ONTARIO ENERGY BOARD

STAFF SUBMISSION

Hydro One Networks Inc. - Leave to Construct Transmission Reinforcement Project (Bruce to Milton)

EB-2007-0050

July 2, 2008

1. THE PROCEEDING

Hydro One Networks Inc. ("Hydro One") filed an amended application (the "Amended Leave to Construct Application") with the Ontario Energy Board (the "Board") dated November 30, 2007 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B (the "Act"). This Amended Leave to Construct Application addresses certain changes to Hydro One's original application filed with the Board on March 29, 2007.

Hydro One is seeking an Order of the Board to construct approximately 180 kilometres of double-circuit 500 Kilovolt ("kV") electricity transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV) extending from the Bruce Power Facility in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton. Hydro One also proposes to make modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines. This Leave to Construct Application was given Board file No. EB-2007-0050.

2. ESTABLISHING NEED

Hydro One in its Application[1] indicated that it concurs with the OPA's determination that there is a need to increase the long-term transmission capacity out of the Bruce area as quickly as possible. The present transmission system has the capability to transmit about 5,000 MW of the generation from the Bruce area. The amount of nuclear and wind generation capacity committed will increase to an estimated 5,500 MW by 2009, and 7,100 MW by 2013. This schedule reflects the amended contract between Bruce Power and the OPA announced in August, 2007[2]. With the additional wind generation opportunities also identified by the OPA in the area, the total generation in the area could reach 8,100 MW, for a shortfall in transmission capacity of about 3,100 MW.

Hydro One indicated that given the shortfall between transmission capability and forecasted generating capacity in the Bruce area, there is a need to reinforce the

[1] Exhibit B/Tab 1/Schedule 3/pages 1-2
[2] Exhibit B/Tab 6/Schedule 5/Appendix 1/Page 2 (Update Version, March 10, 2008)

transmission system as early as possible. This will permit full deployment of the committed generating resources and enable the development of new renewable energy resources in the Bruce area, consistent with Government policies and directives.[3]

Board staff noted in Hydro One's Argument in Chief[4] that the OPA presented its forecast that covered the period 2007 to 2020. The OPA summarized its Forecast in four components:

- 1,500 MW of refurbished nuclear generation at the Bruce "A" plant (per Ministerial Directive),
- 700 MW of committed wind generation (per Ministerial Directive),
- 1,000 MW of planned wind generation (per Ministerial Directive), and
- The refurbishment or replacement of Bruce "B" nuclear units when they reach end-of-life 2015-2020.

Board staff note that based on this plan, three questions should be answered for parties to evaluate the need for the project. These are:

1. What is the likelihood of the construction of the 700 MW of Committed Wind and Refurbishment Completion of the 4 Bruce A Units?

2. What is the likelihood of implementing the Bruce B Refurbishment and development of the 1000 MW of Projected Wind?

3. Should the transmission need be based on the Name-Plate Rating versus Operating Capacity Factor assumptions for the wind generators?

Each of these questions is addressed below.

1. What is the likelihood of the construction of the 700 MW of Committed Wind and Refurbishment Completion of the 4 Bruce A Units?

Board staff note that there were no significant concerns expressed by parties suggesting that it was not likely that the refurbishment of the Bruce A units, and

[3] Exhibit B/Tab 6/Schedule 5/Appendices 8 to 12
[4] Hydro One's Argument in Chief, June 23, 2008, pages 4-6

the 700 MW of committed wind generation would occur. This would mean all 8 Bruce Units (Bruce A + Bruce B for about 6,300 MW) and the 700 MW of committed wind would be in service by 2012.

2. What is the likelihood of implementing the Bruce B Refurbishment and development of the 1000 MW of Projected Wind?

Hydro One submitted[5] that the OPA's assumptions regarding the refurbishment or new build replacement for the Bruce B units are reasonable. Hydro One listed four points as evidence in support of this view:

- The continued need for nuclear electricity generation in Ontario to serve baseload electricity requirements of 14,000 MW, and to this end the Supply Mix Ministerial Directive directs the OPA to make plans for such outcome;
- Grid access and existing infrastructure at the Bruce Complex allows continued historic levels of nuclear output (apart from transmission transfer capability);
- The local Bruce Area community supports the continued and expanded nuclear generation; and
- The operator of the Bruce nuclear facility has expressed interest in continuing nuclear generation in the context of either Bruce B refurbishment and/or replacement.

