McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

George Vegh
Direct Line: 416 601-7709
Direct Fax: 416 868-0673
Email: gvegh@mccarthy.ca

mccarthy tétrault

May 24, 2011

Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto ON M4P 1E4

Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: **IN THE MATTER OF** the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by ACH Limited Partnership for a licence amendment pursuant to section 74 of the Ontario Energy Board Act, 1998;

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

Board Files: EB-2011-0065 and EB-2011-0068

Attached please find Response Submissions of ACH Limited Partnership and AbiBow Canada Inc. on the Stay Application of the First Nations Group.

Sincerely,

per George Vegh

GV:MAB
att
c: Douglas Keshen
Jim Gartshore, Vice-President Energy & General Manager, ACH Limited Partnership
Alice Minville, Senior Counsel, AbitibiBowater Inc.
All Applicants/Participants on file

EB-2011-0065
EB-2011-0068

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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;

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Response Submissions of AbiBow Canada Inc. ("AbiBow") and ACH Limited Partnership ("ACH", collectively, the "Applicants") on the Stay Application of the First Nations Group

Introduction and Summary of Applicants' Position

1. By order dated May 20, 2011, the Ontario Energy Board granted licence amendments requested by the Applicants. The effect of the order is to change ACH's status as owner of eight hydroelectric generating stations to owner and operator and to remove the same eight hydroelectric generating stations, which AbiBow currently operates, from Schedule 1 of its licence.

2. The Board granted these orders after receiving written submissions from all parties and, in particular, after considering the submissions of the First Nations Group that the orders, if granted, could adversely impact the aboriginal rights of the members of the First Nations Group and thus trigger the Crown's duty to consult.

3. The Board found that the duty to consult was not triggered by the orders requested here. According to the Board, "even assuming all the factual matters relied upon by the First Nations Group are correct, the Board has no responsibility or authority to consider the adequacy of the Crown's consultation efforts in the current proceedings."

4. By motion dated May 24, 2011, the First Nations Group requested the Board to stay its orders.

5. The Applicants submit that the case for a stay is not made out because the First Nations Group has not met the test for such relief as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[1] All three components of the test must be met.

6. In applying the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, the Applicants submit the following:

> (i) There is no serious issue to be decided – the Board was right to summarily dismiss the First Nations Group's claim that the orders requested would adversely impact them;
> (ii) The First Nations Group has not demonstrated that they will suffer irreparable harm, or indeed ***any*** harm, if a stay is not granted. Indeed their rights have not even been impacted by the orders – they have the same rights after the orders as they had prior to the orders; and
> (iii) The balance of convenience weighs against granting the stay because, as indicated, the First Nations Group continues to have the legal rights they had prior to the orders while, on the other hand, the Applicant AbiBow will face significant financial harm by the delay of this matter being brought to resolution.

7. The Applicants' submissions on these points are set out in greater detail below.

(i) Serious Issue to be Tried

8. The First Nations Group argues that there is a serious issue to be tried because the Crown's duty to consult is itself, a serious issue. But that is not the test. The test is whether the First Nations Group has demonstrated that it has a serious argument that the Board made the wrong decision.

9. The Ontario Court of Appeal has stated that "a strong case for a stay must be made out by the party seeking the stay. The court must proceed on the assumption that the judgment under appeal is correct and the motions judge's findings must be *prima facie* accepted."[2] The Ontario Divisional Court has applied this reasoning and refused to stay a Board decision where the applicant could not demonstrate that there was a serious reason to question the correctness of the Board's decision.[3]

10. The First Nations Group's argument that the order could adversely impact its aboriginal rights, and thus trigger the duty to consult is manifestly weak. In fact, the Board proceeded on the assumption that all of the First Nations Group's allegations were true and, ***even with that most generous interpretation***, the Board could not find a compelling argument:

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[1] (1994), 111 D.L.R. (4th) 385 (S.C.C.).

[2] *Ontario (Minister of Natural Resources) v. Mosher* (2003), 41 C.P.C. (5th) 66 (Ont. C.A.) at 73 (per Cronk J.A.).and *Ogden Entertainment Services v. United Steelworkers of America, Local 440* (1998), 38 O.R. (3d) 448 at 450 (Ont. C.A.) at 450 (per Robins J.A.).

