

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

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

MÉTIS NATION OF ONTARIO

WRITTEN SUBMISSION – PHASE II

I. OVERVIEW

The Métis Nation of Ontario (MNO) makes the following submissions with respect to Phase II of these designation proceedings for the proposed East-West Tie transmission line (EWT). The EWT is identified as a priority transmission project in Ontario's Long-Term Energy Plan (LTEP).

The MNO also relies on its presentations from the community sessions held by the Board in Thunder Bay on May 2 and 3, 2013 as well as the MNO's letter to the Minister of Energy dated January 15, 2013. These materials have been filed with the Board.

In this Phase, the Board must apply the Decision Criteria established in Phase I to the applications submitted by seven prospective transmitters. Based on this assessment, the Board will select the most qualified transmission company to develop, and subsequently seek a leave to construct approval for the EWT.

The MNO has focused its submissions on the proper interpretation, application and assessment of: (1) First Nation and Métis Participation, and, (2) First Nation and Métis Consultation, in the context of the EWT designation. The Board, in its Phase I Decision has established that these are two distinct criteria that must be addressed in all applications, and which will be used to assess and determine the successful applicant.

II. INTRODUCTION

The Intervener

The Métis Nation of Ontario (MNO) represents Métis individuals and communities throughout Ontario. In this proceeding, it is intervening on behalf of three of its Community Councils: the Thunder Bay Métis Council, the Superior North Shore Métis Council and the Greenstone Métis Council (the “Community Councils”). A map of these Community Councils in relation to the EWT is attached as Appendix A. Both the Thunder Bay Métis Council and the North Shore Métis Council are located within 40 kilometers of the proposed EWT.

Collectively with the MNO, along with these Community Councils, represent a regional rights-bearing Métis community that spans the north shore of Lake Superior as a part of the Upper Great Lake Métis community acknowledged in *R. v. Powley*, [2003] 2 S.C.R. 207.¹ This Métis community has rights and interests related to land and resources within their shared traditional territory, which will be traversed by the EWT.

The rights and outstanding claims of this Métis community are well-documented and well-known in this traditional territory.² Specifically, the harvesting rights of this community have been accommodated by the Crown through a negotiated agreement with the MNO.³ As well, the Community Councils have been identified by the Ontario Government for Crown consultation in relation to the EWT.⁴

The Importance of this Designation

This designation is extremely important for the MNO and its Community Councils. It represents the first opportunity to test and implement the First Nation and Métis participation policies in the LTEP with respect to new transmission, which the MNO has worked with the Ontario Government to advance over the last several years in order to ensure fair and equitable Métis inclusion.⁵

It also represents an opportunity for the Community Councils, on behalf of the Métis community in the region, to meaningfully participate in the building of

¹ *R. v. Powley*, [2003] 2 S.C.R. 207, para. 21. **[MNO Case Law for Oral Sessions, Tab 1]**

² MNO Materials for Oral Sessions, Tabs 14-16.

³ MNO Materials for Oral Sessions, Tabs 14-16.

⁴ MNO Case Law for Oral Sessions, Tab 3.

⁵ Letter from Minister of Energy to Ontario Power Authority dated May 31, 2011.

Ontario's green energy economy as well as benefit from new transmission that will cross the community's traditional territory for generations.

For the Métis, this will be a precedent-setting designation. It will either send the message that the policy commitments in the LTEP are real and that they will be meaningfully implemented for both First Nations and Métis communities. Or, it will send a signal that the Métis community, whose traditional territory is crossed, will likely not meaningfully participate in the EWT in a manner consistent with the commitments in the LTEP. The MNO intervenes to ensure the later is not the result of this designation, or the template for future designations.

Moreover, for Ontario as a whole, this designation is the first-of-its-kind. As Ontario citizens and ratepayers, Métis also has an interest in ensuring this designation serves the public interest and advances the development of the province's green energy economy. The MNO hopes that through this designation a positive, effective and durable framework for the advancement of future transmission in the province is developed.

III. THE INCLUSION OF FIRST NATION AND MÉTIS PARTICIPATION AND CONSULTATION AS DECISION CRITERIA

Aboriginal Participation and Consultation as Distinct Decision Criteria

In undertaking this Board-initiated designation proceeding pursuant to sections 70 and 78 of the *Ontario Energy Board Act, 1998*, the Board is also obligated to fulfill its related statutory roles within its governing legislation.

Section 1(1) of the *Ontario Energy Board Act*, which was amended by the *Green Energy Act, 2009*, includes the following Board objective:

5. To promote the use and generation of electricity from renewable energy in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. (emphasis added)

In its Phase I Decision, the Board confirms that the LTEP articulates Ontario Government policy with respect to energy development in the province.⁶

⁶ EB-2011-0140, Phase I Decision and Order, p. 7 (Issue #4).

The LTEP states the following with respect to new transmission projects being advanced in Ontario,

Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nations and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely affected. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.⁷

These two related requirements with respect to new transmission in Ontario – aboriginal participation and aboriginal consultation – originate from different sources and are distinct. In its Phase I submissions, the MNO explained this distinction as follows:

It is critical to recognize that the government’s policy commitment to First Nation and Métis participation in energy projects (i.e., Aboriginal Participation), and its constitutional and legal obligations flowing from the Crown’s duty to consult and accommodate affected First Nations and Métis communities in relation to energy projects (i.e., Aboriginal Consultation) are inter-related, but distinct from one another. These two issues must not be conflated in the East-West Tie Line designation process.

The support and encouragement of **Aboriginal Participation** in energy projects is a distinct policy-based commitment of the Government of Ontario. The policy seeks to remedy part of the difficult history of energy development in Ontario and its disproportionate impacts on First Nations and Métis communities. Part of this history is the systematic exclusion of Aboriginal people from decision-making and benefits relating to energy project planning and development. While these policies may have their origins in Canadian constitutional and common law respecting Aboriginal and treaty rights, they are now stand-alone policy goals and operate independently of any other legal obligations of the Crown respecting a duty to consult. ...

The adequacy of **Aboriginal Consultation** is a constitutional obligation that applies to any and all government decisions that stand to affect the Aboriginal or treaty rights (recognized, proven or asserted) of an Aboriginal people. The Crown’s duty flows from the honour of the Crown and “a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.”⁸

⁷ LTEP, p. 49.

⁸ *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, para. 32. [MNO Case Law for Oral Session, Tab 6]

Consistent with Ontario policy and the Crown's duty to consult and accommodate, the Board added "First Nation and Métis Participation" and "First Nation and Métis Consultation" as distinct decision criteria for designation in the EWT proceeding, and issued corresponding filing requirements for both criterion.

The MNO agrees with the Board's addition of these two independent decision criterion in the context of the EWT specifically, as well as for future designations related to other priority transmission projects identified in the LTEP.

The MNO submits that credible and viable First Nation and Métis participation and consultation plans are requirements for designation. They are not optional. The sections below outline what is required in the context of these two distinct decision criteria, along with submissions on how the respective plans of prospective transmitters should be assessed in the context of this designation.

