



# Government/Industry Relations

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Hearing Order GH-002-2015

## **NATIONAL ENERGY BOARD**

**IN THE MATTER OF** the *National Energy Board Act*, R.S.C 1985, c. N-7, as amended and the Regulations made thereunder;

**IN THE MATTER OF** the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 37, as amended, and the regulations made thereunder;

**AND IN THE MATTER OF** an application dated March 31, 2013, by NOVA Gas Transmission Ltd. ("NGTL") for a Certificate of Public Convenience and Necessity and other related approvals pursuant to Part III and Part IV of the *National Energy Board Act* for approval to construct and operate the 2017 NGTL System Expansion Project (the "Project");

**AND IN THE MATTER OF** National Energy Board Hearing Order GH-002-2015 dated July 21, 2015 and National Energy Board File Number OF-Fac-Gas-N081-2014-20 02

## **WRITTEN ARGUMENT-IN-CHIEF OF BIGSTONE CREE NATION**

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## INTRODUCTION

1. Bigstone is a First Nation in Alberta with a membership of approximately 7,752. Bigstone is a signatory to Treaty No. 8, which formalized the Crown-First Nation relationship for the purposes of peaceful cohabitation and shared use and management of the lands, waters and resources within Treaty No. 8's geographic boundaries.
2. Bigstone possesses inherent Aboriginal rights as well as existing Treaty No. 8 rights throughout its traditional territory. These rights are constitutionally protected by section 35 of the *Constitution Act, 1982*. Bigstone's Treaty No. 8 rights expressly include the right to hunt, trap, fish and gather. However, Bigstone's Treaty No. 8 rights extend beyond the written terms of Treaty No. 8 and encompass rights that are incidental to the explicit rights granted by the treaty. These incidental rights including self-governance rights and the right to promote environmental conservation in order to ensure that Bigstone can continue to exercise its rights within its territory.

("Bigstone's s. 35 Rights")

3. Bigstone continues to use and occupy Bigstone Territory. It relies upon the lands, waters and resources within Bigstone Territory to advance its economies and way of life. Further, Bigstone manages Bigstone Territory according to Bigstone laws and principles for the benefit of the collective including future generations of Bigstone citizens. Maps of Bigstone Territory have been provided to the National Energy Board (the "Board") and NGTL in its written evidence.<sup>1</sup>

("Bigstone Territory")

4. NGTL is proposing to construct and operate a multiple project expansion by adding various proposed new pipeline segments to its existing pipeline system in northern Alberta in order

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<sup>1</sup> Exhibit C6-08; Exhibit C6-06.

to service the asserted increased need for sweet natural gas transportation (the “Project”). The Project consists of approximately 230 kilometres of new pipeline that will be part of five new and separate pipeline segments that will “loop” existing segments of the NGTL system. The NGTL system is an integrated natural gas pipeline system consisting of approximately 24,500 kilometers of pipeline, associated compression and other facilities located in Alberta and British Columbia (the “Existing NGTL System”). Of particular importance to Bigstone is the proposed Liege Lateral Loop No. 2 Pelican Lake Section (the “Liege Section”). The Liege Section would consist of approximately 56 km of 30-inch (762 mm) diameter pipe and would connect to the already approved Liege Lateral Loop 2 Thornbury Section. The Project, including portions of the Existing NGTL System, the Liege Section and the Liege Lateral Loop 2 Thornbury Section, are located within Bigstone Territory.

5. Although limited by its capacity constraints, Bigstone has participated in good faith as an intervenor in the National Energy Board hearings for the Project in an effort to inform the Board and NGTL about Bigstone’s material concerns in respect of Project-specific impacts to Bigstone’s s. 35 Rights. In the absence of Crown led government-to-government consultation with Bigstone outside the hearing process and the Crown’s participation at the regulatory quasi-judicial adversarial hearing, Bigstone also has concerns regarding the uncertainty in respect of the Board’s role in consultation and accommodation for the Project. Without an explicit delegation of the Crown’s duty to consult onto the Board, the Crown certainly cannot rely upon the hearing process for the Project to discharge the constitutional obligations that it owes to Bigstone.
6. These concerns are amplified by the level of NGTL’s and TransCanada existing activities within Bigstone Territory and the inadequate consultation that has been provided in respect of both the existing and prospective activities of both NGTL and TransCanada. As such, the Project must be considered within this context and the cumulative impacts to Bigstone from

the existing and proposed activities. Past experience demonstrates that NGTL clearly overstates the economic benefits of the Project or NGTL has excluded Bigstone from the asserted considerable benefits of the Project including those from the TransCanada's Aboriginal Contracting Program. Therefore, it is Bigstone's position that the costs of the pipeline, including cumulative impacts, outweigh the benefits.

