ONTARIO ENERGY BOARD PROCEEDINGS:

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 Canada Inc.for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act*, *1998*;

RESPONSE TO THE APPLICANTS' OBJECTION TO THE FIRST NATIONS' REQUESTS FOR COMBINED INTERVENOR STATUS

SECTION ONE: REASONABLE APPREHENSION OF BIAS

The Notice of Application in this proceeding was signed by the Board Secretary. It states, on page 1: "The applications will be decided by the Counsel, Special Projects, who has been delegated this authority pursuant to section 6 of the Act. The Counsel, Special Projects, does not intend to provide for an award of costs when deciding these applications." The identity of "the Counsel, Special Projects" was not indicated.

On the date this Application was issued, March 29, 2011, the Board had not yet received either a request for an award of costs under the Board's Practice Direction on Cost Awards or any submissions in relation to such a request. The First Nations assumed, therefore, that this part of the Notice was simply issued in error and, on April 5, 2011, submitted an order that they are eligible to apply for a cost award.

Procedural Order No. 1 was also issued over the signature of the Board Secretary, again without indicating the identity of the person delegated to decide the Applications or the identity of the person who wrote Procedural Order No. 1. The First Nations assume that it is the same person but they cannot be certain.

The Procedural Order gave the First Nations until today's date, May 6, 2011, to make further written submissions. Those submissions are contained in Section 2 of this document. However, before receiving the First Nations' submission, the Applicants' response or the First Nations' reply, the author of the Order has made the following statements:

> 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 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 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.

These statements establish that their nameless author is predisposed to reject the First Nations' submissions even before reading them. Moreover, this would appear to be the second time this person, or perhaps some other Board employee, has decided an issue before hearing submissions.

The test for reasonable apprehension of bias was originally set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. That test was later adopted by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193) and has become the law. It is as follows:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. According to the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

The First Nations respectfully submit that the answer to that question in the present case is "yes". They, therefore, ask the author of the Procedural Order No. 1 to disqualify himself or herself from deciding the balance of the case and withdraw. Since the First Nations do not know the identity of that person, they ask the Board's management committee to confirm either that this person has withdrawn or that it has reassigned the balance of this proceeding to a different Board employee under section 6.

SECTION TWO: THE FIRST NATIONS' SUBSTANTIAL INTEREST

Part A: The Crown's Duty to Consult and Accommodate

The First Nations' interest in this proceeding is substantial and arises out of the Crown's duty to consult and accommodate.

This duty is of relatively recent origin. It was not until *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 that the Supreme Court of Canada enunciated the Crown's duties in relation to the potential infringement of claimed, but still unproved, aboriginal rights. At paragraph 11, the Court observed: "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."

At paragraph 35, the Court asked and answered the following question:

> … 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.

The *Haida Nation* case was similar to the present case in several ways, two of which will be mentioned here. First, the decision at issue involved Crown approval of the transfer of forestry licences from one private company to another private company, with attendant change of control. Second, the licence at issue, a Tree Farm Licence known as a T.F.L., did not "itself authorize harvesting, which occurs only pursuant to cutting permits". The Province maintained, therefore, 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'". We will see that a similar issue arises in the present case. The Court rejected this argument at paragraph 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. … If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

This statement of the law was reaffirmed by the Supreme Court in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43. At paragraphs 44 and 47 of that decision, the Court stated "the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41, emphasis omitted) … 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."

As they must do, lower courts have followed and applied the law as enunciated by the Supreme Court. Reference can be made to two judgments of the Supreme Court of British Columbia, *Gitxsan First Nation v. British Columbia (Minister of Forests)* 2002 BCSC 1701 and *Adams Lake Indian Band v. British Columbia* 2011 BCSC 266. At paragraph 160 of the *Adams Lake* decision Madam Justice Bruce wrote:

> In *Gitxsan*, Tysoe J. (as he then was) recognized that a change in the decision maker or the character of the decision maker may potentially lead to adverse consequences with respect to claimed aboriginal rights. In *Gitxsan*, the issue was a change in control of Skeena Cellulose Inc. who held the forest licence in dispute. The Province argued there was no adverse impact resulting from the change in ownership and thus there was no duty to consult. Tysoe J. rejected the Province's submission and held at para. 82 of *Gitxsan*:
>
> > I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly.