IV. THE OVERALL ASSESSMENT OF DECISION CRITERIA IN THIS DESIGNATION

The Board made clear in its Phase I Decision, that it would not articulate an assessment methodology to be applied to decision criteria. Rather, the Board confirmed that "[a]ll the decision criteria are important, and the Board is unwilling to restrict its ability to give full consideration to each criterion before it is informed by the context of the applications for designation."⁹

As a result, the Board has rejected an approach that assesses distinct decision criteria through the lens of other decision criteria (*e.g.*, First Nation and Métis plans should not be assessed on the basis of cost and reliability, but as a stand-alone criterion).¹⁰

The MNO agrees with this approach to the Board's assessment and decision-making process and submits that each decision criteria, including First Nation

⁹ EB-2011-0140, Phase I Decision and Order, p. 9.

¹⁰ This MNO notes that the oral submissions of Pic River First Nation, on behalf of Bamkushwada LP, are inconsistent with the Board's Phase I Decision and Order on this issue. These First Nations argue that aboriginal consultation and participation plans should be assessed "from the perspective of cost and reliability to customers." [EB-2011-0140, Oral Session Transcripts, May 2, 2012, p. 109 (lines. 4-9)]. This is inconsistent with the Board's decision on this issue as well as Ontario policy. The MNO submits that the formulated "questions" these First Nations suggest need to be answered by the Board in relation to assessing each prospective transmitter's aboriginal consultation and participation plans are unsound and would lead to the Board contradicting its previously stated approach to applying the decision criteria in this designation process for the EWT.

and Metis participation and consultation, must be given a full and independent assessment based on the plans submitted by the prospective transmitters.

The MNO submits that this is the only way the Board can achieve its “primary objective” of selecting the “most qualified transmission company to develop, and bring a leave to construct application for the EWT line,”¹¹ consistent with the Board’s statutory mandates and obligations.

V. THE REQUIREMENT OF FIRST NATION AND MÉTIS PARTICIPATION

Ontario’s Policy and First Nation and Métis Participation in New Transmission

The LTEP clearly recognizes that First Nations and Métis participation is a distinct and stand-alone policy objective that must be advanced in relation to future designation, development, construction and operation of priority transmission projects in Ontario.

Where new transmission lines are proposed, Ontario is committed to meeting its duty to consult First Nations and Métis communities in respect of their aboriginal and treaty rights and accommodate where those rights have the potential to be adversely affected. Ontario also recognizes that Aboriginal communities have an interest in economic benefits from future transmission projects crossing through their traditional territories and that the nature of this interest may vary between communities.¹² (emphasis added)

The plan specifies core aspects of the policy of aboriginal participation, as well as the objectives of the policy:

Ontario recognizes that successful participation by First Nation and Métis communities will be important to advance many key energy projects identified under the Long-Term Energy Plan. ...

There are a number of ways in which First Nation and Métis communities could participate in transmission projects. Where a transmission line crosses the traditional territories of aboriginal communities, Ontario will expect opportunities to be explored:

- Provide job training and skills upgrading to encourage employment on the transmission project development and construction.

¹¹ EB-2011-0140, Phase I Decision and Order, p. 3.

¹² LTEP, p. 49.

- 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. The government will also work with the OPA to adjust the Aboriginal Energy Partnerships Program – currently focused on renewable energy projects – to provide capacity funding for aboriginal communities that are discussing partnerships on future transmission projects.¹³

Based on the language in the LTEP, there are several fundamental aspects of Ontario aboriginal participation policy as it relates to new transmission. These are:

- The policy is separate and distinct from any obligations flowing from the Crown’s duty to consult and accommodate. It is not meant to discharge the Crown’s duty, but “recognizes that Aboriginal communities have an interest in economic benefits from future transmission.”
- The policy’s goal is to “advance key energy projects” through First Nation and Métis participation. As such, it should not be implemented in a manner that will potentially delay, frustrate or hinder transmission projects.
- The policy is only applicable to aboriginal communities whose “traditional territories will be crossed by the new transmission” (i.e., there is a geographic nexus required to have an interest in these non consultation-based economic benefits).
- The policy applies to “First Nation and Métis communities” equally. There is no hierarchy between aboriginal groups and an assessment of rights, claims or interests is not required in order to have an interest in these economic benefits flowing from new transmission.
- The policy creates positive obligations on transmitters to engage in participation related discussions with aboriginal communities that are proximate to a new transmission project (i.e., “expect opportunities to be explored”, “further” employment, “enable” participation). It is not advanced by transmitters refusing to engage some aboriginal communities, prescriptive approaches or largely meaningless commitments.

¹³ EB-2011-0140, Phase I Decision and Order, p. 7.

The MNO submits that these aspects of the LTEP's aboriginal participation commitments with respect to new transmission must be appreciated and understood in order for the Board to properly facilitate and implement Ontario policy as well as assess the participation plans of prospective transmitters in the context of the EWT designation. Anything less would be inconsistent with Ontario policy.

Further, the MNO notes that this interpretation of the LTEP's aboriginal participation commitments with respect to new transmission is consistent with other government actions and initiatives, as described in detail in the MNO's oral submissions to the Board.¹⁴

First Nation and Métis Participation as a Distinct Criteria and Filing Requirement

As discussed above, although the Board would not set out a rigid methodology, it has given "guidance" to applicants through its articulation of the decision criteria and filing requirements. With respect to aboriginal participation, the filing requirements are:

- 3.1 If arrangements for First Nation and Metis participation have been made, a description of:
 - The First Nation and Metis communities that will be participating in the project;
 - The nature of the participation (e.g. type of arrangement, timing of participation);
 - Benefits to First Nation and Metis communities arising from the participation; and
 - Whether participation opportunities are available for other First Nation and Metis communities in proximity to the line.
- 3.2 If arrangements for First Nation and Metis participation have not been made but are planned, a description of:
 - The plan for First Nation and Metis participation in the project, including the method and schedule for seeking participation;
 - The nature of the planned participation; and
 - The planned benefits to First Nation and Metis communities arising from the participation;
- 3.3 If no First Nation or Metis participation in the project is planned, detailed reasons for this choice.

¹⁴ MNO Oral Submission, Presentation by MNO President Gary Lipinski, pp.6-8.

The MNO submits that having a First Nation and Metis participation plan that is credible, meets the Board's filing requirements and is consistent with Ontario policy as well as the Board's decision criteria are threshold issues that must be met in order for a transmitter to be designated in this proceeding. A prospective transmitter that has submitted a plan that fails to meet these requirements, or is otherwise inconsistent with or does not operationalize Ontario policy, as set out in the LTEP, cannot be designated.

Further, the MNO submits that a clear statement from the Board that these decision criteria are threshold issues will be of assistance to prospective transmitters contemplating participation in future designations. It will also strengthen the importance of the LTEP's commitments with respect to First Nation and Métis participation in new transmission.

Key Considerations for Assessing Participation Plans

The Board has stated that it will exercise its judgment for each criterion, with the assistance of evidence and submissions of interested parties. The MNO respects the Board's jurisdiction to make decisions in this way and in a manner consistent with its mandate under the *Ontario Energy Board Act, 1998*, including, its new responsibilities to implement Ontario policy in relation to new transmission.