Parties were of differing views in regard to whether or not to plan transmission capacity for continuation of the Bruce B units for the period following the end of their useful life (2015-2020).

There appears to be some level of uncertainty in the evidence regarding whether or not Bruce B will be refurbished, and on what schedule such refurbishment would take place. Although Hydro One maintains that the new transmission line is required irrespective of Bruce B refurbishment, several intervenor groups disagree.

[5] Argument in Chief, June 23, 2008, pages 15-16 under heading 2. Reasonableness of Continued Bruce B Generation

Board staff notes that a recent Ontario Government announcement[6] stated in part that:

> *" As part of Ontario's energy plan to maintain 14,000 MW of nuclear generation capacity, the Bruce Site will continue to provide approximately 6,300 MW of baseload electricity through either refurbishment of the Bruce B units or new units at Bruce C. A joint assessment will be undertaken to determine which option delivers the best value for Ontarians."*

Parties are asked to address their comments to whether there is some uncertainty regarding the refurbishment of the Bruce B site, and if so, how the Board might incorporate that uncertainty into an order. Generally, the Board could deny the application and indicate to Hydro One to refile when the refurbishment was more certain, approve on conditional grounds with Hydro One having to demonstrate there is a commitment to refurbishing the generators or it could accept Hydro One's argument that the need for the line is not affected by the decision to refurbish the Bruce B units.

Hydro One's evidence[7] was that its wind generation forecast estimate is based on two elements: (i) the small projects of 10 MW or less developed under the standard offer program (SOP); and (ii) large wind projects. The SOP estimate amounts to 300 MW. Applications from small projects under the SOP was oversubscribed and is the subject-matter of what the OPA described as the "Orange Zone" where procurement restrictions are in place. The Orange Zone was described in the Technical Conference[8] where only 300 MW of such projects can be accommodated at the distribution level.

The development of large wind generation facilities is a planning assumption used to help support the need for new transmission capacity. This generation capacity is based upon an assessment that up to 1,400 MW is expected to be developed in the Bruce Area, commencing in 2013. For purposes of the transmission planning forecast, the OPA adjusted the 1400 MW by a factor of

[6] Announcement by Infrastructure Ontario on June 16, 2008 entitled "PHASE 2 OF NUCLEAR REPLACEMENT STEP IN ONTARIO'S 20-YEAR PLAN TO BRING CLEAN, AFFORDABLE AND RELIABLE ELECTRICITY TO ONTARION"
[7] Hydro One's Argument in Chief, June 23, 2008, page 7
[8] Transcript for the Technical Conference, April 15, 2007, pages 16-17

50% to 700 MW. Hydro One's total projected wind estimate is therefore 1000 MW (700 MW large wind + 300 MW SOP).

Any new wind farm would either connect at the distribution level or at the transmission level. Those connecting at the transmission level would normally need transformation facilities to step up to the transmission level, and at a minimum a transmission line tap to connect to the provincial transmission system. In some cases, there are clusters of wind sites that require radial transmission lines to connect these resources to the transmission system. In direct examination,[9] Mr. Russell (S.O.N. expert witness) indicated that the wind generation will be considered in the Integrated Power Supply Plan hearing, and that the cost of transmission requirements will be addressed through the acquisition process.

Board staff would like to clarify two important aspects. The first aspect is that according to the Board's Transmission System Code[10], the cost of a "Network" classed reinforcement such as the Bruce-Milton transmission line project will not be attributed to any generator wishing to connect to the transmission system. This is consistent with Hydro One's approach as presented in its Argument in Chief[11].

The second aspect, however, is about new radial transmission lines needed to connect generation projects to the transmission system. The Board is currently investigating a regulatory approach to determine how these lines should be funded. That approach is expected to cover key areas such as the cost responsibility of the various parties (generators, transmission owners.. etc.), as well as the protocols for development and construction of such lines.

Board staff notes that the funding responsibilities for the new transmission lines may influence the likelihood of the wind generation being constructed in the Bruce area.

[9] Transcript, Vol 14, June 11, 2008, pages 27029
[10] Transmission System Code, July 25, 2005, Section 6.3.5
[11] Hydro One's Argument in Chief, June 23, 2008, pages 7-9

Another area of uncertainty related to the wind generation is that to date no counterparties have been identified that will actually build these wind farms. No contracts have been executed, and no formal discussions appear to be underway with potential developers. The OPA's forecast does not anticipate any of the new wind coming on-line until 2013, so the question to parties is; what the likelihood of the wind generation being constructed is?. Again, the Board has the option of denying the application, accepting it, or accepting it with conditions that address this uncertainty.

