



File No. 26349-064 JBH
Reply to: John B. Harvie

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February 2, 2018

Via Email

Manitoba Indigenous and Municipal Relations
200-500 Portage Avenue
Winnipeg, MB R3C 3X1

Attention: Dave Hicks

Dear Sir:

RE: Proposed Lake Manitoba and Lake St. Martin Outlet Channels Project

Please be advised that we represent Pinaymootang First Nation ("PFN") regarding all matters involving the proposed Lake Manitoba and Lake St. Martin Outlet Channels Project (hereinafter the "Project").

Upon review of the attached Golder Associates Interlake Reserve Tribal Council October Phase 1 Traditional Land Use and Traditional Knowledge Report (hereinafter the "Phase 1 Report") [Tab 1], it has become evident that PFN can no longer be involved with the "streamlined" consultation process that has been facilitated by the Interlake Reserve Tribal Council ("IRTC").

As further clarified below, PFN is no longer and has never been a party to the attached August 10, 2017 Crown Aboriginal Consultation Agreement (hereinafter the "Consultation Agreement") [Tab 2] as the consultation methods are inherently flawed, there is a conflict of interest for IRTC to represent 6 First Nations with respect to consultations and the Consultation Agreement was never binding upon PFN or its members.

Consultation Methods are Flawed

As stated in the attached Lake Manitoba and Lake St. Martin Outlet Channels Project Description Summary (hereinafter the "Project Summary") [Tab 3] at page 28, "Pinaymootang, Dauphin River, Little Saskatchewan, Lake St. Martin are all signatories to Treaty 2 and have rights to hunt and trap and exercise their indigenous and Treaty Rights throughout the RAA (Regional Assessment Area)."

As found in the attached CBC article from August 2017 [Tab 4], Premier Brian Pallister has called the consultations for the Project the "most comprehensive, thorough and robust Crown and Indigenous communities consultations in the history of Manitoba." However, the

two phased consultation approach as contained within the Consultation Agreement is inherently flawed and does not facilitate meaningful participation in Crown Consultation. The prior Consultation Proposal put forth by IRTC provided for no legal funding and very minimal funds for technical advice on the Project. This is completely unacceptable.

An effective consultation process between a First Nation and the government must be collaborative, not merely a streamlined afterthought or another box to check for an environmental licence. PFN was not able to provide input on the process that was to be followed in assessing effects of the Project on environmental, indigenous and Treaty Rights. It is not acceptable for the IRTC to be the gatekeeper to Project related information that should be freely disseminated to PFN and its members.

Consultation must be transparent. We have been informed that work may begin on the construction of new access roads or the realignment of existing roads prior to the adequate study of surface water, traditional land use, and wildlife effects. Actions such as this are very alarming and will not stand. These roads are adjacent to important hunting grounds that would be adversely affected absent adequate study and mitigation efforts.

The Project is a massive undertaking that will create a boundary that extends from Lake Manitoba to Lake Winnipeg, isolating PFN from the southern Interlake region. Pursuant to the Phase 1 Report, the closest channel to PFN, the proposed Lake Manitoba outlet channel is described as follows: approximately 23 kilometers in length; involves a water control structure and several bridges; 125 meters wide; 8 meters deep; and there will be water in it at all times.

The effects of a 125 meter wide channel that is to be permanently watered will have astronomical effects on the region for generations to come. It is our understanding that Manitoba is in the early phases of assessing adverse environmental impacts. It is impossible for PFN members to be meaningfully consulted with on this project if these impacts are not known. Wildlife and environmental effects, including the water regime, must be studied in a comprehensive environmental assessment that takes into account past and future cumulative effects.

PFN will be providing comments to the Canadian Environmental Assessment Agency ("CEAA") on the Project Summary strongly requesting that an environmental assessment be conducted for the Project. Of particular importance in our submission to CEAA, we will be drawing attention to the following section of the Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52) (hereinafter "CEAA 2012"):

19 (1) The environmental assessment of a designated project must take into account the following factors:

(a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated

project in combination with other physical activities that have been or will be carried out;

PFN was not given the opportunity to comment and consultation did not occur when the Fairford River Control Structure was first constructed. In addition, Interlake First Nation communities were not consulted prior to the construction of the Lake St. Martin Emergency Outlet Channel System. Manitoba must take consultation seriously now and the cumulative effects of the Project in conjunction with prior water control works must be properly understood before environmental approval can be sought.