The MNO submits that the objectives of the Board require it to ultimately select a designated transmitter whose First Nation and Métis participation plan meets and promotes the objectives of Ontario policy with respect to aboriginal participation as set out in the LTEP. A transmitter with a participation plan that is inconsistent with or undermines Ontario policy cannot be designated, since such a result would breach the Board's statutory obligations in the context of this proceeding.

The MNO submits that there are a number of key considerations that must be brought into the assessment of each application and its First Nation and Metis participation plan. These are core concepts and objectives of the policy set out in the LTEP.

Building healthy and sustainable aboriginal economies through participation

One of the overarching objectives of the LTEP policy with respect to First Nation and Metis participation in new transmission projects is to promote the development of new, healthy and sustainable economies within Aboriginal communities.

The Ontario Government, First Nations and Métis communities recognize this objective cannot be achieved through short-term, temporal or fleeting economic benefits from energy development occurring on the traditional territories of aboriginal communities. It can only be achieved through stable sources of new wealth and revenue in order to support aboriginal communities.

As a part of building a green energy economy in the province, the Ontario Government has repeatedly affirmed its commitment to working with “First Nation and Métis partners to help create economic opportunities that will improve the quality of life for current and future generations” and “unlocking Ontario’s clean energy potential and creating real and lasting opportunities for First Nation and Métis communities.”¹⁵ (emphasis added)

Consistent with this approach, government commitments in the LTEP, such as the Aboriginal Loan Guarantee Program, have been designed to help First Nation and Métis communities buy equity in green energy projects to “provide a community with guaranteed and sustainable long term sources of revenue.”¹⁶ Similarly, as discussed above, the LTEP states, “Ontario will encourage transmission companies to enter into partnerships with aboriginal communities” whose traditional territories are crossed.¹⁷

The goal of these Ontario policies is to enable aboriginal communities to grow and participate in the real economies of energy development and provides long-term economic benefits based on a sharing of the wealth generated in and from their traditional territories.¹⁸ The MNO notes that this model of First Nation and Metis participation is very different than traditional Impact and Benefit Agreements (IBA) approaches.¹⁹

Aboriginal participation in energy development allows new relationships to be built and promotes new and diverse entrants into the energy sector. Another key advantage of this type of approach is that it provides the opportunity for the interests of government, the ratepayer, industry, First Nations and Métis to align in relation to energy development. As specifically noted in the LTEP, it assists in projects achieving a “social licence” to be developed: “Ontario recognizes that successful participation by First Nation and Métis communities will be important

¹⁵ MNO Materials for Oral Sessions, Tab 10, p. 2.

¹⁶ MNO Materials for Oral Sessions, Tab 10, p. 1.

¹⁷ LTEP, p. 49.

¹⁸ The MNO also notes that these types of partnerships enable First Nation and Métis communities to assume financial risk as well as share in the revenue stream generated by the project by putting them in the place of a transmitter, rather than adding to project related costs.

¹⁹ IBA’s are often, in the best sense, an accommodation that is the outcome of a consultation process. However, historically IBA’s have been little more than one time payments that provided little in the way of capacity building or sustainable income streams. The MNO submits that IBA’s or similar community impact agreement models will continue to have a place as an accommodation, but they cannot supplant the commitment to aboriginal participation that is set out in Ontario policy.

to advance many key energy projects identified under the Long-Term Energy Plan”.²⁰

It is submitted that, based on Ontario policy, it is fundamental that the designated applicant have put forward a credible plan for First Nation and Metis participation that can achieve the overarching goal of promoting health and sustainable aboriginal communities, and does not only offer a traditional IBA style arrangements.

Providing a range of opportunities for participation

As described above, the LTEP specifies the expectations that form Ontario policy with respect to First Nation and Metis community participation in new transmission projects:

- Partnerships with aboriginal communities, where commercially feasible and where those communities have expressed interest.
- 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.

The Board’s filing requirements reflect a recognition of these expectations, and the MNO submits that no application that fails to address these categories for both First Nations and Métis should be accepted. While it is recognized that no two aboriginal communities’ circumstances are the same, and all communities and proponents are free to enter into agreements that meet their mutual needs and interests, communities should, at the very least, be given the opportunity to explore all means of participation identified in the LTEP.

A participation plan that dictates, limits or completely excludes the opportunity for these participation related discussions to be engaged with First Nation or Métis communities whose traditional territories are crossed by a transmission line is inconsistent with Ontario policy and the Board’s filing requirement. These types of approaches do not implement Ontario policy, but “claw back” commitments made to First Nation and Métis communities.

If there is no demonstration of an opportunity for participation consistent with the LTEP for First Nations or Métis communities proximate to a transmission line, this must be explained in the aboriginal participation plan. Where a plan fails to

²⁰ LTEP, p. 49.

provide an adequate explanation, that plan should be rejected by the Board because it does not implement Ontario policy.

The opportunity for partnership or equity participation

Following from the above, no application should be accepted that precludes the opportunity for certain kinds of participation by a proximate community that has expressed interest. Specifically, any application that expressly denies a proximate aboriginal community the opportunity to discuss partnership or equity participation should be rejected by this Board on the basis that it is inconsistent with the language and goals of Ontario policy.

The MNO does not say that Ontario policy requires that proponents enter into partnership agreements with any interested community. These arrangements must be realistic and commercially feasible. However, an approach taken by a prospective transmitter that precludes even the possibility of partnership is inconsistent with policy. If the Board were to accept such a plan in these designation proceedings, it would permit and legitimize an approach to aboriginal participation that could fundamentally undermine the goals of Ontario policy and set a dangerous and destructive precedent for future designations.

This would send a signal to all future designations that transmitters should no longer attempt to work with and align interests with all of the aboriginal communities whose traditional territories will be crossed by project – just pick the communities you think are the most important to win designation and the rest can be left out entirely or promised meaningless opportunities that do not align with their community’s capacities, interests or needs, and will not result in any real participation in the project.

Moreover, the message will also be sent that participation by proximate Métis communities is not really needed in new transmission in order to be designated. Essentially, First Nations and prospective transmitters can allocate out all participation opportunities amongst themselves, and then hide behind “freedom to contract” or “self-determination” claims. This puts Métis in an untenable and adversarial position. The MNO submits it makes a mockery of the policy’s overall goals.

The MNO acknowledges Ontario policy does not require all parties to become partners or enter into contractual relationships, but it also cannot be implemented in a manner that shields prospective transmitters from having to preserve some space or opportunities for other aboriginal communities to meaningfully participate in a manner consistent with the commitments in the LTEP.

