

June 27, 2011

VIA E-MAIL AND COURIER

David Estrin
Direct 416-862-4301
Direct Fax 416-863-3401
david.estrin@gowlings.com

Scott A. Smith
Direct 416-369-7210
scott.smith@gowlings.com
File No. T984833

Honourable Brad Duguid
Minister of Energy
Hearst Block
900 Bay Street, 4th Floor
Toronto, ON M7A 2E1

E-mail: brad.duguid@ontario.ca

Honourable Christopher Bentley
Minister of Aboriginal Affairs
160 Bloor Street East, Suite 400
Toronto, ON M7A 2E6

E-mail: christopher.bentley@ontario.ca

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, ON M5H 1T1

E-mail: colin.andersen@powerauthority.on.ca

David Lindsay
Deputy Minister of Energy
Hearst Block
900 Bay Street, 4th Floor
Toronto, ON M7A 2E1

E-mail: david.lindsay@ontario.ca

Dear Sirs:

Re: Request for Immediate and Appropriate Consultation with the Grand Council of Treaty #3 Regarding Adverse Impacts on Aboriginal and Treaty Rights associated with Hydroelectric Dam Operations and the Hydroelectric Contract Initiative

Introduction and Summary

We are lawyers for the Grand Council of Treaty #3 in this matter. The Grand Council of Treaty #3 is the traditional government of the Anishnaabe Nation in Treaty #3 territory, with communities located in northwestern Ontario (and Manitoba). Treaty #3 territory subject to the jurisdiction of the Grand Council of Treaty #3 is set out in the map attached to this letter. The Grand Council of Treaty #3 generally has a responsibility to facilitate consultation on behalf of the Anishnaabe Nation in Treaty #3,¹ and Crown consultation about the matters raised in this letter should be directed to the Grand Council.

¹ *Manito Aki Inaknoigaawin*, s. 3.

Significant adverse impacts on Treaty #3 territory, reserve lands, as well as on the Aboriginal and treaty rights of Treaty #3 First Nations have been and continue to be caused by the operation of dams associated with hydroelectric generating stations sanctioned by the Ontario Crown. These impacts arise, for example, where water levels higher than under natural conditions are maintained by dams in the Lake of the Woods and Rainy Lake watersheds. Maintaining water levels at unnaturally high levels has caused the historical and ongoing flooding of Treaty #3 territory and reserve lands. This flooding in turn causes impacts such as erosion of Treaty #3 territory and reserve lands, interference with hunting and fishing rights, the growing of wild rice, impacts on Sturgeon, and reduced or impaired access to Treaty #3 territory and reserve lands.

These impacts constitute an unjustifiable infringement of the Aboriginal and treaty rights of Treaty #3 First Nations. Unfortunately, when the Crown is engaging in actions which sanction the continued operation of these facilities, it is failing to consult with the Grand Council of Treaty #3 or individual Treaty #3 First Nations to determine the extent of the ongoing infringements and appropriate and required accommodation to prevent or mitigate these adverse impacts.

Recent Crown conduct in respect of the Hydroelectric Contract Initiative (“HCI”) and the HCI Contract between the Ontario Power Authority (“OPA”) and ACH Limited Partnership (“ACH”) illustrate the ongoing Crown failures to respect the duties of consultation and accommodation to which the First Nations are constitutionally entitled.

In the most recent events, the Crown failed to acknowledge there could possibly be any ongoing impacts and infringements associated with operation of dams and the inter-relationship of the HCI program and therefore the Crown refused to agree there was a duty of consultation, let alone accommodation. The serious failure to acknowledge the relationship between Crown actions which allow continued operation of these facilities and the corollary unacceptable impacts on Aboriginal and treaty rights must be addressed.

We are therefore writing to request a meeting between you and your senior officials and the Grand Council of Treaty # 3 in July to begin an appropriate consultation process to examine these issues, determine the extent of ongoing infringements and the accommodation measures required to address the inequitable and unconstitutional state of affairs.

Recent Events Illustrating the Current and Continuing Unacceptable Situation

ACH owns and operates the Calm Lake, Sturgeon Falls, Fort Frances, Kenora and Norman Generating Stations (“Generating Stations”) pursuant to Electricity Licence EG-2006-0124. It sells electricity generated at the Generating Stations to the OPA under a HCI contract.

