Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2013-0015

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 McLean's Mountain Wind Limited Partnership for an electricity generation licence as a Feed-In Tariff Program participant.

Decision on Oral Hearing and Procedural Order No. 1
April 26, 2013

McLean's Mountain Wind Limited Partnership ("McLean's") filed an application with the Board dated January 17, 2013 under section 60 of the *Ontario Energy Board Act*, *1998* seeking an electricity generation licence as a Feed-In Tariff ("FIT") Program participant.

In the application, McLean's states that in April 2010, the Ontario Power Authority ("OPA") awarded two FIT Program contracts to the applicant, relating to the purchase of electricity generated at the applicant's proposed McLean's Mountain Wind Farm in Little Current, Ontario. Further, McLean's states that in November 2012, the OPA provided McLean's with "Notice to Proceed" for the wind farm.

The Board assigned file no. EB-2013-0015 to the application. The Board issued a Notice of Application and Hearing on February 13, 2013.

On February 26, 2013, the Wikwemikong Unceded Indian Reserve No. 26 ("Wikwemikong") filed a request with the Board for an oral hearing. Wikwemikong requests an oral hearing so that they may provide oral evidence on how McLean's project and application for a generation licence might infringe on the exercise of their aboriginal or treaty rights. Wikwemikong also raises the issue of the duty to consult and whether there has been adequate consultation.

On March 5, 2013, the Manitoulin Coalition for Safe Energy Alternatives ("MCSEA") provided a letter that supported Wikwemikong's request for an oral hearing.

The Board also received submissions from two individuals: Anne Marie General and Emily Weber.

On March 8, 2013, McLean's responded to Wikwemikong's submission, stating that there are insufficient grounds to hold an oral hearing in this proceeding. McLean's submits that the reasons for denying the oral hearing request in the current case are similar to those for the denial of the request for an oral hearing in the leave to construct proceeding for the transmission facilities connecting the same wind farm to the IESO-controlled grid (EB-2011-0394). McLean's also submits that the matters raised by Wikwemikong are beyond the scope of this proceeding and that therefore, there is no need to conduct an oral hearing to acquire additional evidence on such matters.

Scope of the Proceeding

Under section 57 of the Act, no person may generate electricity for sale through the IESO-administered markets or directly to another person unless it is licensed by the Board to do so. An electricity generation licence permits the licensee to participate in the Ontario energy market. The licence does not grant approval to build the generation facility itself. It is, therefore, a process for licensing the applicant, not the facility. The scope of a generation licence application process has been articulated by the Board in its Decision and Order of March 23, 2010 for York Energy Centre LP's Electricity Generation Licence proceeding (EB-2009-0242). In that decision, the Board stated:

> In the exercise of its licensing function, the Board's practice is to review a licence application based on the Applicant's' ability to own and/or operate a generation facility and to participate reliably in Ontario's energy market.
>
> The Board uses three main criteria to assess an electricity generator licence applicant:
>
> - The applicant's ability to be a financially viable entity with respect to owning and operating a generation facility in Ontario's energy market;
> - The applicant's technical capability to reliably and safely operate a generator; and

- The applicant and its key individuals' past business history and conduct such that they afford reasonable grounds for belief that the applicant will carry on business in accordance with the law, integrity and honesty.

When an applicant for an electricity generation licence is a FIT Program participant, the OPA undertakes a rigorous assessment of the applicant's financial viability, technical capability and conduct. If the OPA is satisfied with the results of this assessment, the OPA grants the applicant a Notice to Proceed. Because of the rigour of the OPA assessment process, the Board will generally grant a generation licence to an applicant if it has received a Notice to Proceed from the OPA.

The scope of a licence application procedure does not include a review of the merits or impact of the generation facility or the transmission facilities which connect the generator to the electricity grid. The generation and transmission facilities are subject to environmental and other permitting processes which are not conducted by the Board. The transmission facilities are subject to a leave to construct proceeding before the Board, but that review is limited by the Act and does not include environmental issues. McLean's was granted leave to construct the transmission facilities by the Board's Decision and Order of June 28, 2012 (EB-2011-0394).

Oral Hearing Request

Rule 34.01 of the Board's *Rules of Practice and Procedure* states that, in any proceeding, the Board may hold an oral, electronic or written hearing, subject to the *Statutory Powers Procedure Act* ("SPPA") and the statute under which the proceeding arises. Section 5 of the SPPA provides, in part, that the tribunal shall not hold a written hearing if a party satisfies the tribunal that there is good reason for not doing so.

The Board has considered the Wikwemikong submission and the letter of comment in support of it. The Board has determined that an oral hearing is not required.

Wikwemikong explained the reasons for requesting an oral hearing as follows:

> An oral hearing is imperative in order to provide an opportunity for community elders to share their historical understanding of the aboriginal perspective of the purpose and intent of the Bond Head Treaty of 1836 and the rights and responsibilities attached to the Treaty. In order for our elders to express their historical

> understanding of the aboriginal perspective regarding the purpose and intent of the Bond Head Treaty of 1836 and how the project may potentially interfere with the exercise of the guarantees set out in that treaty, they must communicate orally and in the Anishinaabe language.

Wikwemikong has identified that the *project* may interfere with the guarantees set out in the treaty. However, the project (specifically the wind farm and the associated transmission line) is not within the scope of this licence proceeding. Wikwemikong has identified no issues that are within the scope of this licence proceeding, namely the financial viability, technical capability, and conduct of the applicant. Accordingly, the Board concludes that an oral hearing is not required to hear Wikwemikong's evidence.

Having decided there will be no oral hearing, the Board will proceed with a written hearing. The Board has already received written submissions from a number of parties. Wikwemikong has not made written submissions, which may be because Wikwemikong was awaiting a decision on the request for an oral hearing. The Board will therefore make provision for Wikwemikong to file written submissions on the merits of the application within the scope of the proceeding. The Board will also make provision for McLean's to provide reply submissions.

Duty to Consult

Wikwemikong outlines its understanding of the duty to consult Aboriginal groups in respect of the project and goes on to state:

> We could find no evidence of being provided with information about the project being considered and would like to know the full scope of it and, in particular, on the question of how the activities might impact on the exercise of our rights and to canvass the question of how any interferences might be mitigated or accommodated, if mitigation measures are not possible.

As described above, the "project" (the wind farm and associated transmission line) is not the subject of the current proceeding. The Board's authority to determine questions of law and fact is specifically limited in section 19 of the Act to areas within its jurisdiction. As outlined above, the Board has no jurisdiction with respect to the siting, contracting, construction or impacts of the wind farm and only limited jurisdiction over the transmission line which connects the wind farm to the electricity grid. This limited

jurisdiction over the transmission line has already been exercised by the Board in a different proceeding (EB-2011-0394). Wikwemikong has raised no issues with respect to the duty to consult which are directly related to matters before the Board in this licence application proceeding.

