

**Responses to Appellant's Supplementary Representations
accompanying their Representations dated January 31, 2017**

Information and Privacy Commissioner of Ontario Appeal PA16-128

Concerning

**Freedom of Information Request A-2015-00061 to the
Ontario Ministry of Natural Resources and Forestry**

March 7, 2017

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Representations of Mitchell Shnier Responses to Appellant's Supplementary Representations

Appellant's Supplementary Representations, Issue A

- 1) Many of the Appellant's points made in their Supplementary Representations simply repeat points they previously made in their Appellant Representations, to which I have already responded in my Representations.
- 2) Concerning paragraphs 9 through 18 of the Appellant's Supplementary Representations:
 - a) As noted in PO-2112: *"Generally speaking, settlement privilege ceases to apply once an unconditional and complete settlement has been achieved"*. Therefore, as the settlement between the Appellant and the MNR has apparently been completed, even if there was settlement privilege, it has now ceased to apply.
 - b) While indeed the cited *Sable Offshore Energy Inc. v Ameron International Corporation* decision discusses settlement privilege, in that decision:
 - The concern was that settlement with other parties had not been completed.
 - Whereas for the proposed Bala project a settlement has apparently been reached, as is stated in paragraph 9 of the Appellant's Supplementary Representations.
 - The purposes and concerns of disclosure are different than for the proposed Bala project, as noted in my Representations for paragraphs 75 through 81 of the Appellant's Representations, for example:
 - For the proposed Bala project the harms claimed are too speculative.
 - A settlement negotiation is between two parties, so as the MNR does not claim this privilege then such a claim is unjustified.

I would therefore submit that settlement privilege does not justify the use of the exemption in section 19 of the Act for the Proposed Project.

Furthermore, as noted in PO-2018: *"one of the central purposes of the Act is to shed light on the operations of government"* and to enable: *"public scrutiny of government activities"*. It is not within the spirit or provisions of the Act to facilitate secret deals between the government and private developers as this settlement would be if the contested records were to be withheld.

- 3) Concerning paragraph 19 of the Appellant's Supplementary Representations:
 - a) The Appellant's claim/threat that the contested records: *"would be protected from disclosure and inadmissible as evidence in a court of law"* is meaningless as the issue at hand is a decision by the IPC which has its own guiding Act, purposes and precedents. We are not in a court of law.
 - b) The Appellant appears to introduce this irrelevant point as an opportunity to threaten legal action against the Government in an apparent attempt to influence the Adjudicator's decision.
- 4) Concerning paragraph 21 of the Appellant's Supplementary Representations:

It would certainly be more appropriate and credible for the Government of Ontario, and not the Appellant, to determine the applicability of Section 18 of the Act which is entitled and concerns: *"Economic and other interests of Ontario"*.

- Indeed, by their not contesting the release of these records, the MNRF has determined this is not a valid concern.

5) Concerning paragraph 26 of the Appellant's Supplementary Representations:

- a) Quoting from the Appellant's paragraph: *"The Section 18(1)(e) Records, if disclosed, would severely hinder the MNRF's ability to continue negotiations on the Bala Falls Project and/or other similar renewable energy projects in the future."*

I find it bizarre that the Appellant feels it necessary give negotiation advice to the MNRF, with whom they were just in an adversarial relationship on a settlement negotiation.

- b) Here the Appellant claims settlement negotiations have not concluded, whereas in paragraph 9 of the Appellant's Supplementary Representations the Appellant indicated settlement negotiations have concluded.

By not providing consistent information, the Appellant is not fulfilling its burden of proof, as this limits my ability to respond due to the conflicting claims they provide in their Representations.

6) Concerning paragraphs 32 and 33 of the Appellant's Supplementary Representations:

I find it ironic that the Appellant claims that the: *"expansion of public-private-partnerships (P3s) and their increased usage in recent years necessitates a change in the application of the provisions in the Act"*.

I note that the Appellant, or companies related to their parent company has:

- In 2010 sued the City of Thunder Bay for \$126M as the City would only approve 14 of 18 of their proposed wind turbines.
- In 2013 sued the Township of Muskoka Lakes and others for \$3M for alleged defamatory statements involving the Proposed Project.
- Initiated a Judicial Review and in 2014 received the decision on their seeking an order compelling the MOECC to issue a Renewable Energy Approval for the proposed Thunder Bay project.
- In 2015 initiated an appeal to the Environmental Review Tribunal in attempting to get the MOECC to reverse a decision for the proposed Thunder Bay project.
- In 2015 initiated a \$60M lawsuit against the MOECC due to not being issued environmental approval for the proposed Thunder Bay project.

