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*;

REPLY TO THE APPLICANTS' RESPONDING SUBMISSIONS REGARDING THE FIRST NATIONS' REQUEST FOR INTERVENOR STATUS

Reasonable Apprehension of Bias

To begin with, the Applicants' submissions on this issue overlook the fact that Procedural Order No. 1 contained opinions about both Crown involvement and potential adverse impact. These are, in fact, the two central issues in any duty to consult case. This was confirmed at paragraph 42 of the *Rio Tinto* decision where, as previously noted, the Supreme Court said: "… 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."

However, the Order only invited further submissions in relation to the second issue, potential adverse impact. The passage immediately preceding the Procedural Order and the Order itself stated:

> … 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.
> …
> **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.

As for the issue of Crown involvement, the author of the Order apparently did not need to receive further submissions. He/she was already of the following opinion:

> 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.

This opinion was not expressed with any qualification and was obviously not made subject to the receipt of further submissions. It cannot be fairly described as tentative.

In addition, the Order prejudges the question of potential adverse impact. The Applicants have, from the outset, characterized the licence amendments as "administrative", having no impact on the First Nations' rights. They continue to take that position in their latest submission. The difference now is that the Applicants can and do rely upon Procedural Order No. 1 as support for their position! They quote the following passages of the Order:

> 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.

Again, there is nothing in these statements to indicate a tentative or an open mind. Nor can one be inferred from the mere willingness to receive further submissions, as the Applicants suggest. No adjudicator can escape scrutiny on grounds of reasonable apprehension of bias by simply pointing to his/her willingness to hear further submissions. That is not the law. The "reasonable and right-minded person" referred to the *Baker* case must consider all the "required information", including unqualified statements on central issues made before receipt of submissions.

As is now clear, the First Nations take the position that they have established, or should be allowed to establish through their intervention, both Crown conduct and a Crown decision that may adversely impact on their aboriginal and treaty right to harvest wild rice. They are entitled to have their submissions on these central issues considered and decided by an adjudicator whose conduct has not created a reasonable apprehension of bias. The adjudicator assigned to this case has created such an apprehension. At worst, he/she has purported to decide these issues before receiving the First Nations' submissions. At best, he/she has exhibited an unequivocal predisposition to reject the First Nations' submissions before receiving and considering them. Either way, he/she should be disqualified from proceeding any further with this case.

Paragraph 13 of the Applicants' Responding Submissions

In this paragraph, the Applicants make the following allegation:

> The First Nations Group incorrectly describes the applications before the Board as a "Crown approval of a transfer or change in control of the licence needed to generate hydro power."

With respect, there is nothing incorrect about this description. The Board is an administrative tribunal created by the Crown in right of Ontario. Pursuant to its power under section 74 to amend operators' licences, it is being asked to approve a transfer or change in control of those licences from AbiBow to ACH. Without this transfer or change, ACH will not be legally authorized to either generate or sell electricity from the subject facilities pursuant to section 57 which stipulates: "no … person shall, unless licensed to do so under this Part, … (c) generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person;…" Moreover, in a letter to Fort Frances Power Corporation dated April 15, 2011, filed in these proceedings, the General Manager of ACH acknowledged the desire to change of control in the operation of the facilities:

> … ACH will become an arm's-length party to ABC [AbiBow Canada Inc.] . Accordingly, ABC will no longer operate the Facilities, and the Licence Amendments are being sought to reflect this.

Paragraph 14 of the Applicants' Responding Submissions

In paragraph 14, the Applicants make this further allegation:

> At page 15 of its Response, the First Nations Group refers to the matter before the Board as resulting in "a transfer to a different corporate entity with a different controlling mind and a different set of corporate objectives" thereby triggering the duty to consult. In the context of the applications presently before the Board, such a description is patently wrong.

This allegation is based on a failure to read or understand the text preceding the quote. This text is set out again, this time with emphasis on the part the Applicants appear to have missed:

> 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.

Again, with respect, there is nothing "patently wrong" with any of these assertions or submissions. On the contrary, they are all supported either by the Securities Purchase Agreement or the caselaw referred to in the First Nations' Response.

