Gitga'at First Nation's Submission to the Expert Panel on National Energy Board Modernization

(March 31, 2017)

1. Introduction

The Terms of Reference for the Expert Panel on National Energy Board Modernization (Panel) mandated the Panel to: "Engage national and regional Indigenous organizations, groups, and communities (including First Nations, Métis and Inuit) to enable their participation at regional and local levels." More specifically, it mandated the Panel to: "... directly engage and consult with Indigenous organizations, groups, communities and individuals during its review in order to gain an understanding of issues and opportunities related to NEB activities." To this end, the Panel was directed to "... put a process in place to allow Indigenous peoples input into the review in writing...". This submission is the Gitga'at First Nation's "input into the review in writing".

The Gitga'at First Nation (Gitga'at) reviewed all 12 discussion papers in preparing this submission. The 8th (*Indigenous Engagement and Consultation*) and 9th (*The National Energy Board's Participant Funding Program*) discussion papers broach the topic of the adequacy of Canada's and the NEB's funding of Indigenous participation in Crown consultation and associated NEB processes. Both papers assume – what is in fact the case − that generally the availability and level of funding affect the ability of Indigenous peoples[1] to participate in these processes. By implication, then, both papers assume that generally the availability and level of funding will affect the ability of Indigenous peoples to take advantage of those of the Panel's recommendations meant "... to further enhance Indigenous engagement, consultation and participation with respect to (1) reviews of specific pipeline projects before and after a decision has been made; and (2) on a broader, non-project specific level." Stated differently, both assume that generally the availability and level of Indigenous participant funding will affect the efficacy of the Panel's relevant recommendations, should they be accepted.

Despite evincing an appreciation of a linkage between funding and Indigenous participation, the aforementioned discussion papers do not similarly evince a cognizance of the possibility that there may be legal and not merely policy issues at stake. Based on Gitga'at's experience in Crown consultation processes, including Crown consultation processes intertwined

[1] In our submission, we prefer the phrases "Indigenous *peoples*" and "Aboriginal *peoples*" to "Indigenous *groups*" and "Aboriginal *groups*". Peoples, not groups, are the rights holders under the relevant Canadian constitutional and international human rights law.

with NEB regulatory processes,[2] we are convinced not only (1) that the Panel's and therefore Canada's efforts to enhance Indigenous participation will amount to half measures at best unless Indigenous participation is adequately funded but also (2) that Indigenous participation will not be adequately funded until Canada acknowledges a legal obligation to ensure it.

Our purpose in this submission is, then, to raise and answer a number of funding-related questions that, practically speaking, should be at the centre of the Panel's deliberations about how to enhance Indigenous participation, including the following:

(1) whether Canada has a *legal* duty to fund Indigenous participation in its consultation processes; and

(2) if so, whether Canada's *legal* duty extends to funding Indigenous participation in NEB processes on which Canada relies to fulfill its duty to consult.

In what follows, in addition to explaining why these questions should be answered affirmatively, we will also discuss what constitutes *legally adequate* Indigenous participant funding.

2. Canada's Approach to Funding Indigenous Participation

Canada currently funds Indigenous participation in three classes of processes relevant to the Panel's purposes, namely, Indigenous participation in:

1. **Crown Consultation Processes**: Crown consultation processes conducted, outside NEB processes, prior to final decisions on the approval of NEB-regulated projects;
2. **NEB Processes**: NEB regulatory processes, including hearings and EAs; and
3. **Post-Approval Processes**: post-approval consultation and other processes (e.g. monitoring) concerned with an NEB-regulated project's construction and operations phases.

Canada only sometimes provides funding for Indigenous participation in Crown Consultation Processes. Although Indigenous peoples participate in NEB Processes in other ways (typically, by submitting letters of comment), only those who participate as intervenors in NEB hearings may receive funding through the Participant Funding Program (PFP). Less frequently than in the case of Crown Consultation Processes, Canada sometimes provides funding for Indigenous participation in Post-Approval Processes.

The foregoing demonstrates both (1) that where Canada has a legal duty to consult Indigenous peoples in regard to NEB-regulated projects, it does not necessarily follow that it funds their participation in Crown Consultation Processes, and similarly (2) that where

[2] It should be noted that the Gitga'at First Nation participated in both the federal consultation and joint review panel process for the Enbridge Northern Gateway Project and was one of the seven Applicant First Nations who successfully challenged the Governor in Council's approval of the project: *Gitxaala Nation v. Canada*, 2016 FCA 187.

Indigenous peoples are legally entitled to participate in NEB Processes, it does not necessarily follow that their participation therein is funded through the PFP.

3. The Law on, and Canada's Approach to, Consultation on NEB-Regulated Projects

Discussion Paper #8 succinctly describes when the Crown's duty to consult arises: it arises "... whenever the Crown contemplates conduct (e.g., a project decision or authorization) that could adversely impact an established or asserted Aboriginal or treaty right" (page 1).

