Board File No. EB-2011-0140

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 70 and 78 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity Applicant to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

INTERVENOR SUBMISSION OF OJIBWAYS OF PIC RIVER FIRST NATION

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I. SUMMARY OF SUBMISSIONS

1 The Ojibways of Pic River First Nation respectfully seek to give context and guidance to the Board as it considers: i) the Aboriginal Participation and Aboriginal Consultation criteria in relation to its stated objectives in this proceeding; and ii) other matters raised by applicants and intervenor.

2 Six applicants (the "Applicants") have applied to be designated to construct a new transmission line (the "East West Tie"). This is the first competitive designation proceeding in Ontario. The decision will be an important step towards achieving the goals of the Long Term Energy Plan (the "LTEP") and the objectives set forth in the draft versions of the Integrated Power System Plan (the "IPSP").

3 To select the successful applicant, the Board must consider

(a) The criteria in the Board's Phase 1 Decision and Order dated July 12, 2012 (the "Phase 1 Decision")

(b) The statutory mandate for leave to construct which the successful transmitter will ultimately be required to meet.

4 The criteria include both Aboriginal Consultation and Aboriginal Participation. The Board must consider the elements of Aboriginal Participation presented by each Applicant and weigh each aspect in accordance with its statutory mandate. The Board should consider each criteria in the context of the interests of consumers with respect to prices and the reliability and quality of electricity services and consistency with the policies of the Government of Ontario for the promotion of renewable energy.[1]

[1] *Ontario Energy Board Act, 1998,* SO 1998, c 15, Schedule B at ss 92, 96(2) [*OEB Act*].

5 This is not the first time the Aboriginal Consultation is before the Board. In a prior leave to construct application brought by Hydro One Networks Inc. for a transmission line from the Bruce Generating Station to the Milton Switching Station, the Duty to Consult was raised and submissions were made to the Board by the Métis Nation of Ontario ("MNO") and the Saugeen Ojibway Nation ("SON").

6 The Board stated in its decision

> *"In fulfilling its responsibility to assess the adequacy of consultation, the Board must necessarily take responsibility for the aspects of the consultation that relate to the matter before it, but should do so with a recognition of any other forum in which consultation issues related to the project are being addressed as well.*[2]

7 Aboriginal Consultation is once again before the Board. The Board must determine the aspects of the consultation process that relate to the matter before it with a recognition of the leave to construct process and environmental assessment processes that will be carried out at a later date. The leave to construct and environmental assessment processes will continue to shape and guide the nature of the consultations and ensure accommodation, where necessary, is achieved.

8 Section VI of this submission includes a table setting out the scope of Aboriginal Participation and Aboriginal Consultation for each stage in the development process. This scoping table is clear that the designation decision is not the final decision on consultation with First Nation and Métis with impacted Aboriginal rights and/or Treaty rights. For this reason, the Board is not pre-judging the determination of future

[2] EB-2007-0050 An Application by Hydro One Networks Inc. for an Order granting leave to construct a transmission reinforcement project between the Bruce Nuclear Generating Station and Milton Switching Station, Decision and Order dated September 15, 2008 at para 69.

consultation obligations to the detriment of First Nations and Métis with asserted or proven Aboriginal and Treaty rights.

9 Pic River submits that certain Applicants and interveners have blurred the line between Aboriginal Participation and Aboriginal Consultation. In some cases, Applicants are using this confusion to explain why their proposals lack certainty such as RES and Altalink. MNO is muddying the waters and asking that participation in the form of a partnership be awarded to MNO on the basis that Métis are protected under section 35 of the *Constitution Act.*[3] and that government policy dictates it. Failing that, they ask that at minimum, the MNO be granted the opportunity to participate in the form of a partnership. They insist on participation in the form of partnership and allege that discrimination will result and litigation will ensue if they are not made equity participants in some fashion.

10 If the Board were to follow MNO's logic, the Board would be putting itself in the position of commercial negotiator, without authority to do so, and would create new law requiring that for all future renewable energy generation, transmission and natural resource projects

(a) MNO is entitled to an equity stake in every partnership established by any First Nation or other Métis organization not represented by the MNO that is connected or rooted in any way with government policy directed towards Aboriginal people in general, and

[3] *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution*].

(b) That for every partnership negotiated by Industry and a First Nation or other Métis organization not represented by the MNO a co-partnership right must be held out to the MNO in case they are interested to participate.

11 The Board should not be persuaded to evaluate Aboriginal Participation based on Aboriginal Consultation obligations nor should the Board be persuaded that government policy requires equity arrangements with MNO in the manners characterized above.

12 As long as a First Nation on its own or in a group; or the MNO on its own or in a group with other Métis organizations that are not represented by MNO; or any collection of the foregoing together have entered into a commercial agreement with a transmitter for participation as part of the Phase II process herein, and such parties have existing or asserted Aboriginal and/or Treaty rights in respect of the lands to which the project relates, such entity meets the definition of Aboriginal Participation and is entitled to the most favourable weighting in the Aboriginal Participation evaluation.

13 The Board is not required to fully discharge the Duty to Consult at this point of the process, and it would be impractical and impossible to determine accommodation obligations or potential forms of accommodation in the absence of consultation.

14 Over the last 7 years First Nations and Métis have become generally familiar with the industry through activities carried out by the Ontario Power Authority (“OPA”). Pic River, through the First Nations Energy Alliance, and the MNO were both registered intervenor in the IPSP proceedings. Through the IPSP process, Pic River and MNO, along with other First Nations and Métis organizations, were made aware of proposed

upgrades to the transmission line connecting Wawa to Thunder Bay to facilitate renewable energy. All First Nations and Métis had the opportunity to form partnerships.

15 The Board should not be persuaded to discount the EWT LP as an invalid example of Aboriginal Participation. This would negate several years of positive capacity building and development among the First Nations comprising the Bamkushwata LP. The decision would set a precedent going forward that MNO could simply insert itself into any existing commercial arrangement in renewable energy and natural resource development going forward touting its Section 35 rights. This is both outside the law and unworkable. It is an abuse of process to suggest that the Board is compelled to negotiate an equity position for MNO that MNO failed to accomplish on its own over a year ago.

16 There is nothing to preclude the designated party from making an application at a later date pursuant to section 86(2) of the *OEB Act* to enable an acquisition granting a future party an equity interest in the designated transmitter. The most recent example of this is the application filed on March 28, 2013 by Hydro One, B2M Limited Partnership and SON LP Co. The applications, if approved, would transfer ownership of the Bruce to Milton Transmission Line to a new partnership between Hydro One and SON, with SON holding up to a 30 percent partnership interest in the new transmitter. The application notes that this partnership is based on commercial efforts and provides an economic opportunity for SON, a directly affected and interested party.

17 Consultation in accordance with the plans accepted by the Board and accommodation, where necessary, will be carried out at a later date in accordance with

Canadian jurisprudence. The Board's objective in this hearing is to evaluate the Applicants' submissions against the Board's criteria.

18 Not all intervenors and Applicants are pleased about the EWT LP strategic decision to co-partner with six First Nations and register as a transmitter on that basis. Those intervenors and Applicants are now resorting to discrimination arguments and are putting the Board on notice that litigation will ensue if MNO is not granted a partnership. These parties fail to understand that the existing partnerships were negotiated on commercial terms and in recognition that partnering with affected Aboriginal communities would bring benefits to the overall development process and benefit all Ontario ratepayers.