It is true that "the further amendments Bluearth will need when it can no longer use ACH's name" are not presently before the Board. And it is also true that the *Rio Tinto* case emphasized the importance of the current decision; at paragraph 49, the Court stated: "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." (emphasis in the original). However, it is no less true, as the Applicants acknowledge in paragraph 14, that the Board must examine the "context of the applications presently before the Board".

In their true context, these are not just applications to amend the licence of an owner who has decided to take over the operation of the facilities so that it can then carry on business as a generator of hydro power. They are rather the second to last step in a multi-step, Crown-initiated, Crown-facilitated plan to put the facilities into the hands of a private company that will upgrade them. First came the ministerial direction to the OPA, then came the OPA's decision to enter into an HCI contract with ACH, then came the proposed sale of ACH to Bluearth, next comes – it may have already come - the decision of the OPA to allow ACH to assign or "flip" the HCI contract to Bluearth, then comes the request to this Board to grant the amendment to make ACH the operator of the facilities and, finally, three months or less after the closing date of the sale of ACH to Bluearth, will come a further request to this Board to grant licence amendments making Bluearth or its affiliate the owner and operator of the facilities.

It is to be noted that the Applicants have not attempted to seriously dispute the accuracy of any of this; they have asked the Board instead to either deny the First Nations the opportunity to prove it or to simply ignore all of it except the applications presently before it, the second to last step of the plan.

And yet, until the Board actually grants the licence amendments, the Crown has effectively withheld its final authorization of this development and it cannot proceed. For this reason, the development is still, as it currently stands before the Board, only contemplated. Accordingly, the Board has both the opportunity and the obligation to apply the controlling principle enunciated by the *Haida Nation* decision and reemphasized at paragraph 48 of the *Rio Tinto decision*:

> The duty arises when the Crown has knowledge, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added [by the Court]).

It follows that as soon as the Board is made aware of the possibility that the contemplated Crown conduct may adversely affect the First Nations' aboriginal and treaty right, it must grant the First Nations' intervenor status to establish, if they can, Crown involvement, the potential for adverse impact and the absence of adequate consultation. The duty to consult, if it exists, is a constitutional imperative involving the honour of the Crown. It must be met and, in this case, should not be delayed until the final step when Bluearth or its affiliate presents further requests for licence amendments.

Indeed, the Board's decision to grant the amendment making ACH the operator of the facilities would be a finding that the amendment is, to use the language of the section 74, "in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*". This would add critical momentum to the proposed development by removing the last obstacle to the sale of ACH to Bluearth. It would also create a favourable environment for "the further amendments Bluearth will need when it can no longer use ACH's name". As the Court of Appeal of British Columbia noted at paragraph 69 of *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68, "practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest."
The First Nations submit that it would be contrary to the honour of the Crown to give this advantage to ACH and its backers while simultaneously denying them intervenor status so that they might try to establish, if they have not already established, Crown involvement, the potential for adverse impact and the absence of adequate consultation.

Paragraphs 17 to 19 of the Applicants' Responding Submissions

In these paragraphs, the Applicants state that they do not control the water levels near the three subject facilities. The First Nations have never suggested that they do. The First Nations are well aware that these water levels are controlled by the Lake of the Woods Control Board (the LWCB) and the International Rainy Lake Board of Control (the IRLBC, not the IRLCB).

But this undisputed fact only points to greater Crown involvement in the higher level strategic planning needed to accommodate wild rice harvesting and hydro generation and a correspondingly stronger basis for the Crown's duty to consult First Nations. The LWCB consists of four members, two representing the Crown in right of Canada, two representing the Crown in right of Ontario and one representing the Crown in right of Manitoba. The two current Co-Chairs of the IRLBC Board are an Environment Canada official and U.S. military official, both clearly instructed by their respective governments.

It would appear from the Unies Report that the changes in water levels needed to accommodate wild rice harvesting and hydro generation will be modest, well within the control of the LWCB and the IRLBC, thus probably excluding the need for the direct involvement of the International Joint Commission (the IJC). However, it is clear that IJC Commissioners are also instructed by their respective governments.

As documented in the Kinew study, the First Nations have, in the past, tried to discuss accommodation plans with the LWCB. These attempts were made well prior to the *Haida Nation* decision and proved unsuccessful, primarily because of the LWCB's belief that it had no authority to engage in such discussions. The First Nations must, therefore, note again that this is no answer to the Crown's duty to consult. As the Supreme Court said at paragraph 63 of the *Rio Tinto* decision: "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".