Parties are asked to address the uncertainty of the construction of both the wind generation and the refurbishment off the Bruce B nuclear units.

3. Should the transmission need be based on the Name-Plate Rating versus Operating Capacity Factor assumptions for the wind generators?

Hydro One has assumed transmission will be needed for the Maximum Unit Rating for all Nuclear Units and all Wind Projects (Committed and Forecasted). This means that the full or nameplate capacity of every unit would be available and generating electricity at any given point in time, and therefore transmission is needed to take that electricity to market.

Hydro One stated[12] that:

> "It is true that, from an operating perspective, nuclear and wind generation do not generate at 100% of their nameplate rating all of the time. But the relevance of this operational attribute to a transmission planning exercise has not been made out by those opposing the project - let alone explained why such an approach could be consistent with government policies to promote renewable energy and the reduction of congestion."

Hydro One's rationale for using nameplate wind capacity factors is based on the view that wind generation, from a societal perspective, is a fixed cost investment, and therefore it is in society's interest to get every last bit of actual generation that comes out of a wind turbine[13].

[12] Hydro One's Argument in Chief, page 17
[13] Transcripts Vol 1, page 61

Mr. Russell (S.O.N. expert witness) indicated that the eight nuclear units were unlikely to all be on, and at full output, at the same time for very many hours per year. In reference to wind capacity factors, Mr. Russell during Hydro One's cross examination[14] indicated that there is more locational diversity amongst wind generators than assumed by the Applicant, and that one shouldn't be building enough transmission capacity to survive the loss of two circuits on the double circuit tower at the time of peak for full nameplate capacity, when it is known that only about 20 percent of that capacity would be counted for meeting firm peaks.

Board staff notes that the historical data for the 8 Bruce units[15] (when all 8 units were in-service between 1987 and 1995) shows that 100 % nameplate capacity from all of these 8 units only occurred between July, 1991 to September 1991. For that 3-month period, the data show between 6,000 and 6,100 MW of coincident peak delivery.

Board staff also notes that there is disagreement amongst the parties as to the available capacity for wind. This ranges from a low of 50% assumed by Pollution Probe in its analysis to a high of 100% used by OPA in its analysis in support for the need to this project.

Board staff seek comments from parties as to whether Hydro One has provided sufficient support for the planning assumptions used to identify the need for the transmission line. If parties specify that the information is less than sufficient, what would be the remedy that the Board should determine to address the information gap?

3. COST BENEFIT ANALYSIS

Two Models were developed to evaluate the cost benefit analysis of the proposed transmission line as well as alternatives to that proposed line. The first Model was developed and used by the OPA to simulate certain scenarios, and was also used by S.O.N. to perform simulations of alternatives. The second Model was developed by Pollution Probe, to perform similar analysis.

[14] Transcript, Vol 14, pages 137 to 147 [Hydro One cross-examining S.O.N.]
[15] Exhibit K5.5 and Intervenor Evidence – [Ross Group & Fallis Group, April 18, 2008 /Tab 3]

The OPA model calculated the net present value of locked-in energy costs amounted to be.approximately $1.1 billion using the Hydro One's discount rate of 5.38 %. Discount rates affect the amount of the estimate. The higher the discount rate the lower the net present value. Therefore, when one is reviewing the cost benefit analysis, one of the key assumptions is what discount rate has been used. When the $1.1 billion is compared to the $635 million for the capital cost of the project, the cost benefit ratio is shown to be positive.

Board staff points out that the discount rate approved by the Board for economic evaluation of transmission projects is prescribed in the Board's Transmission System Code[16], and is consistent with that described by the OPA as "Hydro One Discount Rate" in the response to Pollution Probe interrogatory[17].

Board staff notes that the OPA analysis assumes nameplate capacity for all generating units, which for transmission planning purposes equals to 100% capacity factor for all such units. Notwithstanding the concerns raised by S.O.N. in regard to generation output, see section 2. above, for the purposes of its cost benefit analysis it assumed 100% capacity factors and results in a positive cost benefit ratio. In essence, the argument over the cost benefit analysis is over the timing and magnitude of the generation assets to be connected.