An approach to aboriginal participation where geographically proximate and interested First Nation and Metis communities are excluded from discussions

relating to categories of participation opportunities will lead to the following kinds of harms:

- To allow a proponent to selectively engage communities, and *achieve* designation on this basis, could lead to negative practices whereby a proponent would “shop” for aboriginal communities that are willing to accept a lesser deal. This cannot help but precipitate a “race to the bottom” dynamic where communities will be put into competition with one another for the opportunity to participate in a project, with each community feeling the pressure to accept less or risk being left out.
- Proponents and/or aboriginal communities will be put in *de facto* positions where they are allowed to determine which First Nations or Metis communities they deem are “most directly affected” or worthy of partnership in order to secure designation, rather than developing robust and inclusive participation plans for all aboriginal communities whose traditional territories are crossed.²¹
- These types of “winner take all” approaches for a few communities *will* lead to deep resentment among and between neighbouring aboriginal communities, which will undermine the LTEP’s policy goal of attaining a “social license” for new transmission projects and will create new obstacles and delays for their development. Very likely, these models will lead to decisions being challenged because policy is not being implemented or applied in a non-discriminatory manner.
- This type of approach would likely benefit business “savvy” or “sophisticated” aboriginal communities with financial means, while excluding similarly situated aboriginal communities with more limited capacities or experience in commercial enterprises or energy development will be excluded.

For these reasons, the Board should not accept a plan that precludes the possibility of partnership discussions, or any other form of participation identified in the LTEP with proximate aboriginal communities.

Maximizing opportunities for participation

It is axiomatic that plans that offer the greatest range and level of First Nation and Metis participation will do the most to achieve the goals and objectives of Ontario policy. Clearly, plans that provide for up to 49% equity ownership for

²¹ The MNO notes that this type of “asserted claim positioning” over other aboriginal communities who should also benefit from the Ontario policy is evident in the plan and written submissions of the EWT LP as well as the oral submissions of Pic River First Nation. [EB-2011-0140, Oral Sessions, May 2, 2013, p. 94 (lines 13-18)]

aboriginal communities are better than those offering 25% or no ownership opportunity at all. Similarly, plans that demonstrate the willingness of transmitters to share the project's profit-related or ancillary benefits with proximate communities are more beneficial than those that don't.

The MNO submits that those applications that demonstrably maximize opportunities for aboriginal participation should be viewed more favourably by the Board. Moreover, Ontario policy will be advanced through the designation of a transmitter that offers the greatest amount of participation opportunities to First Nation and Métis communities. It will send a clear message to prospective transmitters that the Board has embraced its role in advancing and implementing Ontario policy with respect to aboriginal participation. Notably, such an approach is consistent with Minister of Energy's directions and actions, who is also tasked with implementing Ontario participation policy in different ways.²²

The MNO also submits that a plan that sets out clear and tangible commitments with respect to aboriginal participation should be preferred by the Board, rather than those that make general or vague commitments.

Opportunities for proximate aboriginal communities

Ontario policy on aboriginal participation, as set out in the LTEP, is linked to geography of where the transmission line will be situated. This policy commitment is made to aboriginal communities – First Nations and Métis – where a new transmission project will be “crossing through their traditional territories”. The policy identifies the need for a geographic nexus between the project's location and aboriginal communities that will have an “interest in economic benefits” flowing from the project. The Board's filing requirements acknowledge the need for a geographic nexus, stating that applicants must demonstrate: “whether participation opportunities are available for other First Nation and Metis communities in proximity to the line.”

MNO submits that this is relevant for two reasons. First, it is an acknowledgement that proximate communities will have a greater interest in economic participation in a project, and greater expectations that they will be given the opportunity to participate in the wealth generated from new transmission within their traditional territory. Second, it narrows the scope of the Ontario policy and makes its implementation practical.

The MNO notes that some intervenors have argued that the policy cannot be read to require engagement of aboriginal communities that are remote from the project area. With respect, these concerns are unfounded. A plain reading of

²² For example, for a description of government activities, directives and programs to support aboriginal participation in energy development see: MNO Oral Submission, Presentation by MNO President Gary Lipinski, pp.4-8.

the policy indicates that expectations regarding aboriginal participation are only applicable to communities who are proximate to the new transmission – any level of “aboriginal participation” (i.e., aboriginal communities outside a project’s study area being owners) will not be sufficient to meet the policy’s goal.

Implementation of policy for First Nation and Metis communities

There is no question that the level of consultation, and potential accommodation measures, required in relation to a new transmission project will be commensurate with the recognized or asserted aboriginal or treaty rights at issue and the potential impacts on those rights. However, such considerations do not apply to the application of policy with respect to First Nation and Metis participation.

As explained above, the LTEP sets out the requirement of a geographical nexus between a project and aboriginal communities. However, it does not contemplate any strength of claim tests, or assessment of impacts among communities whose traditional territories will be crossed by new transmission. Importantly, it does not set out any hierarchy among First Nations and Métis communities. The LTEP’s commitments are based in broader policy objectives of promoting the economies and health of proximate aboriginal communities, and it applies to First Nations and Métis communities equally.

This does not mean that all aboriginal communities must ultimately be offered identical partnership or participation agreements. In fact, it is well-recognized that “one-size-fits-all” approaches do not work for First Nation and Métis communities.²³ However, plans that purport to offer opportunities based on an assessment of rights claims or impacts, or an arbitrary distinction between First Nation or Metis communities whose traditional territories will be crossed, should be rejected.

The MNO submits that such proposals are inconsistent with Ontario policy, and more importantly, if sanctioned by the Board, would lead to a discriminatory application of Ontario policy. The MNO is not arguing that private commercial arrangements made between First Nations and prospective transmitters are discriminatory. However, the MNO submits that if a Crown actor, such as the Board, designates a transmitter that precludes the meaningful implementation and application of Ontario policy for the benefit of proximate Métis communities – that is a discriminatory. It is trite law that discrimination claims cannot be made against private actors contracting amongst themselves. The concern for the MNO is the non-discriminatory application of Ontario policy – through this designation process – not how private actors choose to arrange their affairs.

²³ LTEP, p. 49.

The MNO submits that the above considerations must be considered in the assessment of the Board's decision with respect to each applicant's First Nation and Métis participation plan. Any application that fails to meet these requirements should be rejected in these proceedings, or must only be accepted with remedial conditions being imposed by the Board in order for them to align with Ontario policy.

MNO's Assessment of Participation Plans

Within this designation process, the MNO is encouraged by the level of importance and commitment shown by all transmitters in ensuring aboriginal participation in the EWT. The MNO believes this is a testament to the Board's commitment to implementing Ontario policy in this proceeding.

Given the fact that the MNO will likely need to work with the designated transmitter in the future, it has not determined what it considers the "best" plan. Instead, it has reviewed the plans in relation to the requirements of Ontario policy as well as the key considerations for assessment set out above.

Based on this assessment, all of the prospective transmitters' plans appear to be willing to provide or consider some participation to First Nation and Métis communities if designated, with the exception of EWT LP. While EWT LP's participation plan for First Nations is robust, its plan in relation to Métis participation is deficient and inconsistent with Ontario policy.