Individual Treaty #3 First Nations requested the OPA to consult with them about the potential adverse impacts that ACH’s HCI Contract and the decisions made by the OPA pursuant to ACH’s

HCI Contract may have on their Aboriginal and treaty rights.² Some of the Treaty #3 First Nations also sought standing before the Ontario Energy Board in respect of ACH's application to amend its Electricity Licence.³ Unfortunately, both the OPA and the OEB took the position that no consultation with First Nations was required. The OEB refused to appreciate the relationship between amending the Electricity Licence, the resulting continuation of operations detrimentally affecting First Nations' rights, and why this resulted in a Crown duty to consult and potentially accommodate. The OPA also took that position, but it also claimed it had no duty to carry out Aboriginal consultation.

The unsatisfactory result is that the ongoing adverse impacts on the Aboriginal and treaty rights of Treaty #3 First Nations, associated with Crown decisions being made in respect of such facilities, are being ignored by the Crown, including the OPA, the Ministry of Energy, and the Ministry of Aboriginal Affairs.

In the recent instance of the ACH application, for example, the OPA took the position that it "is not the Crown and does not hold the substantive duty to consult with respect to any facilities covered by an HCI agreement".⁴

The Ontario Energy Board, in its decision rendered on May 20, 2011, held that ACH's application to amend its Electricity Licence to change ACH's status from the owner to the owner and operator of the Generating Stations had no direct connection to the potential infringement of Aboriginal rights.⁵

The Grand Council of Treaty #3 is very upset with these Crown positions and decisions, which constitute a failure by the Crown to even acknowledge a duty of consultation. On June 2, 2011 the Grand Council passed Resolution #CA-11-01, which empowers the Grand Council to take immediate actions to assert, protect, and seek meaningful accommodation of the rights and claims of Treaty #3 First Nations from the Crown and the past and present owners of hydroelectric generating stations in Treaty #3 territory in respect of the HCI program, ACH's HCI Contract and, more generally, on the larger issues outlined above.

We set out below the recent Crown conduct that triggered the duty to consult with the Grand Council of Treaty #3.

The Crown failed to consult Treaty #3 First Nations in respect of the HCI and ACH's HCI Contract

The Crown owed Treaty #3 First Nations a duty to consult and accommodate them about the potential adverse impacts that may be caused by:

- the Hydroelectric Contract Initiative,
- OPA's decision to enter into an HCI contract with ACH, and

² Letter from Mr. James Gillis, Morgan Geare, to Mr. Colin Andersen, CEO of OPA, dated April 20, 2011 re: ACH Limited Partnership & Hydroelectric Contract Initiative; Letter from Mr. James Gillis, Morgan Geare, to Mr. Colin Andersen, CEO of OPA, dated May 11, 2011 re: ACH Limited Partnership & Hydroelectric Contract Initiative; letter from Mr. David Leitch to Mr. Colin Andersen, CEO of OPA, dated May 12, 2011 re: the OPA's HCI contract with ACH.

³ Ontario Energy Board decision and order issued on May 20, 2011 in the matters of EB-2011-0065 and EB-2011-0068.

⁴ Letter from Mr. Colin Andersen, CEO of OPA, to Mr. James Gillis, Morgan Geare, dated June 2, 2011.

⁵ Ontario Energy Board decision and order issued on May 20, 2011 in the matters of EB-2011-0065 and EB-2011-0068.

- OPA's decision to provide written consent to a change in control of ACH under ACH's HCI Contract.⁶

The Crown's duty to consult is triggered by this conduct for at least three reasons.

First, we understand that payments made by the OPA under the HCI Contract provide the financial incentive for ACH to continue operating the Generating Stations. Put slightly differently, OPA is paying ACH for the very activities that are causing the continuing adverse impacts.

Second, the Crown has failed to recognize that any licensing or permitting activity which directly or indirectly allows these dams to continue to be operated so that ongoing, unacceptable, flooding levels are continued, or which may be increased, constitutes a decision which affects Aboriginal and treaty rights of the First Nations in Treaty # 3 territory, and therefore requires prior consultation and potential accommodation.

Third, the Crown's conduct constitutes "strategic, higher level decisions" that "set the stage for further decisions that will have a *direct* adverse impact on land and resources".⁷ Those further decisions include whether the companies that now control ACH will seek to make modification or upgrades to the Generating Stations to take advantage of the strong financial incentives provided under the HCI Contract to optimize the operation of the Generating Stations.

The Crown has failed to discharge its constitutional duties. The Crown not only failed to consult with Treaty #3 First Nations before engaging in the conduct outlined above, but it also failed to even notify Treaty #3 First Nations that it was contemplating engaging in any of the conduct.