7. For reasons articulated herein, it is Bigstone's position that the Board cannot recommend that the Project be approved. In summary, Bigstone submits that the Board cannot recommend the issuance of a certificate of public convenience and necessity (the "Certificate") for the Project for the following reasons:

- The Project will infringe upon Bigstone's established s. 35 Rights to hunt, fish, trap and gather as formerly within Bigstone Territory, and those infringements have not been justified;
- The Project will impact Bigstone's s. 35 Rights, including self-governance rights and the right to promote environmental conservation in order to ensure that Bigstone can continue to exercise its rights within Bigstone Territory. Bigstone's concerns about these impacts are amplified by the fact that no adequate accommodations have been offered that avoid, minimize, mitigate or accommodate these impacts;
- NGTL has not adequately assessed or addressed the impacts to sensitive caribou herds and habitats located within Bigstone Territory and immediately adjacent to the Liege Section; and
- NGTL has not provided sufficient evidence for the Board to conclude that the Project is in the public interest, especially given that the Crown has not assessed, addressed, balanced or justified infringements to Bigstone's s. 35 Rights resulting from the Project.

8. In the alternative, if the Board does recommend approval, Bigstone seeks that the Board place strict and unique conditions on the approval in order to ensure that Bigstone's s. 35 Rights are protected, preserved and advanced through appropriate avoidance, mitigation and accommodation measures.
9. As a result, Bigstone is filing the within written argument-in-chief as an intervenor in this hearing to communicate its concerns regarding the Project and its comments on the NEB's draft conditions for comment dated December 10, 2015 (the "Draft Conditions").

## **LEGISLATIVE AND REGULATORY FRAMEWORK**

10. NGTL applies pursuant to Section 52 and 58 of Part III and Part IV of the *National Energy Board Act*, R.S.C., 1985, c. N-7 ("NEB Act"), for a recommendation for issuance of the Certificate. The Project is a "designated project" under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 ("CEAA 2012").
11. In light of this framework, the Board is required to:
  - provide a report to the Governor in Council recommending whether the Certificate and related approvals should be issued for the Project;
  - set out the Draft Conditions that the Project would be subject to should it be recommended for approval; and
  - conduct an environmental assessment of the Project in order to determine whether the Project will cause significant adverse environmental effects and whether such effects are justified in the circumstances.
12. The Board's mandate for a review of a pipeline project, as well as the factors to be considered by the Board in making its recommendation and the provision for environmental assessments are provided for in section 52 of the NEB Act which are provided below in part:

## **Certificates**

### **Report**

52. (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

(a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

(b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

### **Factors to consider**

(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

(a) the availability of oil, gas or any other commodity to the pipeline;

(b) the existence of markets, actual or potential;

(c) the economic feasibility of the pipeline;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

### **Environmental assessment**

(3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

13. Additionally, the Board's mandate is further prescribed at sections 22, 29 and 31(1) of CEAA 2012, which reads, in part:

### **Responsible authority's obligations**

22 The responsible authority with respect to a designated project must ensure that

(a) an environmental assessment of the designated project is conducted; and

(b) a report is prepared with respect to that environmental assessment.

### **Recommendations in environmental assessment report**

29 (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

(a) its recommendation with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

(b) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

**Governor in Council's decision**

31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

(a) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project

(i) is not likely to cause significant adverse environmental effects,

(ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

(b) direct the responsible authority to issue a decision statement to the proponent of the designated project that

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

(ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.

14. Hearing Order GH-002-2015 dated July 21, 2015, further sets out a list of issues that are to be considered by the Board in the assessment of the Project, which includes:

- The potential environmental and socio-economic effects of the Project, including those to be considered under the Canadian Environmental Assessment Act, 2012;
- Potential impacts of the Project on Aboriginal interests; and
- The terms and conditions to be included in any recommendation or approval the Board may issue for the Project.