Pollution Probe[18] stated that the OPA model overestimated the amounts of locked-in energy because it: failed to consider the spatial diversity of wind in the Bruce Area, failed to consider "partial outages" by improperly being a "two-step" model, and failed to associate transmission penalty data with suspected seasonal variations.

Pollution Probe summarized its findings[19] with the main difference from that of the OPA analysis being the estimated amount and NPV of the locked-in energy. For instance if the scenario of assuming Bruce B is refurbished, the estimate by Pollution Probe of the locked-in energy quantities is 7.4 million MWh, or about 48 % of the 15.5 million MWh estimated by the OPA. In terms of NPV, for the same

[16] Transmission System Code, July 25, 2006, Appendix 5
[17] Exhibit C/Tab 2/Schedule 10 and Schedule 11
[18] Pollution Probe Supplementary Evidence, May 15, 2008 (from p. 10, line 189 to p. 11, line 227)
[19] Pollution Probe Supplementary Evidence, May 15, 2008 page 3

scenario, Pollution Probe shows negative $72 million associated with the scenario of building the proposed line, versus OPA's estimate of NPV of positive 219 million.

Board staff are seeking comments from parties as to the appropriateness of the cost benefit analysis by Hydro One. Parties are asked to discuss any uncertainties in that analysis and comment on how the Board might address those uncertainties in its determination.

Assuming that there are generation assets in the Bruce area that need to be serviced by transmission, there are two key options that Hydro One examined. The transmission line, which it is seeking approval for, and a second option which is implementation of the interim measures comprising installation of a series capacitor and implementation of a Bruce Special Protection System ("BSPS") –it is commonly referred to as "series capacitors/generation rejection". Hydro One considered the second option (use of series capacitors/generation rejection) and determined it was a more costly alternative to the transmission line. It went on to note that the interim measure is just that, temporary. Under the assumptions of refurbishment of the Bruce B units and the 1000 MW of wind generation, a transmission line is the only feasible alternative.

Hydro One argued[20] that the Transmission Line remains the better option even without the Bruce B refurbishment in the 2018/2019 period. Hydro One further states that if the line is built it will provide a more reliable service that the series capacitors/generation rejection "alternative" does not.

Other parties argued that there remains uncertainty around the timing of the transmission line and that until further clarity is provided the interim measures should be considered. This would maintain the flexibility to respond later. Parties are asked to comment on the prospect of proceeding with the transmission line versus the use of the interim measure.

[20] Hydro One Argument in Chief, June 23, 2008, page 26, last paragraph

4.0 IMPLICATION OF CONSTRUCTION DELAY OF THE PROPOSED TRANSMISSION PROJECT

Assuming that there are generation assets in the Bruce area that need to be serviced by transmission, there are two key options that Hydro One examined. The first option is the transmission line, which it is seeking approval for. The second option outlined in section 3.0 above, is implementation of "series capacitors/generation rejection". Hydro One determined that use of the second option was a more costly alternative to the transmission line.

Hydro One argued[21] that the Transmission Line remains the better option even without the Bruce B refurbishment in the 2018/2019 period. Hydro One further states that if the line is built it will provide a more reliable service that the "series capacitors/generation rejection "alternative" does not.

Other parties argued that there remains uncertainty around the timing of the transmission line and that until further clarity is provided the interim measures should be considered. This would maintain the flexibility to respond later. Parties are asked to comment on the prospect of proceeding with the transmission line versus the use of the interim measure.

Board staff filed proposed conditions of approval[22] which were reviewed by Hydro One's witnesses[23]. No reservations were expressed regarding the conditions. These conditions are attached to this submission as Appendix A. The conditions are the standard conditions that the Board has approved in previous leave to construct applications.

Condition 4.1 requires Hydro One to comply with the requirements of the *Environmental Assessment Act*, which are relevant to this application. Board staff note that the commencement of construction of the Transmission Line is contingent on the fulfilment of those requirements. Hydro One's evidence indicates that construction is to commence in January 2009[24]. The proposed

[21] Hydro One Argument in Chief, June 23, 2008, page 26, last paragraph
[22] Ex. K9.10
[23] Transcript, Volume 9, p.157.
[24] Exhibit B/T5/S2/p1, Updated November 30, 2007

conditions of approval require construction to commence prior to December 31, 2011[25].

The OPA during the technical conference[26] in discussing the installation of series capacitors stated:

> "The information from Hydro One is that the earliest that can come in service is 2011…"

and further as part of the Technical Conference

> "The decision on series compensation will be made in consideration of the line-in-service date. In other words, will it be late, the effectiveness of the other measures."

