

BEAMISH LAW

April 8, 2020

Via email: anjala.puvananathan@canada.ca

Impact Assessment Agency of Canada
Ontario Region
600-55 York Street
Toronto ON MSJ 1R7

Attn: Anjala Puvananathan, Director, Ontario Regional Office

Via email: lori.churchill@ontario.ca

Energy, Northern Development and Mines
Strategic Network and Agency Policy Division
6th Flr, 77 Grenville St.
Toronto, ON M7A 1B3

Attn: Lori Churchill, Director, ENDM, Mines and Minerals Division, Indigenous Consultation and Partnerships Branch

Dear Ms. Puvananathan and Ms. Churchill,

Re: Covid-19 and assessment/consultation processes for the Webequie Supply Road Project and Marten Falls Community Access Road Project

I am counsel for Fort Albany First Nation with respect to the impact and environmental assessment processes for the Webequie Supply Road Project and Marten Falls Community Access Road Project. These proposed Projects are located on Fort Albany's traditional territory and stand to have significant impacts on Fort Albany's rights.

I write seeking urgent clarification regarding how the Crown will ensure that the duty to consult in relation to these Projects is met given the unprecedented challenges posed by Covid-19.

Fort Albany urges that Canada and Ontario agree on a coordinated approach that puts minimal demands on First Nation communities until this emergency period has passed and meaningful consultation can be guaranteed.

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Consultation challenges related to Covid-19

Fort Albany currently has no known Covid-19 cases on reserve. However, as a remote fly-in community with conditions including overcrowded housing, high concentration of essential services, widespread pre-existing health conditions, and minimal medical infrastructure, Fort Albany is extremely vulnerable to the spread of Covid-19. It must be even more cautious than most other communities in Canada.

There are many obstacles to holding meaningful consultations with Fort Albany during this time, including and not limited to:

- **Limited capacity to engage:** Like most governments across the country, Fort Albany's leadership and staff are almost wholly focused on Covid-19 preparedness and response and on maintaining essential services, with far fewer resources at their disposal. They cannot reasonably be expected to give attention to processes or deadlines that relate to non-essential matters, especially those decided and set without their consent.
- **Restrictions on gatherings and calls for social distancing:** Public health measures restricting gatherings and calling for social distancing make it impossible to hold the interviews and meetings necessary for consultation. Notably, many elders with knowledge that is critical for these consultations must be protected with particular care.
- **Limited IT infrastructure:** Fort Albany has limited IT infrastructure. Its telephone and internet connectivity are insufficient to support virtual consultation activities such as teleconferencing and videoconferencing at the level needed to substitute for in-person meetings. Further, reliance on such virtual consultation would be culturally inappropriate and exclusionary for many of its members, and would be greatly complicated by interpretation needs.
- **Travel restrictions:** Travel in and out of the community is currently only by airplane, with restrictions on non-essential travel. The community's legal and technical advisors, and Crown or proponent representatives, cannot currently travel to the community to support consultation activities.
- **Dispersal of community members:** As part of the community's emergency response measures, many community members are leaving the reserve area during this time and will be temporarily residing in family groups in many harvesting camps throughout their traditional territory, where it will be impractical or impossible to reach them for consultation activities.

If Covid-19 does begin spreading in the community, the challenges will become even more acute.

For the foreseeable future, the large bulk of the consultation activity simply cannot be done.

However, both the federal and provincial processes appear to be continuing, and Fort Albany continues to receive requests to provide written comments by certain dates, and so on.

Federal processes

With respect to the federal processes, Fort Albany received the notices of the commencement of the impact assessments for both Projects on February 24, 2020. Fort Albany representatives then had a teleconference with Agency representatives on March 12, 2020.

At this teleconference, and subsequently in writing on March 24, 2020, Fort Albany noted concerns about the impacts of Covid-19 on the community's ability to participate in impact assessment processes and related consultations. In the letter of March 24, Fort Albany requested an update at the Agency's earliest convenience about how assessment timelines and processes would be adjusted in light of Covid-19, with a particular focus on how the duty to consult would be fulfilled.

Fort Albany has not yet received the requested information. The Agency's website simply says "Any updates to assessments or consultation plans will be posted on the Agency's website and on the Canadian Impact Assessment Registry as soon as they are available."

Provincial processes

With respect to the provincial processes, Fort Albany has made various inquiries and has raised concerns about the difficulties associated with Covid-19 with provincial representatives and with the Marten Falls team. Fort Albany has consistently been told that the next phase in the assessment processes, the Terms of Reference review, is proceeding and is likely to begin in the spring. It has not been given any specific information about whether or how the processes will be adjusted in light of Covid-19.