15. Bigstone was not consulted by the Crown or the Board before it released its Appendix I List of Issues. As a result, from the outset Bigstone was prejudiced from not being able to advise the Crown on the topics required for the hearing process. In particular, the Hearing Order's Appendix I List of Issues failed to include cumulative environmental effects that are likely to result from the project, including those required to be considered by the NEB's Filing Manual. Trans Canada and NGTL have significantly contributed to the extensive industrial activities located within Bigstone Territory. Bigstone submits that a cumulative effects assessment is warranted and far overdue for the Project.
16. It is Bigstone's position that the Board cannot adequately consider the environmental impacts and public interest issues related to the Project without considering the cumulative impacts resulting from the expansion of the Project. Any decision by the Board to "cut corners" in this regard would be incorrect and problematic.

#### **IMPACTS TO BIGSTONE'S SECTION 35 RIGHTS**

17. Bigstone's position on the Project is grounded in Bigstone's s. 35 Rights. As such, it is necessary to first discuss the nature and scope of Bigstone's s. 35 Rights. After which, Bigstone will explain how those rights will be significantly and adversely affected if the Board recommends approval of the Project. The failure of both the Crown and NGTL to avoid, mitigate and accommodate impacts to Bigstone's s. 35 Rights through appropriate and unique terms and conditions placed upon NGTL ought to lead to the conclusion that the Project will have significant effects on the environment and the Project would not be in the public interest.

#### ***A. Overview of Bigstone's Aboriginal and Treaty No. 8 Rights***

18. Bigstone has six communities on reserve lands for a total of 21,066.6 hectares. These include 166 A, 166 B, 166 C, 166 D, all in the vicinity of the Hamlet of Wabasca (also known

as Wabasca-Desmarais), 166 south of the Hamlet of Sandy Lake, and Jean Baptiste Gambler Reserve 183 surrounded by the Hamlet of Calling Lake. In addition, and as a result of the 2010 Settlement Agreement, an additional 77,000 acres of land will be designated as new reserve lands within Bigstone Territory. Bigstone identifies as Woodland Cree and the families that comprise the Nation have been occupying Bigstone Territory since time immemorial. Woodland Cree peoples have a long-standing history, and associated cultural traditions, as hunters, gatherers and trappers.

19. Bigstone is a signatory of Treaty No. 8, which provides Bigstone the following rights:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.<sup>2</sup>

20. Treaty No. 8 protects Bigstone's right to hunt, trap and fish throughout all of Bigstone Territory. Bigstone has occupied, used and maintained a substantial connection to Bigstone Territory where members exercise their treaty rights to fish, hunt, harvest and trap and further their culture and spiritual practices on the lands and waters.

21. Bigstone seeks to protect the ability of the Bigstone people to hunt, fish, trap, and gather within Bigstone Territory. The importance of Bigstone's s. 35 Rights transcends their actual practice. Bigstone Elders transfer their knowledge of Bigstone's values, laws, governance, identity, culture, spirituality and economic pursuits to Bigstone youth through the exercise of Bigstone's s. 35 Rights. Bigstone's way of life depends on the advancement and protection of Bigstone's s. 35 Rights and Bigstone Territory.

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<sup>2</sup> "Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.", online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca>> [emphasis added].

22. Bigstone has Treaty No. 8 rights that extend beyond just its written terms. The SCC in *R v Sioui*, [1990] 1 SCR 1025 enunciated that the terms of the Treaty extend beyond the written text of the document and requires an understanding of: (i) the historical, cultural and political context; (ii) oral histories of the Indigenous signatories; and (iii) Indigenous laws. These interpretative requirements were confirmed again by the SCC in its decision of *R v Marshall*, [1999] 3 SCR 356, by stating that simply looking at the written text gives “excessive weight to the concerns and perspective of the British, who held the pen.” Accordingly, Bigstone’s perspective is required in order to conduct an assessment of potential adverse effects of the Project on Bigstone’s s. 35 Rights.
23. Bigstone’s Treaty No. 8 rights encompasses rights which are incidental to the rights granted by the Treaty, including environmental conservation required to ensure that Bigstone can continue to exercise its rights, as formerly, in Bigstone Territory.<sup>3</sup>
24. As Bigstone’s Treaty No. 8 rights are existing and established rights, the Crown is required to justify any potential infringement of that right. This is a heavy burden that rests with the Crown and must be discharged. It has not been discharged. For the Project, the Crown has been entirely absent throughout the hearing process and has not undertaken any analysis in this regard. As such, it is unclear as to whom and when a correct assessment of the Treaty No. 8 rights at stake will be undertaken by the Crown and how such an assessment will be weighed in the context of the Board’s decision.
25. Notwithstanding, Bigstone has participated in the hearing process for the Project in good faith and with capacity constraints in an effort to inform the Board and NGTL about Bigstone’s concerns in respect of Project-specific impacts to Bigstone’s s. 35 Rights. These impacts are set out below.