For example, instead of expressing a willingness to discuss Métis participation opportunities, as required by Ontario policy, EWT LP limits Métis communities to the following opportunity:

Where all applicable technical and professional standards are met, the costs are commercially reasonable and the BLP Participating First Nations are not selected to provide the goods or services (due to lack of ability to provide or higher cost option), then EWT LP will give priority with respect to employment, training and commercial opportunities to other Aboriginal community members and to the businesses which they own or control.²⁴

This prescriptive approach does not align with the LTEP's commitment that participation opportunities will be discussed with aboriginal communities in order to meet their unique needs or aspirations. Moreover, this commitment is likely hollow based on the MNO's experience. For example, there may be reasonable no employment or contracts that BLP Participating First Nations do not access. Similarly, since EWT LP has refused to engage the MNO in relation to

²⁴ EWT LP Plan, Part A, Exhibit 7, p. 7.

participation related issues, it has not considered where there are opportunities that Métis communities or Métis businesses could actually access. From the MNO's experience, the caveat of having to meet "applicable technical and professional standards", without related supports, results in Métis communities not accessing employment or contracting opportunities.

The MNO submits that this prescriptive approach to Métis participation is largely an empty promise and does not meet any of the aboriginal participation opportunities set out in the LTEP. Instead of "providing", "enabling" or "furthering" participation opportunities, EWT LP takes the approach that since, in their minds, Métis have been "sitting on the sidelines" prior to designation,²⁵ they should not share in any benefits from the EWT. This perspective is also reflected in their participation plan. This positioning is wrong, and dangerous to this and other designations. It threatens the effective implementation of Ontario policy.

The MNO also submits that this plan does not meet the basic filing requirements and is inconsistent with Ontario policy as it relates to providing some Métis community participation opportunities. Moreover, the EWT LP plan, in relation to the Métis communities whose traditional territories will be crossed, fails to meet any of the key considerations set out by the MNO above. It must be rejected by the Board in its current form, or modified by a condition of the Board in order to comply with Ontario policy.

The MNO also notes that while most of the other participation plans include general commitments to discuss opportunities for equity ownership, training, employment and contracting, some include significant commitments to potential equity ownership for both First Nation and Métis communities. Notably, AltaLink offers up to 49% ownership to proximate aboriginal communities, which could accommodate both the BLP First Nations (33%) as well as Métis communities (remaining 16%).

The AltaLink participation plan demonstrates the success this designation process has had in potentially maximizing participation opportunities for all proximate aboriginal communities. It also illustrates the MNO concerns that through transmitters "locking up" some aboriginal communities at a lower ownership percentage (i.e. BLP First Nation's 33%), without leaving any space for remaining aboriginal communities, less robust and "race to the bottom" dynamics will likely play out in future designations, having a negative effect on all proximate aboriginal communities. Put simply, why would a transmitter ever offer 49% ownership again, if it can secure designation by excluding some proximate communities and only offering 33% to a few?

In implementing Ontario policy, the Board should prefer plans that maximize partnership opportunities for proximate aboriginal communities, consistent with

²⁵ EB-2011-0140, Oral Session Transcripts, May 2, 2012, p. 93 (lines 25-28).

Ontario policy and the key considerations set out above.²⁶ This is the logical way the Board will encourage transmitters to enter into partnerships with proximate aboriginal communities who indicate an interest. Conversely, the Board must reject designating transmitters where some proximate aboriginal communities will see significant benefits, while others will see none.

IV. REQUIREMENT OF ABORIGINAL CONSULTATION

First Nation and Métis Consultation is a Legal Requirement and is Distinct from Ontario Policy as set out in the LTEP

The Crown's duty to consult and accommodate owing to aboriginal communities flows from the honour of the Crown. The honour of the Crown is "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."²⁷ In the aboriginal context, this arises "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."²⁸

The honour of the Crown is "not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled."²⁹ The "honour of Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but yet unproven Aboriginal interest."³⁰ The Supreme Court has also recognized that the duty applies where Aboriginal rights and interests have been reconciled through historic treaties³¹ as well as modern day land claim agreements.³²

In the context of the EWT, the duty arises from the honour of the Crown and the aboriginal and treaty rights (recognized and asserted) in the region where transmission line will be located. For the First Nations that are most proximate to

²⁶ The MNO wants to address the point made in Pic River First Nation's oral submission that an offer of 49% equity does not mean agreements will ultimately be reached. While that is true, the commitment provides a solid basis for all communities to work together in order to realize the opportunity. Moreover, if arrangements are not reached, the designated transmitter will be required to explain why these arrangements could not be reached at a s. 92 hearing. This open, inclusive model provides incentive for all parties to work together to align interests and achieve the designated transmitters commitment.

²⁷ *Manitoba Métis Federation v. Canada (Attorney General)*, [2013] S.C.J. No. 14, para. 65. **[MNO Case Law for Oral Sessions, Tab 5]**

²⁸ *Ibid.*, para 66. **[MNO Case Law for Oral Sessions, Tab 5]**

²⁹ *Ibid.*, para. 73. **[MNO Case Law for Oral Sessions, Tab 5]**

³⁰ *Ibid.*, para. 73. **[MNO Case Law for Oral Sessions, Tab 5]**

³¹ *Mikisew Cree First Nation v. Minister of Canadian Heritage*, [2010] 2 S.C.R. 650.

³² *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103.

the line, these are treaty rights flowing from the Robinson-Superior treaty.³³ For the Métis community, these are aboriginal rights, including, land and resource rights and interests that are claimed, but not yet proven or resolved.

The super-added, constitutional Crown duty that is owed to First Nation and Métis communities is distinct from Ontario policy with respect to aboriginal participation as set out in the LTEP. While the LTEP confirms that the Crown's duty will be met in relation to the EWT, it is not dependent on the LTEP for its foundation or implementation.

Moreover, accommodations that may ultimately flow from the proper discharge of the Crown's duty to consult are not that same as the stand-alone aboriginal participation commitments set out in Ontario policy. The potential of some form of accommodation based on a project's adverse impacts on aboriginal rights or interest is not fulfillment of the Ontario's aboriginal participation policy.

The Board's approval of a First Nation and Métis Consultation Plan must uphold the Honour of the Crown

The Supreme Court of Canada has recognized that the Crown "may delegate procedural aspects of consultation to industry proponents seeking a particular development."³⁴ However, the honour of the Crown, which underlies the duty to consult and accommodate, cannot be delegated to industry.³⁵

So, for example, the Crown may ask a proponent to work with identified aboriginal communities in order to collect traditional knowledge, undertaken independent studies, and gather information, which ultimately assists the Crown to meaningfully discharging its duty owing to aboriginal communities. In undertaking these procedural aspects of consultation, a proponent is not judging, assessing or determining the rights claims of aboriginal communities. Government actors maintain the responsibility to ensure the Crown's honour is maintained and the duty itself fulfilled.

In *Rio Tinto v. Carrier Sekani Tribal Council*, the Supreme Court of Canada rejected arguments that the duty was only engaged when decisions made will directly impact specific lands or harvesting rights.

³³ In its oral submissions to the Board, the Pic River First Nation outlined its ongoing aboriginal title litigation that is based on its claim that its pre-existing title and rights that were not being extinguished and converted to treaty rights protected by the Robinson-Superior treaty. These are not yet proven or resolved claims.

³⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 53. **[MNO Case Law for Oral Sessions, Tab 6]**

³⁵ *Ibid.*, para. 53. **[MNO Case Law for Oral Sessions, Tab 6]**

[44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A 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.³⁶ (emphasis added)

This principle has been applied by the courts in the context of regulatory proceedings similar to the one before the Board.

[66] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.³⁷ (emphasis added)

The MNO submits that, as the Crown decision-maker that is selecting a transmitter to undertake procedural aspects of the duty based on their proposed First Nation and Métis Consultation plan, the Board is required to ensure the plan maintains the honour of the Crown. A plan that is biased or prejudicial towards either First Nation or Métis communities is not a reasonable choice, and will not advance the fulfillment of the Crown's duty to consult and accommodate in relation to the EWT.

Similarly, the MNO submits that a Crown decision-maker that does not consider legitimate concerns raised by an aboriginal community in relation to the ability of a proposed transmitter to undertake procedural aspects of the Crown's duty in a fair and non-discriminatory manner is not consistent with the honour of the Crown and has the potential to frustrate the fulfillment of the Crown' duty.

First Nation and Métis Consultation as a Distinct Criteria and Filing Requirement

In light of the legal and constitutional imperative of aboriginal consultation in relation to transmission projects, the Board added First Nation and Métis

³⁶ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, par. 44. **[MNO Case Law for Oral Sessions, Tab 7]**

³⁷ *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at par. 62. **[MNO Case Law for Oral Sessions, Tab 8]**

consultation as a separate decision criteria. Additional filing requirements in relation to aboriginal consultation include:

10. First Nation and Métis Consultation

The applicant must demonstrate the ability to conduct successful consultations with First Nation and Métis communities, as may be delegated by the Crown.

As part of its Plan, the applicant must file:

10.1 a proposed First Nation and Métis consultation plan, including:

- a list of First Nation and Métis communities that may have interests affected by the project;
- an approach for engaging with affected First Nations and Métis communities, along with rationale or other justification for such an approach;
- a description of any significant First Nation or Métis issues anticipated in consultation and a plan to address them;
- an overview of expected outcomes from the proposed consultation plan.

10.2 evidence of experience in undertaking procedural aspects of First Nations and Métis consultation in the development, construction or operation of transmission lines or other large construction projects. If applicable, previous engagement or existing relationships with the First Nation and Métis communities to be engaged. (emphasis added)

The MNO notes that given the Crown's stated intent that it will delegate procedural aspects of its duty to the designated transmitter, the Board set out the requirement that an aboriginal consultation plan "must" be filed as a part of an application. The MNO submits that any application that does not include an aboriginal consultation plan cannot be delegated.

Further, the MNO submits that based on the filing requirements, if a transmitter is proposing a specific consultation approach for First Nation and Métis consultation it must provide "the rationale or other justification for such an approach". A plan that does not provide an explanation for a specific consultation approach does not allow the Board to assess the credibility or viability of the plan's success, and should be avoided.

Key Considerations for Assessing Consultation Plans

The MNO restates its submission from Phase I of this proceeding with respect to what should be considered by the Board in relation to First Nation and Métis Consultation Plans provided by transmitters,

The Board ... should consider the adequacy and quality of an applicant's Aboriginal consultation plan to assess whether it has the capacity to carry out the procedural aspects of the duty if those are delegated to it, and how that plan compares with the plans proposed by other applicants.

More specifically, the MNO submits that the following questions should be considered by the Board in assessing whether the plan is credible and viable in the context of a designation,

- Has the transmitter demonstrated the capacity that it can undertake procedural aspects of the Crown's duty to consult (i.e., previous experience)?
- Does the plan outline a process that is likely capable of meeting the Crown's procedural requirements for consultation?
- Has sufficient detail been provided in order to understand the plan and assess its potential for success?
- Does the transmitter allocate realistic funding to carry out the proposed plan, along with contingencies?
- Is the plan adaptive and flexible enough to incorporate input from First Nation and Métis communities?

Related to the last question, the MNO stresses that at this stage of the EWT's development plans need to be able to be responsive and flexible in order to address the distinct and diverse consultation requirements and needs of First Nation and Métis communities. A responsive consultation process is essential to meaningful and successful consultations.

The MNO submits that plans that are overly prescriptive in relation to consultation with First Nations or Métis communities, without any engagement of those communities or direction from the Crown to warrant differential approaches to consultation, are not credible and viable plans. Similarly, plans that arbitrarily limit how First Nation and Métis communities will be consulted are unsound and will likely not be able to be successfully executed.

MNO's Assessment of the Aboriginal Consultation Plans

Given the fact that the MNO will likely need to work with the designated transmitter in the future, it has not determined what it considers the “best” consultation plan. Instead, it has reviewed the plans in relation to the key considerations for assessment set out above.

Based on this assessment, the MNO believes that most prospective transmitters have demonstrated a capacity to undertake procedural aspects of Crown consultation.

Similarly, most have outlined processes that will likely be flexible and responsive enough to address the distinct and diverse consultation needs of First Nation and Métis communities whose rights and interests will be impacted by the EWT project.

However, the MNO is concerned in relation to wide disparities between the aboriginal consultation budgets proposed by some designated transmitters in comparison to others. Given the significance of aboriginal consultation in relation to the EWT, the MNO believes plans that have limited consultation budgets should be closely scrutinized by the Board in order to assess whether they are realistic.

The MNO also cautions against the Board Staff's suggestion that modifications to aboriginal consultation plans would require Board approval. These plans, as they currently stand, are frameworks. They must be robust and iterative in order to meaningfully consult with aboriginal communities. If the designated transmitter is required to seek adjustments for additional resources or for environmental studies to be undertaken, consultation could be stifled and delayed. This will be unhelpful to the timely advancement of the EWT project.

While the MNO believes that, by and large, most the prospective transmitters have provided viable First Nation and Métis consultation plans, it believes that the EWT LP plan is deficient and should be rejected, as it is currently proposed.

From the MNO's perspective, the EWT LP's consultation plan is unsound and not viable. A chart outlining the MNO's specific concerns with the EWT LP consultation plan is attached as Appendix B. Key reasons for the MNO concerns include:

- The plan does not approach Métis consultation in a fair and equitable manner to First Nations. The plan sets out a hierarchy between First Nations and Métis, yet it does not explain its justification for these disparities. Also, it repeatedly excludes Métis from consultation opportunities provided to First Nations.

- The plan is driven and controlled by First Nations that are adverse in interests to the Métis community and who have taken the public positions that Métis “are not entitled to consultation and accommodation in regards to land, water and resources in the treaty and traditional territories of the Anishnabek.”³⁸ The MNO does not feel comfortable with individuals from these communities sitting in judgment at discussions where the Métis communities discuss their rights, traditional use and interests in the region.
- The plan proposes a traditional knowledge collection process that the MNO will not participate in because it requires Métis knowledge holders and Elders to disclose information to First Nations that are adverse in interest to Métis rights and claims. This type of approach is inconsistent with other consultation approaches, such as in the development of the Bruce to Milton line, that have allowed the MNO to retain independent professionals to undertake a Métis-specific traditional knowledge study.
- The plan proposes a traditional knowledge study that is methodologically unsound, skewed towards First Nation participation and will not provide for an adequate sample of the impacted Métis community in order to assess EWT’s routing and impacts.