The Board addressed the issue of duty to consult, and the scope of the Board's authority to assess the adequacy of consultation, in its Yellow Fall Power Limited Partnership Leave to Construct proceeding (EB-2009-0120), of which the Decision and Order, and Decision on Questions of Jurisdiction and Procedural Order No. 4 are attached as Appendix 1. The Board also addressed these issues in the context of ACH Limited Partnership and AbiBow Canada Inc.'s combined Licence Amendment proceeding (EB-2011-0065/EB-2011-0068), the Decision and Order of which is attached as Appendix 2.

In the ACH/AbiBow decision, the Board stated that "there must be a clear nexus between the matter before the Board (i.e. the applications the Board is being asked to approve) and the circumstances giving rise to the (possible) duty to consult." The Board went on to describe the limited nature of a licence application proceeding:

> Section 57 of the Act requires electricity generators to be licensed by the Board. The licence 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.

The Board finds that Wikwemikong has identified no issue related to the Crown's duty to consult which is within the Board's jurisdiction in this licence proceeding. Therefore, the Board has no jurisdiction to assess whether there has been adequate consultation.

THE BOARD ORDERS THAT:

1. If Wikwemikong wishes to make a submission in accordance with the scope of the proceeding, it shall do so by filing its submission with the Board in writing, and serving it on all other parties, by **May 3, 2013.**

2. If McLean's wishes to make a reply submission, it shall file it with the Board in writing, and serve it on all other parties, by **May 10, 2013**.

DATED at Toronto, April 26, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX 1

Yellow Falls Limited Partnership
Leave to Construct Proceeding EB-2009-0120
Decision and Order of December 16, 2009 and
Decision on Questions of Jurisdiction and
Procedural Order No. 4 of November 18, 2009

Ontario Energy Board

Commission de l'energie de l'Ontario

EB-2009-0120

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

AND IN THE MATTER OF a review of an application by Yellow Falls Power Limited Partnership for an Order granting leave to construct a transmission line connecting a 16 megawatt waterpower project to the transmission system of Hydro One Networks Inc.

BEFORE: Cynthia Chaplin
Presiding Member

Ken Quesnelle
Member

Paul Summerville
Member

DECISION AND ORDER

Application and Proceeding

Yellow Falls Power Limited Partnership (the "Applicant" or "YFP") filed an application with the Ontario Energy Board (the "Board") dated April 27, 2009 under section 92 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B. The Applicant applied for an order of the Board granting leave to construct transmission facilities (the "Project") connecting a 16 megawatt run-of-the river waterpower generation station located at Yellow Falls to the transmission system owned by Hydro One Networks Inc.("Hydro One"). The Project consists of 25 kilometres of 115 kilovolt ("kV") overhead transmission line, a customer transformer station stepping up voltage from 13.8 kV to 115 kV, and a customer switching station at the point of interconnection with Hydro One's transmission system.

The Application was assigned Board File No. EB-2009-0120.

On July 24, 2009, the Board issued Procedural Order No.1, in which the Board granted the Wabun Tribal Council ("WTC") intervenor status and found it to be eligible for a cost award, subject to various restrictions described in that Order. Procedural Order No. 1 also set out procedural steps for interrogatories on the Applicant's pre-filed evidence and for WTC to indicate by August 7, 2009 if it intended to file evidence.

On August 5, 2009 the Board received a letter from the WTC questioning the limits imposed by the Board on the scope of the proceeding, and asked that the Board reconsider its decision to proceed by way of a written hearing. WTC also indicated that it wished to present both written and oral evidence.

On August 17, 2009 the Board issued Procedural Order No. 2 setting out the procedural steps for the submission of WTC's written evidence and an interrogatory process for that evidence. The Board also indicated that it would make a determination on the necessity for an oral hearing at a later date.

On August 20, 2009 the Board issued a letter to all parties to address issues raised by WTC in two letters dated August 13, 2009 and August 18, 2009, and the Applicant in a letter dated August 19, 2009. In that August 20, 2009 letter, the Board also confirmed that the filing deadlines established in Procedural Order No. 2 remained in effect. Board staff submitted interrogatories on the application, and YFP provided responses. WTC submitted evidence and responded to interrogatories from YFP and Board staff.

On September 21, 2009 the Board received a letter from Mr. Merv McLeod on behalf of the Taykwa Tagamou Nation ("TTN"), requesting an opportunity to prepare a written response to the evidence submitted by WTC with regard to the respective interests in the lands potentially affected by the Project. TTN requested two weeks to prepare the submission. The Board granted TTN intervenor status.

The Board recognized that the interest of WTC and TTN focused exclusively on the adequacy of the Aboriginal consultation undertaken by the relevant Crown agencies and the related land interests. The Board concluded that it should not make provision for additional procedural steps relating to additional evidence on these issues without first determining the extent of its jurisdiction to consider such issues.

On September 29, 2009, the Board issued Procedural Order No.3 which solicited submissions from the parties with respect to three questions related to the Board's

jurisdiction with respect to Aboriginal consultation. The Applicant, WTC, and Board staff made submissions on these questions.

On November 18, 2009 the Board issued its Decision on Questions of Jurisdiction and Procedural Order No. 4 (the "Jurisdiction Decision"). A copy is attached at Appendix A. In summary, the Board found that it did not have jurisdiction to consider the Aboriginal consultation issues raised by WTC. The Board also determined that it did not need to hear oral evidence from WTC, and similarly, that there was no requirement for responding evidence from TTN.

Procedural Order No. 4 also made provision for the filing of submissions on the application itself. The Board indicated that TTN could file a submission if it chose, and that it would be eligible for an award of costs to the extent its submission was within the scope of the Board's proceeding, namely the criteria established in section 96(2) of the Act.

Board Findings

Section 96(2) of the Act provides that for an application under section 92 of the Act, when determining if a proposed work is in the public interest, the Board shall only consider the interests of consumers with respect to prices and reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. In the context of this Application, the Board has considered the following matters:

- Project need
- The System Impact Assessment and the Customer Impact Assessment reports
- Impact on ratepayers
- Land matters and Environmental Assessment

Project need

YFP indicated in its application that it had originally intended to construct a 20 MW generating station at Island Falls, some 3 km from the site of construction for the current application. In response to Board staff Interrogatory no. 1, YFP advised that, "the Island

Falls Project was awarded an RES II contract by the Ontario Power Authority ("OPA"), but that the RES II contract is valid only for projects greater than or equal to 20 MW …". YFP also indicated in its original application that it intended to contract the sale of electricity from the current project through the OPA's proposed Feed-in-Tariff ("FIT") procurement program.