19 The questions for the Board on Aboriginal Participation and Aboriginal Consultation should simply be

(a) Does the applicant meet the criteria in the Phase 1 Decision, specifically the requirement to propose Aboriginal Participation?

i. How will the proposed or existing Aboriginal Participation affect other criteria, including schedule and costs? For example, is Aboriginal participation already in place? Does the applicant have any existing relationships with affected Aboriginal communities to draw on?

ii. What weight should be given to each applicant's proposed or existing Aboriginal Participation in light of the Board's statutory mandate to consider interests of consumers with respect to prices and the reliability and quality of

electricity services and consistency with the policies of the Government of Ontario for the promotion of renewable energy?[4]

(b) Does the applicant meet the criteria in the Phase 1 Decision, specifically is there a plan for Aboriginal Consultation?

i. How will the Aboriginal Consultation Plan affect other criteria, including schedule and costs? For example, has the Aboriginal Consultation Plan been subject to review and input from affected Aboriginal communities?

ii. What weight should be given to each applicant's Aboriginal Consultation Plan in light of the Board's statutory mandate to consider interests of consumers with respect to prices and the reliability and quality of electricity services and consistency with the policies of the Government of Ontario for the promotion of renewable energy.[5]

20 It is Pic River's submission that because the Board has chosen to evaluate Aboriginal Participation and Aboriginal Consultation as separate criteria, and in that criteria, the Board has not prescribed a formula for Aboriginal Participation, the role of the Board in Phase II of this proceeding is to assess if the Aboriginal Participation proposed by the Applicants conforms to the LTEP, the Letter for the Minister of Energy to the Ontario Energy Board dated March 29, 2011 (the "Minister's Letter"), and how such Aboriginal Participation will contribute to cost, timing and reliability to customers.

[4] *OEB Act,* ss 92, 96(2).
[5] *OEB Act,* ss 92, 96(2).

II. PIC RIVER'S SELECTION OF TRANSMITTER

21 Based on the above and the remainder of the submission, Pic River respectfully requests that the Board give significant weight to EWT LP on the basis of Aboriginal Participation and Aboriginal Consultation and their affect on timing, cost, and reliability and compliance with government policy.

III. PIC RIVER'S INTEREST IN THIS PROCEEDING

22 Pic River is also known as the Begetikong Anishnabe and claim Aboriginal title to unceded territory. Pic River's unceded territory was considered "Indian Territory" pursuant to the *Royal Proclamation of 1763*[6]. According to that Proclamation, only the Crown could obtain a surrender of Indian lands by treaty, and then only at an assembly called for that purpose.

23 In 1849, when the British Crown was considering a treaty with Anishnabek People of Lakes Huron and Superior, Governor General Lord Elgin established the Vidal-Anderson Commission to enquire into the claims of the Indians. The Deputy Provincial Surveyor, Mr. Alexander Vidal of Port Sarnia and the Superintendent of Indian Affairs, Mr. Anderson received instructions from J.H. Price, Commissioner of Crown Lands to conduct a natural resources survey on the north shoes of Lake Huron and Lake Superior. Anderson began in Cobourg and travelled to Penetanguishene whereas Vidal began in Port Sarnia and travelled to the American side of Sault Ste. Marie. Both men found that many First Nation representatives they expected to find in these areas were absent. After some delay, Anderson met Vidal in Sault Ste. Marie and they left together for Fort William. After a Council Meeting at Fort William the two men visited Hudson's Bay Company posts at Pic and Michipicoten. They then travelled back

[6] *Royal Proclamation, 1763* (UK), reprinted RSC 1970, App II, No 1.

towards Sault Ste. Marie stopping at Garden River, Mississauga River and a village near French River.

24 The Final Report to the government, written by Vidal, was an amalgam of geological observations of the land, descriptions of their interactions with First Nation's people and notes on their meetings with various Chiefs over the 2 year period. The Report concluded with recommendations on proceeding with a proposed treaty. The Report stated that the Indians' claims to the territory were valid and "*derived from their forefathers who have from time immemorial hunted upon it...*" The Report also discussed the nature of the territorial rights of the First Nations who inhabited the land and that those rights were based upon a:

> *long established custom, which among these uncivilized tribes is as binding in its obligations as Law in a civilized nation, has divided this territory among several bands each independent of the other; having its own Chief or Chiefs and possessing an exclusive right to and control over its own hunting grounds...*

They also noted that the limits of the hunting grounds were well known and acknowledged by neighbouring bands.

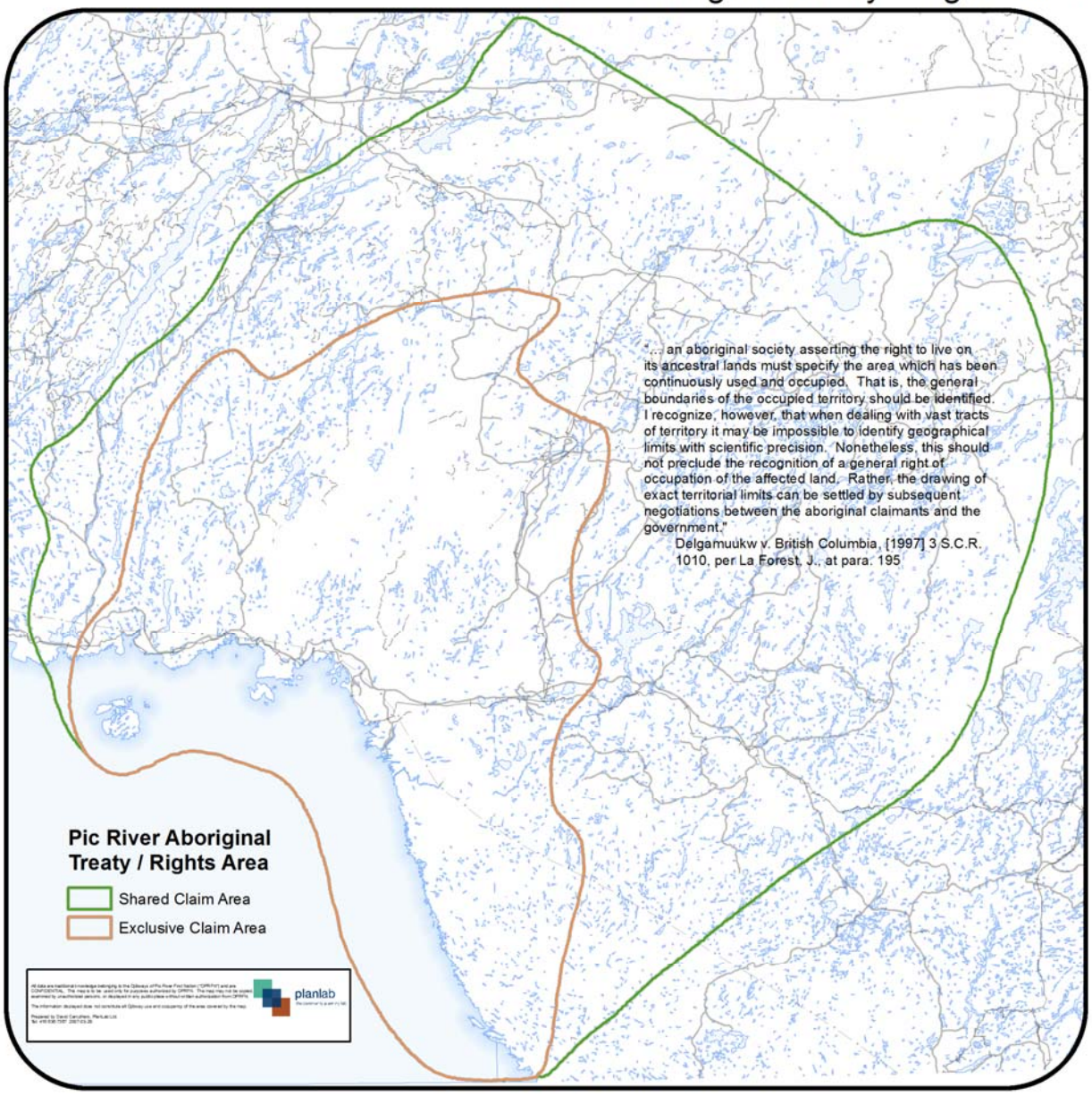
25 In 1995, Pic River filed a claim for Aboriginal Title based on Pic River's claim that Pic River never signed the Robinson-Superior Treaty. Pic River is recognized as a "band" under the *Indian Act*[7] and its members are "Indian people" within the meaning our section 35 of the *Constitution*. The Pic Heron Bay Reserve (I.R. #50), on the Pic River, is located on the north shore of Lake Superior, east of Thunder Bay and about 15 km southeast of Marathon. The reserve measures 800 acres in size.

