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November 5, 2010

BY COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, Box 2329
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Leave to Construct the Detour Lake Power Project Phase I – Island Falls to Detour Lake
Submissions of the Applicant
Board File No: EB-2010-0243

Please find attached the Submissions and Book of Authorities of Detour Gold Corporation in the above referenced proceeding. These materials will be filed on the Board's RESS system and hard copies will be delivered to the Board later today. Electronic copies are being sent to all Intervenors and a hard copy is being delivered to legal counsel for the Wahgoshig First Nation.

If there are any questions please contact the undersigned at your earliest convenience.

Yours truly,

AIRD & BERLIS LLP

Scott A. Stoll

SS/hm
Encl.

cc: All Intervenors
Derek Teevan
Wayne Clark

Filed: Nov. 5, 2010
EB-2010-0243
Submissions of
Detour Gold

DETOUR GOLD CORPORATION

LEAVE TO CONSTRUCT THE DETOUR LAKE POWER PROJECT PHASE I – ISLAND FALLS TO DETOUR LAKE

SUBMISSIONS OF THE APPLICANT

November 5, 2010

ONTARIO ENERGY BOARD

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)

SUBMISSIONS OF DETOUR GOLD CORPORATION

Introduction

1) Detour Gold Corporation ("**Detour**" or the "**Applicant**") is a publicly traded mining company with its head office in Toronto, Ontario. Detour is re-opening the Detour Lake Mine (the "**Mine**"), a gold mine that operated until the 1990s. The original mine was supplied by electricity from the Ontario transmission grid via a line that originated at Island Falls and travelled east to the Detour Lake Mine. The original line was decommissioned in 2002.

2) On July 20, 2010 Detour Gold filed an the Application with the Ontario Energy Board (the "**Board**") for leave to construct a transmission line to serve the Mine. This project is known as the Detour Lake Power Project – Phase I ("**DLPP Phase I**"). The DLPP Phase I transmission line is approximately 138km in length. The DLPP Phase I connection to the Hydro One Networks Inc. ("Hydro One") transmission system will occur at Island Falls on the C3H circuit.

3) As noted, the Application is to construct a line that is to provide electricity for the re-opening of the Mine. The peak demand will be approximately 20MW. Detour plans to file an application for leave to construct a second phase ("**DLPP Phase II**") that will enable Ontario transmission grid to supply the operational needs of the Mine which will have a peak demand of approximately 120MW.

a) DLPP Phase I

4) Detour will construct a transmission line from the Mine to Island Falls along the route of the former transmission line that was removed from service. The DLPP Phase I transmission line will be designed, as much as possible, for 230kV. However, during Phase I the transmission line will only be operated at 115kV system. The connection at Island Falls is temporary until DLPP Phase II is completed at which time the connection at Island Falls will be removed.

5) A copy of the System Impact Assessment for DLPP Phase I completed by the IESO may be found at Exhibit B, Tab 6, Schedule 2. A copy of the Customer Impact Assessment completed by Hydro One may be found at Exhibit B, Tab 6, Schedule 3.

b) DLPP Phase II

6) DLPP Phase II will see the construction of approximately 38km of 230kV transmission line from Island Falls to Pinard TS. The connection at Pinard TS will be to the 230kV transmission grid. The temporary connection to the 115kV system will be removed and the newly constructed transmission line will be connected to the 138km DLPP Phase I transmission line. Prior to energization, Detour will ensure that any work required to modify the DLPP Phase I transmission line to operate at 230kV is completed.

7) Detour has applied to the IESO for a System Impact Assessment which should be completed in 2011. Detour plans to file for leave to construct DLPP Phase II as soon as the required studies are complete.

Leave to Construct

8) The DLPP Phase I requires leave to construct from the Board and approval of a draft agreement to be offered to all affected landowners. Section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B) (the "**Act**") is reproduced below:

> 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.
>
> (2) Subsection (1) does not apply to the relocation or reconstruction of an existing electricity transmission line or electricity distribution line or interconnection where no expansion or reinforcement is involved unless the acquisition of additional land or authority to use additional land is necessary.

9) Section 96 (1) of the Act requires the Board to grant leave to construct where the Board finds the proposed work is in the public interest. Section 96(2) then prescribes what the Board shall consider in determining the public interest: the interest of consumers in respect of prices; reliability and quality of electricity service, each of which are addressed below.

> **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.
>
> (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.

10) The Board's focus is on the transmission line not on the use to which the electricity is put by the customer. The Divisional Court, in ***Power Workers Union, Canadian Union of Public Employees, Local 1000 v. Ontario Energy Board***, 2006 CanLII 25267 as paras. 38 and 39, (ON S.C.D.C.) see **Tab "A"**, considered the Board's authority in the context of a leave

to construct (where the Board's considerations are broader) and the Board's jurisdiction is limited to those issues pertaining to the pipeline. Therefore, the Board's considerations in a section 92 application are limited to the transmission line.

Purpose, Need and Timing

11) DLPP Phase I is required to supply the power needs of the Mine during the redevelopment. Detour completed a review of the power supply options and concluded that the proposed project best met the needs of the mine and had an acceptable impact. Detour considered alternative supply points from the Ontario and Quebec transmission grids and alternative fuels including diesel, natural gas, water and wind.

12) The route chosen utilizes the prior right-of-way of the decommissioned line. The right-of-way is still clearly evident. Use of this right-of-way avoids any unnecessary impacts.

13) The proposed transmission line will be used for both the redevelopment and operation of the Mine. Detour requires the approval in order to complete the redevelopment which is currently underway.

Price, Reliability and Quality of Service

14) It is expected that the DLPP Phase I will have marginally positive impact on the price of electricity for consumers. Detour plans to own and operate the transmission line and assets at the connection to Island Falls. Detour has no plans, at this time, to sell the line or transfer ownership to any other entity. As noted in the evidence, Detour has raised $533 million for the redevelopment of the Mine and has allocated in excess of $50million for the construction of the required transmission facilities.

15) Detour is in the process of negotiating a Connection Cost Recovery Agreement with Hydro One for the connection work to complete the tie-in at Island Falls. This agreement will be compliant with the Transmission System Code. The cost of the connection will be borne by Detour and is very small compared to the cost of the remainder of the transmission line and the Mine.

16) As the DLPP Phase I is better utilizing the existing transmission grid it expects a marginal improvement of the cost of delivery. Detour's load will be relatively constant, 24 hours per day 7 days a week, and will not likely cause any impact on the price of electricity in the wholesale market.

17) Detour will abide by the requirements of the IESO, Hydro One, the Board and any other regulatory agencies having jurisdiction over the construction and operation of the transmission line.

18) The System Impact Assessment (Exhibit B, Tab 6, Schedule 2, page 4) concluded:

(1) Will not materially affect the reliability of the IESO-controlled grid.

(2) Will have an insigficant effect on the system fault levels.

(3) Under the studied scenarios, the incorporation of the new 115kV Detour Mine site will not cause thermal overloading of the local area transmission.

(4) Under the studied scenarios, the incorporation of the new 115kV Detour Mine site will not cause any voltage related reliability issues to the IESO-controlled grid.

19) The Customer Impact Assessment, (see Exhibit B, Tab 6, Schedule 3, page 3) provided:

> Voltage Study Results
>
> Voltage changes are within acceptable limits for all busses in the study area. Customers and Hydro One transmission busses will experience voltage variations within the limits outlined in the Transmission System Code and IESO market rules.
>
> 3.0 Connection Reliability
>
> The new line will be built to Hydro One transmission line design standards and thus it is expected that reliability will not decrease below the existing 115kV circuits in the area, or below the transmission delivery point performance standards set forth under the Transmission System Code and IESO market rules.
>
> Conclusions and Recommendations
>
> The proposed connection of Detour Gold Mine can be incorporated into the 115kV C3H transmission line (Hunta SS x Canyon SS). There is no adverse impact on Hydro One customers connected to this line.

20) The System Impact Assessment and the Customer Impact Assessment confirm the DLPP Phase I is acceptable from a service quality and reliability standpoint.

Land Issues

21) In order to grant leave to construct, section 97 of the Act requires that the Board must be satisfied that the Applicant has offered or will offer each owner of land affected an agreement in a form approved by the Board. Detour has filed a draft Agreement to Grant an Easement and Easement at Exhibit B, Tab 6, Schedule 5.

22) Detour filed a list of impacted landowners at Exhibit B, Tab 6, Schedule 6. The majority of the proposed route is on Crown land and will require a land use permit from the Ministry of Natural Resources for which an application has been made.

23) No comments were made nor were any interrogatories asked about the draft agreements that were provided at Exhibit B, Tab 6, Schedule 4.

> **97.** In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

24) Detour has committed to making the required offer to each affected landowner. Detour will acquire all necessary land rights prior to entering the land for construction.

Environmental Issues

25) The environmental aspects of the proposed transmission line are beyond the jurisdiction of the Board's consideration in this proceeding. The Board has recognized its limited jurisdiction in Procedural Order No. 1 which is appended to these submissions as Tab **"B"**.

26) The Board noted that the outstanding concerns of the Wahgoshig First Nation are related to environmental issues. In Procedural Order No. 2 the Board provided the following:

> The Board has reviewed the record of the proceeding and has determined that an oral hearing is not required. In reaching this conclusion the Board has considered WFN's request for an oral hearing. The Board notes that WFN's evidence is a compendium of documentation on the issue of consultation and in all substantive respects bears on the issues associated with the Environmental Assessment and not the Leave to Construct.
>
> The Board will now proceed to invite written submissions on the application.

27) Detour has completed an individual environmental assessment. The document is currently under final review by the Minister of the Environment.

28) Detour is in the process of securing the environmental permits and does not foresee any issues regarding the issuance of such permits in due course.

Consultation – Public and First Nation

29) Detour has had several meetings with government agencies, impacted parties, interested stakeholders and First Nations. Detour, in its prefiled evidence and in its response to various interrogatories filed voluminous amounts of materials indicating that it had been having meaningful discussion with many interested parties for the past 4 years.

30) Detour also filed confirmation that it had entered into agreements with Wahgoshig First Nations, the Moose Cree First Nation and the Taykwa Tagamou First Nation. Detour is continuing to meet with First Nations and this will continue throughout the project. Through its contractor, Detour will be employing a substantial number of First Nation workers, both on the power line construction and on the mine redevelopment.

31) The duty to consult with First Nations arises where the government is to make a decision that may impact a right or a claimed right of such First Nation. Government decisions will not have the same potential impact, nor are all potentially impacted rights the same, so the nature of the obligation to consult changes. The Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73, see **Tab "C"**, described the duty to consult as follows:

> The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. (para. 39)

> The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake.(para. 45)

32) Further, the obligation to consult does not create an obligation to agree. Therefore, the mere fact that a First Nation does not agree with a decision does not mean there was a failure to consult. Further, the First Nation has an obligation to make its concerns known – it cannot refuse or fail to engage nor can it frustrate the consultation process – the duty of good faith in consultation is placed on all parties. The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC, see Tab "C", described the duty to consult as follows:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted. (para. 42)

33) The Board is not required to complete independent consultation as the Crown. The Board has previously taken this position that the Crown speaks with a single voice.

34) The issue of consultation in the context of a license to construct was addressed in ***The Matter of Application of Hydro One for an Order granting License to Construct transmission reinforcement project between Bruce Nuclear Generation Station and Milton*** (OEB Sept, 2008), see **Tab "D"** at page 68. The Board's considerations are limited to the interests of consumers with respect to price, reliability and quality of service. Consultation for the project as a whole will be assessed by the Ministry of Mines, Northern Development and forestry and deemed adequate by virtue of providing Detour with its approval of the Closure Plan. Approval of the Closure Plan is anticipated in the next few weeks. The statement by the OEB in the Bruce to Milton application is instructional:

> *"There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. It is not necessary that each Crown actor that is involved with an approval for the project take on the responsibiltiy to ensure that consultation for the entire project has been completed; such an approach would be unworkable. It would lead to confusion and uncertainty and the potential for duplication and inconsistency. It would also lead to a circular situation in which each Crown actor finds itself unable to render a final decision because it is waiting on the completion of other processes."*

35) The transmission line will have minimal, if any, potential impact. The Project is acceptable from each of these criteria, price, reliability and quality of service.

Other Approvals:

36) Owners and operators of transmission systems are required by section 57(b) of the Act to obtain a transmitter's license prior unless an exemption is provided in the regulations. Detour is exempt from the requirement to obtain a transmitter license by O.Reg. 161/99 – Definitions and Exemptions section 4.0.2(1).

37) Detour will be applying to the Board for a wholesaler license in the first quarter of 2011.

38) Detour will apply to the IESO to be a market participant.

Conclusion

39) Detour submits it has satisfied the requirements for the granting of leave to construct and requests:

(i) the Board grant leave to construct the DLPP Phase I; and,

(ii) approve the agreements as required by section 97 of the OEB Act.

40) As a condition of approval Detour expects to have to comply with the requirements of the IESO, Hydro One and the OEB.

All of which is respectfully submitted.

Dated: November 5, 2010

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EB-2010-0243

DETOUR GOLD CORPORATION

LEAVE TO CONSTRUCT THE DETOUR LAKE POWER PROJECT PHASE I – ISLAND FALLS TO DETOUR LAKE

BOOK OF AUTHORITIES

November 5, 2010

7433495.1

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COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, E. MACDONALD & CAMERON JJ.

B E T W E E N:	
POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS	*Andrew K. Lokan*, for the Appellant, Power Workers Union, CUPE Local 1000 *Paul H. Manning*, for the Appellant, Society of Energy Professionals
Appellants	
- and -	*M. Philip Tunley*, for the Respondent, Ontario Energy Board *Gordon Cameron*, for the Respondent, Union Gas Limited
ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP	*Patrick Moran & Jennifer Teskey*, for the Respondent, Greenfield Energy Centre Limited Partnership *Michael D. Schafler*, for the Intervenor, Enbridge Gas Distribution Inc.
Respondents	
	HEARD: June 6 & 7, 2006

BY THE COURT:

NATURE OF PROCEEDING

[1] The appellants appeal from two decisions of the Ontario Energy Board, dated November 7, 2005 and January 6, 2006. The Board allowed applications for leave to construct a gas pipeline to the proposed Greenfield Energy Centre near Sarnia, Ontario.

[2] The applications were made to the Board, pursuant to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 ("*OEBA*").

[3] The appellants are the Power Workers' Union ("PWU") and the Society of Energy Professionals ("SEP"). The appellants are labour unions whose members are employed at a number of coal-fired generating stations, including the Lambton Generating Station ("Lambton").

[4] The two decisions appealed from may be summarized as follows:

- **Decision on the Merits – January 6, 2006**: The Board granted leave to construct the gas pipeline to the Greenfield Energy Centre ("GEC") to two applicants who had filed competing applications to the Board. These successful applicants are the respondents in the case at bar: Green Field Energy Centre Limited Partnership ("GEC LP") and Union Gas Ltd. ("Union Gas").

- **Motion Decision – November 7, 2005**: The Board excluded certain "pre-filed" evidence sought to be adduced by the appellant SEP.

[5] Section 96 of the *OEBA* directs the Board to make an order granting leave to construct a work where the Board is of the opinion that the construction "of the proposed work is in the public interest". The central issue to be determined on this appeal is whether the Board properly limited the scope of its jurisdiction under this section. The Board chose to limit its public interest consideration to the *effects of the actual pipeline construction*; it declined to consider the *effects of the GEC itself*, including the closing of the Lambton coal-fired plant.

BACKGROUND

The Greenfield Energy Centre ("GEC")

[6] In June, 2005, GEC LP entered into a twenty-year, standard Clean Energy Supply contract with the Ontario Power Authority to construct, operate, and supply electricity to Ontario's power grid from the GEC.

[7] The GEC is a proposed 1,005 MW gas-fired generating station to be located in Courtright, south of Sarnia. The GEC is intended to replace the 1975 MW coal-fired Lambton under the provincial government's coal replacement plan. The GEC is to be located about three km. south of Lambton.

The Applications to Construct the Pipeline

[8] GEC LP filed an application with the Board, pursuant to s. 90 of the *OEBA*, on July 20, 2005, for leave to construct a natural gas pipeline for the GEC:

Leave to construct hydrocarbon line

90. (1) No person shall construct a hydrocarbon line without first obtaining from the Board an order granting leave to construct the hydrocarbon line if . . .

(c) any part of the proposed hydrocarbon line,

(i) uses pipe that has a nominal pipe size of 12 inches or more, and

(ii) has an operating pressure of 2,000 kilopascals or more; or

. . .

[9] The pipeline proposed by GEC LP would by-pass the distribution system of Union Gas, which holds the municipal franchise and certificate rights to distribute natural gas in the area. On August 30, 2005, Union Gas also filed an application to build a pipeline to serve the GEC. Its proposed pipeline would connect the GEC directly to Union Gas' Courtright Station.

[10] With respect to the competition between GEC LP and Union Gas, the issue was whether Union Gas was entitled to a monopoly on the supply of gas pursuant to its franchise and Board jurisprudence, or if the GEC LP should be permitted to construct its own by-pass gas pipeline.

[11] The Board's "Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario" ("Guidelines") required GEC LP and Union Gas to file an environment review report. The respondents complied with this requirement.

[12] The Board heard the applications in a combined proceeding. The PWU and the SEP were granted intervenor status in the proceeding before the Board. The SEP and the PWU sought to make submissions on the effects of the GEC itself, including air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic and environmental impacts consequent on the closure of Lambton.

The Application by the PWU and the SEP to the Ministry of the Environment

[13] The PWU and the SEP also requested on July 8, 2005 that the GEC construction be elevated to a full environmental assessment under the *Environmental Protection Act*. The Minister of Environment denied that request on November 18, 2005. The Minister's position was that the GEC qualifies for an exemption from the *Environmental Assessment Act* under the

Electricity Projects Regulation, O. Reg. 116/01. This decision is the subject of a separate pending judicial review application before the Divisional Court.

The Motion to Exclude Evidence

[14] Prior to the hearing before the Board, the SEP filed documents relating to the need for the pipeline, the impact upon consumers, and environmental matters. By Notice of Motion dated October 5, 2005, GEC LP moved for an order excluding the documents. The Board heard submissions from the SEP, the PWU, Union Gas and GEC LP. In the Motion Decision dated November 7, 2005, the Board excluded three of the documents. It stated:

> In deciding whether to grant leave to construct, the Board must determine whether the pipeline itself is in the public interest, not whether facilities connected to it will be in the public interest... In considering the leave to construct application, it is not within the Board's jurisdiction to determine whether the generating station is in the public interest. (p. 6)

[15] In accepting certain of the SEP's materials as relevant to the issue of cumulative effects of the pipeline, the Board stated that "it remains an open question as to the appropriate use and weight to be accorded to this material during the hearing"

The Decision on the Merits

[16] The hearing took place over nine days. The Board was required to consider the following provision of the *OEBA*:

> **Order allowing work to be carried out**
>
> 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.

[17] The Board found that the public interest would not be well served if GEC LP's application for a pipeline were denied, since it is in the public interest for gas customers to have access to the services they require. As GEC LP could not currently access adequate services from Union Gas, it was in the public interest to allow GEC LP to pursue those services directly through the option of bypassing Union Gas. None of the parties had established that Union Gas or its customers would suffer direct harm due to the approval of GEC LP's application.

[18] The Board approved the competing applications of both GEC LP and Union Gas. However, Union Gas was approved on the condition that it obtain the GEC as a customer.

[19] On the issue of the "need" for the proposed pipelines, the Board concluded that should the GEC proceed, the pipeline would clearly be needed in order to supply natural gas.