Board staff noted that YFP had not provided evidence to indicate that a FIT contract has been executed, or if an application has even been submitted. Based on this information, Board staff submitted that since the application has included neither a RES II contract nor a FIT contract, and the Applicant has provided no evidence of authority to access the Grid for the power from the proposed generating station. In Board staff's view, these documents must be filed so as to demonstrate project need for the associated transmission facilities before the Board can make a final determination on this application.

YFP responded:

> *OPA has advised YFP that OPA prefers contracting through amendments of the existing RES II contract to reflect the revised project characteristics. YFP and OPA are in the midst of finalizing the amendments to the YFP's RES II contract. YFP is willing to agree to file with the Board confirmation of the signing of a contract with OPA as condition of leave to construct. YFP submits that there is no need for YFP to file a complete copy of the contract with the Board as it will contain sensitive information (such as pricing) which is not relevant to any issues before the Board.* [1]

The presence of a contract for sale of power to the OPA is a pre-requisite to ensure the transmission facilities are in fact required. The Board will accept YFP's proposed condition of approval regarding the provision of confirmation that a contract has been executed with the OPA for the associated generation, and will require YFP to file the contract if the Board so directs.

[1] Applicant Reply Submission dated December 1, 2009, page 2, item 3

System Impact Assessment ("SIA") and Customer Impact Assessment ("CIA")

The Board's filing requirements for transmission and distribution applications[2] specify that the Applicant is required to file a System Impact Assessment ("SIA") performed by the IESO and a Customer Impact Assessment ("CIA") performed by the relevant licensed transmitter, in this case Hydro One Networks Inc.

YFP filed an SIA, from the Independent Electricity System Operator ("IESO"), which was prepared for the "Island Falls Project" which YFP had originally planned to construct. However, the current Project is at a different location and has been reduced in size from 20 MW to 16 MW. YFP also provided a CIA report[3] which is also based on the "Island Falls Project".

Board staff noted that YFP's response to Board staff Interrogatory No. 1 did not clearly indicate when the SIA and CIA documents for the Project would be completed and provided to the Board. Board staff submitted that approval of the Project should be conditional on the Board receiving the final SIA and CIA reports for the Yellow Falls project. Board staff was also of the view that given the importance of the SIA and CIA to a section 92 application, it might be necessary for the intervenors or Board staff to review or otherwise make submissions on the CIA and SIA once they are filed.

With respect to the SIA, YFP's responded as follows:

> *The Independent Electricity System Operator ("IESO") issued a SIA Report July 6, 2006, a copy of which is provided at Tab 13 of the Pre-filed evidence. That SIA report was issued based on the previous design with the dam and power house at Island Falls, rather than the present location at Yellow Falls. However, although the dam was relocated, there is no material changes to the design of the project that affected the SIA. The generator and associated parameters will remain the same as the generator manufacturer is proposing the same model of generator for updated design. IESO has confirmed that the July 6, 2006 SIA is still valid in these circumstances (see attached email chain between IESO and Canadian Hydro).* [4]

[2] Filing Requirements for Transmission and Distribution Applications, November 14, 2006, Section 4.3.8 (System Impact Assessment), and Section 4.3.9 (Customer Impact Assessment
[3] Applicant's Pre-filed evidence, dated October 6, 2009, Tab 14, CIA, Revision 1 Report by Hydro One Networks Inc.
[4] Applicant Reply Submission dated December 1, 2009, page 2, item 4

YFP also submitted that if circumstances change and the IESO decides that a revision to the SIA is needed, YFP is willing to file with the Board any revised SIA as a condition of approval for the application. YFP also indicated that the requirements contained in the SIA will be met in the construction of the facilities.

The Board will require YFP, as a condition of approval, to file an updated SIA report reflecting the new location or a letter from the IESO confirming that the July 6, 2006 SIA is still valid.

With respect to the CIA, YFP responded:

> Changes may be needed to the CIA as a result of the reduction in generation capacity from the earlier Island Falls proposal to the Yellow Falls Project. YFP has contacted Hydro One to determine what changes may be needed. It is expected that if changes are needed those changes would make it easier for YFP to comply because Yellow Falls Project has lower generating capacity than the earlier proposal. The requirements contained in the updated CIA will be adhered to in the construction of the proposed facilities."[5]

The Board will require YFP, as a condition of approval, to file updated CIA report reflecting the new location or a letter from the Hydro One Networks Inc. confirming that the October 6, 2006 CIA is still valid.

Impact on Ratepayers

The Application indicates that the proposed facilities will be paid for and owned by the Applicant and the project will therefore have no impact on transmission rates in Ontario. The Board accepts this evidence.

Land Matters and Environmental Assessment

The evidence shows that Notice was properly served on all parties as directed by the Board, including four landowners whose properties are in the vicinity of the proposed project, TTN, and WTC representing three Aboriginal Communities.

[5] Applicant Reply Submission dated December 1, 2009, page 2, item 8

YFP's evidence indicated that the proposed transmission facilities are located on Crown Lands and that the four landowners[6] are either abutting the right of way, or near the right of way, but are not directly affected by it, and therefore no Easement Agreements are needed.

The final Environmental Assessment Report[7] ("EAR") was released on February 18, 2009, and the Notice of Completion review and comment period ended on March 20, 2009. Opposition to the final EAR and a "Bump-Up" request, to conduct an individual environmental assessment,[8] was made on March 13, 2009 to the Ministry of Environment by the WTC on behalf of three First Nation Communities.[9]

The Board notes that construction of the transmission line and related facilities cannot begin until the process stipulated in the *Environmental Assessment Act* is completed. Accordingly, the Conditions of Approval will include a requirement to file with Board evidence that the process stipulated by the *Environmental Assessment Act* is completed.

Conclusion

Having considered all of the evidence related to the application, the Board finds YFP's proposed transmission line project to be in the public interest in accordance with the criteria established in section 96(2) of the Act.

YFP requested that its leave to construct be granted for a period of at least 12 months, due to the uncertainty regarding the completion of the Environmental Screening Process. The Board will grant the request.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of Act, Yellow Falls Power Limited Partnership is granted leave to construct electricity transmission facilities, as described in the first paragraph of this Decision and Order, connecting the 16 MW waterpower Project at Yellow Falls to the transmission System owned by Hydro One Networks Inc. near

[6] Applicant's Pre-filed evidence, dated April 27, 2009, Tab 1, Schedule B & Tab 4 (Map showing the 4 private lands near the interconnection point)
[7] Applicant's Pre-filed evidence, dated April 27, 2009, Tab 2, pages 25- 26
[8] Applicant's Pre-filed evidence, dated April 27, 2009, Tab 12
[9] First Nations of Mattagami, Flying Post and Wahgoshig are listed in the March 13, 2009 letter from WTC to the Ministry of Environment requesting "Bump-Up", individual environmental assessment, for the proposed Project.

the Town of Smooth Rock Falls, subject to the Conditions of Approval attached as Appendix B to this Order.