At first glance, the *Rio Tinto* case may appear to be more like the present case than the *Haida Nation* case. The *Rio Tinto* case involved the flooding of the First Nations' ancestral homelands many years ago, without prior surrender or consultation, to satisfy the hydro demands of local industry, with excess hydro being sold off, in that case to BC Hydro. But despite this similar historical backdrop, the legal and factual issues that arose in the *Rio Tinto* case were fundamentally different from those that arise in the present case.

Unlike the present case, the decision at issue in the *Rio Tinto* case did not involve Crown approval of a transfer or change in the control of the licence needed to generate hydro power. It involved only the approval of the sale of hydro power to BC Hydro under a 2007 Energy Purchase Agreement (an EPA). This fact was central to the Court's ultimate decision. At paragraph 92, it stated: "The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows." (emphasis in the original)

This finding was also central to the Court's conclusion that no higher-level managerial or policy decisions were at stake. Its comments at paragraph 87 are highly instructive for present purposes.

> The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests. (emphasis added)

Of course, the First Nations accept the Court's ruling in the *Rio Tinto* case that "past", "prior" or "underlying" infringements do not trigger the duty to consult. However, as explained below, their request to intervene is not an attempt to use any such infringement as "the hook that secures and reels in the constitutional duty to consult on the entire resource", to use the language of the Chief Justice at paragraph 52. Their interest is rather to protect the *future* exercise of their treaty and aboriginal rights. It is, therefore, important to note that the *Rio Tinto* case did not decide that ongoing and continuing infringements cannot trigger the duty to consult. On the contrary, the Court repeatedly stated that where future development of the resource is still possible, the Crown's duty to consult continues. This can be seen in the following comments:

1. At paragraph 2, the Chief Justice said: "I would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights."
2. At paragraph 38, the Court stated: "As the post-*Haida Nation* case law confirms, consultation is '[c]oncerned with an ethic of ongoing relationships' and seeks to further an ongoing process of reconciliation by articulating a preference for remedies 'that promote ongoing negotiations'."
3. At paragraph 46, the Court stated: "The adverse effect must be on the future exercise of the right itself; …"
4. At paragraph 50, "The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests …"
5. At paragraph 54, the Court stated: "An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights."
6. As quoted above, at paragraph 87, the Court talked about "… high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants."
7. At paragraph 92, the Court recognized the First Nations' "ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights."

Part B: The Duty to Consult in relation to Wild Rice

As the *Haida Nation* decision makes clear, the Crown's duty to consult First Nations extends to claimed but still unproved or undecided aboriginal rights. Moreover, since the Court described the duty as a corollary of section 35 of the *Constitution Act of 1982* and since section 35 recognizes and affirms both treaty and aboriginal rights, the duty also extends to claimed but still unproved or undecided treaty rights. Still, the Court also held that the depth or content of the duty to consult will depend on the strength of the claim to a treaty or aboriginal right and on the potential for its infringement.

The historical basis for the claimed treaty right is summarized in the attached document entitled "Documents of 1873 Relevant to the Treaty 3 Right to Wild Rice". As signatories to Treaty 3, the First Nations take the position that these documents establish their treaty right to continue to harvest wild rice in surrendered territories "as by the past". Any doubts arising from the absence of this language in the version of Treaty 3 published by Canada must, in light of the other documents referred to and in accordance with the jurisprudence on treaty interpretation, be resolved in favour of the First Nations.

The historical basis for the claimed aboriginal right is set out in Chapter Five of the attached Ph. D. thesis written by Kathi Avery Kinew and entitled " MANITO GITIGAAN Governing in the Great Spirit's Garden: WILD RICE in TREATY #3". The First Nations take the position that this document establishes that harvesting wild rice constituted a distinctive practice, custom and tradition of the First Nations' ancestors prior to European contact in accordance with the jurisprudence on the definition of aboriginal rights. It also establishes that flooding for hydro has caused, and will continue to cause, wild rice losses to the First Nations that are both monetary and cultural.

The 1999 Report of the Aboriginal Justice Inquiry of Manitoba contained the following comments about wild rice as a treaty and aboriginal right.

