**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,

S.O. 1998, c. 15, Schedule B;

**AND IN THE MATTER OF** an application by Yellow Falls Power Limited Partnership for an Order granting leave to construct a transmission line connecting a 16 megawatt waterpower project to transmission system of Hydro One Networks Inc.;

**AND IN THE MATTER OF**

**ONTARIO ENERGY BOARD PROCEDURAL ORDER NO. 3**

**(September 29, 2009)**

# SUBMISSIONS OF THE WABUN TRIBAL COUNCIL

# ON BEHALF OF

# THE MATTAGAMI, FLYING POST AND WAHGOSHIG FIRST NATIONS

The Board requires submissions on the following 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?

QUESTIONS 1 AND 2:

For the reason given in the Submissions of Board Staff, the Wabun Tribal Council (The Council) will address these questions together.

Position of the Council:

The Council does not submit that the Board itself has a duty to engage in Aboriginal consultation, and does not take issue with Board Staff submissions on that point.

Procedural Order No. 1 states as follows: "Should this Board approve the leave to construct application, its order will be conditional on all necessary permits and authorizations being acquired, including a completed EA." It is the position of the Council that the Board should make the necessary inquiries to ensure that adequate consultation with the affected members of the Council has occurred before granting the requested approval. The question to be considered is whether the Board has the jurisdiction or indeed the duty to so do.

The Council made jurisdictional submissions on this point previously, in response to Procedural Order No. 1, and the submissions of the Council herein are necessarily somewhat repetitive of those submissions.

Section 96(2) of the *Ontario Energy Board Act*:

This provision, it is argued, restricts the Board in the present case to consideration of price, reliability and quality of electrical service and, where applicable, promotion of use of renewable energy sources. As these are not at issue, it is said the Board lacks jurisdiction.

But the application of these criteria is qualified; they are at issue only "when, under subsection (1), [the Board] considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection is in the public interest" (s. 96(2)). Council does not dispute the public interest, asking only that its members be consulted and, as appropriate, accommodated before the public interest is served. Thus s. 96(2) is not engaged at this stage, because in determining whether consultation has been adequate the Board is not considering "whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection is in the public interest," but rather whether a constitutional obligation has been met. In the submission of the Council, in dealing with the consultation requirement the Board is

not addressing whether the construction and interconnection are in the public interest, but rather fulfilling a constitutional duty.

It is submitted that as the final Crown decision maker, with the power to consider questions of law (s. 19(1), *OEB Act*), the Board is the appropriate element of the Crown to consider whether the Crown's constitutional duty has been met.

Irrespective of the strict statutory interpretation issue, it is submitted that, as a constitutional duty, the duty to consult, where applicable, overlies statutory provisions and informs their construction. It is to be noted that Ontario government policy is to expressly take steps to recognize the duty to consult. The recently-enacted *Green Energy Act, 2009*, contains the following interpretive provision:

> **1(2) Interpretation**
> This Act shall be interpreted in a manner that is consistent with section 35 of the Constitution Act, 1982 and with the duty to consult aboriginal peoples.

Similar provisions are to be found in Bill 173, *Mining Amendment Act, 2009*, at s. 2, and Bill 191, *Far North Act, 2009*, at s. 3, currently in the legislative process.

Acknowledging the differences that may exist between environmental assessment legislation and practice in Ontario and British Columbia, the Council nevertheless urges on the Board the general proposition set out by the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*:

> If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation.
>
> 2009 BCCA 67 at para. 53

QUESTION 3:

This question is reproduced for convenience:

> 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?

As already noted, Procedural Order No. 1 states as follows: "Should this Board approve the leave to construct application, its order will be conditional on all necessary permits and authorizations being acquired, including a completed EA."

Non-EA permits and authorizations:

The Council is not fully informed as to the complete list of the "necessary permits and authorizations," but permits and authorizations beyond the completed EA are clearly contemplated. At least some of these can be expected to be issued by Crown agencies. It is the submission of the Council that the Board should not merely note the issuance of these in a mechanical fashion, but should ensure that adequate consultation has taken place. This determination may well amount to no more than an inquiry of the agency and the affected First Nation(s); in the case of disagreement, the Board might be required to assess adequacy. In this regard, *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* is again apposite:

> The existence of such a duty [to consult] and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4; [2006] 1 S.C.R. 140 (S.C.C.), and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner.
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> 2009 BCCA 67 at para. 42

Therefore, in response to the second part of question 3, it is submitted that the Board, upon being apprised of the issuance of such a permit by a Crown agency, should enquire whether Aboriginal consultation has taken place, and with which First Nation(s). The Board should then inquire of the First Nation(s) whether in their view the consultation was adequate. If the answer was affirmative, no further inquiry would be necessary. If negative, the Board would have to determine whether in its judgment the consultation was adequate. Only if the Board determined that the consultation was adequate should the application at issue be approved.

EA process:

The Council understands the term "a completed EA" in the passage quoted from Procedural Order No. 1 to refer to an environmental assessment approved by the government of Ontario and final in every respect, insofar as the line construction and interconnection are concerned (i.e., those portions of the subject matter of the EA also within the scope of the application at issue in this file). If Board approval of the application is to await a completed EA in the sense understood by the Council, as it should, it is submitted that upon being advised of completion of

the EA, the Board should, as with other authorizations, inquire of the First Nation(s) involved whether in their view the consultation was adequate, then proceed as described above, depending on the response.

CONCLUSION:

While it is appreciated that this approach may take the Board into somewhat uncharted waters, the fact is that the constitutional doctrine to which the Council appeals is relatively new, and novel approaches should not be avoided on that account where the fulfillment of a constitutional duty is at stake.

The alternative to a comprehensive final review by the Board of all authorizations to ensure compliance with this doctrine is an approval process that has the potential of leaving a checkerboard of authorizations made without adequate consultation having been carried out. In such a case, the project would have been approved in the absence of adequate consultation, leaving affected First Nations with little recourse but litigation, conducted only after the project was underway, at which point some issues may become moot.

It is submitted that the Board does have the jurisdiction to inquire whether the consultation duty has been adequately discharged, and if necessary assess the adequacy of the consultation. Moreover, as the Crown agency with final responsibility for approval, it is submitted that the Board has a duty to do so.

All of which is respectfully submitted on behalf of the Wabun Tribal Council, October 15, 2009.

[*Original signed by John Edmond*]

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