Board staff notes that no separate approval is required under the Ontario Energy Board Act to construct the facilities associated with the interim measures. In addition, the Board cannot order Hydro One as part of this proceeding to put the interim measures in place.

There is uncertainty around the timing of the approvals process and when generation will be committed to in the Bruce area. Staff invites parties to comment on the necessary actions, including the deployment of interim measures, required to maintain transmission capability to meet the generation requirements from the Bruce area in the event that construction is delayed.

5. ABORIGINAL CONSULTATION

Introduction - The Issue

Issue 6.1 on the Issues list reads as follows:

> Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights are affected by this project been identified, have appropriate consultations been conducted

[25] Condition 1.2 of Ex. K9.10
[26] Transcript, Technical Conference, October 15, 2008, page 34, lines 12-23 and page 199, lines 22-26

> with these groups and if necessary, have appropriate accommodations been made with these groups?

In addition, the Board panel provided the following direction to parties on the final day of the oral portion of the hearing:

> [R]egarding argument, the Board is requesting specific input in the argument on issue 6, which is in regard to Aboriginal consultation and accommodation. We ask parties to address the following questions in their argument: What Crown consultation and accommodation is required for the purposes of approving a section 92 leave-to-construct application; and what, if any, consultation and accommodation issues are within the Board's jurisdiction in this case; and has the required consultation and possibly accommodation been done.[27]

Evidence in the Proceeding

Interrogatories

In response to an interrogatory from Board staff, HONI filed information relating to its consultation activities with Aboriginal groups.[28] This interrogatory response provided a detailed account of which Aboriginal groups were contacted, how they were selected, and an overview of the results of their consultations at that time.

Oral Hearing

Questions related to Issue 6 were directed to Hydro One's Panel 3, comprised of Ms. Cameron, Mr. Thomson, Ms. Cancilla, and Mr. Schneider. SON, MNO and Board staff all asked questions on consultation issues.

Memorandum of Understanding with the Minister of Energy

[27] Transcript, volume 14, pp. 2-3.
[28] Ex. C, Tab 1, Sch. 38

On Day 8 of the oral hearing, Hydro One filed a signed Memorandum of Understanding (the "MOU") between Hydro One and the Minister of Energy. The same document had been filed in a response to a Board Staff Interrogatory, but at that time the document had not been executed.

The MOU's stated purpose is to "set out the respective responsibilities of the Crown and HONI for carrying out the S. 35 Duty that may be owed in relation to the Project [which is separately defined as the Bruce to Milton transmission line project]"[29]. The MOU delegates many of the procedural elements of any duty to consult with regard to the project to Hydro One.

Relevant for the purposes of this hearing is s. 27 of the MOU, which states:

> The Parties acknowledge that the requirements for satisfying any S. 35 Duty in the context of a statutory process applicable to the Project are within the jurisdiction of the ministry, board, agency or decision-maker having responsibility to administer that statute, and therefore:
>
> a. it is for the responsible ministry, board, agency or decision-maker to satisfy itself in relation to the Crown's S. 35 duty within the context of its approval, permit or authorization powers; and
>
> b. the content of the Plan shall reflect, and is subordinate to, the procedures and decisions of the responsible ministry, board, agency or decision-maker.

It is Board staff's submission that s. 27 makes it clear that the MOU does not purport to alter any s. 35 duty that is held by the Board. In other words, whatever consultation responsibilities the Board has, they are in no way impacted by the MOU. The MOU is helpful in that it clarifies the role that Hydro One is playing in the consultation process, but it does not alter any responsibilities that the Board has in this regard.

[29] Exhibit K 8.1, s. 2. "Section 35 Duty" is defined in s. 1 of the MOU as follows: "'S.35 Duty' means any duty the Crown may have to consult and, where appropriate, accommodate Aboriginal peoples in relation to the Project flowing from Section 35 of the *Constitution Act, 1982*." The phrase "Section 35 Duty", therefore, should be considered to be synonymous with the duty to consult and possibly accommodate as referenced throughout this submission.