> Even where treaties are silent on the issue of wild rice, it is possible to demonstrate that the parties expected traditional economic pursuits to continue. It would be in keeping with recent court rulings to assume that references to hunting and fishing could extend to include other traditional economic pursuits such as the harvesting of wild rice.
> …
> Aboriginal people see the harvesting of wild rice as a traditional occupation which their ancestors never would have given up intentionally at the signing of the treaties.
> …
> In our opinion, based upon a review of the information before us, the right to harvest wild rice is, at least, an Aboriginal right. We believe that this Aboriginal right encompasses both personal consumption and commercial purposes. This right can be exercised on reserves and on Crown lands. As with other Aboriginal rights, it now has constitutional protection.[1]

In sum, the First Nations submit that their claim to a treaty and aboriginal right to harvest wild rice is strong, that the potential for the ongoing or continuing infringement of this right is great if not certain and that the risk of non-compensable damage is high. This is, therefore, the kind of case in which particular attention must be paid to paragraph 44 of the *Haida Nation* decision. The Supreme Court stated:

> 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.

Part C: An Accommodation Plan for Wild Rice

The objective of consultation is to identify and try to resolve or "accommodate" differences. At paragraph 49 of the *Haida Nation* decision, the Supreme Court stated:

[1] http://www.ajic.mb.ca/volumel/toc.html

> 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": The 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.

Twenty-three years before the Supreme Court wrote those words, the Indian Commission of Ontario commissioned a study "to compare simulations and define impact of preferred wild rice regulation on power production" on Lake of the Woods, Rainy Lake, Namakan Lake, Lac La Croix, the English River and the Winnipeg Rivers. The study was conducted by Unies Ltd., independent consulting engineers from Winnipeg. Its report is attached and is hereinafter called the Unies Report.

The Unies Report came to the conclusion that wild rice harvesting could be accommodated with hydro power generation through a combination of minor changes in the regulation of water levels and "relatively small" drops in hydro power generation. The report's Principal Findings and Conclusions included the following paragraphs:

> 4. The restrictions on water levels and water level changes required to improve the modelled rice harvest also resulted in a decrease of approximately 7 million kWh's in the average annual electric energy production from hydro-electric plants on the Winnipeg River system above Lake Winnipeg. The energy generated during winter was actually increased by the operation preferred for rice but this increase was more than compensated by a decrease in average summer generation. A breakdown of energy production for the preferred, present and historic operations are provided in Tables 6.4 and 6.5. The estimated change in energy generation is relatively small, approximately 0.15 percent of total average generation of the Winnipeg River system plants.

5. The modifications to reservoir operating criteria preferred for rice production result in changes in water levels and stream-flows too small to have an appreciable impact on resources other than wild rice and electrical energy.

6. The benefits and disbenefits of increased wild rice production resulting from the preferred operating criteria accrue to different interest groups. The economic benefits of increased wild rice production accrue to the native and other residents of Northwestern Ontario. The economic disbenefits of producing electricity at alternative sites accrue to the total population of Manitoba and Ontario. In essence this represents a redistribution of income from a very large population to a small population in Northwestern Ontario. The financial impact on the customers of Manitoba Hydro and Ontario Hydro however, would be minimal. For the residents of Northwestern Ontario the financial impact would be of some significance and would be favourable to the local economy.

The Unies Report came out in October 1981. We can safely assume that the Indian Commission of Ontario provided copies of this Report to Canada's Department of Indian Affairs and to the Ontario Ministry of Natural Resources as they were both members of the management committee authorizing the study.

However, in October 1981, section 35 of the *Constitution Act, 1982* did not exist. Moreover, even when it was adopted the next year, thus giving constitutional protection to *existing* treaty and aboriginal rights, it was not until November 2004, 23 years after the Unies Report came out, that the Supreme Court issued its first decision on the duty to

consult in relation to *claimed but unproved* aboriginal rights, *Haida Nation*. The perhaps unsurprising result is that the accommodation plan identified by the Unies Report has never been the subject of the kind of Crown consultation required by the *Haida Nation* case.

It is almost 30 years since the Unies Report came out. More up-to-date, alternative accommodation plans may now have to be considered. However, the First Nations submit that the Unies Report, by its very existence, underlines a point of central importance, namely, that the historical fact of flooding, and the likely permanent loss of First Nations reserve lands, does not mean that wild rice harvesting can no longer be accommodated with ongoing flooding for hydro generation. On the contrary, 100 years after the flooding first began, the Unies Report showed how this kind of accommodation might still be possible.