2. Wabun Tribal Council and Taykwa Tagamou Nation may file with the Board by Tuesday, December 29 2009 their respective cost claims, subject to the restrictions which have been placed upon their cost eligibility, and in accordance with the Board's Practice Direction on Cost Awards. A copy of each cost claim shall be sent to Yellow Falls Power Limited Partnership.
3. Yellow Falls Power Limited Partnership may object to either cost claim no later than **Friday, January 8, 2010**, by filing its submission with the Board and delivering a copy to the intervenor in relation to whose cost claim the objection is made.
4. If an objection to an intervenor's cost claim is filed, that intervenor will have until **Tuesday, January 19, 2010** to make a reply submission to the Board, with a copy to Yellow Falls Power Limited Partnership as to why its cost claim should be allowed.
5. Yellow Falls Power Limited Partnership shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.
6. All filings to the Board noted in this Decision and Order must be in the form of 2 hard copies and must be received by the Board by 4:45 p.m. on the stated dates. An electronic copy of the filing must also be provided. If you already have a user ID, the electronic copy of your filing should be submitted through the Board's web portal at www.errr.oeb.gov.on.ca. If you do not have a user ID, please visit the "e-Filing Services" page on the Board's website at www.oeb.gov.on.ca and fill out a user ID password request. For instructions on how to submit and naming conventions, please refer to the RESS Document Guidelines also found on the "e-Filing Services" webpage. If the Board's web portal is not available, the electronic copy of your filing may be submitted by e-mail at Boardsec@oeb.gov.on.ca. Those who do not have internet access are required to submit the electronic copy of their filing on a CD or diskette in PDF format.

ISSUED at Toronto on December 16, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

DECISION ON QUESTIONS OF JURISDICTION
AND PROCEDURAL ORDER NO. 4 -
[Issued November 18, 2009]

Yellow Falls Power Limited Partnership
Transmission Line and Associated Transmission Facilities (the "Project")
EB-2009-0120

DATED: December 16, 2009

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0120

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

AND IN THE MATTER OF a review of an application by Yellow Falls Power Limited Partnership for an Order granting leave to construct a transmission line connecting a 16 megawatt waterpower project to the transmission system of Hydro One Networks Inc.

DECISION ON QUESTIONS OF JURISDICTION AND PROCEDURAL ORDER NO. 4

Yellow Falls Power Limited Partnership (the "Applicant" or "YFP") has filed an application with the Ontario Energy Board (the "Board") dated April 27, 2009 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B. The Applicant has applied for an order of the Board granting leave to construct transmission facilities (the "Project") connecting a 16 megawatt run-of-the river waterpower generation station located at Yellow Falls to the transmission system owned by Hydro One Networks Inc.("Hydro One").

The Application was assigned Board File No. EB-2009-0120.

Introduction

On July 24, 2009, the Board issued Procedural Order No.1, in which the Board granted the Wabun Tribal Council ("WTC") intervention status as well as its request for cost eligibility, subject to various restrictions described in that Order. The Procedural Order called for interrogatories on the pre-filed Applicant evidence to be submitted by August

7, 2009, and for WTC to indicate by August 7, 2009 if it is their intention to file evidence. The Applicant was ordered to file responses to interrogatories by August 17, 2009.

On August 5, 2009 the Board received a letter from the WTC questioning the limits imposed by the Board on the scope of the proceeding, and asked that the Board reconsider its decision to proceed by way of a written hearing. WTC also indicated that it wishes to present both written and oral evidence in this proceeding.

On August 17, 2009 the Board issued Procedural Order No. 2 setting out the procedural steps for submission and examination by parties of WTC's written evidence. The Board indicated that it would make a determination on the necessity of oral evidence at a later date. WTC was ordered to file evidence by August 28, 2009, and interrogatories on that evidence were ordered filed by Friday September 4, 2009. Responses from WTC were to be received by September 11, 2009.

On August 20, 2009 the Board issued a letter to all parties to address issues raised by WTC in two letters dated August 13, 2009 and August 18, 2008, and the Applicant in a letter dated August 19, 2009. The main issue raised by WTC in these letters concerned its view of the Board's role in assessing the Crown's duty to consult Aboriginal peoples (specifically the WTC) for the Project. The Board directed that parties could make argument on this issue at the conclusion of the evidentiary portion of the proceeding. In this respect, WTC would be permitted to file any evidence which it wished to rely upon for purposes of its argument on this issue. The Board also confirmed that the filing deadlines established in Procedural Order No. 2 remained in effect.

Board staff submitted interrogatories on the application. YFP provided responses to the interrogatories by August 17, 2009. WTC submitted evidence on August 27, 2009. YFP and Board staff submitted interrogatories to WTC. WTC provided responses to the interrogatories by September 11, 2009.

On September 21, 2009 the Board received a letter from Mr. Merv McLeod on behalf of the Taykwa Tagamou Nation ("TTN"), requesting an opportunity to prepare a detailed written response to the evidence submitted by WTC with regard to the respective interests in the lands potentially affected by the Project. TTN requested two weeks to prepare the submission.

The Board granted TTN intervenor status to participate in this proceeding going forward.

The interest of WTC and TTN focused exclusively on the adequacy of the Aboriginal consultation undertaken by the relevant Crown agencies and the related land interests. The Board concluded that it should not make provision for additional procedural steps relating to additional evidence on this issue (whether it be the oral hearing requested by the WTC or the request by the TTN to file a response to the WTC's written evidence) without first determining the extent of its jurisdiction to consider such issues.

On September 29, 2009, the Board issued Procedural Order No.3 which solicited submissions from the parties with respect to three questions:

1. What is the scope of the Board's jurisdiction to consider issues relating to the duty to consult in a section 92 leave to construct application?
2. Is the Board's jurisdiction to consider the adequacy of the consultation and possible accommodation limited to the public interest criteria governing the Board's assessment of a leave to construct application (price, reliability, and quality of electrical service)?
3. Does the Board have the jurisdiction to consider the adequacy of the consultation, and possible accommodation, in relation to approvals and processes beyond the leave to construct proceeding, including the environmental assessment, the various permitting processes of the Ministry of natural resources, and any other activity or approval undertaken by a Crown entity in connection with the project? If the board does have the requisite jurisdiction how should be exercised and how should it be aligned with the other related approval and permitting processes, for example the environmental assessment process.

The applicant, Yellow Falls Limited Partnership, the intervenor Wabun Tribal Council ("WTC"), and Board staff made submissions on these questions.

This decision and order contains the Board's findings on these issues and makes provision for the next procedural steps in this application.

