



EB-2011-0115

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 Detour Gold
Corporation for an Order granting leave to construct a new
transmission line and associated facilities for the Detour
Lake Power Project (Phase II)

PROCEDURAL ORDER NO. 1

Detour Gold Corporation ("Detour") has filed an application with the Ontario Energy Board (the "Board") dated April 19, 2011 under sections 92 and 97 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B ("the Act"). Detour is seeking an order of the Board granting leave to construct a transmission line and associated facilities from Pinard TS to the Island Falls area (the "Project"), where it will connect to a previously approved transmission line supplying the Detour Lake Mine, located 180 km northeast of the Town of Cochrane. Detour also seeks an order approving the form of easement agreement provided in the application. Detour Gold Corporation is a Canadian gold exploration and development company headquartered in Toronto. The Board has assigned File No. EB-2011-0115 to the application.

Interventions

The Board issued a Notice of Application and Written Hearing on May 11, 2011. Detour has served and published the Notice as directed by the Board. Taykwa Tagamou Nation ("TTN") and the Independent Electricity System Operator ("IESO") have applied for intervenor status. TTN also requested that costs be awarded, and expressed a preference for a written hearing.

In its intervention request, TTN indicated that the Project is within the Custodial Lands and Traditional Use Territory of the TTN and its intervention would be restricted to the concerns about potential impacts of the Project on TTN interests. .

The IESO indicated that it intends to make submissions and ask interrogatories, as necessary or as requested by the Board, with respect to the review and assessment of the reliability implications of the Project. It took no position on the form of hearing.

The Board grants intervenor status to the IESO. The Board will grant TTN intervenor status and cost eligibility, subject to the restrictions described below.

Scope of the Board's Jurisdiction in a Leave to Construct Application

The Board's jurisdiction to consider issues in a section 92 leave to construct case is limited by sub section 96(2) of the OEB Act which states:

- (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. 2009, c. 12, Sched. D, s. 16.

In its intervention request, TTN indicated that the scope of its intervention would be restricted to the concerns about potential impacts of the Project on TTN interests. However, TTN's intervention request also refers to an Impacts and Benefits Agreement for the Detour Lake Gold project which explicitly recognizes "TTN's right to make representations concerning any environmental or social concerns to any provincial regulatory body considering the approval of any proposed activity related to the Project".

The Board notes that environmental and social issues are matters that are beyond the scope of this proceeding. As a result, the Board will not require Detour to answer interrogatories related to such issues, unless they fall within the specific criteria of section 96(2) and are within the scope of this proceeding. Furthermore, the Board will not award costs in this proceeding for matters which are outside the scope of this proceeding.

While the Board does not have the jurisdiction to determine issues related to environmental and social concerns outside of the scope of section 96(2), it is important to note that both Leave to Construct and Environmental Assessment (“EA”) approvals are required before the Project may proceed. Should this Board approve the Leave to Construct application, its order would be conditional on all necessary permits and authorizations being acquired, including a completed EA.

The Board has in prior decisions addressed the extent of the Board’s jurisdiction to consider the issue of the adequacy of Aboriginal consultation. For example, in a case involving Yellow Falls Power Limited Partnership, the Board found:

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.

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.¹

In that decision, the Board went on to describe the relevant scope for issues related to Aboriginal consultation and accommodation:

¹ Yellow Falls Power Limited Partnership, *Decision on Questions of Jurisdiction and Procedural Order 4*, EB-2009-0210, November 18, 2009. See also, Northgate Minerals, *Procedural Order 2*, EB-2010-0150, July 29, 2010.

Finally, in the Board's view, if it does have any jurisdiction at all to consider matters relating to the adequacy of consultation with Aboriginal peoples, section 96(2) operates to expressly constrain the Board's discretion, and limits its jurisdiction to the determination of matters of law arising exclusively in connection with the prescribed criteria, namely price, quality, reliability, and the government's policies with respect to renewable energy projects. The Board finds that the Legislature's unequivocal intention was to limit the scope of such proceedings to the enumerated criteria, and to preclude any other considerations of whatever kind, from influencing its determination of the public interest. The Board's authority to determine questions of law is not open-ended, but rather has been strictly prescribed by section 96(2).

The same approach will be adopted for the current proceeding. Only Aboriginal consultation and accommodation issues which fall within the specific criteria of section 96(2) will be considered within the scope of this proceeding

Requests for Cost Eligibility

TTN requested cost eligibility for participation in the proceeding.

The Board grants cost eligibility to TTN subject to the right of reply of the Applicant within 5 days, but the extent of the cost eligibility will be restricted to matters directly within the scope of this proceeding, as indicated above. Further information on activities that are eligible for an award of costs is outlined in the Board's *Practice Direction on Cost Awards* on the Board's website. Please note that, unless the Board specifies otherwise, cost claims are to be filed at the end of this proceeding. Cost claims will be subject to the Detour's right of objection.

Procedural Steps

In the Notice of Application and Written Hearing, the Board indicated that it intended to proceed by way of a written hearing unless any party satisfies the Board that there is a good reason for not proceeding by way of a written hearing. TTN requested a written proceeding, and no other party indicated a preference for an oral hearing. The Board will proceed with a written hearing.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. Intervenors and Board staff who wish information from the Detour that is in addition to the evidence pre-filed with the Board and that is relevant to the hearing shall request the information by means of written interrogatories filed with the Board and delivered to the Detour on or before Friday, **June 17, 2011**. All interrogatories and responses must include a reference to the section of the application which identifies the specific evidence on which the interrogatory is based.
2. Detour shall, no later than Wednesday, **June 29, 2011** file with the Board and deliver to all intervenors, a complete response to each of the interrogatories.
3. Intervenors and Board staff shall if they wish, file relevant evidence with the Detour and with the Board and all other intervenors, no later than Friday, **July 8, 2011**.

All filings to the Board must quote file number EB-2011-0115, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All filings should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date. Parties must also include the Case Manager, Edik Zwarenstein at edik.zwarenstein@ontarioenergyboard.ca and Board Counsel, Ljuba Djurdjevic at ljuba.djurdjevic@ontarioenergyboard.ca in all electronic correspondence related to this case.

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Attention: Board Secretary

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DATED at Toronto, June 8, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX 'A'

TO

PROCEDURAL ORDER NO. 1

Applicant and List of Intervenors

Board File No: EB-2011-0115

June 8, 2011

Detour Gold Corporation
EB-2011-0115
APPLICANT & LIST OF INTERVENORS

June 8, 2011

APPLICANT	Rep. and Address for Service
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INTERVENORS

Rep. and Address for Service

**Detour Gold Corporation
EB-2011-0115**

APPLICANT & LIST OF INTERVENORS

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June 8, 2011

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**Detour Gold Corporation
EB-2011-0115**

APPLICANT & LIST OF INTERVENORS

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June 8, 2011

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