FRANKLIN GERTLER
ÉTUDE LEGALE • LAW OFFICE

Aldred Building
507 Place d'Armes, Suite 1701
Montréal, Québec, Canada H2Y 2W8
TEL (514) 798-1988
FAX (514) 798-1986
admin@gertlerlex.ca

BY E-MAIL AND BY POST

April 30, 2009

Me Véronique Dubois
Secrétaire
RÉGIE DE L'ÉNERGIE
Tour de la bourse, C.P. 001
800, Place Victoria, 2e étage, bureau 255
Montréal (Québec) H4Z 1A2

Re: Demande d'approbation de la grille de pondération des critères non monétaires pour l'appel d'offres éolien issus de projets communautaires et autochtones (A/O 2009-01) – Intervention du Mi'gmawei Mawiomi
Dossier de la Régie : R-3685-2009
N/D: 2105-010

Dear colleague,

This is further to our brief telephone conversation of April 21, 2009 regarding the above-captioned matter and further to the April 22, 2009 letter from Hydro-Québec. Please note that by mistake the letter was not sent to us by e-mail and we only discovered it on Friday, April 24 on the Régie's web site. We notified Hydro-Québec and finally received it by e-mail on April 27, 2009. So, after reviewing these matters with our clients, we are now in a position to respond to your enquiry and to the letter from Hydro-Québec.

Upon review of the observations and comments of the Mi'gmawei Mawiomi, filed on April 9, 2009, Hydro-Québec's letter and the relevant law, it is our view that the Régie has the jurisdiction and the obligation to exercise its powers in accordance with the requirements of the constitution. This includes satisfying itself that the Crown (including the government and Hydro-Québec) has complied with its obligations to consult and accommodate in the matters in which the Régie is part of the Crown resource allocation and use decision-making process that may affect Aboriginal rights and title and Treaty rights. In this connection, it is interesting to note two very recent unanimous decisions of the British Columbia Court of Appeal involving the British Columbia Utilities Commission[1] that explicitly decline to

[1] See: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca67/2009bcca67.html) , par.46-47 and 54 where it held:

> [54] While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. (…)

and *Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 BCCA 68, http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca68/2009bcca68.html*

follow the *obiter* of the Alberta Court of Appeal[2] relied upon by the Régie in decision D-2007-059 in the passage cited by Me Fréchette in his letter of April 22, 2009.

We are not convinced that notice to the Attorney General under article 95 of the *Code of Civil Procedure* or otherwise is required. In this connection, we note that there was no such notice in the application by the Assembly of First Nations of Quebec and Labrador in R-3595-2006. Furthermore, as noted at page 17 of decision D-2006-166 in that case, article 7 of the *Rules of Procedure of the Régie de l'énergie* already provides for a universal right of intervention for the Attorney General.

Yours sincerely,

FRANKLIN GERTLER LAW OFFICE

per: Franklin S. Gertler, Attorney

FSG/edc
c.c. (by e-mail):
Me Yves Fréchette, Hydro-Québec
Mi'gmawei Mawiomi

[2] *Dene Tha' First Nation v. Energy and Utilities Board (Alta.)*, 2005 ABCA 68 (CanLII),