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<sup>3</sup> *Simon v. The Queen*, [1985] 2 SCR 387.

**B. Project-Specific Impacts to Bigstone's s. 35 Rights**

26. All of the evidence submitted to date establishes Bigstone's extensive connection to the area adjacent to the Liege Section and necessarily leads to the conclusion that Bigstone's s. 35 Rights *will be* impacted. In particular, Bigstone relies upon the following references:

- C6-01 Application to Participate (A71123)
- C6-04 Information Request No. 1 to NGTL (A72320)
- C6-05 Information Request No. 2 to NGTL (A73314)
- C6-06 Place Names in the Traditional Use Study Area (A73314)
- C6-07 Notice of Motion for NGTL to Provide Full and Adequate Responses (A73851)
- C6-08 Written Evidence (A74124)
- C6-09 Notice of Motion Seeking Confidential Filing of Revised Written Evidence (A75240)
- Oral Traditional Evidence Hearing (Edmonton, Alberta, November 5, 2015)

27. The following foregoing evidence establishes the following adverse impacts to Bigstone's s. 35 Rights:

- impacts to Bigstone's Treaty No. 8 harvest rights including hunting, trapping, fishing, gathering;
- impacts to the following wildlife: moose, woodland caribou, mule deer, white tail deer, elk, upland game birds, bear, beaver, cougar, coyote, fisher, fox, lynx, marten, mink, muskrat, red squirrel, river otter, snowshoe hare, weasel, wolf and wolverine;

- impacts to wildlife populations due to increased predation as a result of the new clearance and right-of-way contemplated by the Project;
- impacts to mineral licks, raptor nests, active den sites, hibernacula, and rare plants;
- impacts to the amount of available habitat for mammals, as a result of vegetation clearing, soil handling and sensory disturbance from human activity;
- impacts to air quality and increased noise and odours;
- impacts arising from increased traffic, access and interference; and
- cumulative effects of past, present and reasonably foreseeable impacts to Bigstone's traditional territory and on Aboriginal and Treaty No. 8 rights to hunt, trap, fish and gather.

28. The foregoing evidence clearly establishes that the effects of the Project will significantly impact Bigstone's ability to exercise its Aboriginal and Treaty No. 8 rights within Bigstone Territory. Bigstone will be directly and adversely affected by the Project. Further, Bigstone's objections to the Project have not been addressed by NGTL, the Crown, or any other party which will be further demonstrated in the below sections. NGTL has not offered to put in place appropriate mitigation and accommodation measures.

***C. Bigstone's Project-Specific Concerns Have Not Been Addressed***

***i) The Project Will Have Significant and Direct Adverse Effects on Sensitive Caribou Habitat and Populations within Bigstone Territory***

29. At the Oral Traditional Evidence hearings in Edmonton, Elder Clement Auger expressed his deep concern regarding project-impacts to sensitive caribou habitat and populations when he stated:

1221. But my main reason for being here today is to speak on behalf of the real declining herd of caribou. They're right over my line; I see them now and then. But back in the seventies, there was a lot – whole herds of them, big herds. Now you hardly see them.

1222. And knowing that they've been in the spotlight for quite a while, not only in government circles, it seems that they've been pretty well abandoned by both the federal and provincial government, and that has to change because they all agreed that they're endangered.