Also relevant is s. 25:

> The Plan shall set out in detail the manner in which HONI proposes to carry out its responsibilities under this MOU, including particularly under section 9, from the date of this MOU forward, such Plan to include the identification of all significant steps and a timetable for their completion, including, for example, a description of:
>
> a. the steps remaining to complete the consultations undertaken to satisfy any S. 35 Duty that arises in the application under s. 92 of the *Ontario Energy Board Act*;
>
> b. the steps for carrying out the consultations required to satisfy any S. 35 Duty that arises in the Environmental Assessment required under the Environmental Assessment Act.
>
> c. the steps for carrying out the consultations required to satisfy any S. 35 Duty that arises in the permitting process under the Public Lands Act.

It appears that section 25(a) contemplates that there may be a s. 35 duty arising under the s. 92 application before the Ontario Energy Board. This appears to be separate from any s. 35 duty that arises under either the environmental assessment process or the permitting process under the *Public Lands Act*, as these elements of the s. 35 duty are identified separately in subsections (b) and (c). However, s. 25(a) does not necessarily state that there is a s. 35 duty residing with the Board, only that there may be such a duty.

Consultation for the Project is Ongoing

Hydro One's pre-filed evidence and oral evidence reveal that it has been actively consulting with Aboriginal groups regarding this project for some time.

There appears to be no dispute, however, that consultation with Aboriginal groups regarding the proposed transmission line is ongoing and is not yet completed. Witness Panel 3 was asked this question directly by counsel for

SON, counsel for MNO and counsel for Board staff. In each case, the witnesses responded that although consultation had begun, the process was not yet complete[30].

Hydro One's Argument in Chief

It is Hydro One's submission that the Board has very limited powers to consider consultation issues within the context of a s. 92 application. At p. 69 of its argument in chief, Hydro One states: "*Haida* confirms that the substantive obligation to consult Aboriginal peoples rests with the Crown, and only procedural aspects of consultation may be carried out by third parties. By extension, *Haida* stands for the proposition that it cannot be for the Board to assess the adequacy of Crown consultation.[31]"

Hydro One's view is that the Board's responsibilities regarding consultation are very limited: "As part of its decision making process, the Board should consider the evidence before it, including the evidence of consultation carried out by the applicant the Crown, all within the context of the section 92 application before it and within the context of an ongoing environmental assessment which will ultimately result in a Ministerial decision. The Board may make findings of fact as to the consultation record that has occurred to date to assist in the Project's environmental assessment[32]."

Hydro One argues that the Board is only empowered to assess the Crown's duty to consult within the ambit of its section 92 and s. 96 jurisdiction, i.e. matters dealing with the price, quality, and reliability of electricity service. Consultation matters relating to environmental and archaeological issues are properly under the purview of the environmental assessment process.[33]

Hydro One concludes by stating that its consultation efforts have been sufficient for the purposes of a s. 92 application, and that the Board has a sufficient record to conclude that the applicant's consultation activities have been robust.

[30] Transcript, volume 8, pp. 101-103; volume 9, p. 129; and vol. 9, p. 154.
[31] Hydro One Argument in Chief, p. 69.
[32] Hydro One Argument in Chief, pp. 68-69.
[33] Hydro One Argument in Chief, p. 67.

The Position of Other Parties

Since Board staff is filing its argument before the intervenors in this case, it is not aware what positions other intervenors may take.

Both the SON and the MNO asked detailed questions of the applicant regarding the consultation activities it had undertaken. However, Board staff does not know if either of these parties intend to argue that it is the Board's responsibility to make a decision on the adequacy of Hydro One's consultation activities.

The Law

Aboriginal peoples in Canada hold rights under section 35 of the *Constitution Act, 1982*, which states as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

A series of recent Supreme Court of Canada cases have made it clear that the Crown has a duty to consult and possibly accommodate Aboriginal groups prior to taking any action which may have an adverse impact on an Aboriginal or treaty right.[34] That the Crown has a duty to consult with Aboriginal groups regarding this project does not appear to be in dispute. What is less clear is what role, if any, the Board has in discharging or adjudicating on this duty.

[34] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 ("Haida"); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550 ("Taku"); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] S.C.C. 69 ("Mikisew").

What is the Crown?