[20] The Board found that the GEC's (as opposed to the pipeline's) environmental effects that were raised by the SEP and the PWU could not be tied back to some effect of pipeline construction. The Board determined that such effects were not within the realm of "cumulative effects" as contemplated in the Guidelines. The Board stated:

> To be clear, only those effects that are additive or interact with the effects that have already been identified as resulting from the pipeline construction are to be considered under cumulative effects. (p. 10)

[21] It stated further that it had no jurisdiction to consider the arguments of the intervenors:

> ... the law is clear that jurisdiction on environmental matters associated with the power station falls under the *Environmental Assessment Act* administered by the Ministry of the Environment, and not the Ontario Energy Board. (p. 17)

COURT'S JURISDICTION

[22] The Divisional Court has jurisdiction to hear this appeal, pursuant to s. 33 of the *Ontario Energy Board Act, 1998*, s.O. 1998, c. 15, Sched. B:

> 33.(1) An appeal lies to the Divisional Court from,
>
> (a) an order of the Board;
>
> ...
>
> (2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

STANDARD OF REVIEW

[23] The parties disagree on the applicable standard of review. Under the pragmatic and functional approach espoused in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the court is required to examine the following factors in determining the appropriate standard of review:

> **Privative Clause:** The *OEBA* does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.

Expertise: As per this Court in *Consumers' Gas Co. v. Ontario Energy Board*, [2001] O.J. No. 5024, the Board has a "high level of expertise" on issues such as economic forecasting and the viability of a monopolistic utility. The *OEBA* provides the Board with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.

Purpose of the *OEBA*: The objectives of the *OEBA* with respect to gas are listed in s. 2. These objectives are policy-laden and require specialized knowledge of the industry, which suggests deference is owed where the Board is required to engage these objectives:

> **Board objectives, gas**
>
> 2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
>
> 3. To facilitate rational expansion of transmission and distribution systems.
>
> 4. To facilitate rational development and safe operation of gas storage.
>
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
>
> 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers.

Nature of the Problem: The appellants and the intervenor agree that the issue is a question of law: what is the scope of the Board's jurisdiction under the public interest test in s. 96 of the *OEBA*? Some of the respondents characterize the issue

as one of the Board's discretionary decision-making powers to determine what considerations are relevant to its assessment.

Conclusions: In our view, the standard of patent unreasonableness is not appropriate in light of the Supreme Court of Canada's comments in *Voice Construction Ltd. v. Construction General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, where Major J. described the "rare" circumstances in which the patent unreasonableness standard is to apply, at para. 18:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard.

The issue is essentially a question of law, requiring a determination of the scope of the Board's jurisdiction. This requires a consideration of the proper interpretation of the jurisdiction-conferring provisions in the statute and the appropriate level of deference to be accorded to other decision-makers that may have concurrent jurisdiction over certain issues. In my view, these are issues of law on which the court has more expertise than the Board. Absent a privative clause and in light of the express appeal right on questions of law and jurisdiction, the appropriate standard is correctness.

KEY ISSUES

1. Did the Board err in concluding it had no jurisdiction to assess the environmental and socio-economic effects of the end use of natural gas?

2. Did the Board err in excluding some of the SEP's evidence?

TWO COMPETING PIPELINE APPLICATIONS

[24] The appellants were granted intervenor status under s. 96 of the *OEBA*. The Board is directed to make an order granting leave to construct a work where the Board is of the opinion that the construction of "the proposed work is in the public interest".

[25] The Board has published guidelines outlining many of the matters it may take into consideration, such as cumulative effect and social consequences of implementing each route site or alternative. The guidelines for pipelines deal mainly with physical environmental effect.

[26] The Board in its decision also considered the physical effect of another pipeline, the placement and building of the GEC in a relatively small area.

THE JURISPRUDENCE

[27] The appellants rely on *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, [2005] F.C.J. No. 1895 (C.A.) for authority that the Board should consider the end use of the gas. The factual issue in that case is substantially different in that the power plant was to be built in the U.S. No Canadian authority would have reviewed the plant. Here, of course, the Ministry of the Environment gave its approval and by correspondence with the appellants, dealt with the concerns raised by them.

[28] The National Energy Board ("NEB") is expressly permitted to "have regard to all considerations which appear to it to be relevant".

[29] The OEB does not have such broad authority. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 may be distinguished again on the broader powers of the NEB.

[30] *Nakina Twp. v. Canadian National Railway* 1986 F.C.J. 426 (F.C.A.), cited by the appellants, found the Commission had improperly limited its jurisdiction by failing to consider the public interest when considering the effect of a run through.

[31] In this case, the OEB has refused to consider the effects of a project outside the applications before the Board. Cases such as *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C.S. No. 18 (C.A.) and *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* 1999 F.C.S. No. 1515 (C.A.) are not helpful as they rely upon a comprehensive scheme for assessing the environmental impacts of projects under federal jurisdiction.

[32] The federal scheme as well includes an initial (scoping) under s. 15 and detailed instructions under s. 16. These sections allow a broader jurisdiction under the federal legislation.

ANALYSIS

[33] When dealing with the competing pipeline applications did the Board apply the wrong test? It confirmed a need by finding a long-term demand for the facility and the natural gas. It refused to consider whether or not the end use, power generation, is required by the province. In doing so, it found such a decision was a question for the government of the day.

[34] It concluded as well that the construction of the pipeline would not have an adverse impact on Union Gas' consumers.

[35] To accept the task as suggested by the appellants, including the effects of the closure of the Lambton coal-fired plant, would have set the Board upon a complex and virtually limitless task.

[36] The term "public interest" is confined to a consideration of the specific project, in this case, the pipeline.

[37] The Supreme Court in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4 was dealing with a case of broader jurisdiction from a "public interest" mandate and stated, at para. 49:

> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme.

[38] It is conceded that there is no statutory requirement to be met for the closure of the Lambton plant.

[39] While one can have sympathy with the question of possible job losses, it was, in our view, not improper for the Board, to limit its jurisdiction to the questions before it. As well, it accepted or deferred to the policy role of the government and ruling of the Ministry of the Environment on the assessment of the plant. The appeals are dismissed.

[40] The appeal as to the refusal of the Board to accept the evidence relating to matters it found beyond its jurisdiction is dismissed as the evidence was not relevant to the issue dealt with by the Board.

[41] Costs are payable at $17,500 each to Union Gas and Greenfield Energy Centre Limited Partnership payable by the appellants. The amount was agreed to by counsel. No costs are sought by the Intervenor or the Board.

MEEHAN J.

MACDONALD J.

CAMERON J.

Released: 20060724

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, MACDONALD & CAMERON JJ.

B E T W E E N:

POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS

Appellants

- and -

ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP

Respondents

JUDGMENT

BY THE COURT

Released: 20060724

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

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

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Haida Nation *v.* British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty The Queen in Right of the Province of British Columbia *Appellants*

v.

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation *Respondents*

and between

Weyerhaeuser Company Limited *Appellant*

v.

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements *Interveners*

Indexed as: Haida Nation *v.* British Columbia (Minister of Forests)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for british columbia

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the

petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might

adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject

to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Cases Cited

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; **referred to:** *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

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Paul J. Pearlman, Q.C., and *Kathryn L. Kickbush*, for the appellants the Minister of Forests and the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia.

John J. L. Hunter, Q.C., and *K. Michael Stephens*, for the appellant Weyerhaeuser Company Limited.

Louise Mandell, Q.C., Michael Jackson, Q.C., Terri-Lynn Williams-Davidson, Gidfahl Gudsllaay and *Cheryl Y. Sharvit*, for the respondents.

Mitchell R. Taylor and *Brian McLaughlin*, for the intervener the Attorney General of Canada.

E. Ria Tzimas and *Mark Crow*, for the intervener the Attorney General of Ontario.

Pierre-Christian Labeau, for the intervener the Attorney General of Quebec.

Written submissions only by *Alexander MacBain Cameron*, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, Q.C., and *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind and *Kurt Sandstrom*, for the intervener the Attorney General of Alberta.

Gregory J. McDade, Q.C., and *John R. Rich*, for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band.

Allan Donovan, for the intervener the Haisla Nation.

Hugh M. G. Braker,Q .C., Anja Brown,A rthur C. Pape and *Jean Teillet*, for the intervener the First Nations Summit.

Robert C. Freedman, for the intervener the Dene Tha' First Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief.

Charles F. Willms and *Kevin O'Callaghan*, for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia.

Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, Q.C., for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and

the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the

Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this

framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer

to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81,

the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

> . . . "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty

claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow*, *supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery . . ., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty

to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

C. *When the Duty to Consult and Accommodate Arises*

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal

claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no

legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow*, *supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)" (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if

appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*,

supra, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-

based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw*, *supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1997) provides insight (at pp. 21 and 31):

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . .
>
> . . .
>
> . . . genuine consultation means a process that involves . . .:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalised
> - seeking Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making

decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

E. *Do Third Parties Owe a Duty to Consult and Accommodate?*

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and

resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from

the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The*

Queen (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling*, *supra*. There is therefore no foundation to the Province's argument on this point.

G. *Administrative Review*

60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were

within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. . . . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a

right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has

utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

> (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
>
> (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of

Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting

permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with

the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

> [O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits. . . . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting . . ." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Department of Justice, Edmonton.

Solicitors for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0050

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B) (the "Act");

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Nuclear Generating Station and Milton Switching Station, all in the Province of Ontario.

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

Ken Quesnelle
Member

DECISION AND ORDER
September 15, 2008

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APPENDICES

1. SUMMARY OF FINDINGS

Hydro One Networks Inc. ("Hydro One" or the "Applicant") is seeking an Order of the Board for leave 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 Nuclear Generating Station ("NGS") 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.

In examining whether or not a leave to construct application is in the public interest, the Ontario Energy Board (the "Board") is governed by Section 96(2) of *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Schedule B (the "OEB Act") which states that:

> *In an application under section 92, the Board shall only consider the interest of consumers with respect to prices and the reliability and quality of electricity service 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.*

While the Board considers alternatives to the project, those alternatives are assessed in the context of the specific factors listed in Section 96(2) of the OEB Act. These factors do not include the impact on individual landowners, except to the extent that the impact could materially affect the prices, reliability and quality of electricity service to consumers generally. The environmental and socio-economic impacts of alternative routes are considered in the Environmental Assessment ("EA") process required under the *Environmental Assessment Act*. Individual land rights are considered in the context of a proceeding under the expropriations process.[1]

Given the outline of the Board's test and in the context of this application, the main issues for the Board are as follows:

---

[1] OEB Act, Section 99

I. Is the proposed project needed?

- What is the likelihood of the construction of the 700 MW of committed wind generation and completion of the refurbishment of the 4 Bruce A Units?
- What is the likelihood that Bruce B will be refurbished and that 1000 MW of planned wind generation will be developed?
- Should the transmission need be based on the maximum capacity rating of the generation or on some other level related to the expected operating capacity factor?

II. Is the proposed project economically superior to the alternatives and are the potential rate impacts reasonable?

III. What is the impact on system reliability related to the project? How does this compare to the alternatives?

IV. If the proposed project is approved, what are the appropriate conditions of approval?[2]

V. Are the Forms of agreements offered by Hydro One to the landowners appropriate?

VI. Have appropriate consultation and if necessary, accommodation been made with affected Aboriginal peoples?

The Board examines each of these issues in detail in this Decision and Order.

In summary, the Board approves Hydro One's application for leave to construct approximately 180 kilometres of double-circuit 500 Kilovolt ("kV") electricity transmission extending from the Bruce NGS in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton with conditions.

The need for the project was diligently contested by the intervenors. In particular, the Ontario Power Authority's ("OPA")'s forecast of wind generation and nuclear generation which would be served by the new line was challenged. The Board finds that the forecast for wind generation is reasonable. The Board also finds that the Project is

[2] Draft Conditions of Approval were filed by Board staff during the proceeding, Exhibit K9.10, May 13, 2008

economic whether or not the Bruce B units at the Bruce NGS are refurbished or new nuclear development at the Bruce NGS occurs. The Board finds that the Project is economic over the long term when compared with the primary alternative put forward by intervenors, namely the installation of series capacitors, and use of generation rejection.

The Project also meets the reliability standards of the industry and is consistent with the government's policy on land use.

The Board approves the Forms of agreement as provided by Hydro One.

For the purpose of this application, the Board finds that consultation with Aboriginal groups has been sufficient.

The Board's approval is subject to a number of conditions (see Appendix C). Most notable among these is compliance with the *Environmental Assessment Act*.

The Board's detailed reasons follow in this document.

2. INTRODUCTION

This section provides an overview of the application, the stages of the proceeding and a background to the project

2.1 The Application

Hydro One is seeking an Order of the Board for leave 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 NGS 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.

The original application was filed on March 29, 2007; an amended application was filed on November 30, 2007. The Application was given Board file No. EB-2007-0050. A map filed by Hydro One on November 30, 2007 as part of their amended application showing the location of the project is shown in Figure 1.

Hydro One submitted that the project is required to meet the increased need for transmission capacity associated with the development of wind power in the Bruce area and the return to service of nuclear units at the Bruce NGS. Hydro One proposed an in-service date of Fall 2011 for the new 500 kV transmission line and related facilities. The estimated cost of the transmission project is $635 million.

Bruce to Milton Transmission Reinforcement Project
Potential Route Refinements in Brockton/Hanover/West Grey area, Camp Creek and Halton Hills

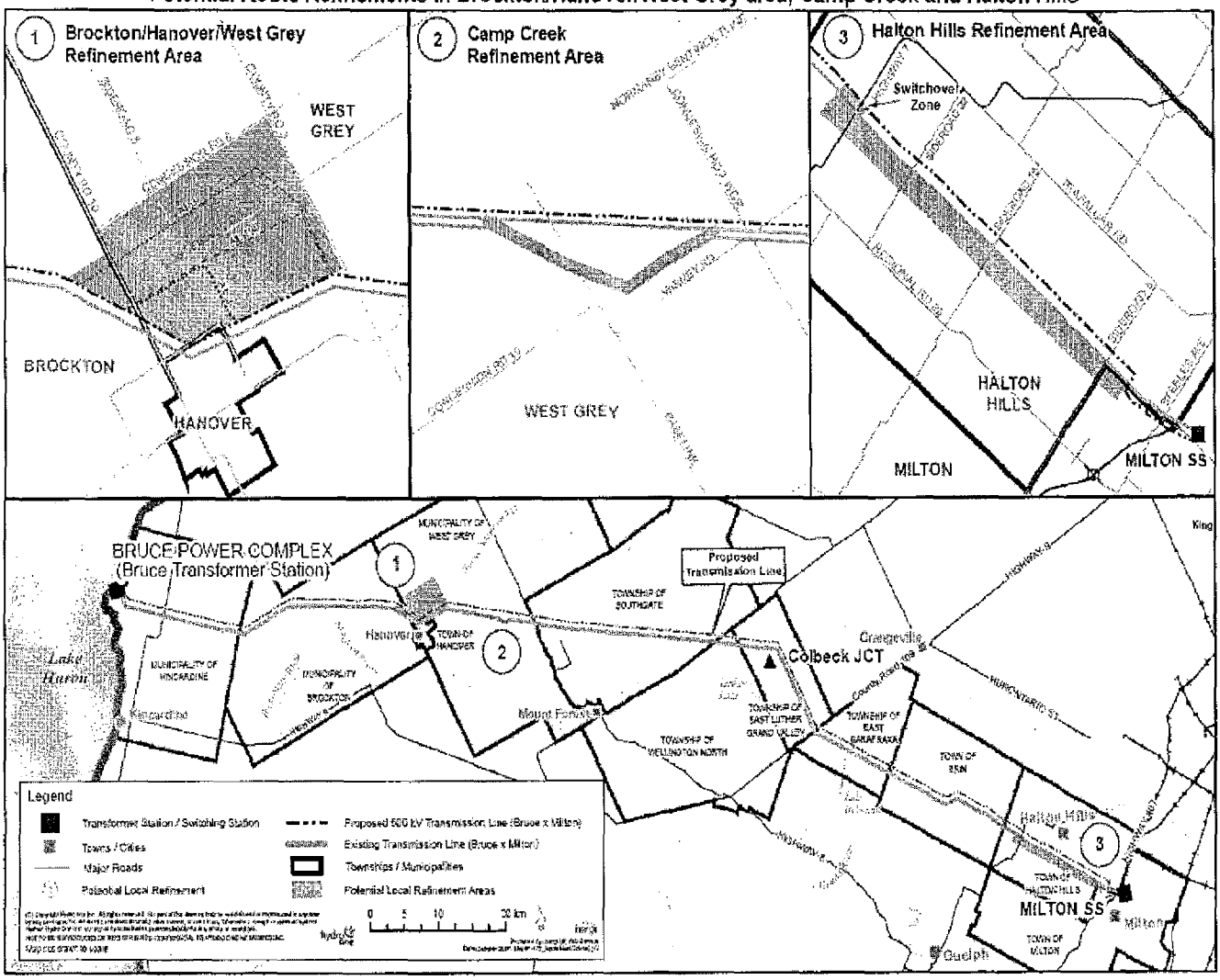


Figure1

2.2 The Proceeding

The Notice of Application for the Leave to Construct Application and the Notice of Amended Application were published in various newspapers and were served on all directly affected landowners. A complete list of participants, including registered intervenors, is attached as Appendix A to this decision.

The Board issued eleven procedural orders in this proceeding. Appendix B of this decision provides details on procedural matters, including list of witnesses, in the hearing.

The oral hearing commenced on May 1, 2008, and concluded on June 11, 2008.

Hydro One filed its argument in chief on June 23, 2008. Board staff filed its submissions on July 2, 2008. Intervenors filed their arguments by July 4, 2008. On July 17, 2008, the record of the proceeding was completed with the Applicant's filing of reply argument.

2.3 Background

2.3.1 Description of the existing Power System – Transmission and Generation

The existing transmission system consists of six 230 kV circuits and four 500 kV circuits, all of which transmit the generation output from the currently in service nuclear units at Bruce NGS, in addition to existing wind farms in the Bruce Area. The six 230 kV circuits transmit power to load centres including Hanover, Orangeville and Owen Sound. Two of the four 500 kV circuits connect the Bruce NGS to the Milton Switching Station, near the town of Milton, and the other two 500 kV circuits connect the Bruce NGS to the Longwood Transformer Station near the city of London.

The existing transmission system presently has a transfer capability of approximately 5,000 MW, which is less than its historic capability because the load flow has changed along the 500 kV system which connects the Bruce Area to the provincial transmission system. The power flow pattern is now from South-Western Ontario towards the Greater Toronto Area ("GTA") i.e. west to east. In the past at the time that the Ontario

transmission system was enhanced for the Bruce NGS, there was significant local load in the Bruce Area and the power flow in Ontario was typically from GTA to the west in support of power exports. This change in power flow is attributed to an existing predominant pattern of importing electricity from Michigan and New York during peak demand in Ontario and the increasing demand, in the GTA during the peak summer season.

2.3.2 Project Description - near term, interim measures and proposed Project

To meet the total electricity generation expected to be in the Bruce area by 2015, Hydro One proposed near-term measures, interim measures, and the proposed Bruce to Milton 500 kV double-circuit transmission line to meet the noted system requirements.

The near-term measures are currently being implemented and include installation of dynamic and static reactive resources at various transformer stations and upgrading the 230 kV transmission line from Hanover to Orangeville.

The interim measures consist of generation rejection and, if needed, series capacitors. The generation rejection is provided by a proposed expansion of the Bruce special protection system ("BSPS") to increase the transfer capability out of the Bruce area until the proposed project is in service. Hydro One indicated that if the Project does not go into service and the use of the BSPS accordingly intensifies, then the reliability of the system will be compromised.