This is because of the nature of the resource in question: natural water bodies and stream flows that are capable of regulation. Indeed, hydro power is often referred to as a *renewable* energy source; renewable because, each year, the water is regulated in a way that permits the production of new hydro power. Wild rice is equally a *renewable* source of food and culture; but it requires a different kind of annual water regulation to produce a new crop each year. The question is whether water can be regulated in a way that accommodates both sets of interests.

The Unies Report gave, and continues to give, reason to believe that it is still possible and practical to talk about how wild rice harvesting might be accommodated with hydro power generation. It shows how the water resource that makes both possible might be managed or developed differently *in the future*, whether that future started in 1981, when the Report came out, or whether it starts sometime in 2011 or after.

Part D: The Consultation Process in relation to Wild Rice

The First Nations understand that their interest in wild rice is not the only interest the Crown must consider. The Court made this abundantly clear in the *Haida Nation* case through the following comments:

1. At paragraph 45, the Court said: "… 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."
2. At paragraph 48, the Court said: "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."
3. At paragraph 50, the Court said: "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."

For their part, the authors of the Unies Report thought that their accommodation plan would require the Crown to balance two primary sets of interests. To repeat, they stated:

> 5. The modifications to reservoir operating criteria preferred for rice production result in changes in water levels and stream-flows too small to have an appreciable impact on resources other than wild rice and electrical energy.

But regardless of the accommodation plan being considered or the consultation process chosen, it is inconceivable that the Crown would not obtain and consider the interests of the owner and operator of three of the generating stations at issue in this proceeding: the Fort Frances Generating Station, the Kenora Generating Station and the Norman Generating Station. The facilities are located on or are part of water systems where the First Nations harvest wild rice. The current owner of these facilities is ACH and the current operator is AbiBow. They are, of course, the Applicants in this proceeding.

However, if the Board grants their Applications, it is equally inconceivable that the Applicants will still be the owner and operator of these facilities when the consultation actually takes place. That is because these licence amendments are amongst the very last steps the Applicants need to take to complete the sale of ACH to Bluearth Renewables Inc. and its partners (Bluearth) in accordance with a Securities Purchase Agreement, parts of which have already been filed with the Board.

In their letter to the Board dated March 18, 2011, the Applicants' lawyers maintained that "ACH is not selling any of its assets, and ACH will remain the owner of the Facilities". In fact, pursuant to Article 7.1 of the Securities Purchase Agreement, the Purchasers must "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". In his most recent letter to the Board dated April 21, 2011, the Applicants' lawyer acknowledged more candidly that AbiBow needs to obtain "the proceeds of the sale of ACH" by June 9, 2011. This letter finally acknowledged the commercial reality that these Applications are motivated by the Applicants' desire to sell ACH to Bluearth.

But this letter was wrong to describe the amendments sought as "a trivial administrative change to the Applicants' licences". These amendments, and the further amendments Bluearth will need when it can no longer use ACH's name, are neither administrative nor trivial. They are necessary legal steps that are or will be taken to effect a complete change in the ownership and operation of the three generating stations mentioned. In so doing, they will transfer to Bluearth a direct interest in any consultation or accommodation

involving wild rice. As the cases demonstrate, a transfer to a different corporate entity, with a different controlling mind and different set of corporate objectives, can trigger the Crown's duty to consult the First Nations.

Still, as was made clear in the *Haida Nation* case, repeated at paragraph 42 of *Rio Tinto*: "… for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question."

Part E: Crown Conduct

In this case, the Crown conduct was engaged in by the Ontario Minister of Energy and Infrastructure and the Ontario Power Authority (the OPA).

On May 7, 2009, the Minister issued a ministerial direction to the OPA. This direction took the form of a letter to the Chief Executive Officer of the OPA, attached. The Minister stated that "it is advisable to pursue the initiative of seeking new contracts (the 'New Contracts') for hydroelectric facilities". It further specified that "The New Contracts will provide strong incentives for optimizing the operation of the Facilities …". The authority for this ministerial direction was section 25.32(4.1) of the *Electricity Act, 1998*. It is to be noted that the Minister could have also issued a ministerial direction on "consulting aboriginal peoples" about the new procurement initiative, under section 25.32(4.4) of the *Electricity Act, 1998*. He did not do so. The two subsections are set out below:

> (4.1) The Minister may direct the OPA to undertake any request for proposal, any other form of procurement solicitation or any other initiative or activity that relates to,
> (a) the procurement of electricity supply or capacity derived from renewable energy sources;
> (b) reductions in electricity demand; or
> (c) measures related to conservation or the management of electricity demand.