[3] See *Association of Major Power Consumers in Ontario v. Ontario (Energy Board)*, 228 O.A.C. 11 (Div. Ct.).

The current applications, if approved, would change only the identity of the owner/operator. Although ACH, AbiBow and Bluearth may regard the amendments as a condition precedent to a future sale, the proposed amendments in no way authorize (or even directly contemplate) such a sale. Moreover, the proposed amendments will have no impact whatsoever with regard to the owner and operator's ability to operate the facilities. The proposed amendments to the license relate only to the identity of the owner and operator – there are no other changes. To the extent a sale is ultimately realized, Bluearth will have exactly the same authority to operate the facilities as ACH and AbiBow have today.

More importantly, the proposed license amendments, and indeed the licenses themselves, are not connected to the potential infringement as identified by the First Nations Group. The potential infringement may occur only if there are changes to water levels or flows. The license - whether held by ACH, AbiBow, Bluearth, or anyone else - does not in any way manage or control water levels or flows. These are matters governed by the Lake of the Woods Control Board and the International Rainy Lake Board of Control, and entirely outside the control of the Board and the licensing regime it oversees. To the extent that any parties seek changes, it would be through these agencies and without input from the Board.

11. The Board thus clearly understood that the issue of the duty to consult is a serious one. However, during the motion to intervene the First Nations Group did not demonstrate a serious argument that this duty could be adversely affected by the amendments to the licenses, nor, in this motion, that there is a reason to question the correctness of the Board's decision to amend the licenses.

12. The *RJR* test has been confirmed by the Supreme Court of Canada and other courts to be the appropriate test for forms of injunctive relief in cases involving aboriginal rights and related issues.[4]

(ii) Irreparable Harm

13. The First Nations Group does not make any case for "irreparable harm" as required by the *RJR* test and thereby, fails to meet the required test. The First Nations Group does not even attempt to argue that it will suffer "irreparable harm". Instead, it says that the Board should apply a completely different test that the one mandated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*; the First Nations Group says that the test should only be whether there is a potential adverse impact. This is a remarkable proposition.

14. The proposition that irreparable harm is not needed in the aboriginal context is totally unsupported by authority. None is cited by the First Nations Group, because none exists.

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[4] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 12 – 15; see also *Musqueam Indian Band v. B.C. (Minister of Sustainable Resource Management)*, 2004 BCCA 251; and *Musqueam Indian Band v. Canada*, 2008 FCA 214 (Fed. C.A.).

15. The proposition, in addition to being unsupported by any authority, runs counter to important principles of aboriginal and administrative law already established by the Supreme Court of Canada. The Supreme Court of Canada has referred to the *RJR* test in the aboriginal context.[5] The Supreme Court of Canada has also held that where an administrative tribunal has the power to decide questions of law, it will be presumed to have the concomitant jurisdiction to interpret or decide issues arising in relation to section 35 of the *Constitution Act, 1982*.[6] Thus the suggestion that the *RJR* test should be modified because aboriginal law is somehow unique and must be left to the courts is simply incorrect.

16. Indeed the only allegation that remotely supports the irreparable harm branch of the test is the statement in the First Nations Group's submission in support of the stay motion that the "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." However, there is no basis for this assertion. As the Board specifically noted with respect to the right to harvest wild rice:

> The potential infringement to Aboriginal rights or title identified by the First Nations Group relates to its ability to harvest wild rice. The applications before the Board, if approved, will have no direct impact on water levels or flows, and therefore no direct impact on the First Nations' ability to harvest wild rice. To the extent that there is any potential indirect impact, the connection to the current proceeding is peripheral at best.
>
> Section 57 of the Act requires electricity generators to be licensed by the Board. The license itself does little more than authorize the licensee to generate electricity for the Independent Electricity System Operator ("IESO") administered markets, purchase electricity from the IESO administered market, and sell electricity to the IESO administered market.11 Although the individual generation facilities are identified, the license does not include the generation capacity of the facilities.

(iii) Balance of Convenience

17. In contrast to the lack of impact on the First Nations Group, the Board should balance the harm to the Applicants. By letter dated April 21, 2011, AbiBow advised the First Nations Group and the Board of a cost to AbiBow's parent company, Abitibi Bowater Inc. ("Abitibi") of several millions of dollars per year if AbiBow does not receive the proceeds from the sale of its interest in ACH in a timely way:

> "Unless the Board brings this matter to a resolution shortly, the Applicant AbiBow will face significant financial harm. Specifically, June 9, 2011 is the last date on which Abitibi may redeem at a fixed price US$100MM of notes using the proceeds of the sale of ACH. If the redemption does not occur by then, Abitibi

[5] *Haida, supra* note 4 at para. 12.