The proposed project is approximately 180 kilometres of double-circuit 500 kV transmission line adjacent to the existing transmission corridor (500 kV and/or 230 kV) extending from the Bruce NGS to the Milton Switching Station in the town of Milton. Hydro One proposes an in-service date of Fall, 2011 for the new 500 kV transmission line and related facilities.

2.3.3 Roles of Hydro One, OPA and IESO

Hydro One was responsible for the pre-filed evidence including evidence prepared by the Ontario Power Authority ("OPA"), and the Independent Electricity System Operator ("IESO"). The pre-filed evidence included the need for the project, the proposed alternatives, and the economic benefits of the project.

OPA's mandate under the Electricity Act, 1998 (the "Electricity Act") requires it to perform long-term power system planning for the Province. The OPA provided evidence in this case addressing various key areas including the forecast of generation resources over a study horizon up to 2030, and developed an economic model to evaluate the cost of bottled energy under various scenario assumptions during the proceeding.

The IESO's role includes directing the operation and maintaining the reliability of the IESO-controlled grid; working with the responsible authorities outside Ontario to co-ordinate the IESO's activities with their activities; and establishing and enforcing standards and criteria relating to the reliability of transmission systems. The IESO provided evidence in this case addressing key areas including comprehensive "System Impact Assessment" reports dealing with the proposed project and responding to interrogatories by simulating alternative scenarios during the proceeding.

2.3.4 Application in relation to Environmental Assessment and other permitting processes

The Board recognizes that in addition to this Leave to Construct approval, an approval pursuant to the EA approval is required before the project may proceed. The Board,[3] has already decided in interlocutory proceedings that neither process is completely dependent upon the other.

Hydro One has acknowledged that the Board's leave to construct orders are conditional on the procurement of all necessary permits and authorizations including a completed EA. In this way, the Board ensures that the project cannot proceed without regard to requirements of the EA process, while it considers the matters falling within its jurisdiction in a timely fashion.

The Board, however, satisfied itself that the two processes were not significantly out of step, by ensuring that the approved Terms of Reference for the EA were in place[4], prior to commencement of the oral phase of the hearing which started on May 1, 2008[5]. This is relevant as the Board's mandate is to assess the proposal in terms of prices,

[3] Board Decision and Order on Motion, issued on July 4, 2007, page 5
[4] On April 4, 2008 the Ministry of Environment issued Approval of the Terms of Reference for the EA
[5] Letter from Hydro One to the Board and circulated to all parties, dated April 10, 2008, page 2, advising that on April 4, 2008 the Minister of Environment issued its "Terms of Reference – Notice of Approval".

reliability and quality of electricity service and part of that assessment involves an analysis of alternatives. It was therefore important to ensure that to the extent that alternatives raised in the EA process are relevant and material to the comparison of alternatives in terms of prices, reliability and quality of electricity service, that those alternatives are appropriately considered in the Leave to Construct application.

It should be noted that environmental and socio-economic impacts of alternative routes are considered in the EA process. Individual land rights are considered in the context of a proceeding under the expropriations process as outlined in section 99 of the Act.

3. PROJECT NEED AND JUSTIFICATION

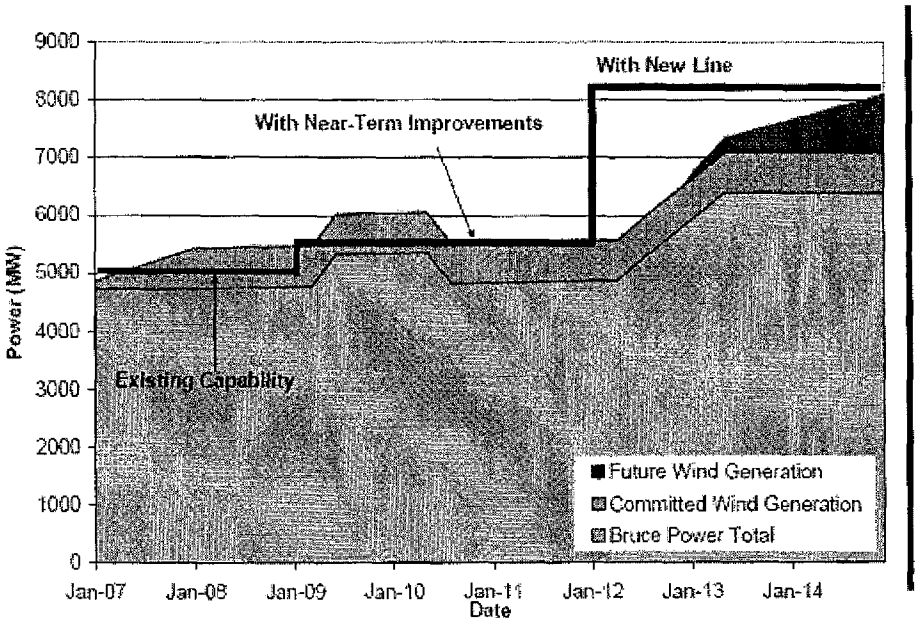
3.1 Introduction

Hydro One submitted that the current transmission system has a transfer capability of 5,000 MW, and the forecast requirement for the year 2015 is 8,100 MW. This increase of 3,100[6] MW is driven by a generation forecast with the following components:

- 1,500 MW of refurbished nuclear generation – when all Bruce NGS units are in service in 2013
- 700 MW of committed wind generation
- 1,000 MW of planned wind generation (700 MW from large wind projects, 300 MW from the Standard Offer Program)
- Refurbishment of Bruce B (or new build) such that generation from the Bruce NGS is maintained at about 6,300 MW over the long-term.

Hydro One provided the following chart to show the generation profile over time and the level of transmission capability provided by the proposed Bruce to Milton line.

[6] Incremental requirements are about 3200 MW, but the current capability of 5000 MW exceed current requirements. The net incremental requirements are 3100 MW



Source: OPA

Figure 2 Source: Exhibit B/Tab 3/Schedule 1/p.2, depicting "Bruce Area Available Generation and Transmission Capacity (2007-2014)"

Hydro One submitted that including the committed wind (700 MW) and committed Bruce A (1,500 MW) amounts in the forecast were not controversial. Board staff agreed with this characterization. No intervenor took issue with these components of the generation forecast. With respect to the 1,000 MW of planned wind, the 300 MW from the SOP was not challenged given the evidence that the program is already oversubscribed.

Two components of the generation forecast were contentious: the 700 MW from planned large wind projects and the forecast generation of 6,300 MW from the Bruce NGS. Another area of dispute was the practice of planning transmission capability to meet the simultaneous Maximum Capacity Rating ("MCR") of all generation, the so-called "planning to nameplate capacity".

Some intervenors, particularly the Saugeen Ojibway Nations ("SON"), raised broader questions with respect to the generation forecast, and specifically the relationship between the generation forecast (and the project generally) and the IPSP.

This section is organized as follows:

- The forecast of planned large wind generation
- The forecast of generation from Bruce NGS
- Planning transmission for total nameplate generation capacity
- The relationship between the application and the IPSP

3.2 The Forecast of Planned Large Wind Generation

Hydro One argued that the current IESO queue for wind generation (which includes 813 MW in projects which have their System Impact Assessment ("SIA") on hold and almost 1,500 MW in additional projects) supports the generation forecast. Hydro One also submitted that the generation forecast was reasonable in light of the August 27, 2007 Ministerial Directive[7] which requires 2,000 MW of renewable generation in Ontario by 2015 and the OPA's intention to satisfy one-third of that requirement from large wind in the Bruce area given its relative proximity to the Province's major load centre and the amount of wind potential in that area. That procurement must be done by 2011 to meet the 2015 date.

Hydro One argued that the 700 MW was a conservative forecast from several perspectives: it represents 50% of the wind potential in the area, 60% of the wind generation in the IESO queue for the area, and 35% of the renewable generation the OPA has been directed to procure. The SON position was that there was uncertainty related to the wind development in the Bruce area. Hydro One argued that the Board must determine whether the OPA's forecast is more credible than SON's views regarding the risk that projects in the queue will result in less than 700 MW being installed.

We address two sub-issues:

1. The August 2007 Ministerial Directive

2. The level of certainty

[7] Exhibit C/Tab 11/Sch. 1/Attachment 1

3.2.1 The August 2007 Ministerial Directive

Hydro One submitted that no further approval is required for the contracts entered into under the August 27, 2007 Ministerial Directive in advance of the IPSP and that the Ministerial Directive is unambiguous and is not a guideline. In Hydro One's view, it is sensible to source 35% of this requirement from the abundant wind source in the Bruce area, given this is an accessible area, especially given the queue.

The OPA noted that its forecast for large wind projects was not dependent upon any Board approval, including approval of the IPSP. The OPA is directed and authorized to acquire 2,000 MW of renewable generation under the August 2007 Ministerial Directive.

The Ross Firm Group ("Ross Group") argued that Hydro One was relying on a very narrow reading of the directive and noted that the directive calls for renewable generation, not just wind generation and that it indicates the generation is to be sourced province wide, not just in the Bruce area. The Fallis Group of Landowners ("Fallis Group") made similar submissions.

3.2.2 Board Findings

The Board concludes that the question of the interpretation of the August 2007 Ministerial Directive is not a consideration in our determination of the reasonableness of the wind generation forecast. It is true the directive refers to renewable generation and does not specify wind generation, but it is a pre-IPSP Directive and the OPA has the authority to decide how the requirements of the directive are to be met. It is not the Board's role to assess the OPA's plans for how to meet the requirement specified in the directive. The Board accepts the OPA's testimony that it intends to acquire an additional 700 MW of wind generation in the Bruce area to meet the requirements of the August 2007 Ministerial Directive.

3.2.3 Level of Certainty

SON submitted that there was substantial uncertainty about the amount and timing of the planned wind generation with respect to:

- willingness of developers to participate in bidding

- qualifications of wind developers
- the actual signing of contracts
- delays and challenges around site acquisition, environmental assessments, financing, equipment acquisition, and the need for additional facilities.

Hydro One submitted that the OPA has the authority to plan in the absence of certainty and to act as counter-party for procurement. Therefore certainty is not required before approval is given to transmission reinforcement. Hydro One summarized its view as follows:

> *What more indicators of certainty should the OPA reasonably require before allocating 700 MW of the directed 2,000 MW renewable energy procurement to Bruce Area wind generation? It has government direction to procure the wind without further authorization; a short deadline; a rich wind resource; proximity to load and strong commercial interest already as shown by the IESO queue.*[8]

The OPA submitted that by only including 50% of the Bruce area large wind potential in the generation forecast, it has substantially mitigated any development uncertainties. Power Workers Union ("PWU") and Canadian Wind Energy Association ("CanWEA") took the same position. The OPA also noted that it has taken steps to procure 500 MW through its June 5, 2008 draft Request for Proposal.

Board staff noted that no contracts have been executed for the planned large wind projects; no formal discussions appear to be underway with potential developers; and no counterparties have been identified. Board staff suggested that, depending upon the level of uncertainty, the Board could approve the application, but condition the approval in a way which addresses the level of uncertainty.

Hydro One responded that it would be inappropriate to impose conditions of approval that had not been put to the witnesses. Hydro One argued that to require any greater certainty would be unreasonable and does not recognize the urgency of the project.

[8] Hydro One, Argument in Chief, p. 15

3.2.4 Board Findings

The OPA's intentions are clear and unequivocal: it intends to procure 700 MW of wind generation from large projects in the Bruce area. The evidence in support of this forecast is strong:

- The OPA has the authority, under the August 2007 Ministerial Directive, to procure wind generation in the short term.
- The studies of wind potential in the area indicate a potential of 1,400 MW – twice the level of the forecast.
- The IESO already has projects in its queue which, in total, exceed the 700 MW forecast.

The uncertainty arises from the fact that the OPA has not yet entered into contracts to procure this wind generation.

In natural gas transmission system reinforcement projects, the Board generally expects to see contractual commitments related to the usage of the capacity if the growth is related to demand beyond the distribution area. In electricity transmission reinforcement applications, however, the Board has not typically required that there be signed contracts to substantiate the need forecast. However, this application is the first instance of a major generation-driven network reinforcement and as such can be distinguished from other recent transmission expansion applications.[9]

The issue is whether the generation forecast is sufficiently certain to support a project of this magnitude in the absence of signed contracts. The total wind generation forecast is 1,700 MW, of which 1,000 MW is effectively committed and therefore there is little risk with respect to that amount. The Board concludes that there is also little risk associated with the wind generation forecast for the remaining 700 MW: the OPA has already begun the procurement process with its draft Request for Proposal and there are a substantial number of projects in the IESO queue. The Board notes that 400 MW of the 1,400 MW Bruce area wind potential is located north of Owen Sound, and that there is likely higher uncertainty associated with this generation for a number of reasons,

[9] EB-2006-0215 and EB-2006-0242 both related to load growth on the system. EB-2004-0476 related to congestion relief and increased imports (but was not related to specific generation projects) and the Board noted in its final decision that the determination of whether Hydro One should be permitted to recover the project costs from customers would take place in a rates application at which time Hydro One would have to demonstrate the financial benefits of the project.

including environmental issues. However, the Board is satisfied that the OPA has mitigated the risks involved by assuming that only 50% of the potential in the Bruce area will be developed. The Board also notes that the forecast covers a broad geographic region and that there are many potential wind developers. This further reduces the risk of the forecast as compared to a forecast that was based on a narrow area or a single generation developer. The Board concludes that the forecast of large wind generation is reasonable and that therefore the need for 1,700 MW of incremental transmission capability to serve wind generation in the Bruce area has been substantiated.

3.3 The Forecast of Generation from Bruce Nuclear Generating Station

There was no substantive dispute amongst the parties regarding the forecast of generation from the Bruce NGS between now and 2018/2019. The issue is with respect to generation from Bruce NGS beyond 2018/2019, the year in which Bruce B units begin to reach their projected end of life. The OPA's forecast is that generation from Bruce NGS will remain at the level of 6,300 MW beyond 2018, either through refurbishment of Bruce B or the building of new nuclear capacity.

Hydro One submitted that absolute certainty was not an appropriate standard by which to assess the forecast. According to Hydro One, the standard should be whether the forecast is reasonable. Hydro One submitted that the OPA's nuclear generation forecast is reasonable because:

- The Supply Mix Directive includes nuclear base-load at 14,000 MW.
- There is existing grid access and infrastructure at the Bruce NGS
- There is support in the Bruce community for continued generation.
- The Bruce operator has expressed interest in continuing to operate in the context of refurbishment or new build.

Energy Probe submitted that if the line is built and Bruce B is not refurbished, then the line will only be useful for 5 years, after which time it will be stranded because the

existing network would be capable of carrying all of the remaining nuclear capacity. Energy Probe submitted that if a lower cost alternative is available, it should be implemented at least until a decision is made on the future refurbishment of Bruce B.

The Ross Group submitted that there is no evidence the refurbishment will take place; no directive for OPA to enter into negotiations with Bruce Power; no evidence of discussions on an official level. Pollution Probe made similar submissions and concluded that only a binding directive or contract would justify an analysis of the project which ignored the otherwise certain decline in generation with the retirement o Bruce B.

IESO submitted even if Bruce B is not refurbished, the units could be extended beyond the current assumed end of life of 2015-2020.

SON and Pollution Probe submitted that the Supply Mix Directive clearly stipulates that the *maximum* generation from nuclear is to be 14,000 MW and that the OPA was misinterpreting or misconstructing the directive. The Ross Group made similar submissions and noted that the directive does not identify the location of the nuclear generation. Hydro One responded that the OPA had not misinterpreted the Supply Mix Directive; in Hydro One's view, the OPA testimony is that maintaining nuclear generation at 14,000 MW is the most reasonable assumption.

Board staff noted a recent Government announcement, which contained the following statement:

> *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 base-load 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.*[10]

Bruce Power submitted that the Board, as an expert panel, is entitled to take notice of this announcement without further evidence. Bruce Power argued that, as with the Supply Mix Directive, the announcement regarding 6,300 MW at Bruce reflects

[10] June 16, 2008 Announcement by Infrastructure Ontario "Phase 2 of Nuclear Replacement Step in Ontario's 20-year plan to bring clean, affordable and reliable electricity to Ontario"

government policy and is not dependent upon approval of the IPSP. APPrO supported Bruce Power's submissions.

Pollution Probe submitted that the Board should give very limited or no weight to the recent announcement as it is in no way binding nor refers to anything which is binding. In Pollution Probe's view it is, at best, a signal of an intention by the government to negotiate with Bruce Power.

Board staff suggested that there were two options to address the uncertainty:

- The Board could find that there was some uncertainty regarding the refurbishment of Bruce B, in which case the Board could deny the application or could approve the application conditional on some demonstration of a commitment to refurbishment.
- The Board could find that, as Hydro One argued, the need for the project is not affected by the decision to refurbish Bruce B.

Energy Probe concluded that the Board should approve the application subject to two conditions (in addition to those proposed by staff):

- The Ontario government ordering either the refurbishment of Bruce B or the construction of new units at Bruce C
- Bruce Power successfully completing the Environmental Assessment and licensing process

Hydro One responded that it would be inappropriate for the Board to impose conditions that were not put to its witnesses but argued that conditions were unnecessary in any event given the robustness of the OPA's generation forecast.

3.3.1 Board Findings

Hydro One maintained that the OPA forecast was more robust than any put forth by an opposing party. The Board notes, however, that there is no requirement for an intervenor to put forth a "better" forecast. The onus is on Hydro One to substantiate the forecast it relied upon. The Board was greatly assisted by the intervenors' thorough testing of the OPA forecast.

The Board concludes that there is significant uncertainty regarding the future level of generation from the Bruce NGS. In some respects, the evidence indicates that the OPA forecast is reasonable:

- Bruce Power has indicated its interest in refurbishment or new build and it has initiated the environmental assessment process associated with new build on the site.
- The Supply Mix Directive calls for nuclear generation for base-load purposes up to 14,000 MW.
- If Bruce B is not refurbished, the units would likely be run beyond 2018.

However, other evidence points to substantial uncertainty:

- There is no contract in place for the generation in question, nor a directive to enter into a contract.
- Unlike for wind generation, the OPA does not have authority currently to procure the generation in question.
- The IPSP proceeding will examine the plan to use nuclear generation to meet base-load requirements for economic prudence and cost effectiveness.
- While the recent press announcement may be an indication of the government's intentions it is not a formal expression of government policy.

The Board's conclusion is that given the level of uncertainty related to nuclear generation at Bruce NGS, the Board must evaluate the Bruce to Milton project in terms of price and reliability impacts under two scenarios:

1. Assuming nuclear generation continues at a level equivalent to eight units in operation
2. Assuming Bruce B is retired and there is no new build

The results of that analysis will determine how significant the uncertainty regarding future generation levels at Bruce NGS is to the Board's determination of this application and whether the Board should consider conditioning any approval of the project as proposed by Energy Probe. The Board addresses these issues in detail in as part of Financial Evaluation in Section 5.

3.4 Planning Transmission For Total Nameplate Generation Capacity

Hydro One argued that it was appropriate to conduct transmission planning on the basis of nameplate capacity for a number of reasons:

- Planning for less than nameplate generation capacity (e.g. planning based on operating history or forecast capacity) would be contrary to government policy to promote renewables and reduce congestion and puts the system at greater risk with respect to reliability; it would also be contrary to the goal of cleaner generation if the constrained generation is replaced with gas-fired peak generation.
- Planning for maximum output is a longstanding practice, and is in line with design standards; planning for less than maximum output would be planning for congestion.
- Planning for congestion would stifle wind development by asking wind developers to bear the diversity risk.
- Congestion reduction is cost effective because the OPA analysis shows that over time the project is the preferred option on an economic basis.