Immediate consultation is required with the Grand Council of Treaty #3 to determine the extent to which Treaty #3 First Nations must be accommodated in respect of this Crown conduct.

The Grand Council of Treaty #3 demands that the Ontario Crown through the Ministry of Energy and/or the OPA take the following steps to immediately address the Crown's failure to consult Treaty #3 First Nations:

1. suspend OPA's consent to the change in control that it provided to ACH under ACH's HCI Contract until consultation and required accommodation has occurred; and in the interim provide the Grand Council of Treaty #3 with a copy of ACH's HCI Contract and all relevant information or documents about ACH's HCI Contract;
2. if OPA has not yet consented to the change in control, require Crown consultation with the Grand Council of Treaty #3 and accommodation of Treaty #3 First Nations prior to OPA providing its consent to the change in control in ACH;

⁶ The change in control of ACH occurred as a result of the transaction that closed on May 27, 2011 in which AbiBow Canada Inc., Caisse de dépôt et placement du Québec, and CDP investissements Inc. sold 100% of their interest in ACH to Infra H2O GP Partners Inc., Infra H2O LP Partners Inc. and BluEarth Renewables Inc.

⁷ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 at para. 47.

3. consult with respect to the HCI Program, ACH's HCI Contract, as well as other Ontario programs and activities which facilitate or permit the continued operation of dams within the Treaty # 3 territory that have caused and continue to cause flooding and other impacts to First Nations lands and to their Aboriginal and treaty rights;
4. discuss appropriate accommodation measures to address the adverse impacts on Treaty #3 territory, reserve lands, and the Aboriginal and treaty rights of Treaty #3 First Nations arising from dam operations and electricity generation arrangements. Appropriate forms of accommodation may include a resource revenue sharing agreement, co-management of the dams, and subsidizing electricity rates to Treaty #3 First Nations;
5. consult Treaty #3 First Nations about any proposed modifications or upgrades to the generating stations to be carried out through the HCI program or otherwise. Modifications or upgrades to the generating stations may cause increased flooding that will cause additional impacts to Treaty #3 territory, reserve lands, as well as the Aboriginal and treaty rights of Treaty #3 First Nations. While we understand the standard form of the HCI contract provides that an "upgrade" of facilities subject to the program may be subject to Aboriginal consultation requirements, there is no recognition that continued operation and "modifications" of these facilities will cause impacts and Aboriginal rights infringements; these have been omitted from the definition of an "upgrade"; therefore the HCI program is deficient in not requiring any consultation regarding such proposed actions; and
6. more specifically therefore we request on behalf of the Grand Council of Treaty # 3 that the Ministry of Energy and/or the OPA commit to:
 - (a) immediately notify and consult the Grand Council of Treaty #3 if ACH or any other operator working under the HCI program or otherwise requiring Crown approvals within Treaty # 3 territory proposes to make modifications or upgrades to dams and generating stations; and
 - (b) take measures which appropriately accommodate the adverse impacts of proposed upgrades or modifications to the generating stations and dams on Treaty #3 territory, reserve lands, or which may affect the Aboriginal and treaty rights of Treaty #3 First Nations.

Closing

It is clear that the larger issue of the historic and ongoing infringement of the Aboriginal and treaty rights of Treaty #3 First Nations caused by the continued flooding of reserve lands and traditional territories associated with the operation of dams and hydroelectric facilities must be addressed.

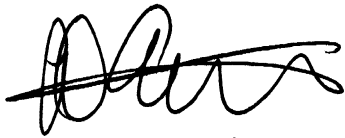
The Crown's failure to consult the Grand Council of Treaty #3 or individual Treaty #3 First Nations about the potential adverse impacts of its conduct in respect of the HCI program, ACH's HCI Contract, as well as other Crown actions which cause or permit the continued operations of dams and associated hydroelectric facilities which cause such continuing impacts constitutes a serious breach of the Crown's duties under s. 35 of the *Constitution Act, 1982*.

The Grand Council of Treaty #3 respectfully but firmly demands that the Minister of Energy immediately take the steps outlined in this letter to begin to address the Crown's failure to discharge its constitutional duties to consult and accommodate Treaty #3 First Nations.

We ask that you contact us to make arrangements for a meeting to be held with The Grand Council of Treaty #3 at its offices in Kenora on a date to be agreed in July to begin discussions of and commitments to resolving the important issues raised in this letter.

Yours sincerely,

GOWLING LAFLEUR HENDERSON LLP



David Estrin
Certified Environmental Law Specialist



Scott A. Smith

cc: Grand Chief Kelly, Grand Council of Treaty #3

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