[7] *Indian Act*, RSC 1985, c I-5.

26 Aboriginal Title is a type of Aboriginal Right that results in a proprietary right to the lands to which it applies. This proprietary right is so strong that, once successful, the provinces' ability to dispense or even use the Crown lands will be put into question, and must meet a test for infringement on Aboriginal rights. Pic River is not aware of any other Aboriginal party that has an existing or asserted claim that would trump that of Pic River in Pic River's exclusive claim area.

27 Other First Nation communities share overlapping use of Pic River's traditional territory. Both the Pic Mobert (easterly) and Pays Platt First Nations (westerly) share outlying portions of the territory claimed by Pic River. Both of these First Nations are partners in the EWT LP proposal. While there are some areas of overlap/shared exclusivity with neighboring First Nations along the edges of Pic River's territory. Pic River has a core exclusive Aboriginal title area that is distinct from this shared region. Pic River's traditional territory is shown on the map below. This is the same map that is annexed to Pic River's claim.

Pic River Aboriginal Treaty / Rights Area



28 Members of Pic River continue to make use of and occupy Pic River's traditional territory. Contemplated development within Pic River's traditional territory will trigger consultation with Pic River, and where appropriate accommodation.

29 Given the strength of Pic River's claim, the depth of consultation that will be required with Pic River sits on the deepest end of the consultation spectrum and thorough consultation will be required to ensure that the Crown's duty vis a vis section 35 of the Constitution has been properly discharged.

30 Pic River's input into the consultation plan provided to date (through Bamkushwata LP) for the EWT LP submission is particularly important due to the deep consultation that is required where an Aboriginal Title claim is asserted. Pic River assures the Board that the EWT LP consultation plan was carefully crafted and well thought out, well resourced and is comprehensive. It is also respectful of other communities and their protocols for engagement (as it must be) and therefore the consultation plan is also flexible to ensure that community involvement and input are needed to further develop the plan specific to each community and thereafter to implement the plan.

31 Pic River submits that the above information is relevant to the Board for the following 2 reasons:

(a) The Board must give considerable weight to an Applicant that has a consultation plan with direct on-going input from a First Nation that is constitutionally entitled to the deepest level of consultation. Little weight should be given to proposals that do not already have such input in place; and

(b) The Board must consider how the Aboriginal Consultation plan submitted will positively impact cost effectiveness and timely delivery in contrast to proposals that do not have a plan in place or have a plan without First Nation input on Aboriginal Consultation.

IV. THE DUTY TO CONSULT AND THE HONOUR OF THE CROWN

A. BACKGROUND

32 The Canadian government and all provincial governments have a Duty to Consult and in some cases accommodate affected Aboriginal groups (First Nations and/or Métis and/or Inuit) before taking any steps that may infringe on Aboriginal or treaty rights. The case law on Duty to Consult was established in *Haida*.[8] Post-*Haida*, other cases have examined:

(a) Whether a Duty to Consult was triggered and assuming it was owed, whether it was properly carried out or discharged

(b) Whether a certain party owes a separate Duty to Consult, such as a crown actor, tribunal, board or municipality

33 *Rio Tinto*[9] further clarified the law surrounding the Duty to Consult and accommodate Aboriginal groups. *Rio Tinto* shed new light on

(a) when the Duty to Consult is triggered; and

(b) the role of administrative/statutory tribunals (such the B.C. Utilities Commission) in addressing Aboriginal consultation and accommodation issues.

[8] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida*].
[9] *Rio Tinto Alcan Inc v Carrier Sekani,* 2010 SCC 43 [*Rio Tinto*].

34 The Supreme Court of Canada in *Rio Tinto* applied the test in *Haida* as a three part test to determine if consultation is required, and whether consultation should be at the low or high end of the spectrum, elaborating on each component of the test:[10]

(a) There must be real or constructive knowledge of a potential aboriginal claim or right

(b) There must be Crown conduct or decision[11]

(c) There must be a possibility that conduct may affect aboriginal rights. There must be a causal relationship between Crown conduct or decisions and adverse impact.[12] The adverse impacts must be from the current conduct or decisions and not from the larger project.[13] Speculative impacts or adverse impacts on future negotiating positions will not suffice.[14]

35 In *Brokenhead Ojibway Nation*, the Court held that

> *There is no at-large Duty to Consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown's Duty to Consult.*[15]

36 The Duty to Consult does not give First Nations or Métis a veto. The Duty to Consult places a positive obligation on Aboriginal communities to participate in

[10] *Rio Tinto* at para 31.
[11] *Rio Tinto* at para 44.
[12] *Rio Tinto* at para 45.
[13] *Rio Tinto* at para 45.
[14] *Rio Tinto* at para 46.
[15] *Brokenhead Ojibway Nation v Canada*, 2009 FC 484 at para 34.

consultation. Aboriginal communities must make a *bona fide* effort to find a resolution to the issues.[16]

37 The Court has stated that "The Duty to Consult is a reciprocal duty and the Crown as well as the Aboriginal party involved must approach this duty by showing ongoing good faith efforts to reach a consensus."[17] Aboriginal rights do "not automatically trump competing rights, whether they be government, corporate or private in nature."[18]

38 The Court has also been clear that Aboriginal communities "cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions."[19]

B. THE SLIDING SCALE

39 In *Haida*, the Supreme Court of Canada held that the Duty to Consult is proportionate to: the preliminary assessment of the strength of the First Nation claim, and the seriousness of the potential adverse effect on the right or titled claimed.[20]

40 In *Mikisew Cree First Nation*,[21] the Supreme Court of Canada found that the Crown's fiduciary duty and the duty to act honourably require the Crown to work with Aboriginal peoples to identify the nature of the rights that will be affected, to respect and accommodate these rights, and to reconcile these rights with the proposed development.

