



EB-2010-0243

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 Detour Gold
Corporation for an Order granting leave to construct a new
transmission line and associated facilities for the Detour
Lake Power Project (Phase I)

PROCEDURAL ORDER NO. 1

Detour Gold Corporation ("Detour") filed an application with the Ontario Energy Board, (the "Board") dated July 20, 2010 under section 92 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Schedule B (the "OEB Act"). Detour is seeking an order of the Board granting leave to construct transmission facilities (the "Project") to re-connect the Detour Lake Mine to the provincial grid at Island Falls in the District of Cochrane and approval of a Form of Easement. The Board has assigned File No. EB-2010-0423 to the application.

The Project involves building a new 142 km 230 kV single circuit overhead transmission line on an existing right-of-way and facilities to connect to the grid, including a transformer station at the Detour Lake mine and a switching station at Island Falls.

Interventions

The Board issued a Notice of Application and Written Hearing on August 12, 2010. Detour has served and published the Notice as directed by the Board. Wahgoshig First Nation ("WFN"), Earthroots, Coral Rapids Power on behalf of Taykwa Tagamou Nation

("TTN") and the Independent Electricity System Operator ("IESO") have applied for intervenor status.

WFN's request for intervenor status described various concerns regarding the Project and what WFN views as a failure by the Crown to adequately carry out its duty to consult and accommodate. WFN requested cost eligibility and that an oral hearing be held instead of a written hearing.

In its intervention request, TTN indicated that the Project is within the Custodial Lands and Traditional Use Territory of the TTN and its intervention would be restricted to the concerns about potential impacts of the Project on TTN interests. TTN also requested cost eligibility.

The IESO indicated that it intends to make submissions and ask interrogatories, as necessary or as requested by the Board, with respect to the review and assessment of the reliability implications of the Project.

The Board also received a request for intervenor status and cost eligibility from Earthroots, a non-profit organization that is concerned with wilderness and watershed protection.

The Board grants intervenor status to the IESO, WFN, TTN and Earthroots.

Scope of the Board's Jurisdiction in a Leave to Construct Application

The Board's jurisdiction to consider issues in a section 92 leave to construct case is limited by sub section 96(2) of the OEB Act which states:

(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 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. 2009, c. 12, Sched. D, s. 16.

As a result, issues related to the Environmental Assessment of the Project are beyond the scope of this proceeding. The Board will not require Detour to answer

interrogatories related to the EA process, nor will the Board award costs in this proceeding for matters which are related to the EA process.

A number of parties have also raised issues related to Aboriginal consultation and accommodation. The Board notes that all of these issues have been related to environmental and land use issues, which are matters that are beyond the scope of this proceeding. The Board has in prior decisions addressed the extent of the Board's jurisdiction to consider the issue of the adequacy of Aboriginal consultation. For example, in a case involving Yellow Falls Power Limited Partnership, the Board found:

It is a well-established principle of administrative law that administrative tribunals have only the powers bestowed upon them explicitly by their enabling statutes, or those which arise by necessary implication. This principle has been applied by supervising courts in numerous cases so as to prevent creeping, unintended jurisdiction in such tribunals. An exception to that principle has been introduced by the Supreme Court with respect to constitutional and constitution-like issues. Specifically, the Supreme Court of Canada has decided that tribunals that have been endowed with the express power to determine questions of law, have a residual or presumed jurisdiction to resolve constitutional issues that come before them in the normal course of their work.

The issue here is the extent to which the Legislature has endowed the Board with the power to determine questions of law with respect to leave to construct applications. Because the Board's power to determine questions of law is specifically limited in section 19 to areas within its jurisdiction, the Board finds that it has no authority to determine constitutional issues, such as the adequacy of consultation with Aboriginals, in relation to any matters beyond the criteria in section 96(2). This is consistent with case law referenced above.¹

In that decision, the Board went on to describe the relevant scope for issues related to Aboriginal consultation and accommodation:

Finally, in the Board's view, if it does have any jurisdiction at all to consider matters relating to the adequacy of consultation with Aboriginal peoples, section

¹ Yellow Falls Power Limited Partnership, *Decision on Questions of Jurisdiction and Procedural Order 4*, EB-2009-0210, November 18, 2009. See also, Northgate Minerals, *Procedural Order 2*, EB-2010-0150, July 29, 2010.

