SUBMISSIONS OF BOARD STAFF REGARDING QUESTIONS IN PROCEDURAL ORDER NO. 3

In Procedural Order No. 3, dated September 29, 2009, the Board sought submissions from parties to the proceeding and Board staff on certain issues relating to Aboriginal consultation. Specifically, the Board sought submissions on the following three questions:

1. What is the scope of the Board's jurisdiction to consider issues relating to the duty to consult in a section 92 leave to construct application?

2. Is the Board's jurisdiction to consider the adequacy of the consultation, and possible accommodation, limited to the public interest criteria governing the Board's assessment of a leave to construct application (price, reliability and quality of electrical service)?

3. Does the Board have the jurisdiction to consider the adequacy of the consultation, and possible accommodation, in relation to approvals and processes beyond the leave to construct proceeding, including the environmental assessment, the various permitting processes of the Ministry of Natural Resources, and any other activity or approval undertaken by a Crown entity in connection with the Project? If the Board does have the requisite jurisdiction, how should it be exercised and how should it be aligned with the other related approval and permitting processes, for example the environmental assessment process?

The following are the submissions of Board staff.

Questions 1 and 2

These questions are related, and Board staff will address them together.

The Duty to Consult Generally

By way of very high level overview, the duty to consult can be described as follows: The Crown has a duty to consult with Aboriginal groups prior to taking any action which may adversely impact an Aboriginal groups' aboriginal or treaty rights. This duty exists even where a claim has been asserted but not proven. In some cases, the duty to consult may lead to a duty to accommodate. The precise extent of the duty to consult and, possibly, accommodate will vary depending on the facts of each situation. The duty to consult was initially described by the Supreme Court in a trilogy of cases: *Haida Nation* v*. British Columbia (Minister of Forests)*[1], *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*[2], and *Mikisew Cree First Nation* v*. Canada (Minister of Canadian Heritage)*[3].

The precise role that administrative tribunals play with regard to the duty to consult remains a topic of some debate.

Should the Board conduct Aboriginal Consultation Itself?

To date, no party in this proceeding has suggested that the Board should have any role in conducting Aboriginal consultation itself. Board staff therefore does not propose to address this point in detail. However, it is Board staff's view that it would not be appropriate for a panel of the Board to engage in consultation itself.

[1] [2004] 3 S.C.R. 511
[2] [2004] 3 S.C.R. 550
[3] [2005] SCC 69

In the Supreme Court case *Quebec (Attorney General) v. Canada (National Energy Board)*[4] ("NEB"), a number of Aboriginal groups argued that, as an agent of the Crown, the National Energy Board owed Aboriginals a fiduciary duty over and above its responsibilities to other participants in the NEB's hearings. The Court soundly rejected these arguments:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown … extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. …
>
> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[5]

[4] [1994] 1 S.C.R. 159. Although this case pre-dates *Haida* and was therefore not a "duty to consult" case, it was recognized at the time that the Crown owed Aboriginal groups a fiduciary duty when dealing with matters that might impact Aboriginal rights.
[5] NEB, paras. 32 and 34-35.

Board staff is not aware of any cases in which an energy regulatory tribunal has been found to be responsible for itself conducting consultation with Aboriginal groups[6].

Questions 1 and 2: The Scope of the Board's Jurisdiction to Consider the Duty to Consult

The Board's powers to grant an order approving a leave to construct application for electricity transmission or distribution lines are set out in section 92 of the *Ontario Energy Board Act, 1998* (the "Act"):

> **92.** (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

The criteria which the Board may consider in its consideration of leave to construct applications are described in section 96:

> 96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.
>
> Applications under s. 92
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> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the

[6] Board staff is aware of one narrow exception to this statement. In *Brokenhead Ojibway Nation v. Canada (Attorney General)* [2009] F.C.J. 608, the Federal Court held that, under some circumstances, a tribunal's normal hearing process could consider relevant Aboriginal concerns and thereby possibly discharge the duty to consult.

> electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
>
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

The initial grant of power to the Board in subsection 96(1) is therefore very broad: the public interest. However, subsection 96(2) then imposes significant restrictions on the scope of the Board's jurisdiction when considering electricity transmission projects: the review must be limited to issues of price, reliability and quality of electricity service, and whether the application is consistent with any governmental renewable energy sources policies.

There are no similar restrictions for hydrocarbon line leave to construct proceedings (i.e. the Board is required to consider the public interest as a whole).

The restrictions imposed by section 96(2) give rise to the following question: is the Board permitted to consider issues relating to the duty to consult in a section 92 proceeding?