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[16] *Haida.* See also *Platinex Inc v Kitchenuhmaykoosib Innuniwug First Nation* (2006), 272 DLR (4th) 727 at paras 91,132 [*Platinex*].
[17] *Platinex* at para 133.
[18] *Frontenac Ventures Corp v Ardoch Algonquin First Nations* (2008), 165 ACWS (3d) 155 at para 34 [*Frontenac*].
[19] *Halfway River Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 [*Halfway*].
[20] *Haida* at para 39.
[21] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage,)* 2005 SCC 69 [*Mikisew*].

41 The assessment of the strength of the claim is a historical and anthropological analysis of the facts of the particular Aboriginal claim being asserted – questions such as what are the nature and scope of the asserted rights:

(a) hunting, fishing, sacred space?

(b) has the Aboriginal group occupied the area?

(c) does the Aboriginal group continue to occupy and use the area?

(d) what are the traditional practices historically and today?

(e) is the claimed right alleged to have existed prior to European contact?

(f) is the right exercised in a modern form today?

42 Once an asserted claim is established, it is important to consider the level of impact to determine the level of consultation. Where a claim is weak, the right is limited, or the infringement is minor, the duty of the Crown is "to give notice, disclose information, and discuss any issues raised in response to the notice."[22] Even at this low end of the spectrum consultation is not perfunctory and engagement must be genuine to attempt to minimize any potential adverse impacts.

43 In *Mikisew*, the Court held that the question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of Aboriginal peoples. The Supreme Court held

> *this does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact.*[23]

[22] *Haida* at para 43.
[23] *Mikisew* at para 55.

44 Where there is a strong case for an aboriginal right and the consequence of the Crown's proposed decision may adversely affect the claim in a significant way, there must be deeper consultation.

45 This will require in depth discussions, formal participation by Aboriginal communities in the decision-making process, and written reasons showing how the issues raised were considered and addressed.

46 Where the issues and concerns raised cannot be addressed, then accommodation measures may be required to mitigate adverse effects. This could include adjusting the project or changing the proposed activity, providing financial compensation or resource sharing, and it may even require the agreement of the rights bearing nation in order for the activity to proceed.

47 The project may also be rejected if there is no acceptable accommodation. Pic River has strong, recognized interests and rights in the lands that will be directly impacted by the East West Tie. Other First Nations and Métis may also have strong rights that will be directly impacted. However, some First Nations and Métis may have weak or limited rights, and may not be impacted by the East West Tie. These communities will require far less consultation, and may only require notice. The Duty to Consult cannot and should not be applied equally to all parties who have provided comments in this process. Consultation must be done on a nation to nation basis, considering the strength of the right or interest and the impact of the East West Tie on that community.

48 It is crucial at this stage in the East West Tie hearings for the Board to assess each Applicant's consultation plan, to understand if and how each Applicant will meet with each potentially affected Aboriginal community and will work with that Aboriginal community to identify the rights that will be affected and create processes for engagement and implementing the procedural aspects of the Crown's Duty to Consult.

49 The courts have said that there is a "moral, if not a legal, duty to negotiate in good faith."[24] Good faith negotiations by all parties is one of the over arching principles guiding consultation, engagement and accommodation between the Crown, Aboriginal communities and proponents. The Board must review the consultation plans to assess which of the Applicants have set out a process that exemplifies the requirement for good faith.

50 Only procedural aspects of the Duty to Consult can be delegated to proponents. Ensuring that the Duty to Consult has been fulfilled always remains with the Crown. At this stage, the role for the Board is to assess the *process* that Applicants have proposed to carry out consultation. It is imperative to always think back to what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the Aboriginal rights identified.

51 In summary, the Duty to Consult is based on Canadian jurisprudence that has been developed through the courts since 2004. The Duty to Consult flows from the honour of the Crown and Section 35(1) of Canada's *Constitution*.

[24] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010.

V. ABORIGINAL PARTICIPATION & ABORIGINAL CONSULTATION

A. OVERVIEW

52 Some Applicants and intervenors have conflated Aboriginal Consultation to Aboriginal Participation in this proceeding.

53 As discussed above, Aboriginal Consultation arises from the Constitution and is established in Canadian case law. Aboriginal Consultation is about the honour of the Crown, recognizing obligations to First Nations and Métis and preventing, mitigating or accommodating impacts.

54 Aboriginal Participation on the other hand, is distinct from Aboriginal Consultation. Aboriginal Participation is informed by government policy and freedom of contract.

55 Courts have drawn the distinction between Aboriginal Participation and Aboriginal Consultation:

> *In my view, steps taken to facilitate and promote successful aboriginal participation in commercial ventures are undoubtedly desirable and beneficial to the province and its citizens as a whole. It is an issue which I understand is presently the subject of negotiation with various government departments and other concerned parties. If such is the case, the parties are to be commended for undertaking such a complex task and I wish them every success. This judgment should not impede their reaching an acceptable accord; it merely declares that on the facts of this case this appellant's right to participate in the commercial marketing of fish does not have as its basis the protected aboriginal right to fish for food and ceremonial purposes.*[25]

56 Courts are clear that Aboriginal Participation is "outside of processes dealing with issues of Treaty and Aboriginal rights and land clams."[26]

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[25] *R v Vanderpeet*, [1996] 2 SCR 507.
[26] *Timber Management, Re*, 1994 CarswellOnt 5711 at para 184 (EAB).

57 The Board has already expressed an understanding of this distinction by including Aboriginal Consultation and Aboriginal Participation as separate criteria in the designation process.

58 This distinction was also recognized by MNO.

59 On May 7, 2012, MNO correctly stated in its Phase I submission, "*that [Aboriginal Participation and Aboriginal Consultation] must not be conflated in the East-West Tie Line designation process.*"[27] MNO appeared to understand the existing law on Aboriginal Participation and Aboriginal Consultation.

60 Unfortunately, one year later, MNO now conflates Aboriginal Participation and Aboriginal Consultation to discount the nature of the Aboriginal Participation presented in the EWT LP submission.

B. FAILING TO UNDERSTAND ABORIGINAL PARTICIPATION

61 It is not clear how or why, over the course of a year, the MNO has shifted its views, ignored the existing law and is now determined that it will vehemently oppose an Applicant's project (the EWT LP) that meets these criteria. The EWT LP includes Aboriginal Participation distinct from Aboriginal Consultation. Further the EWT LP includes the most advanced plan for Aboriginal Consultation and Aboriginal Participation.

62 MNO's original statements in the Phase I proceeding were in keeping with Canadian jurisprudence and practice. MNO's submissions on the application of Aboriginal Participation and Aboriginal Consultation criteria at the recent oral

[27] MNO, Phase I submission dated May 7, 2012, at 4.

submissions are contrary to law and the existing practice by the Crown and First Nations and Métis.

63 MNO is asking the Board to go beyond the existing law and create new law.

64 MNO has chosen this new approach to its submission in an effort to convince the Board that the Aboriginal Participation proposed by the EWT LP is deficient. Pic River asserts that this inconsistency is designed entirely to convince the Board to guarantee the MNO an equity position with whichever Applicant is ultimately designated. The Board should query this inconsistency.