Is this a partner the government wants. Is this a partner that deserves less public scrutiny. I think not.

If future P3 "partners" are as litigious as this, I would hope the Government of Ontario continues to ensure the Act fulfils its current good purposes, enabling the public to ensure our government is for the people, not for secretive deals with private developers.

For the Proposed Project, ensuring the recreating public would be safe and the environment would be protected requires that the public, and not private developers, determine which records are released.

As is a purpose of the Act: such *"information should be available to the public"*, so that the public can have confidence in the approvals issued and decisions made by the government.

7) Concerning paragraphs 34 through 40 of the Appellant's Supplementary Representations:

The Appellant continues to attempt to foster fear, without justification, for extremely unlikely events.

If a party wished to disrupt the operation of the Proposed Project, it would not require any detailed technical drawings or threatening of personnel, nor getting inside or even close to the Proposed Project.

Examples of such vulnerabilities are as follows:

a) Vulnerability: Wires

- The wires carrying power from the Proposed Project would connect to a 44,000 volt distribution line above ground at a Hydro One utility pole across the road from the Proposed Project, on property the Appellant would not own or control.
- If the wires from the Proposed Project were buried to cross the highway, they could quickly be cut where they would run up the utility pole to the 3-phase disconnect at the top of the Hydro One utility pole. Only one of the three wires would need to be cut to cause an immediate and automatic shutdown of the Proposed Project's operation.
- If instead aerial wiring is used to cross the highway, then using a battery-powered angle grinder (for a concrete pole) or battery-powered chainsaw (for a wood pole), the Hydro One utility pole (or a utility pole leading to it) could be quickly and quietly cut down, as easily as felling a tree. Again, this would shut down operation of the Proposed Project.
- The equipment needed for such vandalism would cost a few hundred dollars and is sold at any Canadian Tire store.

b) Vulnerability: Water intake

- Popular in the United States is a type of recreational fishing often called "jug fishing" or a "fishing noodle" (as a plastic jug or swimming pool noodle is often used as a float). These are used for the same purpose as an "ice fishing tip-up" which is popular in Canada.
- The fishing noodle floats horizontally on the water until a fish tugs on the fishing line hanging from it, which causes a weight in a plastic tube to slide to the opposite end, causing the fishing noodle to float vertically. This shows it is time to see if there's a fish on.
- Fishing noodles can easily be made for about \$10 each, using materials available at any Canadian Tire. Detailed instructions are on many web sites, such as:
 - <http://cabelas.com/category/Camp-Cabelas-DIY-Jugfishing-Rig/792580680.uts>
 - <http://forum.gon.com/showpost.php?p=5337014&postcount=9>
 - <http://catfishingfishingonalowbudget.webs.com/noodlejugsmadeeasy.htm>
- The diagram in Appendix Q is available from many web sites on the Internet.

It suggests that the sliding weight (identified as "item 03") be a 5" length of 3/8"-diameter steel "rebar" (such reinforcing bar is commonly embedded in poured concrete to make it stronger).

- As the entire assembly is less than a few inches across (and variations could be made narrower), this would float downstream, fit between the bars of a hydro-electric generating station's intake trash rack, be drawn into the turbine, and the piece of rebar would likely damage the turbine, causing the station's operation to shut down due to excessive vibration. This would likely require months, and hundreds of thousands of dollars, to repair.

I would like to note the following:

- a) The above were all determined without any information from the Appellant or MNR, and are applicable to any hydro-electric generating station.
- b) These vulnerabilities, and others, could be thought of by anyone that put their mind to it (or looked on the Internet).

But the fact is, small hydro-electric generating stations such as the Proposed Project are not targets for terrorism or sabotage because any impact on Ontario's power grid would be insignificant. Therefore, there is no justification for a Section 16 exemption of the Act.

The reason why I am risking being blamed if any of these illegal and inexcusable acts were to occur is to provide convincing evidence that a wide range of vulnerabilities already exist, and it would not make any difference to enabling: *"targeted acts of terrorism or sabotage"* nor create any more danger to: *"security personnel and other employees"* of Swift River if additional technical drawings were to be released.

However, the technical drawings are needed for the good purposes of ensuring serious and unaddressed issues of public safety are addressed.