Paragraph 21 to 24 of the Applicants' Responding Submissions

At paragraph 21, the Applicants admit that future changes to water levels could give rise to the Crown's duty to consult. They state:

> Should ACH want to modify any of the facilities in the future in a way that could impact water levels and flows, any future modifications would be subject to regulatory review by the appropriate provincial, federal, and/or international (in the case of the IJC) agencies at that time, and the Crown's duty to consult could be triggered in the future in such a case.

Why then is the Crown's duty to consult not also triggered when it is the First Nations, rather than the owner/operator of the facilities, who would benefit from changes to water levels to accommodate future wild rice harvesting? Do First Nations not have the right to be *active* partners in the future development of the resource? But how can they be if the Crown's duty to consult is not triggered by a development which may adversely impact on the First Nations' aboriginal and treaty right to harvest wild rice *in the future*? And even if the Crown does consult the First Nations, how can it do so honourably if it has already entered into a long term contract with a private company the terms of which contemplate a development model that may conflict with the accommodation of wild rice?

To avoid these questions, the Applicants maintain that any infringement of the First Nations' right to harvest wild rice is a past or historical infringement. At paragraph 22, they state:

> Any alleged impact that may have occurred on the ability of the First Nations Group to harvest wild rice occurred when the flooding originated and would be, assuming it was deemed to be an impact or infringement at law, a continuing or historical impact or breach which does not give rise to a fresh duty to consult in the present case.

However, the sentence of the *Rio Tinto* decision which the Applicants purport to rely upon, does not, in fact, support this submission. At paragraph 49, the Court said: "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." The word "novel" is perhaps somewhat ambiguous but must be interpreted in light of all the other statements made by the Court confirming that where future development of the resource is still possible, the Crown's duty to consult continues. Those statements are listed on page 7 of the First Nations' Response.

The balance of the Applicants' Responding Submissions

The balance of the Applicants' Responding Submissions deals mostly with the question of the Board's jurisdiction. This issue was not addressed in the First Nations' Response. In particular, the First Nations did *not* take the position that this is a Board to whom the Crown has delegated its duty to consult and accommodate, as suggested by the Applicants at paragraphs 20, 23, 25 and 28 of its Responding Submissions. At this preliminary stage, the First Nations continue to take no position on that issue, requesting instead the right to make submissions on the question if and when it arises.

For the purpose of obtaining combined intervenor, the First Nations submit only that the Board has the power, as a condition of its statutory jurisdiction, to determine whether the Crown's duty to consult has been triggered and, if so, whether adequate consultation has taken place. It would not appear that the Applicants dispute that the Board has this power. Nonetheless, the First Nations submit that this power has now been clearly confirmed by the Supreme Court's decision in *Rio Tinto*. They point to the following:

1. the Board's authority under section 19 to hear and determine all questions of law within its jurisdiction; as stated by the Supreme Court at paragraph 69 of the *Rio Tinto* decision: "The power to decide questions of law implies a power to decide constitutional issues that are properly before it …"

2. the absence of what the Supreme Court called at paragraph 72 of the *Rio Tinto* decision, "a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests";

3. the reference in section 74(1)(b) to the Board's power to consider whether the licence amendment requested is "in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*"; while the objectives of the Board and the purposes of the *Electricity Act, 1998* are *primarily*

economic, this was also true of the mandate of the Commission at issue in the *Rio Tinto* case; the Supreme Court nevertheless stated, at paragraph 70:

> Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the Commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?"

4. the fact that the objectives of this Board are not *entirely* economic; they are set out in section 1 of the statute and read, in part, as follows:

> **Board objectives, electricity**
>
> 1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
> …
> 5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

and the fact that it is the policy of the Government of Ontario to respect its duty to consult and, if appropriate, to accommodate First Nations in accordance with its legal obligations as enunciated by the Supreme Court of Canada

At paragraph 29 of their Responding Submission, the Applicants refer to the Board's decision in the *Bruce to Milton Transmission Project* case. In the First Nations' submission, this decision provides little guidance on the Board's jurisdiction in the current context, namely, applications for licence amendments under section 74(1)(b). The *Bruce to Milton* decision (and it would appear, all of the Board's decisions to date on the

issue of the Crown's duty to consult aboriginal groups) was decided in the context of section 92 and 96(2) which provide as follows:

> **Leave to construct, etc., electricity transmission or distribution line**
> 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
> …
> **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.
> **Applications under s. 92**
> (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.