65 In its oral submission, MNO asks the Board to define Aboriginal Participation as participation that is both with First Nations and Métis and that one "to the exclusion of the other" will not result in Aboriginal Participation that meets the intent of the LTEP and Minister's Letter. With respect, there is no exclusion in the EWT LP. Six directly affected First Nations have come together in this partnership on terms that are fair and commercially reasonable and will benefit rate payers. If the Métis are "excluded" it is not because EWT LP excludes them. The EWT LP Aboriginal Participation and the Consultation plan clearly include Métis. Any, exclusion is on MNO's their own volition.

66 Again, MNO fails to understand the existing law and is requesting that the Board create new jurisprudence. Aboriginal Participation is a commercial agreement based on freedom of contract, supported by government policy. Applicants are free to contract with one First Nation, or one Métis community, or any combination. An Applicant with First Nation partners but not Métis partners is not discrimination. A requirement for Aboriginal Participation with Métis is not the law.

67 Pic River submits that MNO's recent submissions and threats of litigation are tantamount to demanding that the Board give them preferential treatment and create new law and policy. It would appear that the MNO seeks to have its participation guaranteed by the Board, where no other such similar treatment is contemplated for any other First Nations of Métis communities who may be impacted by the project. MNO is asking the Board to interfere in commercial contractual relations, where no such precedent exists in law or policy.

C. ABORIGINAL PARTICIPATION IN THE LTEP AND THE MINISTER'S LETTER

68 Aboriginal Participation is a government policy that has been incorporated into the designation of a transmitter for the east west tie transmission project.

69 The LTEP states that opportunities for Aboriginal Participation should be explored.

70 Neither the Minister's Letter nor the LTEP narrowly define Aboriginal Participation as partnerships.

71 The LTEP is clear that Aboriginal Participation is much broader:

> *There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a new transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities be explored to:*
>
> - *Provide job training and skills upgrading to encourage employment on the transmission project development and construction.*
> - *Further Aboriginal employment on the project.*
> - *Enable Aboriginal participation in the procurement of supplies and contractor services.*
>
> *....*

> *Ontario will encourage transmission companies to enter into partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest.*

72 The Minister's Letter, also leaves the concept of Aboriginal Participation open and broad:

> *"…I would expect that the weighting of decision criteria in the Board's designation process takes into account the significance of aboriginal participation to the delivery of the transmission project, as well as a proponent's ability to carry out the procedural aspects of Crown consultation."*

73 MNO is asking the Board to interpret the Minister's Letter as stating that all Aboriginal communities must participate in the project, that the LTEP requires such participation to be in the form of equity, and that equity participation is the only form of meaningful participation. This interpretation is not supported by LTEP or the Minister's Letter.

74 MNO is also asking the Board to effect an outcome without any support from the LTEP nor Minister's letter. The LTEP and Minister's Letter merely asks that parties consider partnerships where commercially feasible. Furthermore, where the LTEP references "First Nations and Métis", it does so not to imply that both must participate together to meet the governments intent to promote partnerships. It is well accepted that First Nations on their own meet the definition of "Aboriginal", and that Métis on their own also meet this definition.

75 MNO has read into the LTEP things that are not there. Ontario's commitment is to "explore" training, employment and procurement. However, Pic River has gone beyond that and through Bamkushwada LP insisted that these policy objectives

translate into real benefits that are implemented, not just for the Bamjushwada LP First Nations, but for all Aboriginal communities including Métis. The opportunity is substantial, and EWT LP's approach is not discriminatory.

VI. SCOPE OF ABORIGINAL PARTICIPATION AND ABORIGINAL CONSULTATION IN THIS PROCEEDING, LEAVE TO CONSTRUCT, ENVIRONMENTAL ASSESSMENT

76 Pic River encloses a table setting out the requirements for assessing Aboriginal Participation and Aboriginal Consultation at this designation hearing and throughout the process until a transmission line is constructed.

77 Pic River submits that understanding the scope of Aboriginal Participation and Aboriginal Consultation at each stage will assist the Board to understand its role in assessing these criteria.

Stage/Process	Aboriginal Participation	Aboriginal Consultation
Designation Process	Is there a plan for Aboriginal Participation? Are there comprehensive steps to achieve Aboriginal Participation? Is Aboriginal Participation in place in accordance with government policy?	Is there a consultation plan? Is the plan comprehensive? Does the plan include flexibility? Has the plan been reviewed and commented on by affected Aboriginal communities?
Environmental Assessment	Aboriginal Participation should already be in place	Has the Applicant consulted with affected Aboriginal communities (i.e. those communities that meet the test in *Haida)*? Has the Applicant performed Traditional Ecological Knowledge Studies? Has the Applicant considered comments and concerns voiced by Aboriginal communities

		and revised the project to mitigate or eliminate those concerns? Has the Applicant entered into Memorandums of Understanding and/or Impact Benefit Agreements? Was consultation sufficient based on the requirements of an environmental assessment? (no impacts on the community and environment or impacts will be mitigated) Has there been accommodation?
Leave to Construct Hearing	Aboriginal Participation should already be in place	Has the Applicant consulted with affected Aboriginal communities (i.e. those communities that meet the test in *Haida)*? Was consultation sufficient based on the requirements of leave to construct? (consistent with government policy, effect on prices and reliability) Has there been accommodation?

VII. SELECTING A TRANSMITTER BASED ON ABORIGINAL CONSULTATION AND ABORIGINAL PARTICIPATION

78 The table below sets out a comparison of Aboriginal Participation and Aboriginal Consultation for each Applicant. The table also sets out how the Applicants Aboriginal Participation and Aboriginal Consultation affects timing, costs and reliability.

79 Based on the information in the table, EWT LP should be granted significant weight for Aboriginal Consultation, Aboriginal Participation and timing, cost and reliability.

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
ICCON	ICCON will not allow Aboriginal communities to partner in the proposed transmission project. ICCON's approach is inconsistent with Government policy and fails to meet one of the key decision criteria set out by the Board.	ICCON has submitted an Aboriginal Consultation plan. ICCON's Aboriginal Consultation plan is uninformed and does not indicate a proactive approach to consultation. This is clear in ICCON's argument-in-chief – ICCON states that the Board should leave Aboriginal Consultation to be sorted out in an Environmental Assessment and should not be considered now. This approach speaks volumes about ICCON's approach to and lack of respect for Aboriginal Consultation.	If ICCON is selected there will be significant delays. ICCON has not taken a proactive approach to consultation and additional time will be required to 'sort it out' during an environmental assessment. The lack of a consultation plan now, combined with no real concrete plan for participation will likely to be much higher costs than anticipated. ICCON will need to spend significant funds and resources on developing a consultation plan and negotiating participation arrangements. Failure to plan for consultation and participation early will also affect the overall reliability of the project – there has not been any input into the best locations to site towers and lines to ensure protection from the elements and avoidance of ecologically sensitive sites.