> Although the content of the duty varies with the circumstances,
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> [i]n general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.[3]

Since different circumstances call for different content or scope, "... the concept of a spectrum may be helpful ... to indicate what the honour of the Crown may require in particular circumstances"[4]:

> ... At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ...[5]
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> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. ...[6]
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> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. ***The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.*** ...[7]

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[3] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R., 2004 SCC 73 at 39 [***Haida Nation***].
[4] *Ibid*. at 43.
[5] *Ibid.*
[6] *Ibid*. at 44.
[7] *Ibid*. at 45 (emphasis added).

Where the Crown's duty to consult has been triggered, Indigenous peoples are entitled to a meaningful process:

> ... In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. ...[8]
>
> ... The common thread on the Crown's part [at all stages of the consultation process] must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised ..., through a meaningful process of consultation. ...[9]

The Crown's duty to consult may lead to a duty to accommodate:

> Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. ...[10]
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> ... Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. ...[11]

Sometimes Canada relies on NEB Processes to fulfill its duty to consult. Discussion Paper #8 explains:

> In recent years, the federal Crown has relied on the NEB process, to the extent possible, to fulfill its duty to consult Indigenous groups. This approach is consistent with existing consultation and accommodation guidance for federal officials, and has been done as a way of leveraging environmental assessment and regulatory processes to avoid and mitigate potential project impacts, including impacts on Indigenous rights and interests [page 2].

Although left unstated, Canada not only relies on NEB Processes to fulfill its duty to consult, it also relies on them, where appropriate, to fulfill its duty to accommodate:

> When the Crown relies on a regulatory or environmental assessment process to fulfill its duty to consult, such reliance ... is a means by which the Crown can be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated.[12]

4. Three Scenarios

As our main conclusion in this submission for the Panel's consideration, Gitga'at submits that where Canada has a duty to consult an Indigenous people on an NEB-regulated project and the Indigenous people wants to participate in the consultation, Canada has a legal obligation to

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[8] *Ibid*. at 41.
[9] *Ibid*. at 42 (citation omitted).
[10] *Ibid*. at 46.
[11] *Ibid*. at 47.
[12] *Gitxaala Nation v. Canada*, 2016 FCA 187 at 178.

provide funding sufficient to cover what the Indigenous people reasonably requires to participate meaningfully. In what follows, we will show how we arrived at this conclusion.

To begin, imagine the following scenario:

> **Scenario A**: Canada has a duty to consult Gitga'at on a proposed NEB-regulated project; Gitga'at wants to participate in the consultation; Gitga'at lacks the resources to participate; and Canada is aware of these things.

Recall, then, that "[t]he controlling question in all situations [where the Crown's duty to consult is triggered] is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."[13] Given Scenario A, the question is, then: were Canada to act the same as if Gitga'at had declined to participate, do what is minimally necessary to say it did its part (e.g. provide notice), and then go on to complete its decision-making process, would it be true to say that Canada had done what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Gitga'at with respect to the interests at stake? Plainly, no.

The honour of the Crown, in conjunction with s. 35 of the *Constitution Act, 1982*, requires Canada to respect Gitga'at's Aboriginal rights, including the potential rights embedded in Gitga'at's claims.[14] When contemplating a decision that may adversely affect Gitga'at's Aboriginal rights, Canada demonstrates its respect for Gitga'at's Aboriginal rights and thus upholds the honour of the Crown through consultation and, where appropriate, accommodation. Were Canada to proceed in accordance with Scenario A, it would be tantamount to (knowingly) unilaterally exploiting a claimed resource. And, as the Supreme Court of Canada has said, "[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource."[15] On which the Court immediately pronounced, "[t]hat is not honourable."[16]

Manifestly, were Canada to proceed in accordance with Scenario A, it would doing the opposite of effecting reconciliation between the Crown and Gitga'at with respect to the interests at stake.

Assuming it were committed to proceeding with its decision-making process on the project, Canada would be, then, on Scenario A, duty-bound to provide Gitga'at with funding sufficient to enable it to participate in the consultation.

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[13] See above, page 4.
[14] *Haida Nation* at 25.
[15] *Ibid*. at 27.
[16] *Ibid*.

Now, imagine a slightly different scenario:

> **Scenario B**: Canada has a duty to consult Gitga'at on a proposed NEB-regulated project; Gitga'at will participate in the consultation; Gitga'at lacks the resources to participate in a meaningful way; and Canada is aware that Gitga'at lacks the resources to participate meaningfully.

In regard to Scenario B, then, the question arises: were Canada to engage in consultation with Gitga'at in circumstances in which it knew that Gitga'at, due to a lack of resources, could not participate meaningfully, and then go on to complete its decision-making process, would it be true to say that Canada had done what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Gitga'at with respect to the interests at stake? Again, the answer is plainly, no.

