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

UNITED CHIEFS and COUNCILS
OF MNIDOO MNISING

MANITOULIN

July 20, 2016

Hon. Minister Jim Carr
Natural Resources Canada
21st Floor, 580 Booth Street, Room C7-1
Ottawa, ON K1A 0E4

Re: Terms of Reference for the National Energy Board Modernization Expert Panel

Dear Minister Carr:

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 [redacted]), 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 "modernize" the National Energy Board ("NEB").

Comments regarding Review of National Energy Board Modernization

We have serious concerns about the proposed mandate and objectives of the NEB "modernization" review. In particular we are concerned with the "focused" approach proposed by the terms of reference and the extremely narrow consideration of Indigenous issues and concerns.

There is almost no other aspect of the federal government's regulatory process that is more deeply flawed and problematic as the NEB. It is extremely surprising given the repeated public concerns raised by Aboriginal groups, municipalities, environmental groups, former energy officials, and others that Canada is proposing such a limited review of the NEB's mandate and structure.

There are almost too many criticisms and concerns directed at the NEB to list, but the overarching criticism and concerns that have been expressed are adequately summarized by

[redacted]

former BC Hydro CEO and Suncor Board member Marc Eliesen: "In my view the NEB hearing process is a rigged game…it's reached a stage where the NEB is not interested in the public interest, and is more interested in facilitating infrastructure for the oil and gas industry."

This view has been backed up by academic research which shows that in almost ***100 per cent*** of cases where the Crown has failed to discharge the duty to consult and accommodate, the NEB still approved or recommended approval of the project.[1]

The NEB has time and time again failed to give any reasonable consideration of First Nation rights and interests. Aboriginal groups have been forced to repeatedly seek remedy in the courts to have their concerns addressed. (As you know, the Federal Court of Appeal recently released a decision related to failed consultation and the NEB process and there are two additional cases scheduled to be heard by the Supreme Court of Canada in the fall.) While the NEB's failures have been significantly magnified by the Crown's poor efforts at consultation or its failure to engage at all, the fact is that the NEB is a deeply flawed body that has lost the trust of Aboriginal peoples and most Canadians.

The NEB should not be responsible for environmental assessment process or any significant consultation and accommodation process with Aboriginal groups

The terms of reference do not appear to leave open the possibility that the NEB will no longer be responsible for conducting the environmental assessment process. While the evidence is overwhelming that the NEB does not have the institutional capacity or disposition to properly deal with Aboriginal rights and interests, it is shocking that the proposed terms of reference suggest that this fundamental issue will not even be considered.

In addition to not having the appropriate technical capacity to appropriately deal with Aboriginal rights and interests, the NEB's terrible track record shows that an environmental assessment and a process to address the duty to consult and accommodate and the responsibilities under *United Nations Declaration on the Rights of Indigenous Peoples* should be the responsibility of a government body that has the appropriate expertise and independence to be able to carry out these tasks.

The NEB's complete unsuitability as a regulatory process which can in any way deal with Aboriginal rights and interests is exemplified in a number of ways, including:

- tendency to minimize the engagement of Aboriginal parties in the NEB process to provide them with significantly less in the way of procedural fairness and administrative law protections than the general public;

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[1] "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65:4 *University of Toronto Law Journal 382 (2015)*

- at times providing greater procedural fairness to the project proponents than to the Aboriginal parties;

- providing inadequate and often arbitrary funding and opportunities to participate for Aboriginal parties that have no bearing on how seriously a First Nation may be affected;

- as noted above, allowing projects to proceed ***in almost every single case***, even where adequate consultation has clear not occurred, and then suggesting consultation can be performed after the project has been approved;

- consistently insisting Aboriginal peoples engage with the NEB in ways that are not respectful, appropriate, or practically effective where traditional knowledge is involved;

- the NEB's consistent failure and refusal to apply the precautionary principle or to adequately consider cumulative impacts on the environment or on Aboriginal rights and interests.

Implementation of UNDRIP

The terms of reference need to clearly articulate and provide direction to the Panel about the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), articles 19, 32, 28, 29 and 10. In particular, article 29 requires that the principle of free, prior and informed consent be implemented where hazardous materials may affect the lands and territories of Aboriginal peoples.

Not only do the terms of reference not explicitly direct the Panel regarding the implementation of FPIC, but the wording of the proposed issues that the Panel may deal with strongly suggests that the Crown intends to ignore UNDRIP and FPIC – Indigenous participation is viewed as being limited to what happens once the pipeline is built. This appears to assume, as with NEB practice to date, that a project will always go ahead.

Failure to include Indigenous perspectives

The terms of reference suggest that Indigenous involvement in the Expert Panel review will be at best token and there will be no attempt to seriously incorporate an Indigenous perspective into the work of the Panel. This suggests that the NEB will continue to be primarily a tool to promote the interests of the oil and gas, and other energy industries over the interests of Aboriginal peoples.

Proposed "modernization" process inconsistent with the honour of the Crown

The NEB's decisions and processes have a major impact on both proven and asserted rights and title of Aboriginal peoples across the country. The NEB's current process and operations are however completely inconsistent with the honour of the Crown. At a bare minimum, the Crown has an obligation to listen in good faith and to attempt meaningfully address the concerns of

Aboriginal peoples. The NEB's process is so broken that we never even get to the Crown attempting to meaningfully address First Nations concerns because it is clear that the NEB just isn't listening. The NEB is set up in a way that makes it more challenging for First Nations to understand impacts of projects on their rights and to express their concerns in a meaningful way. It is a breach of the honour of the Crown for the Crown to propose a review process which it must know will do nothing to address the fundamental problems of the NEB. This is not acting in good faith as required by the honour of the Crown.

Conclusion

The terms of reference proposed for the Expert Panel are completely inadequate in their scope and the apparent unwillingness of the Crown to grapple with the fundamental problems with the NEB as part of the regulatory system, or the Crown's obligations under UNDRIP. Based on the draft terms of reference it seems likely that this review is likely only to further hinder any hope of reconciliation with Aboriginal peoples.

Respectfully,