In *Haida*, the Supreme Court held that the Crown's duty to consult was grounded in the "honour of the Crown." The word "Crown", however, is not specifically defined in the decision. The case law appears to be clear that the duty to consult applies to both the federal Crown and the provincial Crown. In *Haida* and *Taku*, for example, it is clear that "Crown" refers to the respondent British Columbia Minister of Forests and British Columbia Project Assessment Director respectively. In *Mikisew*, the Crown in question is the federal Minister of Canadian Heritage. In all three cases the "Crown" was ultimately a Minister, whether federal or provincial.[35]

Similarly, in all three cases the disputed Crown action that was at issue was approved by the respective Minister or Ministries. In *Haida*, a tree permit that was approved by the Minister of Forests was at issue. In *Taku*, a project approval granted jointly by the Minister of Environment, Land and Parks and the Minister of Energy and Mines was at issue. In *Mikisew*, the Crown action in dispute was an approval of a winter road by the Minister of Canadian Heritage.

The question that does not appear to be answered directly by any of the case law is: who bears the responsibility for consultation where the decision maker is not a Minister or Ministry, but a different Crown agency? In the current case, the applicant is seeking approval for the leave to construct from the Ontario Energy Board. Although there are other approvals required to proceed with the project (in particular the environmental assessment, which is discussed below), in some respects the Board's decision is the only "Crown action" that there will be. At a minimum, the Board is the only agent of the Crown that considers price, reliability and quality of service.

In its argument in chief, Hydro One suggested that the Board should follow the example set by the National Energy Board ("NEB"). In two cases cited by the applicant, the NEB heard motions from an Aboriginal group requesting decisions that: i) the NEB had no jurisdiction to consider the applications on their merits without first determining whether the Aboriginal group had a credible claim within

[35] In Taku, there were actually two provincial ministers as the project approval was granted jointly by the Minister of Environment, Land and Parks and the minister of Energy and Mines.

the meaning of the *Haida* decision; and ii) the duty of fairness required that the Crown be required to attend and respond to the Aboriginal group's claim[36]. The NEB denied both motions: "The [NEB] disagrees with [the Aboriginal group's] position that .. it must determine the strength of [the Aboriginal group's] claim and assess the adequacy of Crown consultation.[37]" The NEB went on to describe its process with regard to Aboriginal involvement in the hearing process. Although the NEB recognizes that Aboriginal groups may have unique interests or concerns about a proposed project, their participation in an NEB hearing is essentially on the same terms as any other party. They are entitled to all of the usual procedural fairness requirements. What is clear is that the NEB did not consider itself to have any role in either conducting Aboriginal consultation, or ensuring that it was completed by the applicant or any other party. Although the decisions do not say so in as many words, it appears that the NEB does not consider itself to be the "Crown" for the purposes of Aboriginal consultation.

Although these cases are to some extent helpful, it is important to point out that there are key differences between the NEB and the OEB. The most important difference for the purpose of this case is that the OEB is specifically designated as an agent of the Crown by its enabling legislation, whereas the NEB is not.[38] Clearly this is of some relevance in considering what consultation duties are owed by the respective agencies. Board staff submits that this greatly diminishes the value of these two cases as precedents.

When, if ever, is the Board the "Crown" for the purposes of Consultation?

It is Board staff's submission that under certain circumstances, the Board could be considered the Crown for the purposes of ensuring that adequate consultation and possibly accommodation has taken place. The case law is clear that consultation is required where the Crown contemplates conduct that could adversely affect a proven or asserted Aboriginal or treaty right. It is also well established that the issuance of a permit or approval can be considered "conduct" by the Crown. It is submitted that, where the Board is the only Crown

[36] Enbridge Pipelines Inc., Alberta Clipper Expansion Project, Reasons for Decision OH-4-2007, February 2008 (Alberta Clipper") and Enbridge Southern Lights GP, Reasons for Decision OH-3-2007, February 2008 ("Southern Lights").
[37] Alberta Clipper, p. 9.
[38] *Ontario Energy Board Act*, s. 4(4). There is no comparable provision in the *National Energy Board Act.*

agency charged with making a decision that could adversely affect an Aboriginal or treaty right, then the duty to consult (or at least to ensure adequate consultation has taken place) lies with the Board. If the Board were to not consider consultation under such circumstances, and no other Crown agency was involved, then it is not clear how consultation would happen at all. Where several Crown agencies share responsibility for issuing approvals for a project, the duty to consult (or at least to ensure the consultation has taken place) should lie with the authority under whose jurisdiction the Aboriginal or treaty right in question most naturally falls.

The environmental assessment process

In addition to an approval under section 92 of the Act, Hydro One is also required to complete an environmental assessment ("EA") for the proposed project. The EA process is not completed unless and until it is approved by the Minister of the Environment. It is Hydro One's view that it should be in this process where consultation issues relating to environmental and archaeological matters should be addressed.

