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*;

REQUEST FOR A STAY PURSUANT TO SECTION 33(6) PENDING APPEAL TO THE DIVISIONAL COURT

Forum for Requesting a Stay Pending Appeal

Section 33(1)(a) of *Ontario Energy Board Act, 1998* creates a right to appeal an order of the Ontario Energy Board to the Divisional Court. Sections 33(6) and (7) then authorize either the Board or the Divisional Court to stay the order pending the appeal. The relevant provisions state:

> **Appeal to Divisional Court**
>
> 33. (1) An appeal lies to the Divisional Court from,
>
> (a) an order of the Board;
>
> …

Order to take effect despite appeal

(6) Subject to subsection (7), every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise.

Court may stay the order

(7) The Divisional Court may, on an appeal of an order made by the Board,

(a) stay the operation of the order; or

(b) set aside a stay of the operation of the order that was ordered by the Board under subsection (6).

The *Statutory Power Procedure Act* applies generally to the Ontario Energy Board; any exception is of no relevance here. Section 25(1)(b) of the *Statutory Power Procedure Act* also recognizes the possibility of two forums for seeking a stay pending appeal. It states:

Appeal operates as stay, exception

25.(1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

…
(b) the tribunal or the court or other appellate body orders otherwise.

When a stay pending appeal can be sought in two forums, the tribunal or the appellate court, is the appellant free to simply choose its forum? The Divisional Court answered that question in the negative in *Rose (Re)* 1982, 38 O.R. 162. In that case, the Commercial Registration Appeal Tribunal's power to grant a stay pending appeal was found in section 8(9) of the *Collections Agencies Act* while the Divisional Court's power to grant to a stay pending appeal was found, the Court held, in section 11(5) of the *Ministry of Consumer and Commercial Relations Act*. Justice Southey nevertheless held that the appellant was obliged to seek a stay pending appeal *first* from the tribunal whose decision was being appealed. At paragraphs 12 and 13, he wrote:

> … In my judgment, an appellant in a case such as this, where a statutory provision like s. 8(9) is in force, ought first to make application for a stay to the tribunal. If the tribunal refuses to grant the stay, then, in my judgment, the appellant can apply for a stay to this Court, not by way of appeal from the order of the Court below, but in exercise of its powers under s. 11(5) of the Ministry of Consumer and Commercial Relations Act.
>
> It may be that an application to this Court for a stay following refusal of a stay by the tribunal should be properly characterized as an appeal from the decision of the tribunal against a stay. In my judgment, however, it makes no difference what label is properly put on the application to this Court for a stay. I am quite satisfied that the Court has the power to grant a stay in proceedings before it, whether by way of appeal or otherwise, notwithstanding a prior refusal of a stay by the tribunal. The point which I seek to emphasize is that, in the absence of special circumstances, an appellant ought not to apply to this Court for a stay unless he has first applied to the tribunal below. In this case, in my view, the appellant ought to apply forthwith to the tribunal for a stay. If it is refused he may re-new this motion to this Court.

It follows that the First Nations must first seek a stay pending their appeal from this Board, not from the Divisional Court.

Grounds for Seeking a Stay

In its decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4^{th}) 385, the Supreme Court of Canada set out a three-part test to determine whether a stay application should be granted:

> a. There is a serious issue to be decided,
>
> b. The applicant for the stay will suffer irreparable harm if a stay is not granted, and
>
> c. The balance of convenience favours the granting of a stay because the harm to the applicant outweighs any potential harm to the respondent.

The seriousness of the Crown's duty to consult First Nations when their interests may be adversely affected can hardly be doubted: it is a constitutional imperative based on the honour of the Crown.

Moreover, this duty gives rise to relatively new questions of constitutional law that are not within the Board's particular or specialized area of expertise. As the Divisional Court observed at paragraph 15 of its decision in *Toronto Hydro-Electric System v. Ontario (Energy Board)* (2009) 252 O.A.C. 188:

> As noted in *Dunsmuir* [the Supreme Court of Canada's decision in *New Brunswick (Board of Management) v. Dunsmuir* [2008] 1 S.C.R. 190] (at paras. 54, 55 and 60), the standard of review for questions of law may depend upon the nature of the question of law. Where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

Much as the Board may believe that it reached a correct legal decision, it can and should still acknowledge that the arguments of the First Nations merit consideration by an appellate court before its order takes effect.

As for "will suffer irreparable harm", the First Nations submit that this should not be part of the test applied to stay applications in duty to consult cases. In this context, the test should only be potential adverse impact. Any higher test would undermine the purpose of the duty to consult as explained in *Haida Nation*. Again, much as the Board may believe that neither Crown conduct nor potential adverse impact was established, it can and should still acknowledge that the arguments of the First Nations merit consideration by an appellate court before its order takes effect.

Finally, as to the balance of convenience, it has not been established that the Applicants in this proceeding would suffer any harm as a result of a stay pending appeal. The lawyers representing them have made certain allegations in this regard but have not produced any evidence to substantiate their claims. The First Nations rely, therefore, upon the statement made by Justice Goodman of the Court of Appeal at paragraph 12 of his decision in *International Corona Resources Ltd. v. Lac Minerals Ltd*. (1986) 21 C.P.C. (2d) 252:

> I am of the view that as a general rule it is in the interest of justice that the "status quo" be maintained pending an appeal where such can be done without prejudicing the interest of the successful party.

Even if there is some temporary financial prejudice to the Applicants in granting a stay pending appeal, the First Nations submit that it is outweighed by any change in the "status quo" which threatens the future exercise of their aboriginal and treaty right to harvest wild rice. Again, while rejecting the First Nations' argument, the Board can and should recognize that its decision to grant the license amendments will facilitate the sale to Bluearth and could jeopardize, perhaps permanently, the First Nations' future aboriginal and treaty right to harvest wild rice.

All of which is respectfully submitted in support of a request for a stay of the Board's orders pending appeal.

Two copies, signed, delivered to the OEB on Tuesday, May 24 , 2011

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David G. Leitch,
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