should be outlined in the IPSP, in order to provide Aboriginal communities a clear understanding or the roles and responsibilities of the OPA vis-à-vis the Crown's consultation and accommodation duties (i.e. who does what between the OPA, the OEB and the Ministry of Energy, how Aboriginal communities can become engaged, etc.).

The MNO also notes that unlike the standard of review proposed by OPA for the rest of the IPSP, the question as to the existence and content of the duty to consult and accommodate is one of law, invoking a reviewable standard of correctness.[37]

Finally, the MNO submits the recently released *Ipperwash Inquiry Report* should guide the OEB in its review of the IPSP. The MNO believes the *Ipperwash Inquiry Report's* recommendations reinforce the need for the OEB to incorporate the duty to consult and accommodate within its review of the IPSP as well as the need for this duty to be incorporated into the IPSP. Further, the report's policy analysis on Aboriginal peoples and the management of Ontario's natural resources are extremely relevant to the matters that are before the OEB. A copy of the *Ipperwash Inquiry Report*, Volume II, Chapter 5, on natural resources, is attached as Appendix C.

[37] *Dene Tha', supra,* par. 93; *Ka'a'Gee, supra,* par 93.

3. The MNO's Proposed Issues List

Structure of Proposed Issues List

As stated above, the OEB's duty to review the IPSP in relation to the Crown's distinct obligations to Aboriginal peoples flows from a source outside the current legislative framework. As such, the MNO submits that OEB is not bound or constrained by the existing legislative framework or the narrow review mandate suggested by the OPA. Therefore, the MNO proposes the issues list be structured as follows:

Part I – The IPSP

1. Compliance with Directions Issued by the Minister of Energy
2. Economic Prudence and Cost Effectiveness

Part II – The Procurement Process

Part III – Aboriginal Peoples

1. The IPSP
2. The Procurement Process

The MNO believes this structure of the issues list would allow for the Crown's duties to Aboriginal peoples to be assessed in a fulsome manner, without being unduly restricted or narrowed. Moreover, it would allow the duty to consult and accommodate to be incorporated into the IPSP, consistent with the recommendations of the *Ipperwash Inquiry Report*. The MNO believes this a more appropriate framework for the review of a purposive and stand-alone constitutional duty, rather than attempting to insert or expand this duty into the narrow questions proposed by the OPA.

Proposed Issues

As noted above, the MNO has had the benefit of reviewing the submissions of the other Aboriginal intervenors and has attempted to consolidate many of the issues identified by others in the proposed issues below. In each of the MNO's proposed issues, the MNO identifies its rationale for the issue, and, where appropriate, whether the issues identified by other Aboriginal intervenors could potentially be addressed under the MNO's proposed issue.

It must be stressed that the MNO has not consulted with other Aboriginal intervenors and does not presume that other Aboriginal intervenors will be or should be supportive of the MNO's suggestions below. The MNO only offers these issues as suggestions on how issues could be grouped for a final issue listing, since many of the specific issues proposed by other various Aboriginal intervenors have overlap under broader themes. As well, the issues list below includes additional issues put forth by the MNO that have not yet been identified in the written submissions of other Aboriginal intervenors.

The MNO proposes that 7 issues (5 dealing with the IPSP and 2 dealing with Procurement Processes) be included under the heading "Aboriginal Peoples". For convenience, a consolidation of these proposed issues is attached as Appendix D.

ISSUE #1 – Have all Aboriginal peoples been identified whose existing or asserted Aboriginal or treaty rights stand to be affected by the IPSP or the electricity projects it contemplates, have appropriate consultations been conducted and, if necessary, have appropriate accommodations been made?

Rationale:

This issue has already been helpfully identified by the SON based on the OEB's issues list in EB-2007-0050. The MNO is supportive of the wording and scope of this issue to address whether appropriate consultations with affected Aboriginal communities have taken place on the IPSP.

It is suggested that this issue is broad enough that it could also address the submissions of NAN (Issue #4), NCO-AFN and FNEA with respect to the OPA's duty to consult and accommodate in the development of the IPSP.

ISSUE #2 – Does the IPSP include ongoing processes and mechanisms to ensure appropriate consultation, and, if necessary, accommodations, with all Aboriginal peoples whose Aboriginal and treaty rights stand to be affected through the implementation of the IPSP?

Rationale:

As discussed above, the duty to consult and accommodate is an ongoing obligation and it must ultimately become deeply entrenched in Ontario's laws, regulations, policies and business practices. The IPSP will play a significant role in how the energy sector develops in Ontario. As such, the MNO submits it should include processes and mechanisms to ensure the Crown's duty if fulfilled to Aboriginal peoples at all stages of its implementation. Respectfully, the MNO submits this cannot be achieved through an 'after-the-fact' assessment by the OEB or the OPA on whether appropriate consultation has been undertaken by a proponent.

The Crown as well as its agents have a pro-active role to play in ensuring appropriate consultations take place. Recent Ontario court cases have stressed the need for the provincial government to not "abdicate its responsibility" in this area.[38] Further, the *Ipperwash Inquiry Report* stresses the need for the duty to consult to permeate provincial actions vis-à-vis natural resource development.[39]

> Ultimately, it would be advisable to incorporate an acknowledgement of this duty in legislation, regulations, and other applicable government policies. This would

[38] *Platinex, supra*, par. 92.
[39] *Report of the Ipperwash Inquiry*, Vol. 2, Policy Analysis, pp. 109-113.

> promote respect and understanding for this duty throughout the provincial government. It would also promote consistency and conformity with the constitutional obligations of the province.

