Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0065
EB-2011-0068

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 ACH Limited Partnership for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by AbiBow Canada Inc. for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998.*

PROCEDURAL ORDER No. 1

ACH Limited Partnership ("ACH") filed an application on March 3, 2011 for an amendment to Schedule 1 of its electricity generator licence EG-2006-0124. The requested amendment is to change ACH's status as owner of eight hydroelectric generating stations to owner and operator. The facilities are the following: Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station (collectively, the "Facilities").

AbiBow Canada Inc. ("AbiBow", and, together with ACH, the "Applicants"), formerly Abitibi Consolidated Company of Canada, filed an application on March 7, 2011 for an amendment to its electricity generation licence EG-2003-0204. The requested amendment is to change the name on the licence EG-2003-0204 from Abitibi Consolidated Company of Canada to AbiBow Canada Inc., and to remove eight hydroelectric generating stations listed above, which AbiBow currently operates, from Schedule 1 of its licence.

On March 29th the Board issued a combined Notice of Application and Hearing to the Applicants. The Applicants were directed to serve the Notice upon the parties who receive electricity from the facilities that ACH will be operating and Keshen Major Law firm ("Keshen Major") who had submitted a letter of interest on behalf of twelve First Nations ("First Nations group") prior to publication of the Notice.

Responses to Notice

By Letter dated April 5, 2011, Keshen Major on behalf of twelve First Nations filed a request for combined intervernor status, oral hearing and an award of cost.

On April 5, 2011 Davis LLP on behalf of Fort Frances Power Corporation ("FFPC") requested intervernor status. On April 15, following clarification by ACH of the issues addressed in the FFPC's letter, FFPC withdrew its request to intervene and replaced it with a request for observer status. FFPC did not object to a written hearing.

Keshen Major in its submission expressed concern about the pending commercial transaction in relation to the subject generation facilities which involved a sale by AbiBow of its indirect interest in ACH to Bluearth Renewables Inc. and partners (the "Purchasers"). The concerns included: complexity of the issues regarding structural changes that may have direct impact on the First Nations' land and resources; lack of consultation with the First Nations group on the sale transaction; and the material impact of the sale transaction on Aboriginal rights that may trigger the Board's duty to consult.

On April 14, 2011 counsel for the Applicants filed a joint reply to the intervenor status request and the objections to written hearings. The Applicants submitted that the First Nations group do not qualify as intervernors as they have not demonstrated that they have a "substantial interest" in the outcome of the proceedings as required in accordance with Rule 23.02 of the Board's Rules of Practice and Procedure. The Applicants state that the issues raised by the First Nations group are outside of the scope of these proceedings and that the operation by ACH of the facilities it currently owns will not have any adverse impact on the Aboriginal rights. The Applicants submitted that there is no justification for an oral hearing due to the limited scope of the matters considered by the Board in these licence amendment applications and given there are no facts in dispute that would require the presentation of oral evidence and cross-examination.

On April 17, 2011 the Board received an additional letter from Keshen Major expressing the intention of the First Nations group to exercise their right to respond to the Applicants' submission under Rule 23.08 of the Board's Rules of Practice and Procedure and requested time to consider and prepare the response proposing May 6, 2011 as a deadline. The letter further states that the issues before the Board are in the very preliminary context and may require extensive Affidavit evidence and complete legal argument to support assertions made in the April 5th submission.

On April 18, 2011 the Applicants replied to the First Nations group letter and objected to the request for timelines extension. The Applicants stated that the Board has enough information before it to determine whether intervenor status should be granted.

On April 21, 2011 AbiBow filed a letter, supported by ACH, stating the Applicants are prepared to waive their objection to the First Nations group request for intervenor status. The Applicants further stated they do not believe the First Nations have a "substantial interest" in these proceedings as required by the Board's Rules of Practice and Procedure. The letter further states that AbiBow will face significant financial harm unless the Board brings this matter to resolution shortly, stating it requires a decision by May 10, 2011.

Next Steps

Despite AbiBow's willingness to waive its objection to the request by the First Nations group for intervenor status, the Board would like to have a more detailed description of the precise nature of the interest of the First Nations group in this application before granting intervenor status.