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
			ICCON also fails to comply with government policy to promote participation with Aboriginal communities. There is no guarantee that ICCON's discussions with affected Aboriginal communities will result in meaningful participation for First Nations and/or Métis.
CNPI	CNPI has an existing partnership with Aboriginal communities. These communities are <u>not</u> directly affected by the proposed transmission project and weighting should take into consideration that cost efficiencies may not be realized in the same manner as when Aboriginal Participation is met through	No Aboriginal Consultation plan submitted. CNPI fails to understand the importance of Aboriginal Consultation. CNPI fails to understand the importance of a flexible plan to initiate dialogue and the process and procedure of consultation with affected Aboriginal communities. CNPI cannot approach Aboriginal communities with no plan or process and simply hope to 'wing it'. This is	Selection of CNPI will likely result in delays and failure to meet timelines. CNPI has not prepared a consultation plan. The time required to prepare an accepted plan after designation will add delays and costs to CNPI's proposal. There will also be added costs because of the inclusion of unaffected First Nations in the participation arrangements. Failure to plan for consultation and participation with affected Aboriginal communities early will also affect the overall reliability of the project.

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
	communities that are directly impacted.	both unacceptable and disrespectful to Aboriginal communities.	
RES	RES proposes to allow for Aboriginal partnerships following selection. This approach fails to consider the extensive time and costs required to negotiate and enter into partnerships with First Nations. Aboriginal equity participation is capped at 20% or $50 million. There is no rationale given in how this proposal was established. There is no	RES has submitted a plan for Aboriginal Consultation. However, RES has stated that RES will consult with not only affected Aboriginal communities but with any other Aboriginal community that expresses an interest in the project. This approach is not only unworkable, but displays a complete lack of understanding for the legal basis of the Duty to Consult. Including unaffected Aboriginal communities in consultation will expand the process, resulting in delays and increased costs. There would be no boundaries on which Aboriginal communities must	RES' plan to consult with any and all Aboriginal communities will add significant time and cost to the project. Consulting with all interested Aboriginal communities will be unnecessarily broad and time consuming. There is no guarantee that RES's discussions with affected Aboriginal communities will result in meaningful participation for First Nations and/or Métis. The lack of a participation plan and participation already in place will add significant time to RES' proposal. RES proposes to offer partnerships to all Aboriginal communities. Attempting to negotiate partnership agreements with 18 different communities with different interests will take years and may never be successful. This will significantly delay and may entirely

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
	provision for management or control in the company. There is no strategy in place to demonstrate how RES intends to reach a commercial agreement with all Aboriginal communities or how the project will be affected by a failure to reach commercial agreement.	be consulted and which are not. Further the legal test for consultation requires an Aboriginal right, interest or title that will be impacted by the project. Expanding consultation beyond these communities essentially empties consultation of all meaning and application.	prohibit any leave to construct hearing.
AltaLink	AltaLink proposes to allow for Aboriginal partnerships following selection. This approach fails to consider the extensive time and costs required to negotiate and enter	AltaLink has submitted a plan for Aboriginal Consultation. It is deeply concerning however, that AltaLink has also submitted draft Terms of Reference for an Environmental Assessment. There was no consultation, notice or opportunities to provide comments	AltaLink's preparation of draft Terms of Reference display a misunderstanding of Aboriginal consultation. This is an indication that consultation will be long, difficult and subject to challenges. AltaLink's approach will add significant time and cost to the project. The lack of existing participation will add

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
	into partnerships with First Nations. Altalink proposes to maintain total control in the project. No provision for Aboriginal control or management. There is no strategy in place to demonstrate how Altalink intends on reaching a commercial agreement with all Aboriginal communities or how the project is affected by the failure to reach a commercial agreement.	given to Aboriginal communities. AltaLinks actions show a grave failure to understand Aboriginal consultation. AltaLinks approach is lacking in respect for Aboriginal communities, the Constitution and the legal framework surrounding the Duty to Consult.	significant time to AltaLink's proposal. Attempting to negotiate partnership agreements with even a small number of Aboriginal communities will take years and may never be successful. This will significantly delay and may entirely prohibit the proposal from moving forward. There is no guarantee that Altalink's discussions with affected Aboriginal communities will result in meaningful participation for First Nations and/or Métis.
EWT	EWT has an existing partnership with the most directly affected	EWT has a comprehensive plan for Aboriginal Consultation. EWT's Aboriginal Consultation plan has	EWT's existing partnership arrangement will reduce the time required to move the project forward. There will be no delays or costs for

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
	Aboriginal communities.	already been reviewed, commented on and revised based on input from the most directly affected Aboriginal communities. Aboriginal Consultation occurs on a sliding scale, with those Aboriginal communities that are most affected requiring the deepest levels of consultation. An Aboriginal Consultation plan developed and accepted by those Aboriginal communities legally entitled to the deepest level of consultation will meet any consultation requirements for less affected Aboriginal communities.	negotiating agreements and setting up corporate structures. EWT's consultation plan has been reviewed and revised by the most affected Aboriginal communities. It will meet the requirements for the deepest levels of consultation. This will reduce the time and costs associated with Aboriginal communities reviewing and commenting on consultation plans and the negotiations that normally occur before consultation can even begin. This plan already includes meaningful participation for First Nations and/or Métis and is in keeping with the stated requirements of the LTEP and Minister's letter.
UCTI	It is unclear whether UCTI will allow Aboriginal partnerships.	No Aboriginal Consultation plan submitted. UCTI fails to understand the	If UCTI is selected there will be significant delays. UCTI has not taken a proactive approach to consultation and additional time

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
	This approach not only fails to meet the decision criteria established by the Board, but also fails to consider the extensive time and costs required to negotiate and enter into partnerships with First Nations.	importance of Aboriginal Consultation. UCTI fails to understand the importance of a flexible plan to initiate dialogue and the process and procedure of consultation with affected Aboriginal communities. UCTI cannot approach Aboriginal communities with no plan or process and simply hope to 'wing it'. This is both unacceptable and disrespectful to Aboriginal communities.	will be required to prepare a consultation plan after designation. The lack of a consultation plan now, combined with no plan for participation will likely to be much higher costs than anticipated. UCTI will need to spend significant funds and resources on developing a consultation plan and negotiating participation arrangements. Failure to plan for consultation and participation early will also affect the overall reliability of the project – there has not been any input into the best locations to site towers and lines to ensure protection from the elements and avoidance of ecologically sensitive sites. UCTI also fails to comply with government policy to promote participation with Aboriginal communities. There is no guarantee that UCTI's discussions with affected Aboriginal

	Aboriginal Participation	Aboriginal Consultation	Impact on Board Objectives
			communities will result in meaningful participation for First Nations and/or Métis.

VIII. RESPONSES TO MNO SUBMISSION

80 During oral submissions, MNO made several comments that are not in accordance with the existing jurisprudence.

To assist the Board, Pic River has responded to some of these inaccuracies.

