



AUNDECK OMNI KANING • M'CHIGEENG • SHEGUIANDAH • SHESHEGWANING • WHITEFISH RIVER • ZHIIBAHAASING



UNITED CHIEFS and COUNCILS OF MNIDOO MNISING

July 20, 2016

Hon. Catherine McKenna
Minister of Environment and Climate Change
Environment and Climate Change Canada
200 Sacre-Coer Boulevard, Gatineau, QC
K1A 0H3

Re: Terms of Reference for Expert Panel Reviewing Environmental Assessment Processes

Dear Minister McKenna:

The United Chiefs and Councils of Mnidoo Mnising represents the six First Nations of Mnidoo Mnising: Aundeck Omni Kaning First Nation, M'Chigeeng First Nation, Sheguiandah First Nation, Sheshegwaning First Nation, Whitefish River First Nation and Zhiibaahaasing First Nation. These six First Nations are the successors to the Aboriginal groups who occupied Manitoulin Island, or Mnidoo Mnising, and the surrounding islands and the surrounding waters and islands since before the arrival of Europeans.

As you may know, we have an on-going court case (Ontario Superior Court of Justice Court File #CV-13-481339), which seeks the vindication and protection of our Aboriginal title to the waterbeds surrounding Mnidoo Mnising, as well as rights to our reserve lands under the 1836 Bond Head Treaty.

It is in this context that we write to comment on the terms of reference for the expert panel to be appointed to review environmental assessment processes in Canada.

Environmental Assessment Process in Canada and Relationship to Aboriginal and Treaty Rights

The current environmental assessment regime in Canada is fundamentally broken.

We therefore welcome a comprehensive review of the federal environmental assessment regime. We believe that this presents an opportunity to begin to undo some of the serious damage done to First Nations by a regulatory regime that took no real account of our interests and in many ways was specifically designed to marginalize undermine our interests and the protection of our s. 35 rights.

While Canada will likely continue to rely on the environmental assessment regime to fulfill some aspects of the duty to consult and accommodate, it is critical that the review be conducted with a recognition that regulatory reviews are only one small part of proper Crown engagement with

First Nations, and in order for the regulatory process to be a *useful* part of that Crown engagement, the process itself needs to be designed in cooperation with First Nations.

Where the environmental assessment regime interacts with the rights and interests of Aboriginal the duty to consult and accommodate will be triggered. This means that any new environmental assessment process must be consistent with the Crown's fiduciary relationship toward Aboriginal peoples and capable of fulfilling the honour of the Crown. As the Supreme Court of Canada has noted the honour of the Crown imposes a "heavy obligation" on the Crown. In the case of this review process this means that the Crown needs to design a process consistent with those obligations and in particular with the obligations under the *United Nations Declaration on the Rights of Indigenous Peoples*.

Specific Comments on the Terms of Reference

Terms of reference need to direct a fresh start approach

As the mandate letter suggests, First Nations, and for that matter, all Canadians do not trust the current environmental assessment scheme. For that reason, the terms of reference for the Expert Panel need to make clear that the report the Panel delivers to the Minister should be focused on providing advice about a brand new regulatory system, not just advice on room for improvement.¹

Given the underlying biases in the current regime against First Nations rights and interests, a fresh start is the only way to ensure that a new system will incorporate protection of First Nation concerns and perspectives from the outset.

First Nations' perspectives must be central to Panel's review

As we have said to both federal and provincial governments many, many times, the UCCMM First Nations are not stakeholders. We are not members of the general public with an undefined "interest" in the environment. We are rights holders under the Canadian Constitution. And in the case of the UCCMM First Nations we are your treaty partners, and most importantly, we are Anishinabek with fundamental responsibilities to the lands and waters within our territories.

Our viewpoint and perspective must be at the heart of any review. While the multi-interest advisory committee is probably well intentioned, it is wholly inadequate to guarantee our perspectives are incorporated into the review. An Indigenous perspective must be present at every level of the review.

¹ Chris Tollefson, "Canada's current environmental assessment law: a tear-down, not a reno", *Policy Options* (13 July 2016).

At least one member of the Expert Panel must be an Indigenous person who can bring both personal experience of impact of regulatory process on Aboriginal rights and interests, and knowledge of Canadian and Indigenous laws to the review.

In addition, we are very concerned that the Panel Secretariat will be composed solely of members of the federal public service and will not include outside voices, including those capable of providing an Indigenous perspective. This will, in our view, severely compromise the ability of the Expert Panel to meet its mandate.

An major ongoing issue in our engagement with the Crown is that the experience, mindset, and preferences of career public servants often severely impedes genuine compromise and understanding. Even well-intentioned public servants struggle to understand or respect our perspectives. We are often very frustrated by the inability of those in government to see past their checkboxes. We want to be very clear that your checkboxes are not our checkboxes. We will not accept any review based simply on checking off boxes for the Crown.

If there is to be any genuine effort to respect the Indigenous perspective in this review process and to design an environmental assessment process that is capable of protecting Indigenous rights, there must be technical staff who understand our issues and our perspective.

Implementation of UNDRIP

The terms of reference need to more clearly articulate and provide direction to the Panel about the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and in particular articles 19, 32, 28, 29 and 10.

Related to this, we are concerned about the statement that: The Panel shall also consider how to enhance regulatory certainty in the development of major projects in Canada.”

It must be made clear that if “certainty” is to be a goal of the new regime that certainty includes the ability of First Nations to be certain that our rights will actually be protected under the environmental assessment process. Certainty cannot just be for the Crown and proponents.

As part of the implementation of UNDRIP, the mandate of the Expert Panel needs to include direction to consider consent of Aboriginal parties to developments with significant impacts.

The precautionary principle must be the starting point

The current system does not respect the precautionary principle or the notion that in some cases the best alternative is to do nothing. Not every project is worth the risk to the environment or to the rights of First Nations. The Panel must be given strong direction on incorporating the precautionary principle as the basis for a new regime.

More review time is required

Under the current terms of reference, the Expert Panel will produce its report, which will then be sent to the Minister. Prior to the final report being provided to the Minister, the Panel should issue a draft report for comment by Aboriginal parties. This is critical to ensure that our concerns were properly understood and adequately addressed.

This is especially important because there is no Expert Panel report that will be issued on all three of the reviews being conducted by the different ministries. This means that there is a very real chance that we will not have a chance to understand and to comment on the *comprehensive* effects of the reviews of the environmental assessment process, the National Energy Board review, and the *Fisheries Act*.

The environmental assessment process is one that affects the UCCMM First Nations and other Aboriginal peoples every day. For too long it has been a system that instead of protecting our rights, serves as a mechanism to chip away at our rights. Now is the time to begin a process that is capable of respecting our rights and responsibilities.

Respectfully,

A handwritten signature in blue ink, appearing to be 'Patsy Corbiere', with a long horizontal flourish extending to the right.

Chief Patsy Corbiere
UCCMM Tribal Chair