There are two components to this issue:

1. Congestion and the Supply Mix Directive
2. Planning Standards and related Planning alternatives (using historical or forecast capacity factors)

3.4.1 Congestion and the Supply Mix Directive

The OPA argued:

> *...it is not a valid objection for intervenors to argue that the OPA should plan transmission to constrain some wind and nuclear resources in the Bruce area because it would be cost effective to do so; in fact, it would not be as shown by the OPA financial evaluation comparing the project to the proposed alternatives. But, more importantly, to do this would be antithetical to the government policy directives which the OPA is bound to follow in planning Ontario's power system. Specifically, it would contravene the spirit of these policy directives if the OPA were to plan transmission in a*

> *manner that would constrain the clean and emission-free wind (and nuclear) resources that the government directed the OPA to procure.*[11]

The PWU made similar submissions.

Pollution Probe submitted that cost effectiveness is a key part of the meaning of the Supply Mix Directive in respect of congestion reduction. The directive reads:

> *6. Strengthen the transmission system to:*
>
> *Promote system efficiency and congestion reduction and facilitate the integration of new supply, all in a manner consistent with the need to cost effectively maintain system reliability.*[12]

Pollution Probe submitted that system reliability would be maintained under the alternative using series capacitors and the Bruce Special Protection System ("BSPS"), and given that it would be lower cost, the option is the more consistent with the Supply Mix Directive and is in the interests of electricity ratepayers.

SON submitted that the directive is clear that congestion reduction is to be done within the context of cost effectiveness. In SON's view, "building transmission capacity to meet 100% of installed generation capacity will always act to reduce congestion, but may risk dramatic and costly overbuild."[13]

3.4.2 Board Findings

The Board finds that government policy (in the form of the Supply Mix Directive) in support of renewable generation and congestion reduction does not in and of itself automatically justify the planning of a transmission project to meet nameplate generation capacity. Considerations of cost effectiveness are relevant, and indeed are specifically referenced in the Supply Mix Directive. With respect to strengthening the transmission system, the requirement is to "promote system efficiency and congestion reduction and facilitate the integration of new supply, all in a manner consistent with the

[11] OPA, Argument, p. 15.
[12] June 13, 2006 Directive (Ex. B, tab 6, schedule 5, appendix 7)
[13] SON, Argument, p. 18.

need to cost effectively maintain system reliability."[14] Therefore the Board must consider the appropriateness of the planning standard in the context of this application.

3.4.3 Planning Standards and related Planning alternatives (using forecast or actual capacity factors)

Pollution Probe submitted that just because nameplate capacity was the planning assumption in the past does not mean that it continues to be a good practice, particularly since this application is the first major instance of including wind generation in network transmission planning.

Hydro One responded that planning to nameplate capacity is appropriate because it is consistent with standard planning practices of the OPA and IESO and the generation mix reflects policy choices by the province, and recognizes the particular characteristics of the supply mix in the Bruce area.

Pollution Probe argued that given the low likelihood of the simultaneous operation of all generation at full nameplate capacity, planning the line to meet that requirement would overstate the actual need. With respect to wind, Pollution Probe argued that due to spatial diversity it was unlikely that all wind generation units would be running at full capacity at the same time. With respect to nuclear generation, Pollution Probe noted that Bruce NGS' historic operation has been in the range of 60-80%. In Pollution Probe's view,

> *it may be more efficient from a societal perspective to simply pay for any locked-in energy during those odd times when the transmission system is running at full capacity than to build an expensive transmission line that would not be needed most of the time.*[15]

Pollution Probe argued that if the more realistic capacity factors of 95% for nuclear and 50% for wind are used, then the proposed line provides substantial additional capacity that would not be needed if the series capacitor/BSPS alternative were used instead – whether or not Bruce B is refurbished. Pollution Probe provided the following chart to demonstrate this point.

[14] Exhibit B/Tab 6/Sch. 5/Appendix 7(Directive-Integrated Supply Plan)/page 2/Item 6
[15] Pollution Probe, Argument, p. 14.

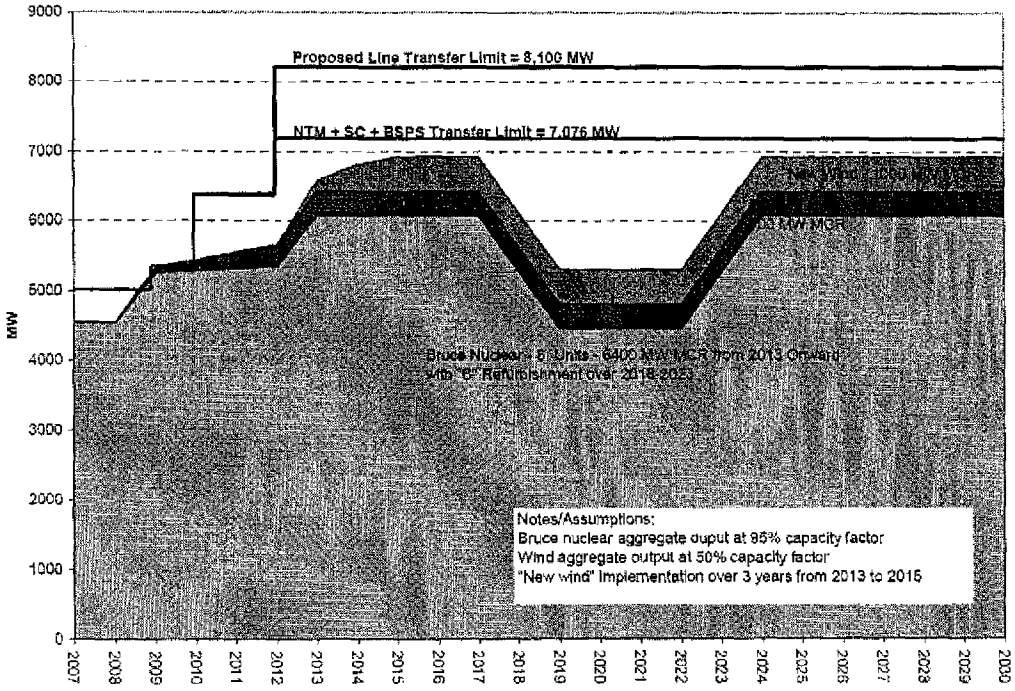


Figure 3 Alternative Assumptions: Depiction of Need for Bruce Area Line Using Bruce Nuclear Station Aggregate CF = 95% and Wind Aggregate CF = 50%

SON noted that the substantive issue of how to treat intermittent wind and other renewable resources from a transmission system planning perspective will be investigated in the IPSP. A decision to approve the project based on the assumption of planning for full wind capacity will influence the nature and scope of investigation of this issue in the IPSP.

The Ross Group submitted that there was no evidence about international standards of planning for wind generation or the reasonableness of Hydro One's reliance on nameplate capacity for transmission planning purposes. Hydro One replied that none of the intervenor witnesses could offer evidence that different planning standards for wind were applied in Texas, Alberta or California.

Pollution Probe questioned the IESO's reliance on the NPCC criterion as the basis for justifying planning to nameplate capacity. The criterion reads: "Transfer capability

studies shall be based on the load and generation conditions expected to exist for the period under study".[16] In Pollution Probe's view, the phrase "generation conditions expected to exist for the period under study" is inadequate justification for expensive capacity which will be unused most of the time.

Hydro One agreed that it is relying on the reference to "generation conditions expected to exist for the period" and submitted that given the Supply Mix Directive the OPA plans to obtain the full capacity of the wind generation. Hydro One maintained that the plan to accommodate wind generation, despite its intermittent nature, was based on clear government policy, and that

> *Once the choice is made to plan to accommodate all available generation, the applicable NPCC standard requires that transmission capable of transferring the planned-for generation be put in place.*[17]

3.4.4 Board Findings

Planning transmission capability to meet nameplate capacity for an intermittent resource is potentially costly. The Board notes that there was simultaneous peak generation from 6 Bruce units and 3 large wind projects on 37 days in 2007. While this represents about 10% of the year when expressed in days, the incidence of simultaneous peaks in terms of hours was presumably substantially less as it is unlikely that there was simultaneous peak wind generation over the entire day for those 37 days. This is reflected in the evidence which was filed showing hourly production on two separate days[18]. There is no evidence to suggest that the incidence of simultaneous peak generation will be higher with the addition of more nuclear and wind generation; indeed the incidence may well be lower.

The OPA's witness agreed that in some circumstances it might not be economic to plan the system to deliver all generation. However, Hydro One testified that the policy framework (which calls for congestion reduction and additional renewable generation) underpins the planning assumption for this application and that the financial impact is only one consideration and is not necessarily the most important consideration. The

[16] Exhibit K5.6/Page 2/section 2.1/Paragraph 2/Second sentence
[17] Hydro One, Reply Argument, p. 14.
[18] Exhibit K1.1

Supply Mix Directive does call for the strengthening of the transmission system, and the Board accepts that planning for an amount less than nameplate capacity is planning for some level of potential congestion.

The Board notes that the evidence is not that the NPCC standard explicitly requires planning to full nameplate capacity; rather, the NPCC standard is that the system meets the planned generation capacity. The evidence is unclear whether the standard would be met if the OPA *planned* for less than 100% of the nameplate wind generation, and planned the transmission system accordingly.

The Board would have been assisted had Hydro One provided more evidence regarding wind generation and system planning in other jurisdictions. While Hydro One argued that the intervenor witnesses did not provide evidence of different planning practices, Mr. Brill (on behalf of the Fallis Group) testified that Florida Light & Power does not plan the transmission system to nameplate wind capacity

The Board does not consider the evidence to be sufficient to make a determination on the appropriateness of planning to full nameplate capacity. The question is whether it must do so in order to decide this application. The Board concludes it does not. Consideration of this issue is connected to the financial evaluation of the project. The financial evaluation is based on a net present value determination of transmission losses and Locked-In Energy. The Locked-In Energy costs are derived from reliability and generation production projections. The question of whether or not to plan for full nameplate capacity is not a determinative factor in the comparative financial analysis. If the conclusion of the financial evaluation was that an alternative was superior from a financial perspective, then the Board would need to assess the merits of the planning approach to determine what weight to give that factor in the overall assessment of the project. As set out later in this decision, however, the Board finds that the project is the preferred alternative from a financial perspective, and therefore an assessment of the planning approach is not necessary.

The IPSP may well examine the planning methodology. The Board's determinations in this application do not pre-judge that examination.

3.5 The Relationship between this Application and the IPSP

SON submitted that the project should not be approved in advance of the IPSP. SON argued that the application is seeking pre-approval of the IPSP because it includes 1,000 MW of planned wind and the refurbishment or replacement of Bruce B, which are core elements of the IPSP. In SON's view, it will be the IPSP, if approved, which will provide the strategic level certainty about generation that will be necessary to substantiate transmission projects, including any transmission project in the Bruce area.

SON argued that Hydro One could have implemented the near term and interim measures, to address the immediate need for enhanced transmission, so that it was not necessary to make this application in advance of the IPSP. SON submitted that because Hydro One chose to proceed with the application,

> *it was incumbent upon them [Hydro One] to establish a full case for the inclusion of the future generation elements, including sufficient evidence respecting OPA's planning work to allow this Board to fully assess that work according to the standards required for the review of such work in the context of the IPSP review.*[19]

SON concluded that the evidence provided regarding the generation forecast was insufficient, and submitted that the Board "should not approve the current application based on the paucity of evidence respecting related forecasting and planning work."[20]

Hydro One responded that "the manner in which the OPA carries out pre-IPSP Directives is not subject to Board approval either within the IPSP or outside the IPSP process."[21]

3.5.1 Board Findings

The Board does not agree with SON that Hydro One had an obligation to provide greater evidence related to OPA's forecasting and planning work. The Board is not examining the underlying planning undertaken by the OPA except to the extent it informs the determination of the reasonableness of the generation forecast and the

[19] SON, Argument, p. 15.
[20] *Ibid.*
[21] Hydro One, Reply Argument, p. 26.

economic evaluation of the project. For example, the scope of this proceeding does not extend to broader planning considerations such as the tradeoffs between generation and conservation and between different types of generation. The IPSP proceeding will deal with those issues.

With respect to the reasonableness of the generation forecast, the scope of this proceeding does not extend to a consideration of the merits of the generation itself (i.e. whether or not 700 MW of large wind *should* be procured).

The August 2007 Ministerial Directive is a pre-IPSP directive, and therefore the OPA has authority to procure the 2,000 MW of renewable generation identified in the directives whether or not the IPSP is approved. The OPA has indicated that it intends to procure 700 MW from large wind projects in the Bruce area. No further Board approval is required in that regard. Therefore, the Board's determination of the reasonableness of the wind generation forecast does not pre-judge the IPSP.

There are a number of issues for review in the IPSP proceedings that relate to nuclear generation for base-load requirements. However, in its decision on the IPSP issues, the Board noted that "many of the most significant decisions regarding nuclear power have been made, or will be made, outside this proceeding."[22] In addition, the Board has already determined that it must assess this application under two nuclear scenarios: with continued generation from eight units at Bruce NGS on the one hand, and with Bruce B retirement and no new build on the other. Therefore, the Board is satisfied that its decision in this proceeding does not pre-judge the determination of future generation at the Bruce NGS or the Board's consideration of base-load nuclear generation in the IPSP.

3.6 Is the Project Non-Discretionary?

The Board's *Filing Requirements for Transmission and Distribution Applications* (the "Filing Requirements") include provisions whereby the applicant is to identify whether the proposed project is discretionary or non-discretionary. Hydro One submitted that the project was non-discretionary because Ministerial directives require the procurement of new generation and drive the need for the project: to minimize congestion, to maintain nuclear base-load, and to increase generation from renewables.

[22] EB-2007-0707, *Decision with Reasons*, March 26, 2008, p. 23.

The Ross Group maintained that the project was discretionary because the witnesses acknowledged that the project accomplished the purposes listed under discretionary projects in the Filing Requirements, and did not testify that it met the requirements under the non-discretionary category. The Ross Group argued that because it is a discretionary project, the evidence in support of the project must be comprehensive and concluded that Hydro One had failed to meet the evidentiary burden in the application.

Hydro One responded that in its cross-examination, the Ross Group had omitted to identify the most important criteria for a non-discretionary project, namely "Projects that are required to achieve Government objectives that are prescribed in governmental directives or regulations."

The Fallis Group submitted that the rules contained in the Filing Requirements require the Board to determine whether the project need is determined beyond the control of the Applicant or is determined at the discretion of the applicant. In the Fallis Group's view, a non-discretionary project is one for which "the need is determined beyond the control of the Applicant", and this means that some party external to Hydro One should have ordered or directed Hydro One to make the application. The Fallis Group argued that the project is, by definition, discretionary, because Hydro One had the discretion not to make the application. The Fallis Group submitted that because the project is discretionary, the Board can examine it through its overall legislative objectives.

Hydro One responded that the Fallis Group argument that Hydro One was not compelled to apply for the Project was largely irrelevant.

The Fallis Group also submitted that the project should be considered in the same way as the Consolidated Hearing Board determined transmission issues previously, including an assessment of alternative technologies. The Fallis Group also submitted that the Board cannot render a final decision in advance of the EA approval and a development permit under the Niagara Escarpment Planning and Development Act.

3.6.1 Board Findings

The Board finds that the project can be categorized as non-discretionary because the need for the project has been determined beyond the control of Hydro One. Specifically, the need for the project has been determined by the OPA in its role as

system planner which is required to achieve Government objectives that are prescribed in directives or regulations.

In any event, the Board concludes that little turns on the project categorization. With respect to the Ross Group argument that Hydro One's evidence was insufficient the Board notes that issues regarding the sufficiency of Hydro One's evidence are addressed throughout the decision. The Board disagrees with the Fallis Group submission that an external party would have had to order or require Hydro One to make the application. There is no support in the Filing Requirements for that interpretation. The Board notes that regardless of the categorization, the Board's legislative objectives are relevant to the consideration of the application.

Further, the Board notes that it is clear in the Board's Filing Requirements (and in its past practice with all leave to construct applications) that it will test a proposal against the reasonable alternatives. The only difference in filing requirements for a non-discretionary project[23] is that the applicant need not evaluate the alternative of doing nothing.

Finally, contrary to the view of the Fallis Group, the Board has the authority to render a final decision in this application, in advance of the EA and Niagara Escarpment processes, provided such approval is conditional on the successful completion of those processes.

3.7 Evaluation Criteria and Identification of Alternatives

Hydro One identified that the project and any reasonable alternatives would need the following essential attributes:

- Meets the required transmission capability
- Has limited effect on other paths
- Uses proven technology
- Is constructed at a reasonable cost
- Is consistent with land use policy

In Hydro One's view, only its proposal meets these essential criteria.

[23] Filing Requirements for Transmission and Distribution Applications, November 14, 2006, section 5.3.2

Hydro One reviewed a number of potential alternatives and reached the following conclusions in respect of each:

1. "Do nothing": the Ontario power system has changed since the time when the transmission system had sufficient capability for the eight nuclear units. The heavy water plant has closed; load patterns have changed; wind is an additional generation resource; the province has an established "off-coal" policy.
2. Use of higher capacity conductor (e.g. ACCR technology): it would require 15 years and $1.8 billion to achieve the same capability as the project.
3. High Voltage Direct Current ("HVDC") options: "HVDC Lite" is not a proven technology; HVDC 500 KV was screened out on basis of cost.
4. Bruce to Essa and Bruce to Longwood: neither line could accommodate the 1,000 MW planned wind.
5. Bruce to Kleinburg and Bruce to Crieff: significantly greater land use requirements from new corridors.
6. Longwood to Middleport: this proposal by Pollution Probe does not meet the need (only provides 7,025 MW), and the evidence is that it would cost more than the proposed project.

We address the following four sub-issues:

1. Sufficiency of the evidence
2. Interpretation of the land use policy
3. Scalability and uncertain generation
4. Near term and interim measures

3.7.1 Sufficiency of the Evidence

The Fallis Group submitted that the Board determined at Motions Day that it would not consider route selection or route alternatives, thereby resulting in insufficient evidence and examination of the costs and adequacy of the various transmission route alternatives.

The Fallis Group also submitted that the more advanced conductor technology is superior to the Aluminum Conductor Steel Reinforced ("ACSR") proposed to be used in the project and is therefore a reasonable alternative for which Hydro One did not

provide adequate comparative evidence. The Fallis Group maintained that the cost estimates provided by Hydro One for this alternative were unsubstantiated and subjective.

Mr. Chris Aristides Pappas, an individual intervenor, submitted that Hydro One had not met the Filing Requirements because it had not examined in sufficient detail new conductor technologies, Flexible Alternating Current Transmission Systems, commonly called "FACTS" technologies, series compensation, etc. He further submitted that the proposed project presents significant risk to the system due to, among other things, the continued use of the BSPS.

SON submitted that by fixing the transmission transfer requirement at 8,100 MW, Hydro One "short-circuited" the evaluation of the alternatives by refusing to consider alternatives associated with less generation or alternatives which provide flexibility to accommodate uncertainty with respect to generation: series capacitors; Bruce to Essa; and Bruce to Longwood to Middleport. Therefore, the Board cannot conclude that Hydro One has considered all reasonable alternatives.

3.7.2 Board Findings

The Fallis Group submission with respect to Motions Day is incorrect. The Board decided that it would not consider route *refinements* within the applied for corridor – it was open to intervenors to explore the various route alternatives in order to test Hydro One's proposal and there was cross-examination on these alternatives.