As the *Bruce to Milton* decision stated, and as the Applicants emphasized by quoting this part of the decision:

> 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.

But in the *Bruce to Milton* case, "the matter before" the Board was an application for leave to construct transmission lines by Hydro One. The Board noted that this project triggered an environmental assessment process (an EA process) and that the EA process included an aboriginal consultation component. Accordingly, the Board decided that it

could discharge "its responsibility to assess the adequacy of consultation" by making its decision conditional on the successful completion of the EA process. It wrote:

> 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 [Terms of Reference]. The Board disagrees with SON'S [Saugeen Ojibway Nation'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.
>
> 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 matter before the Board in the present case is not an application for leave to construct under section 92 and 96(2). It is an application for a licence amendment under section 74(1)(b). There are two fundamental differences between the two.

First, the limitations on the Board's jurisdiction imposed by section 96(2) do not apply when the Board is considering applications under section 74. Those limitations were described by the Board in the *Yellow Falls Power* decision, EB-2009-0120, at page 8 and 9, as follows:

> 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.[citations: *Paul v. British Columbia (Forest Appeals Commission),* [2003] S.C.J. 34, *Nova Scotia (Workers' Compensation Board) v. Martin,* [2003] S.C.J. 54.]
>
> 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.

Second, an application to amend a licence under section 74 does not trigger an EA process as does an application for leave to construct under sections 92 and 96(2). In the section 74 context, therefore, the EA process does not normally exist and, where it does not, cannot constitute an alternative forum for addressing consultation issues.

In the context of this particular application under section 74, it can certainly be argued that the ministerial direction and the OPA's conduct attracted the Crown's duty to consult. It cannot be argued that a minister of the Crown or the OPA constitutes now, or ever constituted, a forum for addressing and determining two of the most fundamental consultation issues that arise in this case: whether their conduct has potential adverse impact on the First Nations' rights, thus triggering the duty, and whether their consultation of the First Nations, if any, was adequate. These are issues that can only be decided by an adjudicative tribunal or the courts.

And yet, in its *Yellow Falls Power* decision, the Board showed a marked reluctance to exercise jurisdiction in these areas, even suggesting that it had none. While its comments were clearly obiter, they must be set out in full and carefully considered. The Board wrote:

> In the Board's view this finding [set out above] is sufficient to dispose of this issue in this case because none of the issues raised by WTC [Wabun Tribal Council] relate to the criteria in section 96(2). The Board finds however that there is another reason, also related to its jurisdiction, which supports its determination that it ought not consider the adequacy of consultation.
>
> In its submissions WTC relied heavily on the proposition that the Board was in some senses the central or final decision-maker with respect to this project.
>
> That proposition is simply not true. With respect to applications under section 92 the Board does not make, and is not empowered to make, any decisions with respect to Crown land rights of way, environmental protection and assessment, protection of species, community or worker safety, socio-economic effects, or any one of a significant number of approvals and permits required by the proponent with respect to such projects. Board approval is but one milestone on the path to project completion.
>
> Each of the approvals and assessments has its own drivers and requires distinct expertise. In our review of the materials filed with this application, it became clear that issues respecting accommodation and consultation with Aboriginal peoples have typically been considered within the rules and protocols associated with the environmental assessment. In this case, it appears to be common ground that the environmental assessment is the appropriate context for the consideration of Aboriginal treaty and land rights. WTC specifically indicated in the evidence that it filed that it considered such matters to fall within the scope of the environmental assessment.
>
> In accordance with the rules and procedures governing the environmental assessment process the Minister of Environment will make a decision. The Board has no mandate or jurisdiction of any kind to suggest that it is empowered to review, assess, or adjudicate upon the adequacy of the Minister's consultation and accommodation of Aboriginal peoples. If WTC continues to have concerns respecting the adequacy of such consultation with the environmental assessment process the appropriate measure for it to take is to challenge the Minister, and if necessary, invoke the supervision of the courts. The same is true for each of the other permitting and approvals processes undertaken by various government agencies with respect to this project.

