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 A STAY PENDING APPEAL

Serious Issue to be decided

At paragraph 9, the Applicants rely upon the Divisional Court's decision in *Assn. of Major Power Consumers in Ontario v. Ontario (Energy Board)* 2007 CarswellOnt 4273, 228 O.A.C. 11 in support of the submission that an applicant for a stay pending appeal must "demonstrate that there was a serious reason to question the correctness of the Board's decision." In fact, at paragraph 19 of that decision, Justice Greer observed: "The threshold of determining whether there is a serious issue to be tried, is a low one."

The other decisions referred to in paragraph 9 do not involve questions of constitutional law decided by an administrative tribunal on a presumed set of facts. A complete reading of these decisions demonstrates that they deal with stays in the context of court rulings and findings on disputed facts. It may be right, in that context, to assume that a judge's view of the law is correct and to accept *prima facie* his/her factual findings. With respect, the Board should not, in considering this stay application, regard its own rulings on questions of constitutional law on a presumed facts with the same deference.

Irreparable Harm

The Applicants argue that there is no authority for the First Nations' submission that they should not be required to show that they "will suffer irreparable harm". In fact, authority is found in the very paragraphs of the *Haida Nation* case to which the Applicants refer. Rather than quoting only parts of those paragraphs, as the Applicants do, the First Nations set out below these paragraphs in the entirety. Particular attention must be paid to paragraph 14.

> **A. Does the Law of Injunctions Govern this Situation?**
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> 12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.
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> 13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.
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> 14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J.J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An

> interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.
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> 15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

The First Nations submit that paragraph 14 provides a clear explanation of how the criteria established by the *RJR-MacDonald Inc. v. Canada (Attorney General)* decision may fail to serve the underlying purpose of reconciliation. Moreover, it is to be noted that while a stay pending appeal is a kind of "interlocutory injunction", it will not operate "over such a long period of time [that it] might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise." Of course, the Court went on in *Haida Nation* to enunciate the potential adverse impact test. The First Nations maintain their submission that this is the correct test to apply when considering stays pending appeal in duty to consult cases.

Balance of convenience

The Applicants have still not substantiated their claims of financial harm. Their *lawyers* have simply repeated allegations contained in their own earlier letters. This is not evidence though affidavit evidence could have easily been entered. We are no longer at a point in the proceeding when the Board should presume facts, as it purported to do in deciding the First Nations' right to intervene. In any event, the First Nations submitted a significant body of evidence to substantiate their claims of Crown involvement and potential adverse impact. It would be totally improper for this Board to assign less weight to that *evidence* than to the unsubstantiated claims made by the Applicants lawyers.