As a general legal principle, it is well established that tribunals can only exercise powers that are given to them by statute. As the Supreme Court explained it in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*[7]:

> Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their

[7] [2006] 1 S.C.R. 140

> statutory authority or 'jurisdiction'; and they cannot trespass in areas where the legislature has not assigned them authority".[8]

The courts have had occasion to address the jurisdiction of tribunals to consider constitutional issues, including Charter and Aboriginal issues. *Paul v. British Columbia (Forest Appeals Commission)*[9] ("*Paul*") involved a challenge to a tribunal's jurisdiction to consider a question of Aboriginal rights. The Supreme Court held that the key question in determining a tribunal's jurisdiction to consider constitutional issues (including questions relating to Aboriginal rights) was whether the tribunal's enabling statute gives it the power to determine questions of law. If the answer to that question is yes, then the tribunal has not only the jurisdiction, but in fact the duty to make determinations on any Aboriginal rights issues (more specifically s. 35 constitutional questions, which includes the duty to consult) that arise within the scope of its proceedings.

A statutory provision granting a tribunal the power to consider questions of law, therefore, amounts to an express or implicit grant of power to the tribunal to consider constitutional questions. As Bastarache J. noted in *Paul*: "I conclude, therefore, primarily on the basis that adjudication is distinct from legislation, that the Legislature of British Columbia has the constitutional power to enable the Commission to determine questions relative to aboriginal rights as they arise in the execution of its valid provincial mandate respecting forestry." He continued: "The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision."[10] The Court concluded: "The province of British Columbia has the legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights on the course of carrying out it valid provincial mandate."[11]

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[8] Para. 35 (citations omitted).
[9] [2003] S.C.J. No. 34
[10] Paul, paras. 34 and 39.
[11] Paul, para. 46.

Nova Scotia (Workers' Compensation Board) v. Martin[12] ("*Martin*") was issued by the Supreme Court on the same day as *Paul*. Martin involved a complaint brought by an injured worker who claimed that the province's *Workers' Compensation Act*, under which he had been found to be not entitled to certain benefits, was discriminatory and violated his rights under the Canadian *Charter of Rights and Freedoms*. Like *Paul*, *Martin* involved a question regarding a tribunal's power to make decisions on constitutional issues, though in this case the issue in question concerned the Charter and not Aboriginal rights. Both Charter issues and questions of Aboriginal rights are constitutional issues, however, and the principles enunciated in *Martin* apply in an Aboriginal rights context. *Martin* is helpful in that it further clarifies the circumstances under which a tribunal is empowered to consider constitutional issues. In particular, *Martin* confirms that a tribunal has the power to consider constitutional issues that arise in relation to matters that are within its jurisdiction:

> In other words, the relevant question in each case is not whether the terms of the express grant of jurisdiction are sufficiently broad to encompass the Charter itself, but rather whether the express grant of jurisdiction confers upon the tribunal the power to decide questions of law arising under the challenged provision, in which case the tribunal will be presumed to have jurisdiction to decide the constitutional validity of that provision. The Charter is not invoked as a separate subject matter, rather, it is a controlling norm in decisions *over matters within the tribunal's jurisdiction*.[13]

[12] [2003] S.C.J. No. 54

[13] Martin, para. 39 (emphasis added). At para. 37 of the decision, the Court further noted that: "it suffices that the legislator endow the tribunal with power to decide questions of law arising under the challenged provision, *and that the constitutional question relate to that provision*." (Emphasis added).

Conclusion- The Board's Jurisdiction

Section 19(1) of the OEB Act clearly gives the Board the power to decide questions of law: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of fact and law." Ordinarily, in accordance with the principles established in *Paul/Martin*, it would appear that the Board has the power and responsibility to determine questions of Aboriginal rights within its hearings. However, s. 96(2) of the Act appears to take this power away in the context of electricity leave to construct applications. The legislature has indicated quite clearly that the Board's review in such cases will have a very limited scope. Indeed, section 19(1) specifies that the Board only has the power to consider questions of law regarding matters that are "within its jurisdiction." In considering whether the Board is empowered to consider issues relating to the duty to consult in a s. 92 electricity application, the question a court would ask is: did the legislature intend for the Board to have the power to consider questions of law relating to matters other than price, reliability and quality of service, or the promotion of the government's renewable energy sources policies? A review of ss. 19, 92, and 96(2) of the Act suggest that the answer to this question is no.