The Board notes that Hydro One's evidence with respect to evaluation criteria and alternatives was not as good as it could have been, but the Board has sufficient evidence to make its determination. Much of the key evidence regarding comparison of the project to the alternatives was developed through intervenor interrogatories, cross-examination, and intervenor evidence. It would have been helpful to have had more analysis in the application itself, even if Hydro One was of the view that an alternative was not worthy of further consideration. As an example, Hydro One's evidence on the

"conceptual alternatives" associated with alternative conductor technologies took the form of a one-page summary filed during the course of the proceeding. The Board expects that in future applications, Hydro One will take a broader view of the relevant alternatives and will provide sufficient evidence in a timely manner to assist the Board in considering alternatives.

3.7.3 Interpretation of the Land Use Policy

Hydro One's position was that the proposal was consistent with provincial land use policy.

The Provincial Policy Statement ("PPS") reads:

> *The use of existing infrastructure and public service facilities should be optimized, wherever feasible, before consideration is given to developing new infrastructure and public service facilities.*[24]

The Ross Group submitted that the PPS should be interpreted in the following way:

- The use of "should" indicates a desire, not a legal obligation or imperative;
- Optimizing the existing corridor does not recognize that additional land acquisition is required for the proposed project as well as the two rejected alternatives.
- "Infrastructure" doesn't include the existing corridor as no specific reference to transmission corridor is made in the definition, whereas there is specific reference to transit and transportation corridors in the definition
- "Feasible" should be defined as "suitable" and should be assessed in terms of the risk of a single corridor and the adverse impact on Camp Creek Lowlands and the Niagara Escarpment.

[24] Exhibit B/Tab 6/Sch. 5/Page 10/Section 1.6.2

3.7.4 Board Findings

The Board concludes that the PPS is clearly directed toward the intensified use of existing infrastructure, including infrastructure corridors. In that context the Board concludes that intensified use of an existing corridor is preferred to an expanded corridor, and an expanded corridor is preferred to a greenfield corridor.

3.7.5 Scalability and Uncertain Generation

SON, Energy Probe and the Ross Group all argued that the proposed project was not suitably scalable. SON argued that total committed generation in 2013 will be about 7,100 MW, but that generation beyond that time could be substantially higher or substantially lower depending upon the outcomes of the IPSP, regulatory approvals, development decisions and competitive procurements:

- Generation production could be as low as 6,250 MW in 2018 if Bruce B begins retirement and if planned wind is not fully realized, generation could drop to 3,700 MW in 2022.
- Alternatively, generation production could reach higher than 8,100 MW if there is both refurbishment at Bruce B and new nuclear build and/or if wind generation beyond the current forecast of 1,700 MW is achieved.

A number of intervenors submitted that the project should be downwardly scalable given the uncertainties related to generation and noted that the Hydro One project is not downwardly scalable.

Hydro One submitted that scalability is achieved through the near-term and interim measures and maintained that there is no reasonable possibility of declines in generation in the Bruce area.

3.7.6 Board Findings

The Board concludes that scalability is an important consideration, particularly given that the project is based on a generation forecast and is not underpinned by contractual commitments. The evidence is clear that the project is designed for 8,100 MW and is not scalable to either lower or higher levels of generation. Hydro One did not take

adequate account of this factor in its analysis of the project and the alternatives. However, the Board finds that this deficiency in the application is not sufficient reasoning to reject the project. In future applications, the Board expects Hydro One to assess how sensitive its analysis of alternatives is to variations in capability requirements.

3.7.7 Near Term and Interim Measures

Hydro One identified two near-term measures which increase transfer capability by 400 MW: uprating the 230 kV Hanover to Orangeville line by 2009 and adding dynamic and static reactive resources to the transmission system in southwestern Ontario. Hydro One also identified two interim measures: expanding the BSPS; and, installing series capacitors if the project were to be delayed beyond the end of 2011. In addition the OPA will maintain the Orange Zone (which prevents the connection of further renewable generation in the Bruce area);

Hydro One argued that these near-term and interim measures do not meet the forecast need over the long term, noting that more transmission capability is needed by 2009 for both committed wind generation and Standard Offer Program wind generation. Hydro One submitted that the interim measures also cannot be considered as an alternative to the project because longer term use of generation rejection in normal conditions breaches reliability standards.

Hydro One submitted that a combination of generation rejection and series capacitors was also not a reasonable alternative. Hydro One stated that the resulting transmission capability of 7,076 MW is insufficient for the forecast need, and series compensation presents operational challenges and cannot be implemented until 2011 given the studies which are necessary (as identified by Hydro One's external consultant) to ensure reliability on the complex Bruce system.

Board staff noted that there is uncertainty around the timing of the approvals process (the Environmental Assessment) and when generation will be committed. Board staff questioned whether the interim measures (including series capacitors) would be appropriate to maintain transmission capability to meet the generation requirements in the Bruce area in the event the proposed line is delayed.

Pollution Probe submitted that a combination of series capacitors and generation rejection is a reasonable alternative which is both viable and reliable:

- Series capacitors are a mature and reliable technology, which Hydro One could implement by the end of 2011.
- The BSPS has been used for decades, which indicates its viability and reliability, and it would still be used if the new line is built.
- The BSPS should be armed more frequently to allow greater optimization of the existing system, in line with land use policy.

Pollution Probe submitted that transmission capability would be 7,076 MW with series capacitors and generation rejection, noting that Mr. Russell testified that the limit could be further increased to 7,176 MW or even 7,400 MW. Pollution Probe submitted that this alternative cannot be rejected as not meeting the need when more realistic capacity factors are used and when one considers the cost effectiveness analysis.

3.7.8 Board Findings

Hydro One screened out the project alternatives based on its criteria, and with the exception of the series capacitor/generation rejection alternative, there was limited dispute about Hydro One's analysis. The Board accepts the evidence that the Longwood to Middleport alternative would provide less transmission capability at higher cost than the proposed project.

However, the series capacitor/generation rejection alternative appears to have some merit based on the uncertainty in the generation forecast and the limited scalability of the proposed project. The series capacitor/generation rejection alternative offers the potential for greater scalability. This alternative would also be consistent with the government's land use policy in that it would result in more intensive use of the existing corridor.

The Board notes that there appear to be limited incentives for Hydro One to optimize its assets. The Board observes that Hydro One was slow to offer evidence on the comparison with "conceptual alternatives" but quick to highlight the "complexity" of series capacitors. Hydro One (and the IESO and the OPA) displayed a definite hesitancy to extend or stretch system capabilities.

It would have been more helpful to the Board if Hydro One's evidence in this area had been more comprehensive. Therefore the Board assesses the proposed project against the alternative of series capacitors/generation rejection in the next two sections: the Financial Evaluation; and the Reliability Evaluation.

The Board is indebted to the intervenors for their rigorous examination of the series capacitors/generation rejection alternative and the testing of this alternative against Hydro One's proposal.

4. FINANCIAL EVALUATION

4.1 Introduction

Hydro One explained that the Locked-In Energy ("LIE") analysis provides an estimate of the cost to Ontario consumers if the proposed facilities are not built and thus inadequate transfer capability resulted:

> *Model results depict the cumulative net present value of costs, including transmission losses and locked in energy, both for the applied-for facilities and those associated with other alternatives. Graphs depicting these results were submitted in evidence and show "cross-over points" where the costs of one option rise above those of the other being considered. Cross-over points of the cumulative cost of an alternative expressed on a NPV basis demonstrate which alternative has a higher or lower cost in the long-term.*[25]

The OPA estimated the cumulative net present value ("NPV") of the locked-in energy costs to be $1.3 billion based on the costs of the locked-in energy and losses and the BSPS upgrade costs, and assuming the near term measures have been installed.[26] If series capacitors are included the cumulative NPV of the costs falls to $917 million (the costs of the series capacitors are more than offset by the reduced locked-in energy).[27] Both of these values are well in excess of the project cost of $635 million.

Hydro One provided the graph below which depicts the cumulative NPV of costs over time for the Bruce to Milton project and the series capacitor alternative under the assumption that Bruce B is refurbished or replaced. This graph shows the cross-over point of 2019, demonstrating that while the series capacitor alternative is less expensive in the early years, its cost exceeds that of the project over the long term.

[25] Hydro One, Argument in Chief, p. 25.
[26] Exhibit C/Tab 2/Schedule 10
[27] Exhibit C/Tab 2/Schedule 11

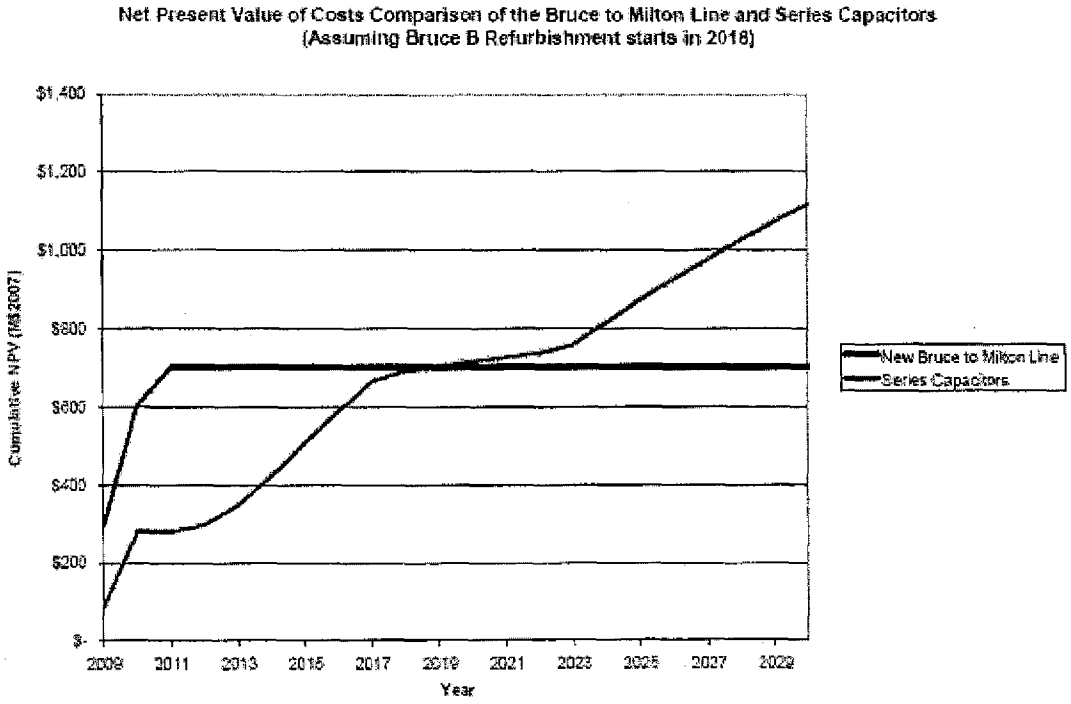


Figure 4 Source: Exhibit K.3.2, slide 1

Hydro One also provided the following graph which shows the results of the same analysis but under the assumption that Bruce B is retired. The cross-over date is unchanged, and although the costs of the series capacitor alternative level off, they remain higher than the proposed project.

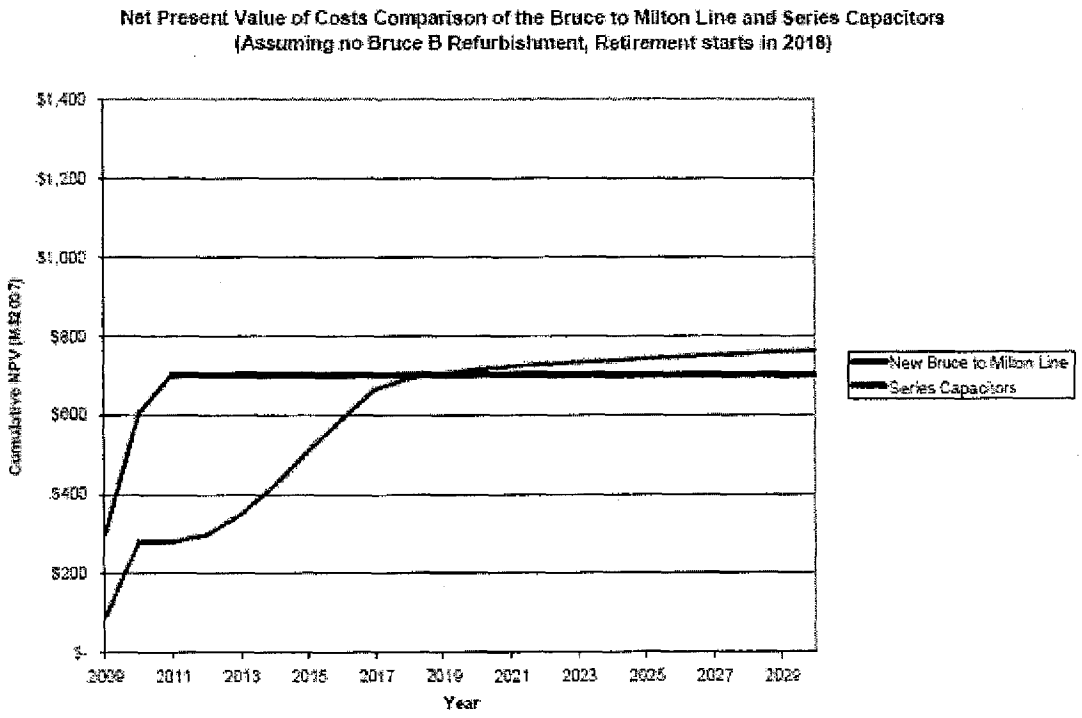


Figure 5 Source: Exhibit K3.2, slide 2

The PWU submitted that the locked-in energy analysis was irrelevant

> *because it presupposes that the task for the Board is to determine the financially optimal combination of generation and transmission resources, regardless of all other factors that make the proposed project a non-discretionary and pre-IPSP project that is recommended by the authorities mandated to do so. Such an exercise would be inconsistent with the authorities of the various entities involved in the electricity sector.*[28]

4.1.1 Board Findings

The Board disagrees with the PWU. This locked-in energy analysis is not irrelevant. The Board must assess the application in terms of prices, reliability and quality of electricity service. This financial analysis is the best means by which the Board can

[28] PWU, Argument, p. 25, paragraph 54.

assess the public interest in respect of price. This is particularly important given the uncertainties associated with the generation forecast and the OPA's approach of planning transmission capability to meet full nameplate generation even though the simultaneous maximum generation from all sources can be expected to occur infrequently.

The Board notes that the intervenors have made a significant contribution to the testing and assessment of the locked-in generation analysis and the series capacitors/generation rejection alternative. First, we examine the Pollution Probe analysis, and then we review the SON analysis.

4.2 Pollution Probe (Fagan/Lanzalotta) Analysis

4.2.1 The Approach to the Analysis

Mr. Fagan and Mr. Lanzalotta, witnesses for Pollution Probe, claimed there were a number of flaws in the OPA model and developed an alternative analysis by which to assess the project. Pollution Probe submitted that the Fagan/Lanzalotta analysis should be accepted over that of Hydro One, and concluded that the proposed line does not make economic sense compared to the alternative (series capacitors/generation rejection), whether or not Bruce B is refurbished.

Hydro One took the position that the adjustments made in the Fagan/Lanzalotta model (namely to use average capacity factors for nuclear generation for the winter/summer and shoulder periods, average capacity factors for wind, and monthly average transmission penalties) were inappropriate for the following reasons:

- Using monthly capacity factors for wind and nuclear underestimates locked-in energy: "using capacity factors as a proxy for the generation profile will under-estimate the amount of generation that is produced, and under-estimate the amount of locked-in energy, where the generation profile is variable, as in the case of wind." (p.29) The OPA convolution of wind and nuclear data captures the detailed generation profiles.
- There is minimal operating flexibility for the CANDU reactors. The OPA approach reflects actual output with more real-time precision than the Fagan/Lanzalotta approach.

- There is no substantiation for the claim of spatial diversity of wind in the Bruce area. The AWS Truewind report of October 2006 refers to spatial diversity, not the April 2007 report which OPA used. (The 2006 report uses 10 minute mast data at sites across Ontario; the 2007 report provides hourly data based on simulated aggregate generation of three "virtual" wind farms in the Bruce area based on 20 years of climate data.) The Pollution Probe approach results in a flat profile (40% for winter and shoulder and 20% for summer); the OPA's approach provides greater precision.
- Deriving the reduction in transmission system capability due to outages (the "transmission penalty") based on monthly averages does not capture real-time effects of congestion: for example, the coincidence of strong wind blowing for three hours at the same time that an unexpected transmission outage occurs. The result is that locked-in energy is underestimated in the Fagan/Lanzalotta model.
- There is no statistical analysis to demonstrate a pattern of transmission outages in shoulder time periods. The OPA testified as to why outages cannot reasonably be expected to be scheduled during shoulder period on a consistent basis.

More specifically with respect to the nuclear generation profile, Hydro One maintained that the two-state model used by the OPA is the most appropriate approach. Hydro One pointed to the chart[29] which presents the nuclear distribution curves for 2007 and submitted that the charts demonstrate that for each unit most of the time is spent either off or generating at maximum capacity. In Hydro One's view,

> *The [OPA] model takes the frequency with which each unit is actually on or off into account with the probabilistic generation profiles, based on three years of historic operating data. As a result, and because the model does not assume that every unit at the Bruce complex generates all the time, Pollutions Probe's concern that the model does not reflect aggregate generation of the Bruce nuclear complex is satisfied.*[30]

Hydro One acknowledged that the OPA model does ignore the approximate 5% of total time at which the unit operates between zero and MCR less 50MW: half would be represented by zero production and half would be represented by full production in the

[29] Exhibit. K13.1, p.1
[30] Hydro One, Reply Argument, p.16.

OPA model. While the OPA could have used a three-state model, Hydro One maintained that the minimal improvement in the model would have necessitated an "exponential increase" in its complexity.

4.2.2 Board Findings

The Board's conclusion is that the Fagan/Lanzalotta analysis has identified some areas of the OPA model which would benefit from further analysis and/or sensitivity analysis, but their model does not provide a superior way of analyzing the project. The Board would like to note, however, that it finds the presentation of alternative approaches to be particularly helpful. The Board understands the data and time restrictions intervenors face when undertaking such analysis and does not expect that such analysis would provide a complete substitute for the applicant's analysis. The Board sees the primary purpose of intervenor expert analysis to be a means of testing the robustness of the applicant's approach and presenting alternative approaches which may be appropriate for the applicant to adopt.

The Board agrees that the greater level of detail in the OPA approach is superior to the Fagan/Lanzalotta reliance on monthly capacity data. The Board also agrees with Hydro One that the OPA's approach to modelling nuclear generation based on a two-state model is superior to the Fagan/Lanzalotta monthly capacity approach in most respects. The Board accepts that the OPA approach appropriately captures the aggregate generation from the Bruce NGS, and that capturing the small amount of time during which there is partial generation from each of the units would result in minimal improvement to the model.

With respect to spatial diversity of wind, the Board notes the concern expressed in the 2006 GE Energy/AWS Truewind Report[31], referenced by Fagan/Lanzalotta, that the data may not adequately capture spatial diversity. The report observes that as a result, "the wind generation profiles produced probably overstates the variability of the combined output of the wind projects."[32] However, this comment is made in the context of the 10-minute data. The report goes on to state

[31] *Final Report to: OPA, IESO, CanWEA for Ontario Wind Integration* Study, October 6, 2006, attached to the Supplemental Direct Evidence of Robert M. Fagan and Peter J. Lanzalotta , filed May 15, 2008.
[32] *Ibid., p. 3.5.*

> *On the other hand, over periods of several hours or more, wind fluctuations tend to be more correlated between projects spaced as many as hundreds of kilometers apart. On such time scales, the lack of geographic diversity in the data probably makes little difference to the overall variability of the combined plant output.*[33]

The OPA relied upon an AWS Truewind report of April 2007. This study simulates production at specific project sites (rather than specific masts) and therefore addresses the issue of spatial diversity within a wind farm project. The OPA took the data from three sites in this study and scaled the results to the forecast total wind capacity of 1700 MW. Although the OPA did not specifically address whether this direct scaling was appropriate or whether additional consideration of spatial diversity across the region was warranted, the Board notes the earlier observation that over longer time periods, the lack of spatial diversity in the data probably makes little difference. The Board concludes that spatial diversity is unlikely to be a significant factor in the context of the OPA model.