[6] *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 at para. 39.

would be required to use such proceeds to repurchase the notes on the open market or to continue to pay interest on such notes. In either case, it will cost AbiBow several million dollars a year more than it would have incurred had it exercised its redemption right. **In order to be in a position to exercise its redemption right by June 9, 2011, it requires a decision by May 20, 2011."**

The Board did in fact render a decision by May 20, 2011 and the parties have been working to close the transaction this week so that Abitibi can exercise its redemption right under its notes by June 9, 2011 at a fixed 5% premium. AbiBow advises that if Abitibi misses the June 9, 2011 date to exercise its redemption right it will either (i) be required to repurchase the notes in the open market, currently at a premium of approximately 15%; or (ii) continue to incur interest at 10.25% on the notes. In either case AbiBow expects that it would suffer damages of at least $10 million and possibly much higher if it is unable to redeem such notes on the market.

18. This information has been on the record for several weeks now and continues to be the case. It is important that the First Nations Group has not offered an undertaking to compensate AbiBow for the damages caused if the pending transaction is delayed and the notes cannot be redeemed by June 9, 2011. While an undertaking as to damages is not a prerequisite for a stay pending appeal, the presence or absence of one is a factor relevant to the balance of convenience.[7] Its absence in this case strongly militates against a stay.

19. By contrast, there is no indication that the First Nations Group will suffer any harm from the amendments to the licenses approved by the Board.

20. In *Haida*, McLachlin C.J, considered the issue of the "balance of convenience" and its effect on aboriginal rights and states" "the balance of convenience test tips the scales in favour of protecting jobs and government revenues."[8]

21. The balance of convenience therefore weighs heavily in favour of refusing the stay.

Conclusion and Next Steps

22. The Applicants submit that the First Nations Group has not made out the case necessary for a stay because, applying the test in *RJR-MacDonald Inc. v. Canada*:

> (i) There is no serious issue to be decided – the Board was right to summarily dismiss the First Nations Group's claim that the orders requested would adversely impact them;
> (ii) The First Nations Group has not demonstrated that they will suffer irreparable harm, or indeed any harm, if a stay is not granted. Indeed their rights have not

[7] *Hastings Corp. v. Toronto (City) Chief Building Official* (2004), 46 M.P.L.R. (3d) 87 (Ont. S.C.J.) at para. 79, *BMW Canada Inc. v. Nissan Canada Inc.* (2007), 57 C.P.R. (4th) 115 (Fed. C.A.) at para. 8, *Maverick Equities Inc. v. Condominium Plan No. 942 2336*, 2008 ABCA 190 at para. 17 and *Ober v. Bennett*, 2009 ABCA 327 at para. 5.

[8] *Haida, supra* note 4, at para. 14.

even been impacted by the orders – they have the same rights after the orders as they had prior to the orders; and
(iii) The balance of convenience weighs against granting the stay because, as indicated, the First Nations Group continues to have the legal rights they had prior to the orders while, on the other hand, the Applicant AbiBow will face significant financial harm by a delay of this matter being brought to resolution.

23. The Board's order dated May 20, 2011 provides that the amended licences will be issued when the Board receives confirmation that the transaction has closed. Given the urgency of this matter, the Applicants wish to notify the Board and the First Nations Group that unless the decision of the Board is stayed before May 27, 2011, the parties intend to close the pending transaction to buy and sell the interest in ACH on May 27, 2011 (or as soon thereafter as all the conditions precedent are satisfied). Confirmation of the closing of the transaction will follow.

All of Which Respectfully Submitted

Dated: May 24, 2011

George Vegh Thomas Isaac **McCarthy Tétrault LLP** Telephone: 416-601-7709 Email: gvegh@mccarthy.ca Counsel for AbiBow Canada Inc.	Sharon Wong **Blake, Cassels & Graydon LLP** Tel: 416.863.4178 E-mail: sharon.wong@blakes.com Counsel for ACH Limited Partnership

To:

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

To:

All Parties