To be clear, it is conceivable that an Aboriginal group might raise a consultation issue that relates to the price, reliability, or quality of electrical service, or the promotion of the government's renewable energy sources policies. If such a case were to arise, it is Board staff's submission that the Board might be required to consider these arguments and make a decision on the merits of the issue. In the current case, however, there is no suggestion that any of the consultation issues relate in any way to price, reliability or the quality of electrical service, or the promotion of the government's renewable energy sources policies.

It might be argued that a decision by the Board to exclude Aboriginal consultation issues that are not related to price, reliability or quality of electrical service from consideration in this hearing will create a consultation "gap". The Board is an agent of the Crown, and has the approval authority for the Project. If the Board cannot consider

Aboriginal consultation issues related to the project, a natural question would be: who can?

There are several possible answers to this question. The first is that Aboriginal consultation issues can be considered in the environmental assessment ("EA"). As many of the issues identified by the WTC might broadly be categorized as "environmental" concerns, the EA is in many ways a natural home for such consultations. However, even in cases where the EA does not adequately deal with Aboriginal consultation, such a situation could not in any way be considered a grant of additional jurisdiction to the Board. The legislature has been very clear that the scope of the Board's jurisdiction on electricity leave to construct applications is narrow. To the extent that this creates a consultation gap, the Board is not empowered to fill this gap.

Question 3

As described above, it is Board staff's view that the Board does not have the jurisdiction to consider Aboriginal consultation issues in a section 92 application, except as such issues may relate directly to price, quality, or the reliability of electricity service, or the promotion of the government's renewable energy sources policies. As such, the Board's jurisdiction to review or approve consultation conducted by other Crown actors is similarly limited.

However, in order to give Question 3 thorough consideration, Board staff will answer the question assuming that its arguments under questions 1 and 2 are rejected, and that it is found that the Board does have the jurisdiction to consider Aboriginal consultation issues more generally.

This issue has been considered in a number of jurisdictions, and in fact by the Board itself.

A recent decision of the British Columbia Court of Appeal is of interest. In *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, [2009] B.C.C.A. 68 ("*Kwikwetlem*") the British Columbia Utilities Board ("BCUC") declined to hear issues relating to Aboriginal consultation in the context of an electricity transmission leave to construct application. The BCUC observed that an environmental assessment ("EA") would be required for the project, and that consultation issues were better considered in that forum.

The Court held that the BCUC erred in its decision, and the appeal was allowed. Despite the requirement for an EA approval, the Court found that the BCUC hearing was a discrete and separate process. The Court stated:

> As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. … The [leave to construct approval] defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion. …
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> The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the [BCUC] process and not during the EAC process. That is the case here; the duty to consult with regard to the [BCUC] process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a [approval]. …

> The question the Commission must decide is whether the consultation efforts up to the point of the decision were adequate.[14]

Although the B.C. Court found that the separate requirement for an EA approval did not eliminate the BCUC's duty to ensure sufficient consultation had taken place, it is important to note some significant differences between the regulatory framework in B.C. versus Ontario. In Ontario it is common for EAs to be completed, or at least underway, prior to an applicant filing a leave to construct application with the Board. In the Bruce-Milton case (see below), for example, the Board had before it the approved terms of reference for the EA (which included Aboriginal consultation issues) and a good understanding of where that process stood. In *Kwikwetlem*, however, it appears that the EA process had not even started. Further, the B.C. Court was concerned that the EA would not address Aboriginal issues at all. Recent changes to B.C.'s EA legislation had removed important sections which mandated First Nations participation. The B.C. legislation also does not include restrictions comparable to those found in s. 96(2) of the Act.

More importantly from the standpoint of answering the Board's Question #3, the *Kwikwetlam* decision does not appear to envision the BCUC passing judgment on any consultation efforts undertaken in the EA process. The Court recognized that the EA and the leave to construct hearing were two different processes, and that neither was "subsidiary or duplicative of the other". It does not appear that the Court intended the BCUC to have any role in reviewing the work conducted through the EA process (nor the EA process reviewing the BCUC's decision, for that matter). The consultation activities that the Court felt it would be appropriate for the BCUC to review appear to have been those of the applicant (which was itself owned by the Crown).

[14] Kwikwetlem, paras. 55, 69 and 70.

Other courts have also expressed doubt that a tribunal has a role in reviewing the consultation activities of other Crown actors. In *Dene Tha' v. Alberta (EUB)*,[15] ("*Dene Tha*') the Alberta Court of Appeal stated:

> A suggestion to us made in argument, but not made to the Board, was that the Board has some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty.[16]

This comment was not central or necessary for the court's decision, and is in that sense may be regarded as *obiter dictum*.