Based on the concerns outlined above, the MNO would refuse to participate in this consultation plan as proposed. It would likely ask the Crown not to delegate procedural aspects of the duty to EWT LP based on this plan. The MNO also submits that the Board’s approval of this plan would not uphold the honour of the Crown, and would likely delay consultation in relation to the EWT.

Moreover, the MNO submits that the EWT LP plan does not meet the Board’s filing requirements. Specifically, these requirement state the plans will include “an approach for engaging with affected First Nations and Métis communities, along with rationale or other justification for such an approach”. The EWT LP plan does not include any justification or explanation for the differential treatment of the Métis in relation to consultation. The MNO submits this reasoning was required pursuant to the filing requirements.

The MNO submits that the EWT LP plan should be rejected by the Board, or remedial conditions are required in order to allow for this plan to be approved.

³⁸ MNO Materials for Oral Session, Tab 13.

VI. CONCLUSION

In closing, the MNO once again stresses the importance of this designation process in implementing Ontario policy for First Nation and Métis participation in new transmission as well as ensuring that the Crown's duty to consult and accommodate is met in relation to the EWT. It is also a precedent-setting designation on whether government, the ratepayer, industry, First Nation and Métis interests can align in relation to the EWT and other new transmission.

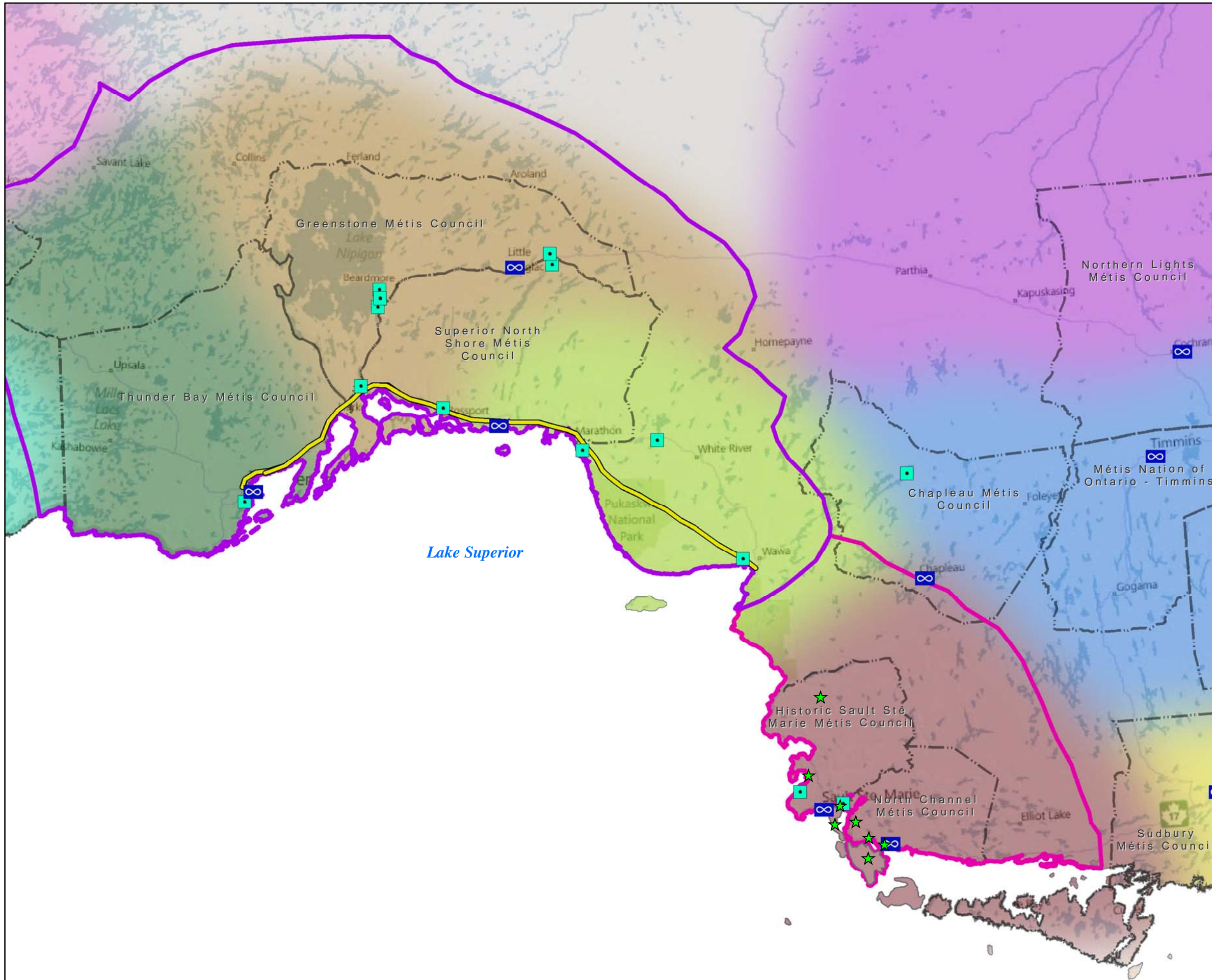
The MNO asks the Board to ensure Ontario policy for both First Nation and Métis participation is advanced through this process. In determining the "best" application and transmitter to advance the EWT, the MNO believes the importance of First Nation and Métis participation and consultation is fundamental. The MNO requests that the Board factor in its key considerations and assessments in making its ultimate determination.

The MNO submits that both the EWT LP's participation and consultation plans are deficient in relation to the Métis communities. The Board should reject these plans as they are currently proposed, or, remedial conditions should be attached to any designation. For example, the following conditions should be included, if EWT is designated:

- That the designated transmitter commit to exploring participation opportunities with Métis communities whose traditional territories will be crossed by the EWT as set out in the LTEP, including, the potential of some form of partnership, if commercially feasible partnership.
- That the designated transmitter commit to developing a revised Métis consultation plan through discussions with identified Métis communities that meets the Board's filing requirements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

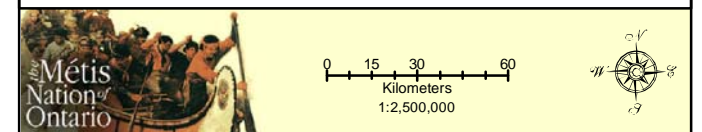
May 9, 2013



Legend

- East-West Transmission Line
- Métis Consultation Protocol Areas**
- Lakehead/Nipigon/Michipicoten
- Sault Ste Marie Region
- Métis Traditional Harvesting Territories**
- Abitibi/Temiscamingue
- Historic Sault Ste. Marie
- James Bay
- Lake of the Woods/Lac Seul
- Lakehead
- Michipicoten
- Nipigon
- Rainy Lake/Rainy River
- Locations Identified As Part of Sault Ste. Marie Métis Community in R. v. Powley
- MNO Community Councils**
- Administrative Boundaries
- Office or Mailing Address Location
- First Nations Identified for Consultation**
- First Nation