> To assume such jurisdiction over other government agencies, would, in the Board's view, be insupportable from a legal point of view, and also grossly inefficient and unsatisfactory from a practical point of view.
>
> In its submissions WTC argues that if the Board does not conduct "…a comprehensive final review of all of the authorizations needed for the project there is a danger that the project would have been approved in the absence of adequate consultation, leaving affected First Nations with little recourse but litigation, conducted only after the project was underway, at which point some issues may become moot." With respect, the Board finds that the various existing approval processes are sufficiently interdependent so as to avoid the scenario depicted by WTC.
>
> Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. In fact, the statute enabling the environmental assessment process prohibits any approval by any authority that is not conditional on the prior completion of the environmental assessment process.
>
> In fact, in the Board's view, the only way to ensure that the appropriate measure of consultation and accommodation occurs with respect to any of the requisite permits, approvals, and assessments of the relevant government agencies is to follow the Board's typical process to make its approval of the leave to construct conditional upon completion of those processes and procurement of those permits. It is clear to the Board that the assessment of the adequacy of consultation and accommodation is best conducted by the various government agencies sponsoring those processes, informed as it is with intimate knowledge of the context, with the possibility or threat of supervision by the courts if deficiencies are thought to exist. For the Board to engage in an ex post facto review of the adequacy of consultation by any of these government agencies would be inefficient, ineffective, and insupportable.

The First Nations challenge this reasoning on multiple fronts.

First, it is now clear from the *Rio Tinto* decision that the Board was wrong in law to assert, albeit in obiter, that it "has no mandate or jurisdiction of any kind to suggest that it is empowered to review, assess, or adjudicate upon the adequacy of the Minister's consultation and accommodation of Aboriginal peoples." The First Nations rely on their earlier submissions on this issue.

Second, in the present case, the Board *is*, in fact, "the central or final decision-maker with respect to this project". It is being asked now to amend the licences in favour of ACH and, once the sale is complete, a few weeks or months from now, it will be asked to amend the licences again in favour of Bluearth or its affiliate. This is not a case in which the Applicants must obtain any other assessments or approvals "with respect to Crown land rights of way, environmental protection and assessment, protection of species, community or worker safety, socio-economic effects, or any one of a significant number of approvals and permits". Nor can the Board make its decision subject to such approvals and permits.

Third, by focusing on all of the lower level approvals and permits needed to complete a project, none of which is actually required in this case, the Board's reasoning ignored the issue of higher level, strategic or structural planning. The *Haida Nation* and *Rio Tinto* decisions tell the Board that it must be more alive to this issue. The Board must take to heart the Supreme Court's admonition found at paragraph 62 of *Rio Tinto* decision:

> The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

Fourth, while the Board suggested that its approach was intended to avoid "inefficient, ineffective and insupportable" decision-making, it can be more accurately described as an attempt to push the admitted complications of such decision-making from its own plate to the courts' plate. This brings to mind another admonition of the Supreme Court, this one found at paragraph 37 of the *Paul* decision, a decision to which the Board referred:

> A further unconvincing argument was that aboriginal rights are, today, complicated and in a state of flux, but that in the future, when they have been settled, it may be appropriate for administrative tribunals to consider them. Again, such lines are not easily enough drawn for that to be the judicial test. The Attorney General of British Columbia presented no workable way of taking from administrative tribunals the complicated aboriginal law issues and leaving with them the simpler aboriginal law issues that they could resolve speedily and satisfactorily, in the best interests of all concerned.

Finally, it is be noted that while the Board has, in several cases, found that the concerns of aboriginal groups could be adequately addressed through the EA process, a process that is not available here, it does not appear from these cases that the Board as ever denied intervenor status to an aboriginal group.

For all these reasons, the First Nations respectfully asks the Board to grant it combined intervenor status in this proceeding, to order an oral hearing and to order that the First Nations are eligible for an award of costs.

Two copies, signed, delivered to the OEB Friday, May 13, 2011

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David G. Leitch

Keshen & Major