Fagan/Lanzalotta have also identified that there is at least apparent seasonality to nuclear production and transmission capacity. It may be that this aggregate pattern has limited impact on the OPA model results given the OPA model is based on a finer temporal level (hourly rather than monthly); however the OPA did not appear to give this serious consideration. The credibility of any model is enhanced if it successfully mimics real-world experience. Hydro One criticizes Fagan/Lanzalotta for not providing statistical analysis of this apparent seasonality. While such an analysis would have strengthened the Fagan/Lanzalotta position, the observation of the pattern alone has some merit.

The Board notes that the IESO did testify that there were attempts made in real operating circumstances to coordinate nuclear and transmission outages, to the extent possible, in the shoulder period.[34] In the Board's view, it is the responsibility of Hydro One (and by extension, the OPA) to consider such circumstances and assess more thoughtfully whether the model could or should be enhanced. The Board expects Hydro One and the OPA to address this issue in the context of any future reliance on the model before the Board

[33] *Ibid.*, p. 3.5.
[34] Transcript Volume 7/pp. 129-130

4.2.3 The Results of the Analysis

The results of the Fagan/Lanzalotta analysis can be summarized as follows:

- If Bruce B is not refurbished, there will be significant excess transmission capacity when the nuclear units reach the end of their life, beginning around 2017. Fagan/Lanzalotta estimated that $245 million would be saved by using the alternative instead of the proposed line.
- If Bruce B is refurbished, the aggregate generation from the Bruce area could be transmitted almost all of the time. Fagan/Lanzalotta estimated that at least $72 million would be saved in this scenario by using the alternative instead of the proposed line.

Pollution Probe argued that in either case the savings would be even higher than estimated because of the conservative assumptions made regarding nuclear capacity factors and the low assumed transmission limit of 7,076 MW. Pollution Probe also maintained that the cost of series capacitors ($91 million) should not be included in the analysis because of other long term benefits of this technology (higher transfer capability in the event of a contingency). If the costs were included, the net savings would still be substantial in the scenario where Bruce B is not refurbished and still likely to outweigh the costs if Bruce B is refurbished.

Hydro One submitted that Fagan/Lanzalotta used the wrong data set in their analysis. They used the OPA scenario "C" (which includes series capacitors) for the comparison, whereas using scenario "B" (which does not include series capacitors) would have been more appropriate, in Hydro One's view, and would have resulted in much higher locked-in energy:

> *...Pollution Probe's assertion that $245 million would be saved by using series capacitors instead of building the line cannot by definition be correct. Mr. Fagan's results do not show the value of the line compared with series capacitors; they show the incremental value of the line after series capacitors are built. Not surprisingly, based on this approach the NPV Mr. Fagan derives is considerably lower than a proper analysis would show.* [35]

[35] Hydro One, Reply Argument, p.19.

Hydro One maintained that the OPA's analysis, which indicates net benefits of $700 million from construction of the line, is the analysis upon which the Board should rely.

4.2.4 Board Findings

Hydro One maintained that the Fagan/Lanzalotta analysis was flawed because it used scenario "C" (which includes the near term measures, the BSPS and series capacitors) for comparison purposes rather than scenario "B" (which only includes the near term measures and the BSPS). The Board does not agree. The Fagan/Lanzalotta analysis is attempting to measure the cost of locked-in energy in the series capacitor/generation rejection alternative; the analysis is not attempting to measure the incremental improvement offered by the Bruce to Milton alternative. However, given the other limitations of the Fagan/Lanzalotta approach discussed above, the Board concludes that the results cannot be relied upon to assess the project.

The Board concludes that based on the OPA analysis, the benefits of the project in comparison to the series capacitors/generation rejection alternative exceed the costs. The benefits are substantially larger than the costs if Bruce B is refurbished or replaced around 2018. This is shown in Figure 4 where the cumulative costs of the alternative are significantly higher over time than the cumulative costs of the project. If Bruce B is retired and not replaced, the cumulative costs of the alternative are still higher over time than the costs of the project, although the difference is much smaller. This is shown in Figure 5. However, the Board accepts that if Bruce B is to be retired, then it is quite likely that the plant would run beyond its current retirement date, thereby increasing the difference in cost between the two alternatives. For example, Figure 6 below shows the comparison assuming Bruce B begins to be retired in 2020 (as opposed to 2018).

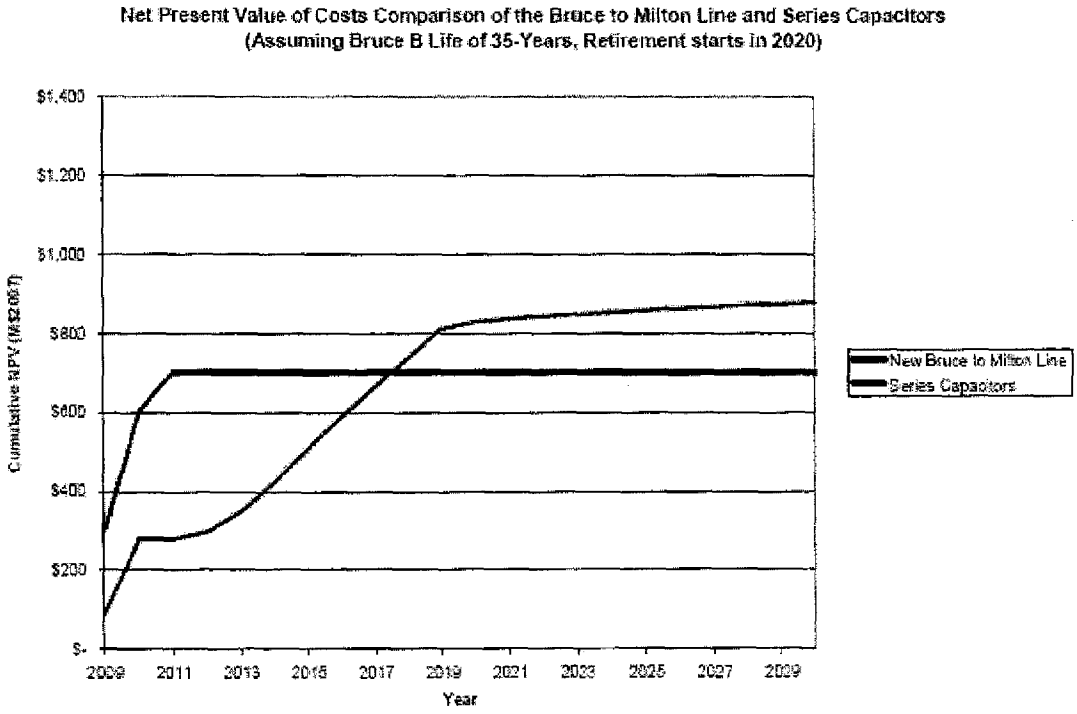


Figure 6 Source: Exhibit K3.2, slide 4

4.3 SON (Russell) Analysis

4.3.1 The Approach to the Analysis

SON submitted that the OPA NPV cost analysis cannot be used to demonstrate the comparative values of various alternatives and is of doubtful reliability given various flaws and assumptions. In particular, the model does not include:

- the annual savings associated with delaying capital costs associated with the project
- the on-going value of series capacitors and its upward scalability

Hydro One responded that the annual revenue requirement is not an appropriate proxy for the avoided costs associated with delaying the line and that delaying the line leads

to a net loss, because the line has a positive net present value. Hydro One also submitted that if series capacitors are installed and the line is subsequently built, then the series capacitors will become redundant unless the generation installed surpasses 8,100 MW.

SON further submitted that the OPA model contains the following flaws:

- Does not accurately measure the avoided costs when wind generation is locked-in, and the avoided cost data is low and outdated
- Does not include losses or outages of enabler lines
- Does not include costs for future switchgear upgrades
- The discount rate should be 10%, not 4%

(SON also submitted that the OPA model did not take account of spatial diversity or the seasonal pattern to transmission derating. The Board has addressed these criticisms in the prior section.)

Hydro One responded that:

- If the most recent avoided cost data were used, the result would make SON's alternative less attractive because the avoided costs have risen.
- Reducing the avoided costs by the cost of the wind generation fails to recognize the Market Rules and Ontario policy.
- Enabler lines are not part of the project and many wind farms in the IESO queue would not require an enabler line, and any alternative would be subject to the same circumstances.
- Expected future upgrades to the Milton station, beyond those included as part of this project, are not related to the project.
- It is appropriate to use a real social discount rate, not a utility-specific nominal rate, when discounting unescalated non-utility cashflows.

SON concluded the OPA model was not a viable system planning tool. Hydro One responded that the model is not intended to be a system planning tool; it complements and confirms the nameplate planning methodology.

4.3.2 Board Findings

The Board's findings in respect of Mr. Russell's analysis are largely the same as for the Fagan/Lanzalotta analysis: namely that Mr. Russell's analysis provides useful insights and valuable testing of the OPA model, but ultimately Mr. Russell's approach cannot be relied upon to evaluate the project. The Board would like to note that it was greatly assisted by the testimony of Mr. Russell.

As with Pollution Probe, SON and Mr. Russell have raised legitimate challenges to the OPA analysis. The Board has already addressed the issues of seasonality in transmission capability and spatial diversity for wind in the prior section of this decision.

The Board does not agree with SON's criticisms with respect to the avoided costs, losses on the enabler lines, and the costs of switchgear upgrades. The Board accepts Hydro One's position that the switchgear upgrades are outside the scope of the analysis and that losses on enabler lines would be common to any of the alternatives being analyzed. With respect to the avoided cost data, the Board notes that the current Navigant data is higher than that used by the OPA and hence the OPA analysis understates the costs of locked-in energy.

The Board does not agree with SON that a 10% discount rate is appropriate. No evidence was lead in support of this level and the Board notes that 10% is substantially in excess of the discount rate set out in the Board's Transmission System Code for economic evaluation of connections. That discount rate is the transmitter's after-tax cost of capital, which in the case of Hydro One is a nominal rate of 5.47%. The Board accepts the use of a real discount rate of 4% in these circumstances.

The Board also disagrees with SON's argument that the savings from locking-in higher cost wind energy should be included. The Board agrees with Hydro One that it would be inappropriate to reduce the avoided costs by the amount of the avoided wind generation costs. First, the Market Rules are such that wind generation is the last to be curtailed, and standard offer wind is not curtailed. Second, if wind generation were to be subject to curtailment, then the wind developers will factor that into their bids in response to the OPA's procurement process. Third, the model uses Navigant's estimates of avoided costs (developed for purposes of evaluating conservation and demand management programs), which are possibly lower than the costs which would

actually be paid for replacement generation using the IESO's Hourly Ontario Energy Price ("HOEP").

With respect to voltage support costs, the Board finds that while there is substantial dispute as to the level of these costs, it would not be appropriate to assume these costs are zero.

Based on these findings, the Board concludes that Mr. Russell's scenarios which show cross-over points beyond approximately 2024 are not relevant.

Although the Board accepts the assumptions used by the OPA, it would be helpful for future evaluations if the OPA were to conduct some sensitivity analysis around these key variables.

4.3.3 The Results of the Analysis

SON argued that the series capacitor/generation rejection alternative would provide 87%-91% of the full nameplate capacity of OPA's assumed 8,100 MW of generation for $535 million less than the cost of the project. SON maintained that Hydro One's own evidence is that this alternative would support a minimum of 7,076 MW (under stressed conditions) up to 7,476 MW (with voltage support). SON maintained that this alternative would provide a lower cost option for meeting committed requirements and allow a staged approach to planning for future requirements given the current uncertainties around wind and nuclear generation.

SON's expert, Mr. Russell, used the OPA's model to analyze a variety of scenarios with Bruce B retirement and with Bruce B refurbishment and with and without voltage support costs. Based on this analysis, the cross-over dates of the cumulative cost NPV varied from 2018 to beyond 2030. SON concluded that these dates suggest that Hydro One could install the series capacitor/generation rejection alternative and have a large window of opportunity to determine whether and to what extent future transmission upgrades are necessary based on actual generation from the Bruce area.

Hydro One acknowledged that the inclusion of voltage support at a cost of $70 million extends the cross-over point, but argued that the evidence is that the cost estimate was likely low and therefore the analysis could not be relied upon. Hydro One asserted that

using a voltage support cost of $105 million would bring the cross-over point forward in time. SON responded that neither Hydro One, nor the OPA, nor the IESO had studied the actual costs of voltage support and that the evidence Hydro One relied on for a higher estimate came from a study developed for a different purpose. Hydro One replied that it was meeting the Filing Requirements by not analyzing options that did not meet IESO reliability standards and did not meet the need identified by the OPA.

With respect to the analysis generally, Hydro One argued that the model cannot be used to justify a delay because it is a cumulative analysis, and not an annual analysis. The cross-over point does not show when another alternative becomes more attractive; it is the point at which the cumulative costs of the alternatives are equal. This is demonstrated by the analysis in Exhibit J14.1 which shows that the projects cannot be sequenced to minimize costs.

Hydro One concluded that a "wait and see approach" does not take proper account of the locked-in energy (due to delay) and duplicated costs, which in Hydro One's view exacerbate price, quality and reliability risks, to the detriment of ratepayers. Hydro One maintained that this would be neither prudent nor cost effective planning and that Mr. Russell's analysis, as presented in Exhibit J14.1, demonstrates that implementing series capacitors now and the constructing the Bruce to Milton line later is a much more expensive option than building the Bruce line now.

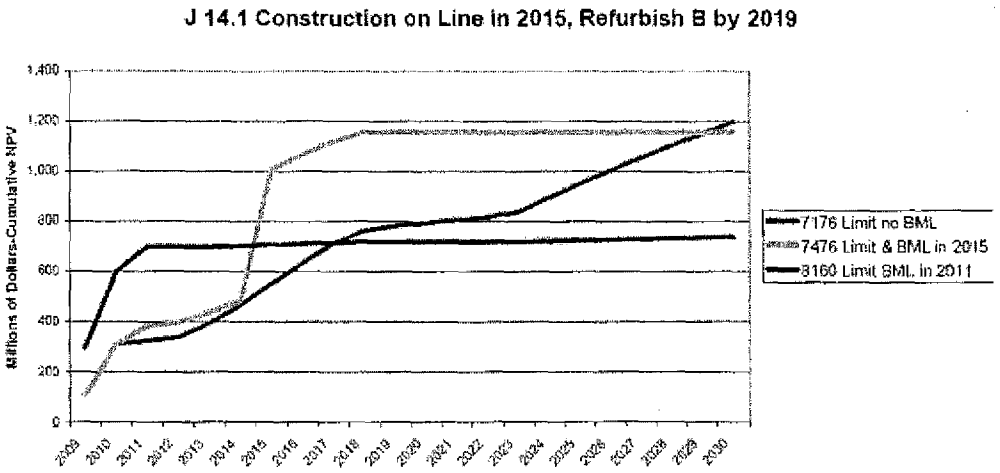


Figure 6 Source Undertaking, J14.1

Hydro One also maintained that the series capacitor/generation rejection alternative was not better from an economic perspective. Hydro One noted that the OPA analysis shows the cross-over in 2018-2019, even if Bruce B is not refurbished, with significant reliability benefits prior to the cross-over. Hydro One maintained that even under the SON alternative analysis, the furthest cross-over point is 2030, which is only 20% of the way through the expected 100 year lifespan of the project. Hydro One argued:

> *In most circumstances, the cross-over occurs in the 2018 or 2019, at about the anticipated commencement time of the refurbishment or retirement of the Bruce B units. This result, using Mr. Russell's own supplementary evidence, indicates that the issue of the future of Bruce B can be removed from the decision-making surrounding the line. As the evidence shows, the line is economically justified even if Bruce B is not refurbished. And if refurbishment or replacement does occur, the line provides considerable upside economic and reliability benefits.*[36]

SON characterized Hydro One's approach in the following way:

[36] Hydro One, Argument in Chief, p. 27.

> *Hydro One suggests that the Board can approve of this Project, and the 635 million dollar expenditure, not on the basis of a current demonstrated need, but on the basis that OPA's financial model predicts a cost savings that may occur in the distant future.*[37]

SON disagreed with this approach. In SON's view, the financial evaluation model has not been used to assess the situation where all "planned" generation is removed. In SON's view:

> *The Board simply has no evidence to determine whether the applied-for project has a lower NPV than alternatives when "planned" generation of 1000 MW of wind and Bruce "B" refurbishment or replacement is removed from the analysis.*[38]

4.3.4 Board Findings

SON and Mr. Russell's main conclusion is that the analysis supports a "wait and see" approach. Their contention is that the series capacitor/generation rejection alternative is sufficient to meet the load requirements until such time as the generation forecast becomes more certain:

- If Bruce B is neither refurbished nor replaced and depending upon the level of wind generation, then the Bruce to Milton line will not be required and Hydro One can continue to rely on the series capacitor/generation rejection alternative.
- If Bruce B is refurbished or there is new build, then the Bruce to Milton line could be installed later.

However, as Hydro One points out, the analysis is cumulative, not annual, and therefore installing both options results in significantly higher costs and reduced net benefits in the event the 8,100 MW forecast is accurate. This might be appropriate if there were the prospect of significant economic benefits from relying on the series capacitor/generation rejection alternative in the event Bruce B is retired and there is no new build. However, that is not the case. In the event there is no Bruce B refurbishment or new build, and assuming the conservative (low) estimate of voltage support costs, the NPV of costs cross-over point under Mr. Russell's analysis is in the

[37] SON, Argument, p. 21.
[38] *Ibid.*

range of 2018-2019.[39] As a result, there is no significant economic benefit to not having built the line because at the point when Bruce B retirement begins the cumulative value of the alternatives is the same. The Board's conclusion is that the economic analysis does not support a "wait and see" approach. The OPA analysis assuming no Bruce B refurbishment or new build also has a cross-over date of 2019.[40]

While the Board agrees that the OPA analysis does not examine the impact of removing the 1,000 MW wind generation, the Board has already concluded that there is sufficient certainty regarding that aspect of the generation forecast.

4.4 Conclusions on the Financial Evaluation

The Board concludes that there are two potential shortcomings to the OPA model: the model assumes no correlation between nuclear production and transmission capability and no pattern of seasonality to either. The evidence, however, is that operators attempt to coordinate nuclear and transmission outages, and do so in the shoulder seasons. On the other hand, in some ways the OPA model has taken a conservative approach (and therefore understated the benefits of the project):

- The model does not include the "take or pay" costs associated with the Bruce A contracts, and therefore may underestimate the cost of any locked-in nuclear generation.
- The model assumes there will be the same transmission derating experience as took place from 2005 to 2007. However, under the series capacitor/generation rejection alternative, the system would be under greater stress and therefore the actual level of derating would likely be higher.
- The model uses estimates of avoided costs, which are possibly lower than the costs which would be paid for replacement generation (HOEP).

The Board finds that the OPA analysis supports the conclusion that, from an economic perspective, the proposed project is preferable to the series capacitor/generation rejection alternative, whether or not Bruce B is refurbished or replaced. The Board also finds that the benefits of the project in terms of reduced locked-in energy meet or exceed the costs of the project whether or not Bruce B is refurbished or replaced.