Background

The Yellow Falls Limited Partnership proposes to build transmission facilities associated with a hydroelectric generation project to be located on the Mattagami River in northern Ontario. Section 92 of the *Ontario Energy Board Act* (the "Act") requires proponents of

such projects to procure an order of the Board authorizing construction of such transmission facilities.

The statute also contains the criteria that the Board is required to consider in making its determination. Put simply, the Board is directed by the statute to limit its consideration of the public interest associated with the project to issues directly related to the price of electricity, and the quality and reliability of the electricity system, and whether the application is consistent with government policy in the area of renewable energy sources.

The sole focus of all of the materials filed in this case by WTC is the assertion that the proponent and the relevant provincial agencies have to date failed in their respective obligations to consult with and possibly accommodate WTC. WTC cites decisions of the Supreme Court of Canada creating obligations to consult and accommodate Aboriginals where Aboriginal or treaty rights may be impacted by projects.

None of the materials filed by WTC address the issues stipulated by section 96(2) of the Ontario Energy Board act referred to above, that is the price, reliability or quality of electrical service, and whether the application is consistent with government policy in the area of renewable energy sources.

Given this circumstance, the Board decided to consider, as a preliminary matter, the scope of its jurisdiction to address Aboriginal consultation issues in this proceeding, which is the sole issue of interest to WTC.

The evidence filed by the applicant in support of its application reveals the following information. The applicant has filed a final environmental assessment for stakeholder, Aboriginal, and Ministry of Environment review. This final version of the Environmental Assessment incorporated a number of changes that had been adopted by the applicant in response to community and government agency comments and concerns.

The final environmental assessment was subject to a review and comment period. During that comment period the WTC requested that the Ministry of the Environment not approve the project and requested that the assessment be elevated or “bumped up” for

a more searching and detailed review. The grounds for the WTC request related exclusively to WTC's view that the company and the province had failed in their respective obligations to consult and accommodate Aboriginals in a manner consistent with the guidance provided by the Supreme Court of Canada.

It is to be noted that the proponent, Yellow Falls Limited Partnership has entered into an arrangement, described as a "business to business agreement" with the Taykwa Tagamou Nation ("TTN"), also an intervenor. TTN is another Aboriginal organization asserting rights associated with the lands upon which the transmission facilities will be built. From the materials filed it can be said that WTC and TTN each assert that their traditional lands include lands impacted by the application.

Positions of the Parties

Board staff's submission is that the Board lacks jurisdiction to consider matters relating to the adequacy of consultation and accommodation beyond those related to the criteria in section 96(2) of the Act. This view is rooted in the interpretation of the relevant statutes and the direction provided by the Supreme Court of Canada.

Section 92 of the Ontario Energy Board Act provides as follows:

> ***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.*

The criteria which the Board may consider in its consideration of leave to construct applications are described in section 96:

> **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.

Section 19 of the Act provides that the Board is empowered to determine questions of fact and law within its jurisdiction.

In providing its direction the Supreme Court of Canada indicated that, where the tribunal has been endowed with the power to determine questions of law it has an innate jurisdiction to consider constitutional issues, such as the adequacy of consultation, even though its enabling statute does not bestow any specific authorization for the exercise of such jurisdiction. In Board staff's view, the authority of a tribunal to determine questions of law serves as kind of essential qualification for the exercise of the innate jurisdiction to determine constitutional issues.

It is Board staff's view that because the legislature has so closely prescribed the matters which may be considered in its disposition of a leave to construct application, all other factors fall outside of its jurisdiction. Board staff submits that the power to determine questions of law therefore does not apply to any matter outside of the criteria enumerated under section 96(2) of the Act. In Board's staff's view this has the effect of removing the Board's authority to determine questions of law with respect to any other matter, and it has no innate authority, in cases subject to this limitation, to address any constitutional issues, such as the adequacy of consultation with Aboriginals in any area outside of the enumerated criteria.

As to Question 3, Board staff argues that the Board has no jurisdiction to supervise the actions of Crown agencies, nor would it be efficient for it to do so.

WTC rejects Board staff's argument. WTC's position can perhaps best be represented by a brief quotation from its submission:

> *Irrespective of the strict statutory interpretation issue, it is submitted that, as a constitutional duty, the duty to consult, where applicable, overlies statutory provisions and informs their construction.*

In other words, WTC asserts that the limits placed on the Board's jurisdiction with respect to leave to construct cases have no effect on the Board's obligation to address disputes related to the duty of Crown agencies to consult and possibly accommodate Aboriginals. In its view, the duty to assess the adequacy of consultation stands alone, unaffected by limitations imposed on the Board's consideration of the public interest. As a corollary to this point of view WTC asserts that the assessment of the adequacy of consultation and accommodation of Aboriginals does not form part of the Board's consideration of the public interest.

It is important to note that WTC considers that it is the Board's duty to assess the adequacy of consultation and accommodation because, in its view, the Board is the "final Crown decision maker". Elsewhere in its submissions WTC refers to the Board as conducting a "comprehensive final review" of the various authorizations required to complete the project, and identifies it as "the Crown agency with final responsibility for approval."

WTC suggests that in order to exercise its jurisdiction to assess the adequacy of consultation the Board should, at some point in the future, when the various authorizations and permits have been approved by various agencies of government, including the finalization of the environmental assessment, inquire from the parties as to whether adequate consultation has been accomplished. If there is a dispute on this issue at that time the Board should re-convene to hear evidence and adjudicate the matter.

Any other approach, WTC suggests, would lead to a "checkerboard of authorizations made without adequate consultation…"

Yellow Falls takes the position that the Board has no jurisdiction to consider issues related to the adequacy of Aboriginal consultation, not even within the confines of the criteria enumerated in section 96(2). The applicant points to the mandatory nature of

the provisions in sections 92 and 96(2) and concludes that the Board may consider no other factors or questions of law, including Aboriginal consultation, when considering applications under section 92. The applicant states:

> *In a hypothetical case, if an Aboriginal group raised a concern relating to one of the Governing Criteria the Board would certainly have the jurisdiction and the duty to consider the substance of that concern and make a determination as to whether the proposed transmission line was in the public interest with respect to the Governing Criteria at issue. However, the Board would not have the jurisdiction to refuse the application on the basis that there was insufficient consultation with the Aboriginal Group with respect to the Governing Criteria at issue. Nothing in the Act give the Board jurisdiction to consider the sufficiency of Aboriginal Consultation as it relates to section 92 applications.*

Yellow Falls also submits that the Board lacks jurisdiction to consider the adequacy of consultation because the proponent in this case is a private enterprise, and not a Crown agency, or an agent of the Crown. In its view, the Supreme Court in creating the duty to consult with Aboriginal peoples in *Haida Nation v. British Columbia (Minister of Forests)*[10] strictly limited the duty to consult to the Crown and its agents. Insofar as the instant application is an application by a private enterprise, questions relating to the duty to consult are inherently beyond the Board's jurisdiction in the Applicant's view.

