



FAX RECORD

**TO: John Pickernell, Assistant Board Secretary
Ontario Energy Board**

FROM: Doug Keshen

DATE: March 28, 2011

FAX NO: 416-440-7656

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RE: Case No. EB-2011-0065



BARRISTERS
SOLICITORS

March 29 2011

John Pickernell
Assistant Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Toronto, Ontario, Canada
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Dear Mr. Pickernell,

Re: Case Number EB-2011-0065

I am writing on behalf of the twelve First Nations listed in Schedule A.

In the above-referenced Application, ACH Limited Partnership (ACH), the owner of the subject facilities, seeks the Board's approval to also become their operator, thus replacing the current operator, ABC (formerly Abitibi-Consolidated Company of Canada).

The Application is motivated by the intention of ABC and its partner to sell all their interests in ACH to Bluearth Renewables Inc., Infra H2O GP Partners Inc. and Infra H2O LP Partners Inc. (the Purchasers). As the Applicant acknowledges in its letter to the Board dated March 2, 2011, "ACH will no longer be an affiliate of ABC". Indeed, if the sale goes through, ACH will be controlled by the Purchasers. It will take on an entirely new corporate identity and may take on completely new corporate objectives, including the expansion of the facilities.

Despite this, the lawyers for ACH and ABC would have the Board treat this as a "purely administrative" amendment to ACH's existing license. Their letter to the Board dated March 18, 2011 maintains that despite a total change in corporate control of ACH, First Nations should not be concerned, or consulted, before the Application is granted because,

after all, the corporate name will still be ACH. In fact, as these lawyers are well aware, Article 7.1 of the Securities Purchase Agreement requires the Purchasers “to discontinue use of the name ‘ACH’ and any variation thereof on or before the expiry of a three (3) month period after the Closing Date”.

These lawyers also propose an incomplete reading of the Supreme Court of Canada’s decision *Rio Tinto v. Carrier Sekani Tribal Council*. At paragraph 47 of its decision, the Court made clear that managerial changes can trigger the duty to consult. It stated:

... high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no ‘immediate impact on the lands and resources’: Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources.

Nor should the Board assume, as the Applicants’ lawyers suggest, that the Purchasers will be entitled to maintain the Applicant’s lucrative OPA contract simply because that contract will, for three months or less, still be held in ACH’s name. Once again, this view ignores the clear language of paragraph 15(8) of the contract which states:

... prior to the 3rd anniversary of the Term Commencement Date, the Supplier:

- (a) may not undergo any assignment of this Agreement; and
- (b) *may not undergo a change of Control*

without the prior written consent of the OPA, provided that the OPA may in its sole discretion withhold its consent.

In its letter dated March 2, 2011, ACH asked the Board “to decide this application without a hearing as no one other than the applicant and ABC will be affected by the proceeding.” Needless to say, we disagree with this assertion. If it has not already done so, the Board should, in our respectful submission, deny ACH’s request.

We look forward to receiving further notice of this proceeding and to participating actively in the Board's hearing process.

Sincerely,



Douglas J. Keshen

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SCHEDULE "A"

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| Naicatchewenin First Nation Box 15, R.R. #1 Devlin, Ontario P0W 1C0 | Northwest Angle #33 First Nation P.O. Box 1490 Kenora, Ontario P9N 3X7 |
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| Ojibways of Onigaming First Nation P.O. Box 160 Nestor Falls, Ontario P0X 1K0 | Wauzhushk Onigum First Nation P.O. Box 1850 Kenora, Ontario P9N 3X8 |
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