[39] Supplementary evidence of SON, Appendix A, p.2 and 4
[40] Exhibit K3.2

5. RELIABILITY EVALUATION

5.1 The Proposed Project

With respect to the Ontario transmission system operation, Hydro One submitted that it needed to de-stress an already stressed system:

> *The Project will provide more of a margin for contingencies and scheduling maintenance, reduce the amount of operating reserve required during outage conditions, and have less complicated re-dispatch actions following contingencies and lower power losses.*[41]

Hydro One noted that the IESO, which is the standards-making body, testified that the proposed line is the best alternative that meets the need from the perspective of reliability.

Hydro One made the following submission:

> *The SIA [IESO System Impact Assessment] concludes that the Project will not result in material adverse effects to the power system, subject to the installation of dynamic compensation, specified shunt capacitors banks and the enhancement of the BSPS (all of which form part of the near term and interim measures).*[42]

Hydro One noted that the Customer Impact Assessment ("CIA") concluded that there will not be any adverse impacts on southwestern Ontario customers.

Hydro One argued that installing more 500 kV lines on a common corridor does not breach reliability standards and that there are risk management procedures in place to address the extreme contingency of a loss of right of way. Hydro One pointed to the IESO testimony to the effect that the consequences of the loss of the right of way are assessed and are acceptable and manageable.

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[41] *Ibid.*, p. 24.
[42] Hydro One, Argument in Chief, p. 61.

5.1.1 Board Findings

The Board finds that the proposed project meets all the necessary reliability requirements. Specifically, the evidence is that all of the requirements of the SIA will be met and that no adverse consequences were identified in CIA. The only substantive issue raised was the risk associated with placing the new line adjacent to an existing line. The Board accepts the evidence of the IESO that a shared right of way does not breach reliability requirements. The Board recognizes that a separate transmission corridor might provide higher reliability but notes that such an approach would entail higher costs and would not be consistent with Ontario's land use policy.

5.2 The Series Capacitor/Generation Rejection Alternative

Hydro One submitted that the transmission and reliability standards are set out in licence conditions, the Transmission System Code, the IESO's Ontario Resource and Assessment criteria ("ORAT"), and the IESO's Market Rules. Hydro One noted that series capacitors would be a new technology on a critical part of the Ontario power system but acknowledged the external consultant's conclusion that series capacitors can be installed provided necessary studies are undertaken. Hydro One expressed more concern about generation rejection and argued that the long term use of the BSPS does not accord with the Northeast Power Coordinating Council ("NPCC") and IESO reliability standards.

The IESO also submitted that long term use of series compensation and generation rejection under normal conditions was inconsistent with NPCC and IESO reliability standards.

Hydro One noted that reducing reliance on the BSPS was one of the project objectives.

Hydro One submitted that long term reliance on generation rejection through a Special Protection System ("SPS") is not permitted under ORAT. Section 3.4.1 reads:

> *[A]n SPS associated with the bulk power system may be planned to provide protection for infrequent contingencies, for temporary conditions such as project delays, for unusual combinations of*

> *system demand and outages, or to preserve system integrity in the event of severe outages or extreme contingencies.*[43]

The section also provides further clarification that a Type 1 SPS (the Bruce SPS is a Type 1) is "reserved only for few specific conditions, including transition periods to enable new transmission reinforcements to be brought into service."[44]

The Ross Group argued that prior to March 2007 the IESO did not preclude the long-term use of SPS and that the limitation on the use of the SPS was only introduced with the fundamental change to the ORAT in February 2007. SON questioned the IESO's authority to create the stricter reliability criteria and pointed out that Hydro One, in its response to IESO, challenged the IESO's jurisdiction to make changes to transmission planning standards. Mr. Russell testified that the change was substantially stricter than the NERC and NPCC requirements and the prior IESO criteria.

SON concluded that even with the questionable change, the provisions do not preclude the interim use of generation rejection as part of a series capacitor alternative. When actual transmission requirements become more certain, further planning can be done: if generation declines, then the generation rejection will be armed less frequently; if generation increases, then transmission upgrades will reduce the need for arming.

Hydro One discounted the SON suggestion that IESO does not have the authority to create new reliability criteria. In Hydro One's view, the position it expressed in 2006 is dated, and the IESO standards which have been issued are legislatively underpinned and not optional.

Hydro One submitted that the proposed expansion and intensified use of the Bruce SPS increases the operational complexity of the system and sparked NPCC concern.

NPCC is one of ten Regional Reliability Councils located throughout the United States, Canada and portions of Mexico that together make up the North American Electric Reliability Council ("NERC"). As a member of NERC, NPCC provides for its members

[43] Exhibit K10.2, tab 19, ORAT, s. 3.4.1.
[44] *Ibid.*

broad based industry-wide reliability standards. The NPCC developed a standard titled "Basic Criteria and Operation of Interconnected Power Systems", which was most recently revised on May 6, 2004. The criteria described in that standard are applicable to design and operation of bulk power systems (in Ontario it is the transmission system operating at voltages above 50 kV).

SON submitted that the NPCC was asked to consider and approve an SPS expanded beyond historical levels and likely more expansive than what would be required under a series compensation alternative (since transfer capability will be increased). SON submitted that it was clear that if the series compensation alternative were pursued, a revised BSPS would need to be developed and assessed for compliance with reliability criteria in the normal course, but that any conclusion as to the NPCC response would be speculation at this point.

5.2.1 Board Findings

There is no dispute that the proposed line provides a higher level of reliability than the series capacitor/generation rejection alternative. The issue is whether the series capacitor/generation rejection alternative meets the relevant reliability standards. Hydro One did not dispute that the series capacitor/generation rejection alternative would meet the relevant reliability standards if it were being used on an interim basis. The dispute arose primarily in terms of whether the series capacitor/generation rejection alternative would satisfy reliability standards if it were to be relied upon over the long-term. While SON proposed that series capacitors could be used in the "interim", it contemplated their potential use until 2021 or later, depending upon the timing of the line installation. The Board finds that this period extends substantially beyond what could be considered an "interim" period.

Under the current IESO ORAT standard, long term use of the alternative quite clearly does not meet the standard. The intervenors did not dispute this; rather they questioned the underlying reliability standard. The Board agrees with Hydro One that the standards themselves are not an issue before the Board in the current proceeding. The current standards are in force and the Board is not in a position to substitute a different standard, even a pre-existing standard.

With respect to the NPCC standards, the Board agrees that it can only speculate as to whether a series capacitor/generation rejection alternative would be approved as a Type I SPS system.

Even if it were established that the series capacitor/generation rejection alternative could be relied upon in the long term, it is clear that the proposed project is a superior alternative in terms of reliability. Further, it has already been determined by the Board that the proposed line is also the preferred alternative from an economic perspective.

6. LAND MATTERS

In accordance with Section 97 of the OEB Act, the Board must be satisfied that Hydro One either has or will offer to each owner of land affected by the approved route an agreement in a form that it has been approved by the Board.

The approved issues list contained two issues related to land matters.

- Are the forms of land agreements to be offered to affected landowners reasonable?
- What is the status and process for Hydro One's acquisition of permanent and temporary land rights required for the project?

6.1 Forms of Land Agreements

The following forms of agreement were included in Hydro One's leave to construct application:

- Easement Agreement
- Agreement of Purchase and Sale
- Offer to Grant an Easement
- Option to Purchase
- Damage Claim Form
- Damage Release Form
- Access for Testing and Associated Access Routes Agreement
- Off-Corridor Temporary Access and Access Roads Agreement

In its submission Hydro One indicated that no party has challenged the forms of land agreements to be offered to landowners as presented in the pre-filed evidence.

Hydro One further stated that Powerline Connections as a group representing over one hundred properties that will be offered those agreements support the forms of agreement.

While the Fallis Group stated that the forms of agreement are in reasonable as far as they go, it submitted that they lacked annual perpetual recognition payments.

6.1.1 Board Findings

The Board notes that no party has raised any concern with the forms of land agreements to be offered to affected landowners. The Board approves the forms of agreement to be offered to the affected land owners.

The Fallis Group's issue related to compensation is not within the scope of this proceeding[45].

6.2 Status and Process for Acquisition of Permanent and Temporary Land Rights

Hydro One submitted that throughout this proceeding, significant time, care and attention had been placed by Hydro One on the implications that a project of this magnitude and of this size would have on individual landowners. Hydro One stated that it had been assisted by Powerline Connections in developing and addressing concerns that, in effect, fall outside of the jurisdiction of this Board, namely, the compensation for land acquisition.

Powerline Connections informed the Board by way of a letter dated April 28, 2008, that it had withdrawn its opposition to Hydro One's section 92 application. In its letter Power Line Connections referenced progress in three main areas which was cited as the reasons for this withdrawal:

- The completion of Hydro One's review of routing alternatives and the report dated March 14, 2008;
- The response of Hydro One to Powerline Connections' interrogatories which secured substantive information to its members to help out in their planning and mitigation strategies; and

[45](1) The Oral Decision: Transcript Vol. 6, May 8, 2008, pages 72-74 ;
(2) Reminder of the Oral Decision, Transcript, Vol. 9, May 13, 2008, pages 1-2 ;
(3) Issues Day Decision and Order, September 26, 2007, Appendix A, Issues List

- The release of Hydro One's land compensation principles for the Bruce to Milton line, which was based on consultation with landowners including Powerline Connection represent a significant progress and departure from previous practices by Hydro One's predecessor.

For its part, the Fallis Group submitted that the Environmental Assessment process and this Leave to Construct process are "out-of-step" and therefore there is no way to determine the status and process for Hydro One's acquisition of permanent and temporary land rights.

6.2.1 Board Findings

The Board recognizes that the need to plan for the acquisition of project associated land rights concurrently with the design stages of a project requires a measured and conditioned approach. There is a need to match the efforts in securing land rights to the certainty of the route and the obtaining of various project approvals.

The Board does not accept The Fallis Group's assertion that the status and process for Hydro One's acquisition of permanent and temporary land rights is undeterminable. The Board has already ruled on the acceptability of the sequence and timing of the two separate processes and finds that the status and process as they relate to this proceeding are readily determinable as has been demonstrated by the Powerline Connection Group.

The Board is satisfied that the steps taken by Hydro One in relation to land rights acquisitions have been commensurate with the evolutionary nature of the project.

7. ABORIGINAL CONSULTATION

7.1 Background

Issue 6.1 of the Issues List deals with Aboriginal consultation:

> Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights are affected by this project been identified, have appropriate consultations been conducted with these groups and if necessary, have appropriate accommodations been made with these groups?

The Board also provided the following direction to parties on the final day of the oral 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.*[46]

Hydro One filed evidence relating to its Aboriginal consultation activities, including information detailing which Aboriginal groups were contacted, how they were selected, and an overview of the results of the consultations as of that time. All parties agreed that Aboriginal consultation for the project as a whole is ongoing and has not been completed.

No other party called evidence on Aboriginal consultation issues. MNO filed a series of documents relating generally to the Métis People and consultation for the project, which its counsel reviewed with the Hydro One witness panel.

[46] Transcript, volume 14, pp. 2-3.

7.2 The Issues

The Duty to Consult

Although there is disagreement amongst the parties regarding the Board's specific role, there appears to be broad agreement regarding the overall nature of the duty to consult.

The duty to consult flows from s. 35 of the *Constitution Act, 1982*:

> 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.

All parties made reference to the three Supreme Court cases that originally described the duty to consult.[47] These cases make it clear that the Crown has a duty to consult with Aboriginal groups prior to taking any action which may have an adverse impact on an Aboriginal or treaty right. In certain circumstances, there will also be a duty to accommodate Aboriginal interests. The duty to consult (including the duty to accommodate where appropriate)[48] arises where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it. The extent of the duty requires a preliminary assessment and is proportionate to the strength of the case supporting the existence of the right or title in question, and to the seriousness of the potentially adverse effect upon the right or title claimed.

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[47] *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*").
[48] Any reference to the "duty to consult" in this decision includes the duty, where appropriate, to accommodate.

On these general points there appears to be broad agreement. In addition, no party argued that the Board itself had a duty to consult on the project. Where the parties differ is with regard to the Board's role in assessing the adequacy of the consultation.

The Board's Role

The Board's authority to approve leave to construct applications for electricity transmission projects comes from sections 92 and 96 of the *Ontario Energy Board Act*. Section 92 states:

> *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.*

Section 96(2) of the Act places certain restrictions on the scope of the Board's review:

> *In an application under section 92, the Board shall only consider the interests of consumers with respect to prices and the reliability and quality of electricity service 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.*

An issue the Board must consider here is whether it is required to evaluate the adequacy of the consultation conducted by reference to the whole of the project and its potential impacts despite the section 96(2) restrictions on the Board's jurisdiction.

In the submissions of SON and MNO, the answer is yes. In its submissions, MNO states that the duty to consult arises from section 35 of the *Constitution Act*. It is a super-added duty that runs parallel to existing statutory and policy mandates. In other words, it cannot be legislated away. MNO submitted: "the OEB, as a statutory Crown decision-maker, whose discretionary authorization (i.e. a leave to contract [*sic*] order) has the potential to adversely affect Aboriginal peoples is accountable and responsible to ensure the constitutional duty has been discharged in relation to its authorization."[49]

[49] MNO final argument, para. 45

MNO cited the Supreme Court decision *Paul v. British Columbia (Forest Appeals Commission)*[50] ("Paul") in support of its contention that Crown statutory decision makers have the jurisdiction to consider Aboriginal rights related issues in the course of their decision making:

> *I am of the view that the approach set out in Martin, in the context of determining a tribunal's power to apply the Charter, is the only approach to be taken in determining a tribunal's power to apply s. 35 of the Constitution Act, 1982. 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 concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provisions. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.*[51] *[Emphasis added by MNO]*

MNO then points to s. 19(1) of the OEB Act, which states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." In MNO's analysis, this leads to the conclusion that the Board has the jurisdiction to consider questions of constitutional law and s. 35 or any other related constitutional provision in its decision making process, including Aboriginal consultation issues.

SON also cites the *Paul* case and makes a similar submission:

> *... as a statutory tribunal, the Board must exercise its decision-making functions in accordance with the dictates of the Constitution, including s. 35(1) of the Constitution Act, 1982. The Board is therefore required to respect and honour, not ignore, the duty to consult and accommodate.*[52]

[50] [2003] S.C.J. No. 34
[51] *Paul*, para. 39.
[52] SON final argument, p. 42.

SON further submitted that the EA is an administrative and political process, and was therefore not an appropriate mechanism for making an independent determination regarding the Crown's consultation obligations.

SON concluded that, since consultation for the project is clearly not completed, the application should be denied.

Board staff adopted a different view. It was Board staff's submission that in this case the Board should only consider Aboriginal consultation issues that relate to prices, reliability and quality of electricity service. Board staff did not rule out the possibility of the Board considering broader consultation issues in some cases; it stated that where no other Crown actor had a responsibility to consider consultation issues relating to matters other than prices, reliability and quality of electricity service, the Board might have to adopt that role. However, given that Aboriginal consultation issues were being considered through the EA process, it was Board staff's view that the Board did not have to adopt that role in this case.

Hydro One submitted that the Board's s. 35 responsibilities are limited by its mandate under the OEB Act. The Board's s. 35 obligations, therefore, can relate solely to prices, reliability and quality of electricity service. Hydro One took issue with MNO's submission that the duty to consult is a super-added duty for the Board, and that it stands as an independent requirement of the Board outside of its enabling statutes. In Hydro One's view there is no authority for this proposition, and it should be rejected. In Hydro One's analysis, the *Paul* decision simply describes the nature of an administrative tribunal:

> *it does not stand for the proposition that Crown consultation must occur in only one venue, that the decision maker's scope of authority is expanded beyond that which is expressly provided for in the applicable legislation and that the first decision maker to consider any consultation aspects must consider all consultation aspects."*[53]

Hydro One submitted that the Board would in no way be delegating or deferring its duty to consult by leaving the issue to the EA process, because the Board has never had responsibility for any s. 35 duties relating to environmental matters. This is an

[53] Hydro One reply argument, p. 32.

obligation of the Minister of the Environment, and has never been an obligation of the Board. The Board's mandate is restricted to prices, reliability and quality of electricity service, even when considering Aboriginal consultation issues.

7.3 Board Findings

The Board's Jurisdiction to Consider Aboriginal Consultation Issues

It is agreed by all parties that Aboriginal consultation is required for the project as a whole. Where the parties disagree is with respect to the scope of the Board's assessment of the consultation. The issue presented by the parties was not whether the Board itself had an obligation or duty to consult but whether the Board had a duty to determine whether the Crown had engaged in adequate consultation. The Board's role, in this case, is to assess whether or not adequate consultation has taken place prior to granting an approval.

The Board is not aware of any cases in which a tribunal has been found to be responsible for either conducting Aboriginal consultation, or for making a determination as to whether or not Aboriginal consultation has been sufficient. Neither is the Board aware of any cases stating that a tribunal does not have these responsibilities. It appears that this issue has yet to be addressed by a Canadian court.

In the absence of definitive guidance from the courts, the Board must analyze the statutes and precedents that do exist and come to a reasoned conclusion.

Paul holds that tribunals that have the authority to determine questions of law have the jurisdiction to deal with constitutional issues. The Board accepts that it has the authority and duty to consider questions of law on matters within its jurisdiction.

Parties suggested that the Board should not approve the application because the consultation in the EA process is incomplete and/or inadequate, and that the leave to construct should only be granted when the Board determines that the consultation as a whole is complete and has been adequate. The Board does not agree with either proposition.

Although the Board has the authority to determine questions of law, the EA process is beyond the Board's jurisdiction and therefore the Board does not have the authority to determine whether the Aboriginal consultation in that process has been sufficient. The Board cannot assume authority over matters that are clearly within the legislated jurisdiction of the EA process. In addition, parties argued that the Board should consider the requirement for Aboriginal consultation related to the development of generation. The Board disagrees. The matter before us is the approval to construct transmission facilities. It does not include the approval of plans for, or development of, generation facilities. Therefore, it is not within the Board's jurisdiction, in this case, to consider the adverse impacts on Aboriginal peoples requiring consultation related to the development of generation.

Regardless of the issue of jurisdiction, the consultation surrounding this project as a whole is clearly not complete. The issue for the Board, therefore, is whether a leave to construct may be granted in the absence of a complete consultation.

Some parties suggest that the Board may not grant a leave to construct until the consultation for the project as a whole is complete. The Board does not think this is necessary. In a general sense this would be impractical and in this specific case it is unnecessary because the Board's leave to construct order is conditioned on completion of the EA process and the EA process will be dealing with the consultation issues raised in direct relation to this project.

There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. It is not necessary that each Crown actor that is involved with an approval for the project take on the responsibility to ensure that consultation for the entire project has been completed; such an approach would be unworkable. It would lead to confusion and uncertainty and the potential for duplication and inconsistency. It would also potentially lead to a circular situation in which each Crown actor finds itself unable to render a final finding on consultation because it is awaiting the completion of other processes. The *Paul* case directly addresses this practicality issue:

> *Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law.*

> *This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.*

The *Paul* case predates the *Haida* case; however in the Board's view this principle applies equally in the consultation context. As a practical matter it is unworkable to have to 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 the 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.

The Evidence

Based on the evidence and argument before it, the Board is unable to identify any adverse affect on an Aboriginal or treaty right that would occur as a result of the Board's granting a leave to construct. Nor has any party identified any such issue on which there has been a failure or refusal to consult.