Directions re consultation
(4.4) The Minister may direct the OPA to implement procedures for consulting aboriginal peoples and other persons or groups as may be specified in the direction, on the planning, development or procurement of electricity supply, capacity, transmission systems and distribution systems and the direction may specify the manner or method by which such consultations shall occur and the timing within which such consultations shall occur.

Soon after receiving the ministerial direction, the OPA announced the creation of the Hydroelectric Contract Initiative (the HCI). An article about the HCI appeared in the Spring 2010, Issue 27 of "Renew", the Ontario Waterpower Association's (the OWA's) newsletter. The full article is attached; it reads, in part, as follows:

> Key contractual provisions include:
> • 20-year term;
> • $69.00/MWh base price;
> • full inflation indexation;
> • on-peak and off-peak incentives;
> • strong upgrade, expansion and redevelopment incentives; and
> • the ability to recapture capital investments that result from specific legislative requirements (e.g. dam safety).
>
> As has been the case with many other important public policy initiatives, the OWA was able to bring considerable expertise and experience to the dialogue with the OPA, through the breadth of its membership. In particular **Marc Mantha (Abitibi Bowater), Jim Gartshore (Abitibi Bowater)**, John Wynsma (Peterborough Utilities), Scott Stoll (Aird Berlis), Chris Lambeck (Regional Power), Don Krause (Genivar) and Bill Touzel (WESA) warrant recognition. Once again, the active engagement and involvement of the OWA membership has yielded results. (emphasis added)

As the added emphasis indicates, Abitibi Bowater officials were well aware of the attractive incentives built into the HCI. On December 1, 2009, ACH entered into an HCI contract with the OPA.

When parts of the Securities Purchase Agreement were made available in February of this year, it became clear that the "flipping" of this HCI contract from ACH to Bluearth is a central feature of the sales transaction. But while that contract is referred to several times in the Agreement (as the "OPA contract"), the HCI contract itself has not been released publicly and the First Nations do not have a copy to produce. They are only able to produce the "Standard Form Contract (HCI Contract)" posted on the OPA's website. That document is attached.

As required by the original ministerial direction, Exhibit J of the HCI contract provides "strong incentives" through what is called an "Upgraded Contract Price", see Appendix 2 of Exhibit J. However, to get that enhanced price, the contract-holder must upgrade its facilities in accordance with article 1.12 of Exhibit J.

As has already been noted, there is a good reason why the duty to consult can be triggered by changes in management or ownership, namely, those changes may bring with them significantly different goals and objectives. The present case is one in which the difference in goals and objectives is readily apparent and highly significant.

ACH has made no attempt to upgrade its facilities in order to obtain the upgraded contract price. It wanted to obtain the HCI contract for another reason: to increase its own commercial value before sale. This is, in fact, consistent with the historical reason why companies like Abitibi Bowater and its predecessors became owners of generating facilities in the first place. Their priority was to generate hydro power for their own operations; selling off excess power made financial sense but it was never their core business. This same pattern is visible in the *Rio Tinto* case. In any event, if generating hydro power were Abitibi Bowater's core business now, it would not be trying to sell ACH.

Bluearth's corporate goals and objectives are completely different. Its website describes it as "an independent renewable power producer, our goal is to sustainably build, own, and operate wind, run-of-river hydroelectric, and solar generation projects across North America." Entirely consistent with those general goals, and with the high price paid, Bluearth's specific goals with respect to these facilities will be to upgrade them as quickly as possible in order to exploit the incentives offered by the Crown through the HCI contract. Entirely inconsistent with those goals will be any plan to accommodate wild rice harvesting that involves reductions in hydro power generation.

But the problem is *not* that Bluearth would oppose such a plan. If the Crown's ultimate responsibility is to balance the First Nations' interests with "other societal interests", then First Nations must expect and accept that some of those other interests will be contrary to theirs.