96(2) operates to expressly constrain the Board's discretion, and limits its jurisdiction to the determination of matters of law arising exclusively in connection with the prescribed criteria, namely price, quality, reliability, and the government's policies with respect to renewable energy projects. The Board finds that the Legislature's unequivocal intention was to limit the scope of such proceedings to the enumerated criteria, and to preclude any other considerations of whatever kind, from influencing its determination of the public interest. The Board's authority to determine questions of law is not open-ended, but rather has been strictly prescribed by section 96(2).

The same approach will be adopted for the current proceeding. Only Aboriginal consultation and accommodation issues which fall within the specific criteria of section 96(2) will be considered within the scope of this proceeding. While the Board does not have the jurisdiction to determine issues related to the EA approval, it is important to note that both the Leave to Construct and the EA approvals are required before the Project may proceed. Should this Board approve the Leave to Construct application, its order would be conditional on all necessary permits and authorizations being acquired, including a completed EA.

Requests for Cost Eligibility

TTN, WFN and Earthroots requested cost eligibility for participation in the proceeding.

In its letter of September 20, 2010, Detour did not object to any of the intervention requests, but suggested that the Board should determine which parties are eligible to make a claim for costs at the conclusion of the proceeding. The Board has decided that it is able to make determinations of cost eligibility now.

The Board grants cost eligibility to TTN, WFN and Earthroots, but the extent of the cost eligibility will be restricted to matters directly within the scope of this proceeding. As indicated above, the Board will not award costs of participation related to the EA. Further information on activities that are eligible for an award of costs is outlined in the Board's Practice Direction on Cost Awards on the Board's website. Please note that, unless the Board specifies otherwise, cost claims are to be filed at the end of this proceeding. Cost claims will be subject to the applicant's right of objection.

Procedural Steps

In the Notice of Application and Written Hearing, the Board indicated that it intended to proceed by way of a written hearing unless any party satisfies the Board that there is a good reason for not proceeding by way of a written hearing. WFN requested an oral proceeding. Detour submitted that an oral hearing was not warranted, but suggested that the Board should issue a procedural order for interrogatories and determine if an oral hearing is required after the completion of the interrogatory phase. The Board will adopt this suggestion.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. Intervenors and Board staff who wish information from the Applicant that is in addition to the evidence pre-filed with the Board and that is relevant to the hearing shall request the information by means of written interrogatories filed with the Board and delivered to the Applicant on or before Tuesday, **September 28, 2010**. All interrogatories and responses must include a reference to the section of the application which identifies the specific evidence on which the interrogatory is based.
2. The Applicant shall, no later than Tuesday, **October 5, 2010** file with the Board and deliver to all intervenors, a complete response to each of the interrogatories.
3. Intervenors and Board staff shall if they wish, file relevant evidence with the Applicant and with the Board and all other intervenors, no later than Tuesday, **October 12, 2010**.

All filings to the Board noted in this Procedural Order must be in the form of 2 hard copies and must be received by the Board by 4:45 p.m. on the stated dates. An electronic copy of the filing must also be provided. If you already have a user ID, the electronic copy of your filing should be submitted through the Board's web portal at www.errr.oeb.gov.on.ca. If you do not have a user ID, please visit the "e-Filing Services" page on the Board's website at www.oeb.gov.on.ca and fill out a user ID password request. For instructions on how to submit and naming conventions, please

refer to the RESS Document Guidelines also found on the “e-Filing Services” webpage. If the Board’s web portal is not available, the electronic copy of your filing may be submitted by e-mail at Boardsec@oeb.gov.on.ca . Those who do not have internet access are required to submit the electronic copy of their filing on a CD in PDF format.

DATED at Toronto, September 21, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX 'A'
TO
PROCEDURAL ORDER NO. 1

Applicant and List of Intervenors

Board File No. EB-2010-0243

DATED: September 21, 2010

**Detour Gold Corporation
EB-2010-0243**

APPLICANT & LIST OF INTERVENORS

September 21, 2010

APPLICANT

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INTERVENORS

Rep. and Address for Service

**Detour Gold Corporation
EB-2010-0243**

APPLICANT & LIST OF INTERVENORS

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September 21, 2010

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Taykwa Tagamou Nation**

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**Detour Gold Corporation
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APPLICANT & LIST OF INTERVENORS

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September 21, 2010

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