1223. What if they are? Why are they not making a committed stand because in not time they'll be gone and that's one of our own heritage, I would say, because my forefathers in this area, they lived off caribou. They didn't abuse them. They used them for food and clothing and everything. And to me it has a historical significance to Bigstone Cree because we're all connected in some way.

1224. And on that same topic, I would venture to say that part of the problem is the massive projects that disrupt their habitat. They're real sensitive to change, their calving grounds, their migration routes.

1225. But some of you might have no idea. I would urge every – every person that is in authority or in government circles, if you would see that place where they have their annual migrations going back millennia you'll still see those trails. They're clear. They're visible even in the winter. That's how much they have used that area for calving. Now, you hardly see that because, like I said, they're really declining. And I don't know, I think it's kind of too late for them.

30. Bigstone does not agree with NGTL's conclusion that "the Project's contribution to the overall level of disturbance in these ranges will be <0.1%, which will not meaningfully change the level of overall disturbance from existing conditions within these ranges." Bigstone has not had the opportunity to test the evidence submitted by NGTL relating to caribou as it faced capacity constraints. Bigstone's reasonable proposed work plan to engage third party experts was met with a bald response and vague commitment to working collaboratively.

31. Notwithstanding its capacity constraints, Bigstone provided NGTL with its technical comments on NGTL's Caribou Offset Measures Plan for the Liege Lateral Loop No. 2 Thornbury Section on November 20, 2015, in order to consistently voice its specific concerns regarding the endangered caribou populations within Bigstone Territory. In summary, Bigstone's concerns included the:

- (a) lack of time and capacity to complete review of NGTL's OMP;
- (b) failure to describe how the actual residual effects will be measured;

- (c) failure of how the success and effectiveness of the proposed offsets will be measured;
- (d) failure to provide recent and relevant data from their previous caribou programs and empirical evidence to show the success of the plans on mitigating residual impacts on caribou habitat;
- (e) failure to provide the methods and empirical measurements that will be undertaken to measure the success of the proposed plan. None of this critical information has been provided in the Preliminary Caribou OMP;
- (f) failure to show how the success of caribou habitat restoration is defined;
- (g) failure to show how successful the habitat restoration actually is in reducing residual effects to caribou; and
- (h) lack of empirical measurements and a program design that would allow for a transparent evaluation of the plan's success. As it stands, the plan requires that the Board and Bigstone simply trust NGTL to fulfil the NEB conditions without providing the necessary evidence; and
- (i) failure to meaningfully consult Bigstone of the caribou OMP.

32. Even if NGTL has accurately assessed impacts to caribou and caribou habitat in and around the Liege Section, which is denied, the proposed mitigation measures to address these impacts are wholly inadequate. Again, Bigstone has not been provided any capacity or the opportunity to meaningfully engage NGTL on the Caribou Habitat Restoration and Offset Measures Plan and Caribou Habitat Restoration and Offset Measures Monitoring Plan.

33. Additionally, there is no indication in NGTL's application or filed material that information about impacts to caribou, informed by Bigstone's knowledge, expertise and understanding, have resulted in any change to NGTL's plans or mitigation measures. To the contrary, NGTL

has not facilitated a collaborative relationship with Bigstone so as to ensure that Bigstone's concerns regarding caribou are properly assessed, addressed and accommodated in the form of tangible revisions to NGTL's Environmental and Socio-Economic Assessment ("ESA").

*ii) The Project Will Have Significant Adverse Effects on Traditional Land Use and Occupancy Sites.*

34. For the reasons set out below, Bigstone refutes NGTL's conclusion that "the likely effects of the Project on TLRU will be low magnitude ... and not significant."

35. First, NGTL has refused to enter into a framework whereby project-specific impacts identified in Bigstone's Traditional Land Use Study can be meaningfully discussed. Instead, NGTL wishes to rely on the ESA, which was submitted prior to their consideration of the preliminary draft of Bigstone's TLU, which became later available at no fault of its own. The ESA contains a mere "catch-all assessment" of the Project impacts and does not go into any details of the unique rights and interests of Bigstone. Further, the ESA fails to demonstrate how Bigstone's Traditional Land Use Study or its oral traditional evidence transmitted at the hearings have been incorporated.