A final important rationale for incorporating consultation ongoing and pro-active consultation measures in the IPSP is increasing certainty and stability in the energy sector. As noted by Justice Smith in the *Platinex* case, with respect to the lack of Crown involvement in ensuring effective consultations in the mining sector,

> One of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies, like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.[40]

Similarly, proponents and investors in the energy sector could face challenges, if effective consultations do not take place throughout the implementation of the IPSP. Ongoing and pro-active consultation measures in the IPSP could alleviate much of the uncertainty proponents face vis-à-vis the discharge of the duty to consult. Further, Aboriginal communities will not be placed in the adversarial position of having to attempt to stop or delay an application to the OEB or a contract being awarded by the OPA, if issues can be addressed in advance through pro-active, collaborative and meaningful consultation processes. The *Ipperwash Inquiry Report* reinforces this proposition as well,

> Long-term economic development, either in general or for Aboriginal peoples, is not very likely if the Aboriginal and non-Aboriginal communities are at war with each other. That is why provincial government leadership is so important. The provincial government is in a unique position to bring together the various parties, organizations, and interests in the spirit of constructive cooperation and understanding.[41]

ISSUE #3 – Does the IPSP identify or propose ongoing processes and mechanisms to ensure all Aboriginal peoples whose existing or asserted Aboriginal or treaty rights stand to be affected by future iterations of the IPSP are appropriately consulted and, if necessary, accommodated?

Rationale:

The OPA, as a planning agent of the Crown, has a duty to ensure Aboriginal communities know how they can be effectively involved in the development of future iterations of the IPSP. Consultation, as it relates to planning, cannot be delegated, delayed or so convoluted that it is rendered meaningless. Similar to the rationales set out for Issues #2, the MNO submits consultation and accommodation processes for the development of future iterations of the IPSP should be committed to by the OPA and set out in the IPSP.

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[40] *Platinex, supra,* par. 96.
[41] *Ipperwash, supra,* p. 108.

ISSUE #4 – Does the IPSP adequately address the unique energy needs and realities of Aboriginal communities in Ontario (i.e. social, economic, political and environmental issues, right to connect, needs of northern and remote communities, capacity to participate in energy sector, etc.)?

Rationale:

Unlike other stakeholders, the Crown has well-recognized and special constitutional relationships with First Nation and Métis communities in Ontario. As such, the MNO submits that the IPSP needs to address the unique issues and needs that flow from these relationships. In addition, as discussed above, the IPSP is *more* than just a traditional power system plan, therefore, it is appropriate for the OEB to look at these broader social, economic, political and environmental issues as they relate to Aboriginal peoples, in its review of the IPSP.

The *Ipperwash Inquiry Report* also provides support for this type of broader consideration of issues affecting Aboriginal peoples, rather than the usual approach of just doing the minimal legal requirement.

> I wish to emphasize, however, that the rationale for including Aboriginal peoples in managing natural resources and enjoying their benefits goes beyond simply meeting legal obligations. There is a strong, practical, interest-based rationale for this approach. It is also a benefit of all Ontarians that Aboriginal peoples share in the bounty of the province and in the case of its resources. Sharing resources and resource revenue is one way for Aboriginal peoples to take control of their lives, build viable economies, and improve the dire conditions under which many of them are forced to live.[42]

It is suggested that this issue is broad enough that it could also address the submissions of NAN (Issues #1 to 3), the FNEA (Issues #1 and 2) as well as many of the issues and suggestion raised by the NCO-AFN.

ISSUE #5 - Were the costs and/or impacts (i.e. sociological, environmental, financial, etc.) on existing or asserted Aboriginal or treaty rights of Aboriginal communities factored into the OPA's consideration and assessment of the IPSP's proposed electricity projects and in considering alternatives? If so, how was this done?

Rationale:

As discussed above, within the OPA's planning, the affects of the IPSP on the rights, interests and way of life of Aboriginal peoples in Ontario needed to been assessed and considered. The MNO submits that the OEB review must provide Aboriginal peoples an opportunity to know and understand if this was done, and, if it was, how it was done (i.e. what data or information was relied upon by the OPA, what Aboriginal communities were engaged, etc.)

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[42] *Ipperwash, supra,* p. 109.

The MNO supports the SON's proposed issues for "Considerations of Safety, Environmental Protection and Sustainability" and "Economic Prudence and Cost Effectiveness", as set out in P.5 and P.6 of the SON's submission. If the OEB adopts the SON's proposed issues framing, the MNO's proposed Issue #5 would no longer be required, since this issue is adequately addressed in the SON's proposal.

ISSUE #6 – Have appropriate consultations taken place with all Aboriginal peoples whose existing or asserted Aboriginal or treaty rights stand to be affected by the OPA's procurement processes?

Rationale:

This issue is based on the same rationales outlined in Issue #1, but is in relation to the OPA's development of its procurement processes.

It is suggested that this issue is broad enough that it could also address the submissions of NAN (Issue #4), SON (Issue P.4), NCO-AFN and FNEA with respect to the OPA's duty to consult and accommodate in the development of the IPSP.

ISSUE #7 – Do the OPA's proposed procurement processes include appropriate measures and mechanisms to ensure the unique needs of Aboriginal peoples are addressed and that adequate consultation and, if necessary, accommodation, takes place with Aboriginal peoples whose existing or asserted Aboriginal or treaty rights stand to be affected by these procurement processes?

Rationale:

This issue is largely based on the same rationales outlined in Issues #2, but is in relation to the OPA's procurement processes having the fulfillment of the Crown's duty to consult and accommodate incorporated within them.

It is suggested that this issue is broad enough that it could also address the submissions of NAN (Issues #2 and 3), SON (Issue P.4), the FNEA (Issue #3) as well as many of the procurement related suggestions raised by the NCO-AFN.

Finally, the MNO submits that it is supportive of the additional issue (Issue P.3) suggested by the SON related to societal acceptance of the IPSP.