Indeed, the Terms of Reference ("TOR") for the EA include a section relating to Aboriginal consultation. Section 8.4 of the TOR, entitled "Aboriginal Communities and Groups Engagement/ Consultation Plan", provides an overview of Hydro One's plan to ensure proper consultation and possibly accommodation takes place. The TOR recognizes that consultation is a duty held by the Crown, but notes that procedural aspects of the duty can be delegated to third parties.[39] The TOR states: "Hydro One is committed to working closely with the Crown to ensure that the duty to consult Aboriginal communities and groups is fulfilled. … Hydro One's process for Aboriginal communities and groups is designed to provide information on the project to the Aboriginal communities and groups in a timely manner and to respond to and address issues, concerns or questions raised by the aboriginal communities and groups in a clear and transparent manner throughout the completion of the regulatory approval processes (e.g., the EA process)."[40]

[39] As discussed above, Hydro One has entered a MOU with the Minister of Energy which delegates procedural aspects of the duty to consult to Hydro One.
[40] TOR, pp. 74-75.

In addition to section 8.4, there are numerous additional references to the consultation activities that Hydro One plans to undertake as part of the EA process. Under the heading "Traditional/Aboriginal Land Use", for example, it states: "Based on consultation with the Aboriginal communities and groups, the EA will document concerns and issues raised. The EA will also describe how Hydro One proposes to address these concerns. The EA document will describe Aboriginal communities and groups, their traditional uses of the land, and their established and asserted claims.[41]"

What is the Board's Role Regarding Aboriginal Consultation in the Current s. 92 Application?

As described above, it is Board staff's view that in circumstances where no other Crown agent has a responsibility for considering Aboriginal consultation issues, and in order to ensure that proper consultation has taken place, the Board may have to consider these issues itself.

In the current case, however, it appears that all Aboriginal consultation issues relating to environmental or archaeological matters are being thoroughly considered through the EA process. The Minister will presumably not approve the EA unless he is satisfied that the consultation and possibly accommodation as described in the TOR have been completed. Until the EA is completed, the project cannot commence. It appears, therefore, that the Board can have confidence that consultation and accommodation issues are being dealt with through a separate proceeding. Board staff further submits that the EA process is a more natural forum to consider consultation issues relating to environmental and archaeological matters than this s. 92 proceeding, as environmental and archaeological issues are normally outside the scope of a s. 92 proceeding.

However, the Board retains the sole authority to consider matters relating to the price, quality and reliability of electricity service. It is conceivable that one of the Aboriginal group intervenors will suggest to the Board that there is some manner of Aboriginal or treaty right that relates directly to price, quality or reliability. This appears to be unlikely, but as Board staff has not yet seen the final argument of

[41] TOR, p. 42.

the intervenors, the possibility cannot be entirely ruled out. If such an argument is raised, the Board should consider the merits of that argument. As discussed above, the MOU between Hydro One and the Minister of Energy contemplates a possible role for the Board in considering consultation issues.

Conclusion

It is Board staff's submission that the Board does not need to consider Aboriginal consultation issues in this proceeding unless they relate directly to price, reliability or the quality of electrical service. To be clear, the Board would only have to consider consultation issues if a legitimate argument is presented that one or more Aboriginal groups has an Aboriginal or treaty right relating directly to price, reliability or quality of service.

Outside of their Constitutionally protected consultation rights, the Aboriginal group intervenors are of course entitled to all of the normal rules of procedural fairness. Board staff is by no means suggesting that Aboriginal group intervenors must demonstrate an Aboriginal or treaty right to make submissions on the issues of price, reliability or quality of service in this proceeding. However, the Board should only specifically consider consultation issues as described in *Haida*, *Taku*, and *Mikisew* if an Aboriginal or treaty right relating to price, reliability or quality of service is demonstrated.

Hydro One has asked for a conclusion by the Board that its consultation efforts have been "robust". Assuming that no party asserts any Aboriginal or treaty right that relates to price, reliability or quality of service, however, it is Board staff's submission that the Board is in a position to say little more than that consultation with Aboriginal groups appears to be underway. The record in this proceeding is available to the public, and can presumably be used by any party in the EA process. However, there is no specific finding that the Board can make with regard to the adequacy of consultation based on the record – by Hydro One's admission consultation is ongoing and is not complete.

- All of which is Respectfully Submitted -