The *Dene Tha'* decision was followed in a recent decision of the Quebec Régie de l'Énergie. In *Hydro-Québec c. Intéressés,*[17] Hydro Quebec applied to the Régie to modify some of the sub criteria in the scheme used to determine whether a project adhered to principles of sustainable development. A number of Aboriginal groups intervened claiming that the original sub criteria were developed absent Crown consultation, and as such the Régie could not approve a modification until adequate Crown consultation had occurred. The Régie found, however, that it did not have the jurisdiction to consider the issue: "The Régie is not invested with the power to supervise the Crown in order to ensure that it has respected its constitutional obligations towards Aboriginal people."[18]

The Board itself has considered this issue. EB-2007-0050 ("Bruce-Milton") involved an application by Hydro One for leave to construct an electricity transmission line from the Bruce nuclear facility to a switching station near Milton. Two Aboriginal groups intervened in the proceeding, and argued that the Board could not approve the project

[15] [2005] ABCA 68.
[16] Para. 28.
[17] D-2007-59. Decision issued May 25, 2007.
[18] Unofficial translation, p. 9. In French, the text reads: "Elle n'est pas investee d'un pouvoir de surveillance sur la Couronne afin de s'assurer que celle-ci respecte ses obligations constitutionnelles envers les autochtones."

because Aboriginal consultation had not been completed. The applicant agreed that the duty to consult was engaged, and that the consultation had not been completed. However, it argued that duty to consult issues were being considered through the ongoing EA process, and that it was not the Board's responsibility to ensure that consultation for the project was successfully completed (except to the extent that any Board order would be contingent on the completion of the EA).

Ultimately the Board decided that consultation was sufficiently advanced for the purposes of the Board's approval, and granted the leave to construct order. The Board held that the EA process was beyond the Board's jurisdiction, and that it did not have the authority to determine whether the Aboriginal consultation in that process had been sufficient.[19] However, the Board noted that consultation issues were being addressed through the EA process, and that the Board's approval was contingent on the successful completion of the EA. This gave the Board comfort that the project could not proceed until consultation had been completed.

In addition to jurisdictional constraints on its ability to pass judgment on the EA, the Board also held that it would be both impractical and unnecessary for the Board to engage in a parallel process to consider identical consultation issues:

> As a practical matter it is unworkable to have two separate Crown actors considering identical Aboriginal consultation issues for the same project. In fulfilling its responsibility to assess the adequacy of consultation, the Board must necessarily take responsibility for aspects of the consultation that relate to the matter before it, but should do so with a recognition of any other forum in which consultation issues related to the project are being addressed as well.[20]

[19] EB-2007-0050, p. 68.
[20] EB-2007-0050, p. 69.

The Board continued:

> The EA process, which must by approved by the Minister of the Environment, is specifically charged with addressing Aboriginal consultation issues relating to the project through its TOR. The Board disagrees with SON's contention that the environmental assessment process is not an appropriate mechanism for making a determination regarding the Crown's consultation obligations. The duty to consult and, if necessary accommodate, is a duty owed by the Crown to Aboriginal peoples. The Crown must satisfy itself that consultation has been adequate. A determination regarding the adequacy of consultation which is made by a Minister of the Crown after having considered the record of consultation conducted as part of an Environmental Assessment is an entirely appropriate and logical means by which the Crown can assure itself that consultation has been adequate. As the Crown will be making the decision to grant the EA, and given the Crown's broad duty to ensure adequate consultation, it is reasonable to expect the Minister to consider the Crown consultations that have gone on in areas beyond the project, namely generation planning.[21]

Ultimately the Board held that consultation was being conducted by an agent of the Crown, and that as the Board's approval was contingent on the successful completion of the EA, it could approve the project with the knowledge that the duty to consult would be fulfilled.[22]

[21] EB-2007-0050, p. 71.
[22] EB-2007-0050, p. 71.

Conclusion

There appears to be little support in the case law for the idea that a regulatory tribunal is empowered to review or pass judgment on the Aboriginal consultation efforts of other Crown entities (with the possible exception of the applicant, where the applicant is itself related to the Crown). Although the British Columbia Court of Appeal found that the BCUC had a duty to consider the adequacy of consultation efforts (presumably those of the applicant, which was admittedly itself a Crown actor in that case), it did not find that the BCUC had any supervisory role over the consultation activities of other Crown entities. Both the Alberta Court of Appeal and the Quebec Régie de l'Énergie have rejected the idea that tribunals are empowered to review the consultation activities of other Crown actors. The Ontario Energy Board has also decided that, where another Crown actor is responsible for Aboriginal consultation, it will not duplicate that role.

All of which is respectfully submitted. **October 9, 2009**