A. PIC RIVER RESPONSES TO MNO ORAL SUBMISSIONS

	Excerpts from MNO Oral Submission	Pic River Response
1	*"Given all this, the Board cannot interpret the Ontario government policy to allow a designation in the East-West Tie that would completely exclude even the possibility of a Métis community partnership."*	The Minister's letter does not explicitly require • That all affected Aboriginal communities become partners • That all Aboriginal communities listed in the Minster's Letter become partners • That any partnership must include MNO. It is not the job of First Nations to ensure a bargaining spot for Métis within private commercial relationships.
2	*"We do not say that the Board must ensure that a partnership is ultimately achieved or reached. But what is clear is that a designating partner who refuses to even discuss the possibility of a partnership with impacted Métis communities would be a breach of Ontario government policy."*	To state there would be a breach is completely false. Government policy requires considering Aboriginal Participation with Aboriginal communities. The government policy does not require that Aboriginal participation be in pace with at least one Métis community. The policy treats both First Nations and Métis equivalently, as one group. Participation can be with only one

	Excerpts from MNO Oral Submission	Pic River Response
		member of the group. It is not a breach of policy to include less than the entire group. AP can take many forms including employment opportunities, contracting opportunities and education and training. As the example of SON and Hydro One in the Bruce to Milton Line demonstrates, there may still be opportunities for participation as a project progresses.
3	*"This type of approach undermines Ontario's policy commitments to both First Nations and Métis communities. It makes a mockery of all the work First Nations and Métis communities have done together over the past few years. This model is a non-starter for the East-West Tie project specifically, as well as for all future transmission projects."*	The EWT LP is an example of proactive strategic thinking on behalf of Aboriginal communities and industry and should be recognized on that basis. MNO just like other Aboriginal communities had the opportunity to form partnerships in advance of the opening of the designation process. MNO just like Pic River was involved in the IPSP and the LTEP consultations and was fully aware that a designation process would unfold and that it would be incumbent upon them to negotiate partnerships as part of the process – not to rely upon the Board to negotiate on its behalf.

	Excerpts from MNO Oral Submission	Pic River Response
		The government policy has never been to require partnerships with Aboriginal communities. It has only been to encourage participation. No government policy requires or encourages participation with all affected Aboriginal communities – the government recognizes that this is extremely difficult and untenable.
4	"*The MNO cannot emphasize enough that getting it right in this designation is critical. The prospective transmitters are -- if the prospective transmitters are sent a message that they can pick and choose between affected First Nations or between First Nations and Métis, it would inevitably lead to a government-sanctioned discrimination or arbitrariness. It would also encourage back-room dealings, not open and fair and principled negotiations. We will not have paved a fresh way forward for First Nations and Métis partnerships in a new energy future, but rather, we would put significant new road blocks, in the form of delays, controversy, and litigation.*	Pic River submits that one of the goals of Aboriginal participation is to incentivize industry to partner with First Nations and Métis, on their own or collectively, so that the First Nation or Métis group can build capacity within its community. Capacity building furthers positive, meaningful and long lasting commercial relations and can build acceptance especially where projects pose great impacts to community members and future generations. There is no requirement in policy or law to require partnerships to be formed between Industry and Aboriginal groups. MNO is asking for an outcome to which there is no precedent and which would have a negative impact on First Nations and Métis ability to build capacity for future commercial transactions. First

	Excerpts from MNO Oral Submission	Pic River Response
	That said, the MNO has faith that the Board will see this and act to ensure that the Ontario government policies are not ignored or breached. We do not want the East-West Tie to become the new Métis litigation test case, but a test case on how and when right policies are put in place and implemented the interests of the government, a ratepayer, a private sector, First Nations, and Métis can align."	Nations and Métis would instead be granted passive equity stakes in projects and not receive any additional capacity building benefits that arise from completing commercial negotiations. MNO's endorsement of the AltaLink proposal effectively relegates Pic River to a role of passive investor with no stake in management of control of a company it owns. This is a substantial step back for Pic River.
5	*"This type of approach does not allow participation options to be explored. It sets out a participation plan that would limit Métis participation to the mere potential of contracts or employment that the First Nations do not want.* *With respect, this approach equates to Métis potentially having some access to discarded scraps. It is insulting to the Métis community and undermines the ability of our mutually agreeable participation opportunities to be discussed and agreed between the transmitters and Métis*	MNO had an opportunity to co-partner with an Applicant as part of this designation process. MNO chose not to. MNO has never approached Pic River of Bamkushwada LP to inquire about becoming a partner. It is unfortunate that MNO sat by the side lines and are now suggesting that the Board must rectify this for the MNO and not for all other First Nations or other Métis organizations not represented by the MNO that may be impacted by the project.

	Excerpts from MNO Oral Submission	Pic River Response
	communities."	
6	*"More concerning is that this type of approach essentially creates two classes of Aboriginal communities whose traditional territories will be crossed by the East-West Tie. This is contradictory to the explicit directions in the long-term energy plan, and it speaks to why participants' plans that allow the transmitter the Aboriginal communities to explore opportunities should be preferred over ones that dictate limited opportunities."*	Aboriginal Participation may including: • one or more First Nations only • one or more First Nations and Métis groups • one or more Métis groups only All of the above options meet the criteria for Aboriginal Participation in this proceeding and meet the stated terms of the LTEP and Minister's Letter. Where an Applicant meets any of these three examples, Aboriginal Participation should be awarded to the Applicant. Any other proposal to use best efforts to achieve Aboriginal Participation following consultation, may result in Aboriginal Participation post consultation. There is no guarantee that Aboriginal Participation will be achieved. There is no guarantee that the Board will have awarded designation to an Applicant that meets the stated terms of the LTEP and Minister's Letter.
7	*"The MNO also wants to express its deep concerns and objections to the East-West Tie Limited Partnership with this plan. We want the Board to know that if this plan was approved by*	MNO fails to understand the nature of the Duty to Consult. The Duty to Consult does not give First Nations or Métis a veto. The Duty to Consult places a positive obligation on Aboriginal communities to participate in consultation. Aboriginal communities must make a bona fide effort to find a resolution to the issues.[28]

[28] *Haida.* See also *Platinex* at paras 91,132.

	Excerpts from MNO Oral Submission	Pic River Response
	the Board it would lead to an acrimonious relationship, with the MNO formally requesting that procedural aspects of the Crown's duty not be delegated to the East-West Tie Limited Partnership. *This consultation plan, consistent with the East-West Tie Limited Partnership's overall plans in submission, treats the Métis as a lesser-than Aboriginal groups. The plan's approach is disrespectful and inequitable towards Métis. The methodology for traditional knowledge collection is unsound. The proposed consultation process would essentially put Métis in a position where the consultation is being undertaken by the individuals who are adverse to the interests of MNO. This is unacceptable."*	The Court has stated that "The Duty to Consult is a reciprocal duty and the Crown as well as the Aboriginal party involved must approach this duty by showing ongoing good faith efforts to reach a consensus."[29] Aboriginal rights do "not automatically trump competing rights, whether they be government, corporate or private in nature."[30] The Court has also been clear that Aboriginal communities "cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions."[31]
8	*"What you are being asked to do here is to*	This contention that designating EWT LP as the successful transmitter in this

[29] *Platinex* at para 133.
[30] *Frontenac Ventures* at para 34.
[31] *Halfway*.

	Excerpts from MNO Oral Submission	Pic River Response
	sanction a consultation plan that has the potential of breaching the Crown's duty in relation to -- in relation to that. *And I just want to take you to -- I think there's two important quotes. One is from the Rio Tinto case from the Supreme Court of Canada, and it says this:* *"Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. The potential for adverse impact suffices. Thus, the Duty to Consult extends to strategic, higher-level decisions that may have an impact on Aboriginal claims and rights."* *So it doesn't mean that this is about -- the duty only gets kicked in when somebody's routing, and a harvesting area may be disturbed. This is a strategic level decision that a Crown body is undertaking, that will have an impact on rights.*	process, would enable a breach of the Crown's Duty to Consult is simply false.