Fort Albany has provincial Transfer Payment Agreements (TPAs) relating to the environmental assessment processes, under which it has to meet certain "milestones" by specific dates. Ministry representatives have so far been reasonable regarding short-term adjustments to reporting requirements in recent weeks. However, as long as the assessment processes are officially continuing, Fort Albany can only assume that the work under the TPAs must also continue. Not only is this unrealistic for the reasons outlined above, it may mean that Fort Albany is forced to make expenditures that are of little practical benefit now, only to find that it has run out of funding when the community is able to participate. This is highly prejudicial to Fort Albany's rights.

For example, Fort Albany is currently expected to be recruiting a Community Consultation Coordinator as required under the TPAs, even though little or no consultation activity can be done right now, and under the terms of the TPAs, the funding for this post could run out before the end of the year.

Further, Fort Albany has to conduct Indigenous Knowledge and Traditional Land Use Studies in

order to inform its engagement with the Terms of Reference review and Environmental Assessment phases. If the 45-day Terms of Reference review periods begin in the spring as indicated, this means that Fort Albany has to begin these studies immediately, or risk being without this important information which is critical to understanding the potential impacts of these Projects. It is impossible to conduct these studies in a meaningful way under the current circumstances.

Need for a coordinated approach to adapting these assessment processes

Fort Albany needs to focus on community wellbeing and survival. It is neither reasonable nor responsible for the Crown to expect Fort Albany to continue engaging in these assessment processes in a normal manner, to expend resources and energy negotiating piecemeal accommodations, or to accept uncertainty about the possible consequences for its rights if it is unable to engage. The Crown cannot meet its duty to consult under these circumstances.

The government of British Columbia has considered the impacts of Covid-19 on project consultations, and has prepared guidelines on consultations with First Nations during this time.¹ Without commenting on the sufficiency of these guidelines or the B.C. government's approach to consultations, Fort Albany notes that the guidelines raise many considerations that are relevant to these Projects.

Fort Albany also notes that the Impact Assessment Agency announced yesterday that it will not proceed with First Nations engagement related to the Ring of Fire regional assessment until a later date, in recognition of challenges related to Covid-19. There are also calls for other assessment processes across the country to be suspended, with some proponents already announcing such suspensions.

The Crown must act to remove the pressure on Indigenous groups to participate during this time of crisis, in a manner that does not prejudice their rights and title or allow projects to proceed without credible public and Indigenous engagement.

Fort Albany urges that Canada and Ontario swiftly reach a coordinated position with respect to adaptations to the assessment processes for the Marten Falls and Webequie Roads, working with the proponents as necessary. This should include clear and reasonable measures and assurances, including suspension of deadlines for any steps that should involve public and/or Indigenous engagement, until such time that this engagement can happen in a meaningful and safe way. The Crown should also guarantee that any funding arrangements will be reconsidered as appropriate to ensure that First Nations do not bear additional expense or find themselves less able to engage in consultation as a result of Covid-19. This may require extraordinary changes to normal legislated timelines or rules, as have already been made with respect to other matters in federal and provincial jurisdiction.

All such measures should be taken with the goal of ensuring appropriate consultation periods.

¹ See <https://www.scribd.com/document/454438770/BC-Consulting-Guidelines-During-Covid-19>.

The Crown must not use Covid-19 as justification for suspending or curtailing the need for public and Indigenous engagement with respect to these assessment processes, particularly where constitutionally protected treaty and Aboriginal rights may be affected.

Finally, any adaptations to these processes should not prevent Indigenous groups from undertaking any consultation-related steps that they wish to and that are still possible under the current circumstances.

While the initial decision to suspend these processes can be made by the Crown, decisions about what can be done or resumed, funding needs, and about other detailed accommodations and changes, should be made collaboratively in discussion with Fort Albany and other affected First Nations once they have capacity to do so.

Thank you for your attention to this matter during what is a demanding time for everyone in government. Fort Albany looks forward to your prompt response.

Yours truly,

<Original signed by>

Sarah Beamish
SB/sb

Cc: **Chief and Council**, Fort Albany First Nation
Jackie Sutherland, CEO, Fort Albany First Nation
Caitlin Cafaro, Project Analyst, Crown Consultation Coordinator, Impact Assessment Agency
Jason Frechette, Ministry of Energy, Northern Development and Mines, Indigenous Consultation and Relationships Branch - Ring of Fire Unit
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