Métis Communities and Proposed East-West Tie Transmission Project (Territories and Administrative Geography)



MNO CONCERNS WITH EWT LP CONSULTATION PLAN

Consultation with 6 First Nations	Consultation with the Métis	Métis Concerns with Consultation Plan
An Aboriginal Liaison Officer (“ALO”) will be identified in each of the 6 First Nations to assist in consultations. (EWT LP Plan, Exhibit 10, Part B, Appendix 10A, p. 24, 31)	No equivalent ALO in any Métis community.	The MNO and its communities do not want or feel comfortable with a member of a First Nation being unilaterally identified to “provide ongoing support for consultation activities” within Métis communities for the project. This prescriptive approach to consultation is contradictory to EWT LP’s claims that it will respect how other Aboriginal communities want to be consulted. It demonstrates the lack of equity and fairness in the EWT LP Consultation Plan.
Training, orientation and costs for Aboriginal Liaison Officers. (EWT LP Plan, Exhibit 10, Part B, p. 7)	No training, orientation or costs for any Métis community.	This commitment further illustrates the lack of equity and fairness within the EWT LP Consultation Plan in relation to MNO and its communities. Métis communities will be excluded from this training and ability to build internal capacity, while the 6 First Nations will.
Because of the “far-reaching traditional knowledge and traditional ecological knowledge within the project study area ... [the 6 First Nations] will have a representative present at all meetings with the public and with Aboriginal communities.” (EWT LP Consultation Plan, p. 6)	No similar acknowledgement of Métis knowledge in project study area and Métis community. No Métis participation in meetings with public or other Aboriginal communities.”	The MNO and its communities do not want the identified First Nation ALOs attending Métis meetings given the UOI Resolution and the fact that Métis citizens will not feel comfortable or be willing to speak freely. Moreover, the MNO will not feel comfortable discussing its rights and legal claims in the presence of groups that are adverse in interest to those claims and could use that information in a detrimental manner against the MNO.
“EWT LP will work to understand the Traditional Territories of all potentially affected First Nation communities early in the project.” (EWT LP Plan, Exhibit 10, Part B, p. 8)	“EWT LP will work to understand the traditional land use of potentially affected Métis communities in accordance with the above mitigation strategy.” (EWT LP Plan, Exhibit 10, Part B, p. 8)	The plan does not acknowledge that Métis communities also have traditional territories. This lack of understanding or deliberate prejudice permeates the plan and approach to Métis consultation. This will contribute to mistrust and likely a failed consultation process.

MNO CONCERNS WITH EWT LP CONSULTATION PLAN

<p>“The communities of the Participating First Nation are all located with 40 km of the existing East-West Tie line, which lies entirely within their traditional territories ...” (EWT LP Argument in Chief, p. 5 (footnote 1).</p>	<p>There is no recognition of the fact that the East-West Tie will cross areas that are common traditional territories with Métis communities.</p>	<p>Consistent with the UOI Resolution, the plan portrays a level of exclusivity of the 6 First Nations and that the rights and interests of other Aboriginal groups are subordinate. This approach cannot be sanctioned by a Crown actor. The MNO is also concerned that EWT LP’s partners may be beholden to the political and legal positions of the 6 First Nations to Métis rights, consultation and accommodation (i.e. UOI Resolution) and given the governance structure of EWT LP this bias and discrimination may be institutionalized and affect consultation.</p>
<p>“EWT LP plans to produce a traditional knowledge and land use report as a part of the environmental assessment process.” (EWT LP Plan, Exhibit 10, Part B, p. 8)</p> <p>EWT LP will initiate an Aboriginal Land Use and Occupancy study (“TK/LUO”) for the region. (EWT LP Plan, Exhibit 10, Part B, p. 25-26)</p>	<p>Métis traditional knowledge will be collected by First Nation ALOs as a part of an overall TK/LUO study. The distinct impacts of the project on Métis use and occupancy will not be understood or assessed.</p> <p>Métis will not be allowed to complete their own TK/LUO study through an adequate representative sampling of the Métis community, interviews being conducted in an environment where Métis do not need to feel guarded or free from judgment and a level of confidence over the security and quality of the study completed.</p>	<p>The MNO and its communities will not participate in the TK/LUO study proposed by EWT LP. The methodology is unsound (see below). Métis will not feel comfortable providing sensitive traditional knowledge to ALOs whose communities deny Métis right or the need to consult and accommodate Métis. The Métis should not be forced to disclose confidential information to ALOs that are adverse in interests to Métis rights and claims. Nor will MNO allow the distinct use and occupancy of Métis to be subsumed under one “Aboriginal” TK/LUO study. The MNO objects to a process that does not allow for an independent Métis TK/LUO study to inform routing, environmental assessment, etc. The MNO also believes that the costs associated with creating a documentary film are a waste of ratepayer resources and diverts resources away from undertaking more interviews to better understand First Nation and Métis use.</p>

MNO CONCERNS WITH EWT LP CONSULTATION PLAN

<p>A total of 96 TK/LOU interviews will be undertaken with the 6 First Nations. (EWT LP Plan, Exhibit 10, Part B, p. 28-29)</p>	<p>Less than 31 TK/LUO interviews will be undertaken with the MNO and its communities. Given the fact that these 31 interviews are to be allocated amongst other First Nation as well, it is likely MNO and its communities could have less than 15 interviews.</p>	<p>The methodology proposed by EWT LP is professionally and methodologically unsound. By and large, professionals agree that a sampling of 5-10% of an Aboriginal community's population is required for a credible TK/LUO study. The number of interviews proposed are arbitrary and do not correlate with obtaining an adequately samplings from the distinct First Nation and Métis populations in the study area. This type of inadequate sampling data would not result in a study that could assist with effective routing avoidance, identification of Métis community values and interests in the environmental assessment process, etc.</p>
<p>“EWT will initiate the training of Aboriginal community environmental monitors ...” (EWT LP Plan, Exhibit 10, Part B, p. 28-29)</p>	<p>There is no commitment to Métis community monitors.</p>	<p>The MNO is concerned that consistent with the rest of the EWT LP's Consultation Plan, the Métis community will be excluded. Instead of indicating First Nation and Métis monitors will be hired, the term “Aboriginal” is used. Based on EWT LP's overall approach to Aboriginal consultation, the MNO does not trust that these consultation commitments will be implemented in an equitable or fair manner towards the Métis community. Explicit commitments for MNO community monitors are required.</p>
<p>“EWT LP wishes to develop an MOU with the Crown on the delegation of the procedural aspects of consultation” (EWT LP Plan, Exhibit 10, Part B, Appendix 10A, p. 24, 31)</p>	<p>MNO will object to procedural aspects of the Crown's duty being delegated to EWT LP based on the inequity and unfairness of the current Consultation Plan as well as the apprehension of bias by EWT LP's partners against Métis consultation and accommodation.</p>	<p>Given the lack of fairness and equity within the EWT LP's Consultation Plan and the apprehension of bias towards Métis consultation and accommodation by partners in the EWT LP (i.e., the UOI Resolution), the MNO will ask that procedural aspects of Crown consultation not be delegated to EWT LP.</p>