The problem is that the HCI contract effectively aligns the interests of the Provincial Crown, which plainly wants to encourage the upgrading of hydro generation facilities, with the interests of the contract-holder, who plainly wants to receive an upgraded price for the hydro generated. Moreover, it does this over a long period of time. As the Supreme Court pointed at paragraph 90 of the *Rio Tinto* case, this kind of arrangement undermines the Crown's "ability to deal honourably" with the First Nations' interests.

> In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

Part F: Crown Decision

At paragraph 83 of the *Rio Tinto* decision, the Supreme Court made this simple, yet profound observation: "…the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of *state-authorized developments*." (emphasis added)

The Ontario Energy Board is an administrative tribunal created by the Ontario government. It is clearly part of the state. If it authorizes these amendments, its decision will be a Crown decision. That decision will not, of course, be the only Crown decision authorizing the development that Bluearth will then surely undertake. As we have seen, the ministerial direction and the OPA, both Crown agents, have played a significant role. But without the Ontario Energy Board's decision to grant these amendments, this development cannot proceed. The Board's decision to grant the amendments will be a significant and necessary part of the state's authorization of this development.

Further, we note that the Board's role in this development is not limited to an adjudicative one. Section 25.31 of the *Electricity Act, 1998* stipulates the following:

> **Procurement process for electricity supply, etc.**
> 25.31 (1) The OPA shall develop appropriate procurement processes for managing electricity supply, capacity and demand in accordance with its approved integrated power system plans.
> (2) The OPA's procurement processes must provide for simpler procurement processes for electricity supply or capacity to be generated using alternative energy sources or renewable energy sources, or both, where the supply or capacity or the generation facility or unit satisfies the prescribed conditions.
> **Application for approval**
> (3) The OPA shall apply to the Board for approval of its proposed procurement processes, and any amendments it proposes.
> **Board approval**
> (4) The Board shall review the OPA's proposed procurement processes and any proposed amendments and may approve the procurement processes or refer all or part of them back with comments to the OPA for further consideration and resubmission to the Board.

In light of Board's important adjudicative and administrative powers, the First Nations should be allowed to prove to it that which the Applicants cannot seriously dispute in any event: the First Nations have never been consulted about the development that the state will authorize Bluearth to undertake and this development has the potential to prejudice or infringe upon their aboriginal and treaty right to harvest wild rice.

Part G: No Delegation or Delay of the Crown's duty to consult

As mentioned at the outset, in the *Haida Nation* case, the Province maintained 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'" To repeat, the Court rejected this argument at paragraph 76, stating:

> Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. … If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

A similar issue arises in the present case in that the HCI contract (at least the Standard Form Contract) contains the following provision:

> **1.3 Aboriginal Consultation Requirements**
>
> The Supplier shall for any proposed Upgrade:
>
> (a) provide the Ministry of Energy and Infrastructure (the MEI) with details, in writing, of the proposed Upgrade and in particular whether the proposed Upgrade will have a physical or material effect on the environment or land tenure;
> (b) request that the MEI determine what, if any, Aboriginal consultation requirements (Aboriginal Consultation Requirements) the Supplier must meet in order to carry out the Upgrade; and
> (c) enter into an agreement with MEI, if requested by the MEI, to set out the terms and conditions of the Supplier carrying out the Aboriginal Consultation Requirements.
>
> The Supplier shall not be able to proceed with the proposed Upgrade until it has satisfied the Aboriginal Consultation Requirements.

> The Supplier shall be expected to provide the OPA with any documentation or correspondence relating to the Supplier meeting its commitments under this Paragraph 1.3. Any approval by the OPA for a proposed Upgrade will be conditioned upon the Supplier meeting the requirements of this Paragraph 1.3.

It is clear that any consultation under this provision would be about upgrades and, therefore, fall well below the "strategic planning" necessary to accommodate wild rice harvesting with hydro power generation. But there is an even more fundamental problem with this provision. While it was clearly written after the *Haida Nation* decision was issued, it appears to delegate to the Supplier the Crown's duty to meet the "Aboriginal Consultation Requirements". This is directly contrary to paragraph 53 of the *Haida Nation* decision, where the Court stated:

> … 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.

Finally, the Court indicated, at least implicitly, at paragraph 63 of the *Rio Tinto* decision that once the duty to consult has been triggered, the consultation should be conducted or ordered without delay. It stated:

> As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.