Where Canada has a legal duty to consult Gitga'at, the honour of the Crown and the goal of reconciliation require it to provide a meaningful consultation process.[17] But to be meaningful, the process must be meaningful for Gitga'at.[18] That is to say, Gitga'at must *be able* to participate in a meaningful manner. Therefore, no matter how well designed the consultation process is, unless Gitga'at is able to participate meaningfully, it is not a meaningful process.

Similar to before, assuming it were committed to proceeding with its decision-making process on the project, Canada would be, then, on Scenario B, duty-bound to provide Gitga'at with funding sufficient to enable it to participate in the consultation process in a meaningful way.

To deny that Canada would be, on Scenario B, duty-bound to provide Gitga'at the funding sufficient to enable it to participate meaningfully would be to hold that Canada's legal obligation to provide a meaningful consultation process, a process meaningful for Gitga'at, is dependent on Gitga'at's ability to pay its way.

Generalizing from Scenario B, we anticipate that the notion of *reasonableness* would serve as the standard for determining the amount of funding an Indigenous people would need to participate meaningfully in Crown Consultation Processes. Accordingly, we submit that Canada would be, on Scenario B, duty-bound to provide Gitga'at with funding sufficient to cover what Gitga'at reasonably requires to be able to participate in the consultation process in a meaningful manner. We add that, again generally speaking, the level of funding reasonably required will correlate with the level of consultation to which the Indigenous people is entitled.

Thus far, we have stated our conclusion, with the reasons for our conclusion, that where Indigenous peoples lack the resources either to participate in Crown Consultation Processes or, if they can participate, to participate meaningfully, Canada is legally obliged to provide funding

[17] See above, page 4.
[18] The phrase "meaningful for Gitga'at" should be understood as meaningful in reference to Gitga'at s. 35 rights.

sufficient to cover what they reasonably require to be able to participate in the consultation process in a meaningful manner. However, we have not yet raised the question of whether Indigenous peoples must expend their own money, to the extent they are able, to participate in Crown Consultation Processes.

To address this question, we ask the Panel to imagine a further scenario:

> **Scenario C**: Canada has a duty to consult Gitga'at on a proposed NEB-regulated project; Gitga'at wants to participate; Gitga'at could pay for its participation in the consultation; and Gitga'at refuses to expend any its money to participate.

Like the two previous cases, given Scenario C, a question arises: were Canada to do what is minimally necessary to say it did its part (e.g. provide notice), and then go on to complete its decision-making process without Gitga'at's participation, would it be true to say that it had done what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Gitga'at with respect to the interests at stake? Here too, Gitga'at submits, the answer is, no.

There is an immediate appeal to the statement that although Canada may, as a matter of policy, provide funding, it is not legally bound to fund an Indigenous people's participation in Crown Consultation Processes where the Indigenous people can pay its own way. Despite its appeal, however, the statement entails that Canada is relieved of its legal obligation to provide a meaningful consultation process where an Indigenous people can but refuses to pay its own way. Keeping in mind the context (that is, that the overall decision-making process is Canada's, not the Indigenous people's, that the proponent, not the Indigenous people, sets the decision-making process in motion, and that it is the proposed project's potential to violate the Indigenous people's constitutional rights that gives rise to Canada's duty to consult), it would be far from honourable for Canada to slough off its constitutionally-derived duty on the basis that the Indigenous people can but won't pay its own way.

We submit, then, that on Scenario C, Canada is duty-bound to provide Gitga'at with funding sufficient to cover what Gitga'at reasonably requires to be able to participate in the consultation process in a meaningful way, whether Gitga'at is able to pay its own way or not.

Having set forth what we consider are basic legal principles governing the funding of Indigenous participation in Crown Consultation Processes, we are satisfied to forgo discussion of the specific categories of what Indigenous peoples may reasonably require to participate meaningfully in those processes. With the basic legal principles in place, those categories may best be determined in dialogue with Indigenous peoples.

5. Funding Indigenous Participation in NEB Processes

Finally, we wish to address briefly the question of whether Canada's legal duty extends to funding Indigenous participation in NEB Processes on which Canada relies to fulfill its duty to consult.

Where Canada chooses to rely on NEB Processes to fulfill its duty to consult Indigenous peoples, it must ensure that the NEB Processes are meaningful for this purpose. Given the legal principles discussed above, Canada must, then, ensure that Indigenous peoples are provided funding sufficient to cover what they reasonably require to be able to participate in a meaningful way.

6. Gitga'at's Recommendations

In closing, Gitga'at respectfully proposes the following two recommendations for the Panel's consideration:

1. In accordance with the legal principles discussed above, **Gitga'at recommends** that Canada commit to funding Indigenous participation in Crown Consultation Processes on NEB-regulated projects at a level sufficient to cover what they reasonably require to be able to participate in a meaningful way.
2. Also in accordance with the legal principles discussed above, **Gitga'at recommends** that where Canada relies on NEB Processes to fulfill its duty to consult, it commit to ensuring that Indigenous participation in those processes is funded at a level sufficient to cover what they reasonably require to be able to participate in a meaningful way.