Board Findings

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.[11]

[10] [2004] S.C.R. 511
[11] *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.

In the Board's view this finding is sufficient to dispose of this issue in this case because none of the issues raised by WTC 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.

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 Board has already determined that the issues related to the adequacy of the Crown consultation with Aboriginal peoples in this application are beyond the scope of the section 96(2) criteria and therefore clearly beyond the Board's jurisdiction. The Board therefore does not need to address the arguments of Yellow Falls which are that the Board has no jurisdiction to consider the adequacy of Aboriginal consultation with respect to the criteria in section 96(2) and no jurisdiction to consider adequacy of Crown consultation in cases where the applicant is not a Crown corporation. Yellow Falls acknowledged this in its submissions.

Having made this finding, the Board has determined that it does not need to hear oral evidence from WTC. Similarly, there is no requirement for responding evidence from TTN. The Board will now make provision for the filing of submissions on the application itself. TTN may file a submission if it chooses, and it will be eligible for an award of costs to the extent its submission goes to the issues which are within the scope of the Board's proceeding, namely the criteria established in section 96(2).

THE BOARD ORDERS THAT:

1. Board staff and Intervenors shall file with the Board and deliver to the Applicant a copy of its final submission on any matters outstanding in this proceeding on or before Tuesday November 24, 2009.

2. The Applicant shall file with the Board and deliver to all parties its reply submission by December 1, 2009.

3. All filings to the Board noted in this Procedural Order must be in the form of 2 hard copies and must be received by the Board by 4:45 p.m. on the stated dates. An electronic copy of the filing must also be provided. If you already have a user ID, the electronic copy of your filing should be submitted through the Board's web portal at www.errr.oeb.gov.on.ca. If you do not have a user ID, please visit the "e-Filing Services" page on the Board's website at www.oeb.gov.on.ca and fill out a user ID password request. For instructions on how to submit and naming conventions, please refer to the RESS Document Guidelines also found on the "e-Filing Services" webpage. If the Board's web portal is not available, the electronic copy of your filing may be submitted by e-mail at Boardsec@oeb.gov.on.ca. Those who do not have internet access are required to submit the electronic copy of their filing on a CD or diskette in PDF format.

ISSUED at Toronto on November 16, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX B

Conditions of Approval
For
Yellow Falls Power Limited Partnership
Transmission Line and Associated Transmission Facilities (the "Project")
EB-2009-0120

DATED: December 16, 2009

Conditions of Approval for
Yellow Falls Power Limited Partnership
Transmission Line and Associated Transmission Facilities (the "Project")
EB-2009-0120

1. General Requirements and Necessary Approvals

1.1 Yellow Falls Limited Partnership ("YFP") shall construct the Project and restore the Project land in accordance with its Leave to Construct application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate January 31, 2011, unless construction of the Project has commenced prior to that date.

1.3 YFP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

1.4 YFP shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to material changes in the proposed route, construction techniques, construction schedule, restoration procedures, or any other material impacts of construction. YFP shall not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

2. Contract for Sale of Power with Ontario Power Authority

2.1 YFP shall file with Board confirmation that a contract between YFP and OPA has been executed with respect to the subject generation and will file the contract with the Board should the Board so direct.

3. Environmental Assessment Approval

3.1 YFP shall comply with any and all requirements of the *Environmental Assessment Act* , and file with the Board evidence that the process stipulated in the *Environmental Assessment Act* is completed including a decision by the Ministry of Environment on the "RTE" for individual environmental assessment.

4. System Impact Assessment ("SIA")

4.1 YFP shall file with the Board either an updated SIA report by the Independent Electricity System Operator ("IESO") reflecting the impact attributed to the new location of the project on the system or a letter from the IESO confirming that the July 6, 2006 SIA is still valid.

4.2 YFP shall satisfy the Independent Electricity System Operator (“IESO”) requirements and recommendations as reflected either in its Final System Impact Assessment report.

5. Customer Impact Assessment (“CIA”)

5.1 YFP shall file with the Board either with an updated CIA report reflecting the impact attributed to the new location of the project on the customers of Hydro One Networks Inc.(“HONI”), or a letter from the HONI confirming that the October 6, 2006 CIA is still valid.

5.2 YFP shall satisfy the Hydro One Networks Inc. (“HONI”) requirements as reflected in the Final Customer Impact Assessment report.

6. Project and Communications Requirements

6.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Electricity Facilities & Infrastructure.

6.2 YFP shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. YFP shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

6.3 YFP shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. YFP shall submit five (5) copies of the construction plan to the Board’s designated representative at least ten (10) days prior to the commencement of construction. YFP shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

6.4 YFP shall furnish the Board's designated representative with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's Order.

6.5 YFP shall, in conjunction with HONI and the IESO, develop an outage plan which shall detail how proposed outages will be managed. YFP shall provide five (5) copies of the outage plan to the Board’s designated representative at least ten (10) days prior to the first outage. YFP shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

6.6 YFP shall furnish the Board's designated representative with five (5) copies of written confirmation of the completion of Project construction. This written confirmation shall be provided within one month of the completion of construction.

7. Monitoring and Reporting Requirements

7.1 Both during and for a period of twelve (12) months after the completion of construction of the Project, YFP shall monitor the impacts of construction, and shall file five (5) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Project. YFP shall attach to the monitoring report a log of all comments and complaints related to construction of the Project that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

7.2 The monitoring report shall confirm YFP's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

-- End of document --

APPENDIX 2

ACH Limited Partnership/AbiBow Canada Inc.
Combined Licence Amendment
Proceeding EB-2011-0065/EB-2011-0068
Decision and Order of May 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

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 Inc. for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998.*

BEFORE: Paul Sommerville
Presiding Member

Cynthia Chaplin
Vice-Chair

DECISION AND ORDER

I. Background

ACH Limited Partnership ("ACH") filed an application on March 3, 2011 for an amendment to Schedule 1 of its electricity generator licence EG-2006-0124. The requested amendment is to change ACH's status as owner of eight hydroelectric generating stations to owner and operator. The facilities are the following: Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station.

AbiBow Canada Inc. (“AbiBow”, and, together with ACH, the “Applicants”), formerly Abitibi Consolidated Company of Canada, filed an application on March 7, 2011 for an amendment to its electricity generation licence EG-2003-0204. The requested amendment is to change the name on the licence EG-2003-0204 from Abitibi Consolidated Company of Canada to AbiBow Canada Inc., and to remove eight hydroelectric generating stations listed above, which AbiBow currently operates, from Schedule 1 of its licence.

