



McCarthy Tétrault LLP
Barristers & Solicitors
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kristyn Annis
Dir: 416.601.7624
kannis@mccarthy.ca

Thomas Isaac
Dir: (604) 643-5987
tisaac@mccarthy.ca



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

Sharon Wong
Dir: 416-863-4178
Sharon.wong@blakes.com

March 18, 2011

VIA E-MAIL and RESS

Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Attention: Ms. Kirsten Walli

Dear Ms. Walli :

**Re: ACH Limited Partnership, Application for Licence Amendment, EB-2011-0065; and
AbiBow Canada Inc., Application for Licence Amendment, EB-2011-0068**

On March 2, 2011, ACH Limited Partnership ("ACH") filed an application to amend its generation licence EG-2006-0124 (the "ACH Licence") so as to be licensed as the operator as well as the owner of the eight hydroelectric generating facilities (the "Facilities") listed in Schedule 1 of the ACH Licence. On March 4, 2011, AbiBow Canada Inc. ("ABC") filed a related application to amend its generation license EG-2003-0204 (the "ABC Licence") (the request for amendments to the ABC Licence and the ACH Licence to be referred to collectively as the "Licence Amendments") so as to be removed as the operator of the same Facilities.

ACH is represented by Blake, Cassels & Graydon LLP, and ABC is represented by McCarthy Tétrault LLP. Counsel for both parties are writing this letter jointly as the applications are related.

As ACH stated in its March 2, 2011 application, the owners of ACH have signed a binding agreement for the sale of their interests in ACH and its general partner (the "Sale Transaction") to Infra H2O GP Partners Inc., Infra H2O LP Partners Inc. and BluEarth Renewables Inc. Upon the closing of the Sale Transaction, it is intended that ABC will cease to be the operator of the Facilities and such role will be assumed by ACH.

On March 9, 2011, the law firm of Keshen Major wrote a letter (the "Keshen Letter") on behalf of several First Nations to ACH and Abitibi Bowater Inc. which was copied to the Ontario Energy Board (the "Board"). The Keshen Letter made several incorrect statements as to the nature of the proposed Sale Transaction. We are writing to provide the Board with the correct information about the Sale Transaction and the Licence Amendments, which are solely administrative in nature and will not adversely affect Aboriginal interests.

The Keshen Letter incorrectly asserts that ACH is "preparing to sell the ACH hydro assets". In fact, ACH is not selling any of its assets, and ACH will remain the owner of the Facilities. The OPA Contract and the permits and licences referred to in the Keshen Letter will not be assigned and will continue to be held by ACH. The purchase agreement that is referred to in the Keshen Letter is the agreement pursuant to which the owners of ACH have agreed to sell the securities that they own in ACH (the "Purchase Agreement").

A copy of the Purchase Agreement is enclosed for your information. It is clear from the preamble and Section 2.1 of the Purchase Agreement that its purpose is simply the sale of all the securities (i.e. shares and limited partnership units) that the vendors own in ACH and in ACH's general partner.

The operation of the Facilities will continue in the same manner after the Sale Transaction as before the Sale Transaction. The individuals who are currently responsible for the day to day operations will transfer employment to ACH and those individuals will continue running the Facilities.

Although the Keshen Letter alleges that the Board must consider whether there has been adequate consultation with the First Nations, such assertion is based on a misunderstanding of the Sale Transaction and a failure to appreciate the narrow scope of the Board's review with respect to the requested Licence Amendments. Given the purely administrative nature of the Licence Amendments and the fact that the Facilities will continue to be operated in the same manner as before the Sale Transaction, we do not believe that Aboriginal or treaty rights will be adversely affected and, consequently, the duty to consult would not be triggered in the present circumstances.

The Keshen Letter alleges that "properties necessary to the operation of the Business as currently conducted by the ACH Parties are located on First Nations' Reserves" and that "those properties were and continue to be, illegally flooded for the purpose of generating hydroelectric power". The Facilities are located on various rivers in Northern Ontario. The water levels of those rivers are all regulated by either Ontario or Federal authorities. As operator of the Facilities, ACH will be required to continue to manage the Facilities in a manner that complies with the water levels stipulated by the applicable regulatory authority, being the International Rainy Lake Control Board (Fort Frances GS), the Lake of the Woods Control Board (Kenora GS, Norman GS), the Seine River Water Management Plan (Sturgeon Falls GS, Calm Lake GS) and the Abitibi River Water Management Plan (Iroquois Falls GS, Island Falls GS and Twin Falls GS), respectively.

As is clear from the Keshen Letter, the flooding at issue occurred many years ago. The Facilities in question have been in operation for many decades, the newest Facility having been constructed in the 1920s.

The Supreme Court of Canada recently ruled in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650, that alterations to resources that took place in the past do not give rise to a present duty to consult:

[83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both

parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. **Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource.** The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past.

(emphasis added)

The pending Sale Transaction and the associated Licence Amendments will not have any incremental impact on any of the First Nations since operations are going to continue after the Sale Transaction in the same manner as they have for many years. The same lands will remain flooded both before and after the purchase of the shares and limited partnership units closes, regardless of whether the operator of the Facilities is ABC or ACH. We hope that this information will assist the Board in its determination of the requested administrative Licence Amendments.

Yours truly,

Thomas Isaac
McCarthy Tétrault LLP

Sharon Wong
Blake, Cassels & Graydon LLP

Kristyn Annis
McCarthy Tétrault LLP

c: Douglas Keshen
Jim Gartshore/VP Energy and GM, ACH LP
Alice Minville, Senior Counsel, AbitibiBowater Inc.