	Excerpts from MNO Oral Submission	Pic River Response
	And we think we -- our position is that the Duty to Consult needs to inform that, and you need to be live to that issue when you're making the decision."	

B. WHAT DANIELS SAYS AND WHAT IT DOESN'T SAY

81 *Daniels*[32] says that Métis are Indians for the purpose of section 91(24) of the *Constitution Act, 1867.*[33] The *Daniels* decision means that the federal government has jurisdiction over Métis. The federal government can make laws that apply to Métis.

82 *Daniels* does not grant any rights, status or benefits to Métis. There is no assessment of rights under section 35 of the *Constitution*. There is no requirement to conduct consultation generally or specifically.

83 MNO is attempting to argue that based on *Daniels*, MNO can make discrimination arguments. MNO seems to argue that if Métis are Indians under section 91(24), then they are Indians for all other purposes. And all other things being equal (rights, impacts etc) then to treat Métis as less than First Nations simply because Métis are Métis and not First Nations is discrimination because both are Indians.

84 The difficultly with the MNO argument is that *Daniels* does not say that the Duty to Consult must be applied equally. *Daniels* also does not establish Métis rights. There is no basis in law which substantiates the Métis claim for discrimination. *Daniels* has no relevance here.

85 Further, no Applicant has suggested that Métis would not be consulted. All First Nations and Métis identified by the Minister would be consulted by all Applicants. This actually goes beyond the existing case law requirements. The existing case law only requires consultation for those Aboriginal communities that have an Aboriginal right to title that would be impacted by the project.

[32] *Daniels v Canada*, 2013 FC 6 [*Daniels*].
[33] *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

86 The existing case law is also clear that there are different levels/depths of consultation for different Aboriginal communities depending on the strength of the right or title and the severity of the impact. Different levels of consultation between First Nations and Métis or between two different First Nations is not discrimination if the differences are a reflection of the strength of the title/right and the impact.

C. CASE LAW REFERENCES MADE BY MNO IN THE ORAL SUBMISSION

87 In addition to *Daniels,* MNO cited other cases in the oral submission.

88 MNO cited *Manitoba Métis Federation Inc v Canada*[34] as an example of the Crowns obligation to reconcile pre-existing Métis rights, interests and claims. With respect, this is not the holding in this case.

89 In *Manitoba Métis,* the Supreme Court of Canada holds that a delay in distributing grants of land to Métis children between 1871 and 1880 violated the honour of the Crown. The Supreme Court is clear that the honour of the Crown was only engaged because the grants were incorporated into the *Constitution.*

90 The Supreme Court was explicit – Métis do not have Aboriginal title or rights to these lands:

> *The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal: it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land. The key issue is this whether the Métis as a collective had a specific or cognizable Aboriginal interest in the ss. 31 or 32 land.*
>
> *...*
>
> *In summary, the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis. Nor does the evidence: the trail judges*

[34] 2013 SC 14 [*Manitoba Métis*].

findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention.[35]

91 The Court was equally clear that there was no fiduciary obligation owed by the Crown.[36]

92 MNO also mentioned *Kwikwetlem First Nation v British Columbia (Utilities Commission).*[37] This case was similar to a hearing for a leave to construct in Ontario.

93 In *Kwikwetlem,* the Commission refused to hear any arguments or evidence on Aboriginal Consultation. The Commission deferred the issue of Aboriginal Consultation to the environmental assessment process.

94 On appeal to the British Columbia Court of Appeal, the Court held this approach was incorrect. The Courts decision was based on the leave to construct setting out the specifications of the project prior to the environmental assessment process. This would effectively remove consideration of any alternatives and eliminate possibilities to mitigating or addressing concerns raised by the First Nations. The Commission itself could not consider any alternatives to the project, only the application before it.

95 In addition, the environmental assessment process in British Columbia had recently been revised to remove references to First Nations and consultation.

96 In contrast to the Utilities Commission, the Ontario Energy Board is only at the designation stage. There is no well defined project at this stage.

[35] *Manitoba Métis* at paras 53, 59.
[36] *Manitoba Métis* at para 64.
[37] 2009 BCCA 68.

97 The Board has taken a very proactive approach to consultation in these designation proceedings. The Board has required Aboriginal Consultation Plans and Aboriginal Participation as criteria for the designation process. The Board is accepting and considering submissions on these two criteria and weighing them in the selection of an Applicant.

98 Lastly, MNO may have cited *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*[38] in MNO's oral submissions. We have already cited this case when discussing the Duty to Consult.

99 In *Rio Tinto*, the Supreme Court held that the British Columbia Utilities Commission has the jurisdiction to hear arguments and assess the adequacy of consultation.

100 However, the Supreme Court stated that there is no requirement for consultation where there are no impacts to Aboriginal rights. The Commission had considered if there would be adverse effects and found none. The Supreme Court held that an underlying infringement in and of itself is not an adverse impact giving rise to a Duty to Consult.

101 In the current designation process, there is little impact to Aboriginal rights and title. At most, consultation is at the low end of the spectrum with a need to provide only notice to potentially affected First Nations and Métis communities. The OPA has already taken this step.

[38] *RioTinto*.

102 When the Board hears arguments on leave to construct, there may be a requirement to assess the adequacy of consultation. As mentioned above, the Board is already displaying a proactive approach to future assessments of consultation by requiring now that applicants submit consultation plans.

103 The Board's inclusion and weighting of consultation plans within the designation criteria exceed the legal requirements and is a clear sign that the Board understands the Duty to Consult and the Board's future jurisdiction to assess consultation.

IX. EXAMPLES OF OTHER GOVERNMENT POLICY AND PROCUREMENT PROGRAMS THAT INCORPORATE ABORIGINAL PARTICIPATION PRINCIPLES

104 The Board's approach to evaluating Aboriginal Participation should be consistent with other provincial programs already in place that consider Aboriginal Participation as part of their evaluation criteria. Programs such as the Ontario Power Authority's Feed In Tariff program for renewable energy generation ("FIT") allow for Aboriginal Participation that is self defined. Proponents seeking to do business in traditional territories and Aboriginal communities working through negotiations will inevitably conclude ownership structures and partnership models that are achievable. The alternative is to have corporations or governments prescribe what the relationship will be between Aboriginal communities and resource development projects. Society has rejected this model. There is no precedent for the government, a Court or a Tribunal to require or force a party to enter into a partnership with Aboriginal communities.

X. CONCLUSION

105 The Board's criteria for designating a transmitter includes Aboriginal Consultation and Aboriginal Participation.

106 Aboriginal Consultation and Aboriginal Participation are distinct.

107 Aboriginal Consultation at this stage requires a thorough but flexible plan.

108 Aboriginal Participation at this stage should be assessed by giving weight to those applicants with either participation in place or a concrete plan that will achieve participation.

109 The EWT LP meets the criteria for Aboriginal Consultation and Aboriginal Participation. The EWT LP will not experience the delays, increased costs and reliability concerns that will be experienced by other Applicants without strong Aboriginal Consultation plans and/or guaranteed Aboriginal Participation.

110 The EWT LP should be given significant weight on these criteria

111 Pic River respectfully submits that EWT LP should be given significant weight by the Board in selecting the transmitter for the East West Tie.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 2013.

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