On March 29, 2011, the Board issued a combined Notice of Application and Hearing for the above mentioned applications (the “Applications”). The Applicants were directed to serve the Notice upon the parties who receive electricity from the facilities that ACH will be operating and Keshen Major Law firm (“Keshen Major”) who had submitted a letter of interest on behalf of twelve First Nations (the “First Nations group”) prior to publication of the Notice.

By Letter dated April 5, 2011, Keshen Major on behalf of the First Nations group filed a request for combined intervenor status, an oral hearing and eligibility for an award of cost. The intervention request revolved around the Crown’s duty to consult.

On April 5, 2011 Davis LLP on behalf of Fort Frances Power Corporation (“FFPC”) requested intervenor status. On April 15, following clarification by ACH of the issues addressed in the FFPC’s letter, FFPC withdrew its request to intervene and replaced it with a request for observer status. FFPC did not object to a written hearing.

On April 14, 2011 counsel for the Applicants filed a joint reply to the intervenor status request and the objections to written hearings. The Applicants submitted that the First Nations group does not qualify as intervenors as they have not demonstrated that they have a “substantial interest” in the outcome of the proceedings as required in accordance with Rule 23.02 of the Board’s *Rules of Practice and Procedure* based on the fact that the issues raised by the First Nations group are outside of the scope of these proceedings and that the operation by ACH of the facilities it currently owns will not have any adverse impact on Aboriginal rights.

On April 17, 2011 the Board received an additional letter from Keshen Major expressing the intention of the First Nations group to exercise its right to respond to the Applicants’ submission under Rule 23.08 of the Board’s *Rules of Practice and Procedure* and requested time to consider and prepare the response proposing May 6, 2011 as a

deadline. The letter further stated that the issues before the Board are in the very preliminary context and may require extensive Affidavit evidence and complete legal argument to support assertions made in the April 5th submission.

On April 18, 2011 the Applicants replied to the First Nations group letter and objected to the request for an extension to the timelines. The Applicants stated that the Board has enough information before it to determine whether intervenor status should be granted.

On April 21, 2011 AbiBow filed a letter, supported by ACH, waiving their objection to the First Nations group's request for intervenor status. However, the Applicants stated they do not believe the First Nations group has a "substantial interest" in these proceedings as required by the Board's *Rules of Practice and Procedure*. The letter also stated that AbiBow will face significant financial harm unless the Board brings this matter to resolution by May 20, 2011.

On April 29, 2011 the Board issued Procedural Order No.1. In Procedural Order No.1 the Board sought further submissions from the parties with respect to the First Nations group's interest in the proceeding.

On May 6, 2011 the First Nations group filed a submission in accordance with Procedural Order No.1. The Applicants replied to the First Nations group submission on May 9, 2011. The First Nations group filed its final submission on May 13, 2011.

II. The Duty to Consult

The issue before the Board

The central principles of the duty to consult, as set out in *Haida Nation v. British Columbia (Minister of Forests) ("Haida")*[1], are well known: the duty arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. The duty applies even where Aboriginal rights have been asserted but not yet proven. In some cases, the duty to consult will require the Crown to accommodate. The nature of this accommodation will vary depending on the strength of the Aboriginal claim and the extent of the potential infringement.

[1] [2004] SCC 73.

The issue in this case is whether the action being contemplated by the Board (the approval of the requested license amendments) could give rise to an adverse impact which would trigger the duty to consult. The First Nations group identifies a number of circumstances in which First Nations' interests have allegedly not been considered. A further issue is therefore what role does the Board have with regard to assessing any duty to consult that arises from the circumstances described by the First Nations group.

The role of tribunals with respect to the duty to consult

The Board accepts that in some circumstances it will be its role to assess whether the Crown has adequately discharged the duty to consult. As initially described in *Paul v. British Columbia (Forest Appeals Commission)*[2] and *Nova Scotia (Workers' Compensation Board) v. Martin*,[3] and later confirmed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[4] where a tribunal has a broad statutory mandate and the ability to consider questions of law, it will have the concomitant power to consider Constitutional questions, including the adequacy of Crown consultation efforts.[5] Section 19 of the *Ontario Energy Board Act, 1998* (the "Act") states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact." The Board has in fact already recognized in its Yellow Falls decision that the responsibility to consider the duty to consult will lie within its mandate in certain circumstances.[6]

The Board further observes that the courts have been clear that a tribunal itself will not be permitted to undertake "Crown" consultation absent a clear statutory mandate to do so. As the Supreme Court stated in Rio Tinto:

> A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. **The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.** Consultation itself is not

[2] [2003] S.C.J. 34 ("Paul")
[3] [2003] S.C.J. 54 ("Martin")
[4] [2010] S.C.J. 43 ("Rio Tinto").
[5] Rio Tinto, paras. 55, 66-73; Paul para. 39; Martin paras. 37-39.
[6] EB-2009-0120, Decision on Questions of Jurisdiction and Procedural Order No. 4, issued November 18, 2009 ("Yellow Falls"), pp. 8-11. In Yellow Falls the Board ultimately held it did not have the power to consider the duty to consult on electricity leave to construct applications, as section 96(4) of the Act specifically limits the Board's jurisdiction in these cases. Section 96(4), however, does not apply to the current case.

> a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation. [Emphasis added].[7]

Aside from section 19 of the Act, the Board has no specific legislative mandate with respect to the duty to consult. There is clearly no provision in the Act which provides, either expressly or impliedly, that the Board is empowered to undertake Crown consultation with Aboriginal peoples itself. Indeed, the Board is a quasi-judicial tribunal, and such a role would be incompatible with its responsibility to adjudicate disputes between parties. As the Supreme Court observed in *Quebec (Attorney General) v. Canada (National Energy Board)*:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown … extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. …
>
> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[8]

The First Nations group does not necessarily argue that the Board itself has a duty to consult, although it reserves the right to make submissions on that issue if and when the question arises.[9] In the Board's view, however, this is still an important point to address

[7] Rio Tinto, para. 60.
[8] [1994] 1 S.C.R. 159, paras. 34-35.
[9] First Nations reply submissions, p. 10.

here. To the extent that the Crown's duty to consult has been triggered, the "Crown" in question is not the Board. The Board's role, if any, would be to assess the adequacy of consultation efforts undertaken by other Crown actors.

The nature of the First Nations group's interest

With this as background, the Board will now turn to the question before it. The First Nations group has sought intervenor status in this proceeding. If accepted as intervenors, it is their intention to explore the adequacy of the Crown's consultation efforts with respect to potential infringements of their Aboriginal rights to harvest wild rice. To the extent that these Crown consultation efforts are found to be wanting, they would presumably ask the Board to not approve the proposed license amendment.