Concerns regarding the Project and the process were clearly voiced by members of PFN in the December 14, 2017 meeting held at the Pinaymootang Church Hall. Of note is the following passage contained on pages 12 and 13 of the Phase 1 Report:

During the morning and afternoon meetings, multiple participants expressed that they felt it was inappropriate for the Province to be discussing future projects when there are existing issues that need to be first addressed. These existing issues include the effects of the 2011 flood, which continue to be ongoing for community members. Multiple participants expressed distrust with the Province, and do not feel that the Province fully acknowledges the relationship to the land that they have. Participants expressed that they consider themselves to be the keepers of the land and feel that the Province is not addressing the concerns of their Chiefs and Elders. Participants felt that there should be a plan in place to correct the environmental and social damage that has been done to date prior to moving forward on future projects.

There is a long history of development in this region that has generally been to the detriment of First Nations communities. Manitoba must make great strides to fully discharge their duty to consult and accommodate PFN in good faith in order to obtain their free and informed consent prior to the approval of any project affecting their indigenous and treaty rights. What we have seen to date and what is planned is absolutely not the "most comprehensive, thorough and robust Crown and Indigenous communities consultations in the history of Manitoba."

Conflict of Interest Exists and Consultation Agreement was never Binding upon PFN

The IRTC does serve a valuable purpose on matters where the coordination of efforts of 6 First Nations is desired. However, there exists a strong conflict of interest on this matter where joint ventures and large contracts sought by the IRTC for the construction of the Project are contingent upon meaningful consultation with IRTC members. It is no doubt in the best interest of the IRTC and Manitoba to streamline the consultation process so that construction of the Project can commence as soon as possible.

We understand the importance of the Project from an economic development standpoint, but economic interests must be weighed against the need for meaningful consultation and an understanding of environmental effects.

For there to be meaningful consultation, there must be direct and transparent coordination between PFN and Manitoba. It is completely unacceptable for Manitoba to rely upon the IRTC to fulfill its duty to consult and accommodate rights-holding members of PFN in good faith and with the honour of the Crown. PFN cannot “stand in unity” with the other 5 First Nations in the IRTC. Some IRTC First Nations will put the importance of development above all other considerations while other First Nations will likely experience adverse environmental effects more significant in nature, leading to a desire to more greatly scrutinize the Project effects.

PFN is not and has never been bound to the August 10, 2017 Crown-Aboriginal Consultation Agreement. The Executive Director of the IRTC as “authorized representative of the Parties” signed that agreement and referenced as a schedule the May 4, 2017 IRTC Tribal Council Resolution signed by then Chief of PFN Barry Anderson. Courts have held that an agreement signed by the Chief of a First Nation is not binding upon the First Nation. For an agreement to be binding, it must follow the Indian Act (R.S.C., 1985, c. I-5):

Exercise of powers conferred on band or council

***(3) Unless the context otherwise requires or this Act otherwise provides,
(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.***

The Crown-Aboriginal Consultation Agreement was not executed by a majority of PFN Chief and Council present at a duly convened meeting. Therefore, it is null and void.

Moving Forward

All future correspondence and information regarding the Project must be distributed to PFN Chief and Council and the writer as legal counsel for PFN.

PFN will be submitting a revised Consultation Proposal accompanied with a budget for technical and legal assistance in the near future. The Proposal will be drafted with the assistance of experts to ensure that Crown Consultation is carried forth in a meaningful manner and environmental concerns are properly understood and addressed. The results from the Phase 1 Report and other consultation actions to date will be taken into consideration and incorporated as appropriate into the revised Consultation Proposal.

The IRTC has been notified that PFN is not a party to the August 10, 2017 Crown-Aboriginal Consultation Agreement.

As stated in the Project Summary, the proposed Project is a "designated project" under CEAA 2012 and therefore is expected to require an environmental assessment, subsequent to federal and public review. With the assistance of legal counsel and technical experts, PFN will be providing a written submission to the CEAA prior to the February 12, 2018 deadline for comments. PFN will be strongly requesting that an environmental assessment be conducted so that past and future environmental effects can be studied and mitigated as necessary.

We wish to stress that the only way forward on this matter is to proceed as stated within this letter. We will be providing you with the revised Consultation Proposal with budget for technical and legal assistance in due course.

Please contact us with any questions you may have.

Regards,

MYERS WEINBERG LLP

Per: 

<Original signed by>

~~John B. Harvie~~

~~JBH~~

~~CC:~~

~~Gordon Hannon~~

~~Andrew Robert~~

~~Karl Zadnik~~