As described in their letter dated April 5, 2011, the First Nations group interests revolve largely around issues with respect to the duty to consult.

Put simply, the duty to consult is triggered where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. The First Nations group noted that a Crown decision need not have an immediate physical impact to constitute a potential adverse impact on an Aboriginal right or title, and quoted the Supreme Court's recent *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* ("Rio Tinto") in this regard. The duty to consult is an obligation of the Crown, and not private parties, in relation to a decision or

action of the Crown. In this case, the Crown is not engaged in any degree in the transaction giving rise to the Applications. The transactions are private commercial transactions.

The Board accepts that high level management decisions or structural changes to resource management can in some cases give rise to an adverse impact on Aboriginal rights even where there is no immediate impact on land and resources. Even so, before the Board agrees to hear detailed evidence and submissions on the duty to consult, and whether it has been discharged in this case, it must be satisfied that its decision in this proceeding will have at least the potential to result in some adverse impact to an Aboriginal right or title.

The Board is not satisfied from the correspondence to date that its decision can be expected to have any potential adverse impact on an Aboriginal right or title. The First Nations group point to alleged historic and ongoing infringements of Aboriginal rights related to flooding of certain lands related to the facilities. The Rio Tinto decision is quite clear that historic and continuing infringements do not give rise to a current duty to consult.

In the words of Chief Justice McLachlin: “The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.”[1]

It is therefore the Board’s view that possible past and ongoing infringements to Aboriginal rights on their own do not give rise to a duty to consult in the current proceeding.

The First Nations group also alleges that the ultimate intended purchasers of the Facilities (the “Purchasers”) intend to expand operations and may do so in ways which may have adverse effects of flooding on the First Nations reserves. It is not clear to the Board that such an impact is directly related to the application before it.

First, the only change being sought through the current applications is to amend the licenses to make ACH both the owner and operator of the Facilities, whereas currently it

[1] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* [2010] SCC 43, para. 49 (emphasis in original).

is only the owner. This change is an administrative change to the license. It has no inherent or necessary implications for the operation of the facilities, let alone the expansion of them. The First Nations group have expressed concern over possible expansion of the facilities, but there is nothing in these applications that touches on that possibility. These applications deal with the identity of the owner and operator, and not any aspect of the operation or expansion of the facilities.

The apparent ultimate intent of the shareholders of ACH is to then sell the corporation (i.e. ACH) to the Purchasers. That transaction, however, is not a part of the current application before the Board. These proceedings are neither approving nor considering any potential future purchase of either the companies involved or the specific facilities. Any enquiry into those potential eventualities is beyond the scope of these proceedings.

In any event, such a sale would have no impact on the licenses or the rights and obligations associated with them. The Purchasers of ACH would have to abide by the terms of the current licenses. To the extent that the Purchasers wished to expand operations, they would have to do so within the limitations of the licenses and any other legal or regulatory restraints. In other words, the Purchasers would have exactly the same rights and obligations as the current owners.

With this context, the Board is not yet convinced that the Application has the potential to adversely impact Aboriginal rights or title.

However, the Board will allow the parties to make further written submissions on this issue. Although the First Nations group is not the applicant in this proceeding, it is the party advancing this issue. In that light, the Board will allow the First Nations group the opportunity to reply to the submissions of the Applicants. After considering the submissions, the Board will determine whether the First Nations group should be granted intervenor status in this proceeding.

IT IS THEREFORE ORDERED THAT:

1. Submissions from the First Nations group on the issue of whether or not this proceeding may result in potential adverse impacts to an Aboriginal right or title shall be filed with the Board and served on all parties no later than Friday May 6, 2011.

2. Submission from the Applicants shall be filed with the Board and served on all parties no later than Monday May 9, 2011.
3. Reply submissions from the First Nations group shall be filed with the Board and served on all parties no later than Friday May 13, 2011.

All filings to the Board must quote the file numbers, EB-2011-0065 and EB-2011-0068, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

Tel: 1-877-632-2727 (toll free)
Fax: 416-440-7656
E-mail: Boardsec@ontarioenergyboard.ca

DATED at Toronto, April 29, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPLICANTS & LIST OF PARTICIPANTS

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