36. Second, upon NGTL's receipt of the preliminary draft of Bigstone's TLU, which also outlined recommendations to move forward in a collaborative manner, NGTL has failed to provide a thoughtful response to Bigstone's work for the Project. Additionally, NGTL has failed to demonstrate how such recommendations have been incorporated by NGTL into its ESA.

*iii) Bigstone's Concerns regarding Cumulative Effects Remain Unaddressed*

37. The cumulative effects of increased commercial activities within Bigstone Territory is a significant concern to Bigstone. In the Bigstone Traditional Land Use Study, cumulative effects were identified as a high priority to Bigstone trappers and harvesters.



38. A cumulative effects assessment is all the more important in Bigstone Territory given that there are nearly twenty active unconventional oil sands projects and that there are many upcoming or proposed projects, some of which belong to TransCanada.
39. Some of the various cumulative effects that harvesters have identified include: decrease of clean water for animals, contamination of animals, increase human activity, inability to find certain animals and distress from the irreversible changes to the land and the ability of Bigstone members, currently and in the future, to use the land for harvesting and other cultural purposes.
40. NGTL has not provided the Board with an adequate or reliable cumulative effects assessment. The assessment included in the ESA falls far short of what ought to be undertaken, especially in light of NGTL's significant footprint and various activities within Bigstone Territory.

#### **BIGSTONE HAS NOT BEEN MEANINGFULLY CONSULTED ON THE PROJECT**

41. The Crown must meaningfully consult and accommodate whenever contemplating a decision that has the potential to adversely affect Aboriginal or treaty rights. Consultation must occur in a manner that is consistent with the Honour of the Crown. Bigstone submits that it has not been provided with a consultation process that is accessible and adequate and one that provides an opportunity to meaningfully participate.
42. The federal and provincial Crown does not enjoy unfettered jurisdiction over the lands and resources of Alberta. In *Mikisew*<sup>4</sup> and *Grassy Narrows*<sup>5</sup> the Supreme Court of Canada ("SCC") determined that the Crown must consult First Nations when making decisions relating to First Nations' rights and interests. Consultation must be consistent with the honour of the Crown and its fiduciary obligations. The Crown's ability to make decisions

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<sup>4</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69

<sup>5</sup> *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 43

regarding the lands and resources is subject to constitutionally protected and established Treaty rights, and Aboriginal title and rights<sup>6</sup>. *The Crown must ensure those interests are identified, recognized and protected through a meaningful process of consultation and accommodation.*

43. The duty to consult and accommodate is constitutional in origin and grounded in the honour of the Crown which also “infuses” treaty interpretation and implementation processes. The fundamental purpose of the duty is to advance the objective of reconciliation of Indigenous peoples and non-Indigenous peoples and their respective claims, interests and ambitions through an honourable process of negotiation. In *Haida*<sup>7</sup> and *Mikisew*<sup>8</sup> the SCC was clear that the Crown has a duty to consult with First Nations and, if necessary, accommodate their interests when making a decision that may adversely affect the First Nation’s Aboriginal and Treaty rights and interests.
44. In the treaty context, established treaty rights “rightly occupy the high end of the spectrum of claims demanding deep consultation.”<sup>9</sup>
45. *Bigstone has had no direct discussions regarding consultation and accommodation with the Crown. Also, Bigstone and NGTL have not engaged in any direct discussions regarding mitigation and accommodation measures.*
46. In light of the recent Federal Court of Appeal decision of *Chippewas of the Thames First Nation v Enbridge Pipelines*, 2015 FCA 222, the ability of the Crown to rely upon the Board’s hearing process in discharging its duty to consult is in serious doubt, subject to explicit delegations. The Crown’s intentions and participation during the hearing process has been completely absent. Notwithstanding, Bigstone has participated in the hearing process in

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<sup>6</sup> *Constitution Act*, 1982, being Schedule B to *Canada Act 1982* (U.K.), 1982, c. 11

<sup>7</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SSC 73 at paras. 16-17, 20, 27, 33

<sup>8</sup> *Mikisew Cree*, *supra*, at paras. 51 – 52

<sup>9</sup> *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345

order to provide evidence on Bigstone's s. 35 Rights and interests to the Board and to voice its concerns with respect to how Bigstone has not been provided a sufficient consultation process, leading to the avoidance, lack of mitigation and lack of accommodation of its concerns.