Neither SON nor MNO called a witness in this proceeding to address issues relating to Aboriginal consultation. MNO did file a number of documents which provided information about the Métis People. Several documents reference the asserted Métis Aboriginal right to harvest and other land related issues. For example, in a letter to HONI regarding Métis consultation on the Bruce-Milton transmission line, the MNO wrote:

> *The Crown has never undertaken a Métis traditional land use study and has never provided support to the MNO to undertake such a study in order to identify Métis land use, harvesting practices, sacred places, Métis cemeteries, etc. in the region. As such, the MNO is very concerned that Métis harvesting practices or use of land in the region has not been considered in the development of the Project.*[54]

[54] Exhibit K9.6- Letter dated March 31, 2008, filed in this proceeding as Tab 10 of the Evidentiary Submission filed on April 18, 2008 by the Métis Nation of Ontario

MNO also filed a map showing Métis traditional harvesting territories (which include the Bruce peninsula)[55].

In its pre-filed evidence, Hydro One filed minutes from a number of meetings between itself and SON. Counsel for SON questioned Hydro One's witnesses regarding the consultation activities it had undertaken with SON. Both the minutes from the meetings and the responses under cross examination from Hydro One witnesses reveal that SON had raised a number of concerns about the proposed project. Specific reference is made to, amongst other things, archaeological issues, biological issues, and issues relating to how the project fits in with the overall generation and transmission plans for the Bruce area. There are references to "local benefit" or economic issues, but the main thrust of the concerns relate to what can best be described as environmental or land related issues.

All of the evidence is that the consultation issues relate to the EA process and generation planning decisions. Generation planning is beyond the scope of the project and is the subject of other ongoing consultations. The Memorandum of Understanding between the Ministry of Energy and Hydro One[56] clearly sets out the Crown's acknowledgement of its duty to consult and establishes those areas where Hydro One will undertake some aspects of that consultation for this project. The EA process is a key component.

The Environmental Assessment Process

In addition to the Board's approval, Hydro One must complete the EA in order to commence building the project. The EA is conducted under the aegis of the Minister of the Environment, and the EA is not complete until it is approved by the Minister. The terms of reference ("TOR") for the EA were filed with the Board in this proceeding. The TOR includes 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 states:

[55] Exhibit K9.6- Métis Traditional Harvesting Territories Map, Tab 5 of the Evidentiary Submission filed on April 18, 2008 by the Métis Nation of Ontario
[56] Exhibit K8.1

> *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).*[57]

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.*

The EA process, which must be 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.

[57] Approved Terms of Reference of the EA dated April 4, 2008, Pages 74-75

The Board's leave to construct order is conditioned on the granting of all other necessary approvals and permits. Specifically, the Board's order is conditional on successful completion of the EA process. In this way, the Board has satisfied itself that the process of assessment of the duty to consult (including the duty to accommodate where appropriate) will be completed prior to the commencement of the project and in a practical and workable manner.

The Board's Proposed Aboriginal Consultation Policy

Both MNO and SON made reference to the Board's draft Aboriginal Consultation Policy ("ACP").

The Board issued the draft ACP for comment on June 18, 2007. A variety of stakeholders, including several Aboriginal groups, made submissions to the Board on the draft policy. Every Aboriginal group that made substantive comments on the draft, including MNO, was opposed to the ACP as drafted and asked that the Board not adopt it. To date, the Board has not adopted the ACP, and it currently has no formal policy with regard to Aboriginal consultation.

The Board has recognized that whatever consultation responsibilities it has exist irrespective of the existence of a formal consultation policy. For that reason it has considered Aboriginal consultation issues on a case by case basis as proceedings have come before the Board. In one case cited by MNO, which was released in October 2007, the Board made reference to its proposed ACP. This decision clearly identified the ACP as "proposed" as opposed to final, and should not be taken to mean that the Board has in fact adopted an ACP. In fact, the MNO appears to have recognized that the ACP was still only a draft in a letter to Hydro One dated November 27, 2007:

> *...the Ontario Energy Board has recently issued a draft Aboriginal Consultation Policy that requires all proponents to provide information in their future applications to the Board on how the Aboriginal communities who may be affected by the projects being proposed by proponents have been consulted.*[58]

[58] Exhbit K9.6- Letter dated November 27, 2007 addressed to Hydro One, Tab 9 of the Evidentiary Submission filed on April 18, 2008 by the Métis Nation of Ontario

8. PRICE IMPACTS

Section 96(2) of the OEB Act states that the Board shall only consider the interests of consumer's with respect to prices and the reliability and quality of electricity service when it considers whether the construction of an electricity transmission line is in the public interest. With respect to the cost estimate and rate impact, Hydro One maintained that the $635 million cost estimate was confirmed throughout hearing and that the resulting 9-10% increase in the Transmission Network Pool Rate and 0.45% increase in total electricity bill to a typical residential customer was acceptable. Hydro One noted that the estimated impact for a typical residential customer is $0.50/month.

Mr. Barlow questioned the accuracy of the project budget and suggested that Hydro One should be responsible for any cost overruns.

8.1 Board Findings

The Board concludes that based on the estimates provided, the rate impact is acceptable. The Board notes, however, that Hydro One is at risk for any cost increases and that any cost overruns will be subject to a prudence review at a subsequent rate application.

9. CONDITIONS OF APPROVAL

Board staff prepared a set of standard conditions of approval. Hydro One indicated that it did not have any concerns with the conditions as proposed.

The Fallis Group submitted that if an Order is granted it should also be conditional on the issuance of a Development permit under the Niagara Escarpment Planning and Development Act.

Hydro One responded that a specific condition related to the Niagara Escarpment Planning and Development Act is not required as it is already covered in the general condition proposed by Board staff regarding other permits and approvals.

Board staff and a number of intervenors proposed conditions related to the uncertainty of the generation forecast. In its reply, Hydro One maintained that to "impose conditions in response to which Hydro One has not had the opportunity to provide evidence, would violate the principles of natural justice and fairness" (p.2).

9.1 Board Findings

The Board has determined that the forecast of wind generation is reasonable and contains very little risk. The Board has also determined that the proposed project is the preferred option from an economic point of view, regardless of whether Bruce B is retired or refurbished or replaced. Therefore, while the Board does not agree with Hydro One's submission that imposing conditions without providing the applicant an opportunity to provide related evidence violates the principles of natural justice and fairness, conditions related to the generation forecast are unnecessary in this case.

10. COST DECISION AND ORDER

The board will issue its decision and order on cost awards shortly.

THE BOARD ORDERS THAT:

Leave to construct the transmission reinforcement project between the Bruce Nuclear Generating Station and Milton Switching Station is hereby granted to Hydro One Networks Inc. subject to the Conditions of Approval attached as Appendix "C" to this Order. The transmission reinforcement project includes making certain modifications at the Milton, Bruce A and Bruce B transmission stations to accommodate the new transmission lines.

DATED at Toronto, September 15, 2008
ONTARIO ENERGY BOARD

Original Signed By

Pamela Nowina
Presiding Member

Original Signed By

Ken Quesnelle
Member

Original Signed By

Cynthia Chaplin
Member

APPENDIX A

LIST OF PARTIES

HYDRO ONE NETWORKS INC.
BRUCE MILTON TRANSMISSION PROJECT
DECISION AND ORDER

EB-2007-0050

September 15, 2008

LIST OF PARTIES

Board Counsel and Staff	Michael Millar Neil McKay Zora Crnojackie Nabih Mikhail
Applicant	**Representative(s)**
Hydro One Networks Inc.	Glen MacDonald
Applicant's Counsel	Gord Nettleton Nicole J. MacDonald
Intervenors	**Representative(s)**
William H. Allen	
Association of Power Producers of Ontario ("APPRO")	Jake Brooks David Butters Tom Brett
Bentinck Packers Limited	Steven Lindner
Emily and Jorge Botelho	
Doug, Donna, Daryl and Drew Braithwaite	
Jeff and Bonnie Bruce	
Bruce Power	Brian G. Armstrong, Q.C. George Vegh J. Rosengarten

Buffalo Sunrise Farm	Paul John Eisenbarth and Margaret Helen Cuff
Calldron Gas Bars Ltd.	Bob Ware
Canadian Wind Energy Association	Sean Whittaker
Gwendolyn Charlton and Alvin Mcallister	
Council for the Town of Erin	Kathryn Ironmonger
Donald A. Corbett	
Willis and Madeline Crane	
Dirk Emde	
Enbridge Inc.	Ron Collins Cherry Blackwood
Energy Probe Research Foundation	David MacIntosh Thomas Adams Peter T. Faye Dr. Kimble F. Ainslie
Heinrich and Theresia Eschlboeck	Anthony Wellenreiter
David France	
The Fallis Group	Peter T. Fallis
Keith Cressman **Doris Anna Cressman** **Saugeen Maple Farms Ltd.** **Mervyn Wayne Lewis** **Jennifer Lynne Lewis**	

John Leslie Flanagan	
Phyllis Dianne Flanagan	
Dean Alexander Flanagan	
Allan Eric Foster	
Karyn Foster	
James Douglas Lewis	
Penny Joanne Lewis	
John Mulhall	
Catherine Blanche Mulhall	
Calvin John Hughes	
Stephen Hodges	
Orland Magwood	
Gloria Magwood	
1063755 Ontario Ltd.	
James Magwood, In Trust	
Andrew Magwood, In Trust	
David John Milne	
Mary Joan Milne	
David Mervyn Rawn	
Karen Ruth Rawn	
Thomas William Visser	
Laura Lee Heather Visser	
Gwendolyn Charlton and Alvin McAllister	
Robert Watson	
Sharon Kennedy Meanaul	
Robert George Younger	
Ron Elo	
Paul Garvey	
Mike and Carolyn Giesler	
Great Lakes Power Limited	Peter Bettle Charles Keizer
J.B. Gregorovich	
Sherwood and Gladys Hume	
Independent Electricity System Operator ("IESO")	Carl Burrell John Rattray

Daniel and Marjorie Kobe	
Philip Lawton	
Darvey and Danny Liedtke	
Manfred and Luzia Lindner	
Steve and Catherine Lindner	
Métis Nation of Ontario	Jason Madden
Allan R. McFee	
The Municipality of West Grey	Christine Robinson
Thomas Murtagh **Glenis Falbo**	
One Milton Trust Inc.	Yadvinder S. Toor
Ontario Federation of Agriculture ("OFA")	Neil Currie
Ontario Power Generation Inc. ("OPG")	Tony Petrella
Chris Aristides Pappas	
Bernd and Gerd Pollex	
Pollution Probe Foundation	Jack Gibbons Murray Klippenstein Basil Alexander David Schlissel Peter Lanzalotta Bob Fagan

Power Worker's Union ("PWU")	John Sprackett Bayu Kidane Judy Kwik Richard Stephenson
Powerline Connections	Stephen F. Waqué Frank Sperduti

William Allison
Janet Allison
Edward Bird
Maribeth Bird
Robert Barlow
Bruce Barrett
Dave Clifford
Anne Clifford
Pat Crouse
Steve Crouse
Ralph Cunningham
Vivian Cunningham
Paul Fisher
Pat Fisher
John Hofing
John Jenkins
Julia Jenkins
Steven Joyce
Anne Joyce
Robert McClure
Susan McClure
Joseph Rice
Ivan Rice
Verna Rice
Rice & McHarg Limited
Garry Sterritt
Mary Jean Sterritt
Bonnie Neely
Perry Stuckless
Elaine Stuckless
Mark Bergermann
Janet Bergermann
Leslee Einmann
Scott Einmann
John MacLeod
Melanie MacLeod
Joanne Coletta

Fernando Coletta **Maria Coletta** **Rosa Nucci** **Vittorio Nucci** **Jim Dinatale** **Lisa Dinatale** **Eileen Dinatale** **Elda Threndyle** **Dave D'Auria** **Michelle D'Auria**	
The Regional Municipality of Halton	Peter Dailleboust
"The Ross Firm Group"	Quinn M. Ross
Dave and Martha Barrett **Jack and Hildreth Park** **Lloyd Hutton** **Tom Fritz** **Doug Hackett** **Bob and Betty Mills** **Jim and Jairus Maus** **Dave and Pat Woelfle** **Glenn and Sandra Sawyer** **Carman and Everlyn Hodgkinson**	
C.B. and L. Rutledge	M. Virginia MacLean, Q.C.
Saugeen Ojibway Nations	David McLaren Art Pape Alex Monem Elaine Cameron Dale Jacobs
Dieter E. and Vija M. Sebastian	
Dr. James and Sandra Shaw	
Mathew and Logan Smerek	

Ernest Thompson and Catherine Dalton	
Toad Hall Farm Inc.	Bryn Waern, M.D.
TransAlta Energy Corporation ("TEC")	Sandy O'Connor
TransAlta Counsel	Richard J. King
TransCanada Energy Ltd. ("TransCanada")	Margaret Kuntz
TransCanada Energy Counsel	Angela Avery
Tribute Resources Inc.	Bill Blake
Tribute Resources Counsel	Peter Budd
Union Gas Limited	Patrick McMahon
Marinus and Patricia VanBakel	
Phillip C. and C. Gale Walford	
Bob Watson	Bob Watson
Herman and Berta Weller Cedarwell Excavating Ltd.	Kevin W. McMeeken, LL.B.
Trevor M.A. Wilson	
David Woelfle	

APPENDIX B

PROCEDURAL MATTERS
INCLUDING LIST OF WITNESSES

HYDRO ONE NETWORKS INC.
BRUCE MILTON TRANSMISSION PROJECT
DECISION AND ORDER

EB-2007-0050

September 15, 2008

PROCEDURAL MATTERS
INCLUDING LIST OF WITNESSES

EB-2007-0050
HYDRO ONE NETWORKS INC.

BRUCE-MILTON TRANSMISSION PROJECT

As part of proceeding EB-2007-0050, the Board heard preliminary motions related to how the application should proceed. The Board held a Motions Day on June 25, 2007. The Board issued its decision on the motions on July 4, 2007. In that decision, the Board determined that the overall schedule for the proceeding should be adjusted to allow additional time to facilitate landowner participation in the proceeding and that a Technical Conference should be held.

An Issues Day was held on September 17, 2007. Following the Issues Day, the Board, on September 26, 2007 released its "Issues Day - Decision and Order" by which it approved a final list of issues ("Issues List").

A transcribed Technical Conference was held in Toronto on October 15 and 16, 2007.

Upon receiving the Amended Application on November 30, 2007, the Board invited intervenors in to examine the Issues List and make submissions as to whether changes or additions are appropriate.

To hear the submissions on the Issues List, the Board held a second Issues Day on February 21, 2008. Several parties made submissions on the need for issues to address the relative timing of the Board's leave to construct process and the environmental assessment process. Although the Board made no changes to the Issues List, the Board instructed Hydro One to inform the Board and other parties of the status of the environmental assessment process two weeks before the commencement of the oral hearing in this case. The Board stated it would determine at that time the need to add issues resulting from the timing of the environmental assessment process.

Procedural Order No.5 set out the schedule for interrogatories and the filing of intervenor evidence. On March 7, 2008 the Board issued Procedural Order No. 6 which addressed an issue of confidentiality related to a System Model used by the IESO allowing for Interrogatory Response to be sent to those parties that requested the confidential information on condition that those parties sign the Board's Declaration and Undertaking and files it with the Board. On April 1, 2008, the Board issued its Decision and Order on Confidentiality Matters.

A Motions Day was held on April 3, 2008 to hear submissions from various intervenors with respect to certain interrogatory answers. On April 7, 2008 the Board issued Procedural Order No. 8 requiring Hydro One to provide answers to certain interrogatories filed by intervenors. The Decision and Order on the Motion also dated April 7, 2008 required that Hydro One make its best efforts to obtain this information from Ontario Power Generation, Bruce Power, or some other body.

On April 14, 2008 the Board issued its Procedural Order No. 9, to address an issue in regard to a letter dated April 10, 2008 from the OPA requesting that certain information provided in response to certain Pollution Probe interrogatories be treated in confidence.

On April 24, 2008, Pollution Probe filed a Motion seeking specific information relating to its interrogatories regarding two matters related to the cost effectiveness of the proposed transmission line. The Board decided to conduct this Motion by way of a written proceeding. In a Procedural Order No. 10 issued on April 28, 2008 the Board invited Hydro One to respond to Pollution Probe's Motion and for Pollution Probe to reply prior to the commencement of the Oral hearing on May 1, 2008.

WITNESSES

Witnesses Supporting the Application

The following witnesses representing the Applicant, Hydro One Networks Inc.("Hydro One"), the Ontario Power Authority ("OPA"), and the Independent Electricity System Operator ("IESO") testified at the oral hearing:

R. Chow	OPA
M. Falvo	IESO
V. Girard	Hydro one
J. Sabiston	Hydro One
G. Schneider	Hydro One
D. Woodford	Expert on behalf of OPA
J. Lee	OPA
L.A. Cameron	Hydro One
R.Thompson	Hydro One
E. Cancilla	Hydro One
J. Sabiston	Hydro One
M. Falvo	IESO

Witnesses called by Intervenors

For Pollution Probe Foundation

R. Fagan

P.Lanzalotta

For Saugeen Ojibway Nation

W.Russell

For Fallis Group

E.Brill

APPENDIX C

CONDITIONS OF APPROVAL

HYDRO ONE NETWORKS INC.
BRUCE MILTON TRANSMISSION PROJECT
DECISION AND ORDER

EB-2007-0050

September 15, 2008

CONDITIONS OF APPROVAL
EB-2007-0050
HYDRO ONE NETWORKS INC.
BRUCE-MILTON TRANSMISSION PROJECT

1 GENERAL REQUIREMENTS

1.1 Hydro One Networks Inc. ("Hydro One") shall construct the facilities and restore the land in accordance with its application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2011, unless construction has commenced prior to that date.

1.3 Hydro One shall advise the Board's designated representative of any proposed material change in the project, including but not limited to changes in: the proposed route; construction techniques; construction schedule; restoration procedures; or any other impacts of construction. Hydro One shall not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

1.4 Hydro One shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed project, shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

2 PROJECT AND COMMUNICATIONS REQUIREMENTS

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities.

2.2 Hydro One shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. Hydro One shall provide a copy of the Order and Conditions of Approval to the project engineer within ten (10) days of the Board's Order being issued

2.3 Hydro One shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

2.4 Hydro One shall furnish the Board's designated representative with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's Order.

2.5 Hydro One shall develop, as soon as possible and prior to start of construction, a detailed construction plan. The detailed construction plan shall cover all activities and associated outages and also include proposed outage management plans. These plans should be discussed with affected transmission customers before being finalized. Upon completion of the detailed plans, Hydro One shall provide five (5) copies to the Board's designated representative.

2.6 Hydro One shall furnish the Board's designated representative with five (5) copies of written confirmation of the completion of construction. This written confirmation shall be provided within one month of the completion of construction.

3 MONITORING AND REPORTING REQUIREMENTS

3.1 Both during and after construction, Hydro One shall monitor the impacts of construction, and shall file five (5) copies of a monitoring report with the Board within fifteen months of the completion of construction. Hydro One shall attach to the monitoring report a log of all complaints related to construction that have been received. The log shall record the person making the complaint, the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.

3.2 The monitoring report shall confirm Hydro One's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction and the condition of the rehabilitated land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained. Within fifteen (15) months of the completion of construction, Hydro One shall file with the Board a written Post Construction Financial Report. The report shall indicate the actual capital costs of the project with a detailed explanation of all cost components and shall explain all significant variances from the estimates filed with the Board.

4 ENVIRONMENTAL ASSESSMENT ACT REQUIREMENTS

4.1 Hydro One shall comply with any and all requirements of the *Environmental Assessment Act* relevant to this application.