## **RECOMMENDATIONS SOUGHT**

47. Bigstone submits that the Board should recommend against approval of the Project because it cannot reasonably determine that the Project is not likely to cause significant adverse effects, or that any significant adverse effects can be justified in the circumstances.

48. The Board's recommendation against approval is appropriate for a number of reasons, including:

- (a) the Project does not meet the NEB criteria for recommending approval;
- (b) the Project will have significant adverse effects to Bigstone's established Treaty No. 8 rights and constitutionally-protected Aboriginal rights;
- (c) NGTL's assessment on impacts to caribou and caribou habitat is deficient and incomplete; and
- (d) there is insufficient information provided in the Application, ESA and hearing record for the Board to determine whether the adverse effects to Bigstone's s. 35 Rights can be justified, or to determine whether the Project is in the public interest.

## **PROPOSED CONDITIONS**

49. Should the Board recommend the Project for approval, which it ought not to, Bigstone provides the Board with its comments on the Draft Conditions.

50. With respect, Bigstone submits that the hearing process for the Project has not resulted in any mitigation measures that might appropriately address Bigstone's concerns. In particular, the Draft Conditions proposed by the NEB defers the consideration of critical issues, including caribou populations and habitat. Additionally, as the Draft Conditions are not unique to Bigstone specifically, Bigstone is concerned that the implementation and enforcement of such conditions will only lead to protracted discussions which ought to have taken place prior to the Project Application and ESA being submitted to the Board.
51. Further, the Draft Conditions merely establish a framework for the communication by NGTL to the Board of steps which have been taken to communicate with and address the concerns of First Nations. The Potential Conditions do not facilitate First Nations themselves communicating their concerns to NGTL and the Board. The conditions do not require NGTL to provide capacity funding to enable substantive two-way engagement between NGTL and First Nations. This will prevent First Nations from meaningfully engaging in a dialogue regarding impacts of the Project and potential mitigations measures. The conditions also do not specifically require NGTL to communicate to the Board the specific concerns which have been raised by First Nations with respect to impacts to Aboriginal and treaty rights, including Aboriginal title. NGTL's submissions to the Board in respect of efforts made to contact First Nations and resolve concerns are not adequate, and will not ensure that the Project will move forward in keeping with the requirement of consultation that has the objective of substantially resolving and accommodating impacted First Nations. In absence of Crown consultation, NGTL efforts will invariably fall short of what is required. In light of the newly formed governments and call to action of regulatory reform and meaningful consultations, Bigstone expects that the Crown will fulfill its constitutional obligations and will not attempt to delegate more than procedural obligations to NGTL.

52. Bigstone requests that the Draft Conditions be rewritten to ensure that requirements are put in place to establish capacity funding for First Nations with respect to the consultation requirements which are mandated in the Draft Conditions. Additionally, standards should be established in the conditions which will allow the NEB to assess whether NGTL has sought to meaningfully engage with First Nations and substantially resolve the concerns which have been raised by impacted First Nations.

## **CONCLUSION**

53. Bigstone has established Treaty No. 8 rights and Aboriginal rights within Bigstone Territory, which has been described in Bigstone's evidence and in these submissions. The Crown is required to justify the infringements to the exercise of Bigstone's Treaty No. 8 rights and meaningfully consult Bigstone's in respect of its s. 35 Rights. Upon review of the Project Application, nothing in the evidence filed by NGTL suggests that the Project's infringements can be justified. Additionally, the Crown has not met the high burden of consultation and accommodation that is required to assess and accommodate impacts to Bigstone's s. 35 Rights.

54. In this hearing, Bigstone has presented evidence, both written and oral, which demonstrated that should the Project be approved, it will have significant adverse effects on Bigstone's s. 35 Rights and Bigstone Territory.

55. Bigstone submits that the Board must find that the NGTL's assessment of the impacts to endangered caribou populations and habitats and impacts to traditional land use and occupancy valued components of the Project is deficient in various ways, and therefore, it cannot recommend the Project.

56. Bigstone also submits that the Board must find that impacts to Bigstone's s. 35 Rights as a result of the Project outweigh the potential benefits and therefore, is not in the public interest.

57. In conclusion, the Board must recommend against the issuance of a Certificate.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**