In order to accept the First Nations group as intervenors, the Board must find that they have an interest in these proceedings. In other words, the Board must make a determination that the duty to consult issues identified by the First Nations group are within the scope of the current proceedings. Therefore, for the purposes of this decision, the Board will accept the factual claims made by the First Nations group as correct (or at least potentially correct).

The Board has determined that, 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. The First Nations group has identified no other interests in the proceedings. The Board will therefore not accept the First Nations group as intervenors in these proceedings.

In order to reach this determination, the Board has carefully considered the elements of the duty to consult as described in *Haida* and subsequent cases. The duty to consult arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, however, the analysis cannot stop there. The further question before the Board is whether the Board has any responsibility or authority to address this issue in the current proceedings in relation to other processes happening separate from the current applications.

It is helpful to break out the elements of the duty to consult as they apply in this case. The First Nations group argues that the Board's consideration of the license

amendment applications triggers the duty to consult. Further, the First Nations group argues that the Crown consultations to date in relation to the facilities have been inadequate. The "Crown" in this case has been identified by the First Nations group as the Ontario Minister of Energy and Infrastructure (the "Minister") and the Ontario Power Authority (the "OPA").[10] The Crown conduct at issue is a directive from the Minister to the OPA encouraging the OPA to procure new generation contracts for hydroelectric facilities, and the OPA's subsequent creation of the Hydroelectric Contract Initiative (the "HCI") which offers attractive long term contracts for hydroelectric power generators, including incentives for upgrades and expansions. The potential impact to Aboriginal rights or title is the possibility that the HCI will result in increased or expanded hydroelectric generation, with attendant possible changes to water levels and flows in various watercourses and wetlands. Any changes to water levels or flows may impact the ability of the First Nations to harvest wild rice, which they assert is an Aboriginal right. Specifically with respect to the applications before the Board, the concern is that the proposed license amendments will facilitate the sale of the existing generating assets to a third party ("Bluearth") that intends to ultimately expand operations to take advantage of an HCI contract already held by ACH.

As noted above, the Board accepts that under certain circumstances it will have a responsibility to assess the adequacy of the Crown's efforts with respect to the duty to consult. However, there must be a clear nexus between the matter before the Board (i.e. the applications the Board is being asked to approve) and the circumstances giving rise to the (possible) duty to consult. In the current case, the alleged deficiencies in the Crown's consultation efforts are not related to the Board's consideration of the requested license amendments.

The Crown conduct in question – i.e. the Minister's directive and the OPA's development of the HCI – is not before the Board and the Board has no approval function with respect to these activities. The Board accepts that strategic, high level decisions that may have an impact on Aboriginal rights can trigger the duty to consult. That does not mean, however, that the Board must assess the adequacy of Crown consultation for these types of decisions where there is little or no connection between the decisions in question and the applications before the Board. The Board does not dispute that the conduct of the Minister and the OPA may have triggered the duty to consult; what it does dispute is that this conduct is directly relevant to the applications before the Board.

[10] First Nations group's response to Applicants' objection to request for intervenor status, p. 15.

The applications before the Board are for a license amendment to allow ACH to operate the facilities it is already licensed to own, and for Abibow's generator license amendment to remove its authority to operate these same facilities. Although these amendments are apparently being undertaken to facilitate a sale to Bluearth, this Board is not being asked to approve this future sale in the current proceedings. Indeed, Bluearth is not even a party to these proceedings.

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.

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

[11] A copy of ACH's current generation license is attached as Appendix "A".

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.

The First Nations group submits that a Crown authorized transfer or renewal of a license to private parties can trigger the duty to consult, and that in fact *Haida* involved just such a facts scenario. In *Haida*, however, there was a direct and immediate connection between the license in question (i.e. a tree farming license) and the potential infringement to Aboriginal rights or title (i.e. cutting down cedar trees without consulting or accommodating with the Aboriginals for whom such trees were an intrinsic part of their culture and economy). In Rio Tinto, the Court summarized the potential impact of the license transfer in *Haida* as follows:

> Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, **the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations**. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in Haida Nation, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. **By entering into the contract, the Crown would have reduced its power to control logging of trees, some of the old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required.** The Haida people would have been robbed of their constitutional entitlement.[12] [Emphasis added]

In the current case, the licenses in question have no direct connection to the potential infringement – i.e. changes to water levels or flows that could impact the First Nations ability to harvest wild rice. The proposed amendments to the licenses would not in any way limit the Crown's ability to discharge the duty to consult if and when Bluearth (or any other generator) seeks approval to alter water levels or flows. Nor would it in any way impede the ability of the water control boards to assess the adequacy of any Crown

[12] Rio Tinto, para. 90.

consultation with respect to any previous high level government decisions, such as the development of the HCI.

Although the First Nations group submits that the Board is the central or final decision maker with respect to this project, this is not correct. The Board has no approval authority in relation to the physical operation of the "project".

Conclusion with respect to the First Nations group's request for intervenor status

In sum, the nexus between the Crown conduct and potential infringement of Aboriginal rights on the one hand, and the subject of the Board's proceedings on the other, is not sufficiently strong to provide the Board with the responsibility or authority to assess the adequacy of Crown consultation. The requested approval has no direct connection to the Crown conduct in question, nor to the potential infringement of Aboriginal rights. The Board will therefore not accept the First Nations group as intervenors in these proceedings. To the extent that the Crown conduct to date (the Minister's Directive and the OPA's creation of the HCI) or in the future (with respect to potential future requests by Bluearth or any other entity to alter water levels or flows) has triggered or will trigger the duty to consult, the assessment of whether that duty has been adequately discharged will reside elsewhere.

III. Allegations of an Apprehension of Bias

In its submissions dated May 6, 2011, the First Nations group alleges that the person (or persons) responsible for drafting Procedural Order No. 1 has demonstrated a reasonable apprehension of bias, and should recuse him or herself from considering this matter further. In the First Nations group's view, the statements made in the Procedural Order demonstrate that its author is predisposed to reject the First Nations group's submissions even before reading them.

The First Nations group notes that it is not clear who wrote the Procedural Order, which appears under the signature of the Board Secretary. This proceeding was originally to be decided by Counsel, Special Projects, who is a staff member that had been delegated authority to determine this matter pursuant to section 6 of the Act. The Board's practice is that only routine and non-controversial matters will be decided by a delegated authority pursuant to section 6. Once it became clear that this proceeding would be contested, it was transferred to a panel of the Board pursuant to section 6(7).

It was this panel that authorized Procedural Order No. 1. The same panel has also issued this decision and order.

The test for reasonable apprehension of bias, as originally set out in the dissent in *Committee for Justice and Liberty v. National Energy Board*,[13] and later confirmed in *Baker v. Canada (Minister of Citizenship and Immigration)*,[14] is as follows:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. According to the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically –and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?[15]

The First Nations group alleges that some of the statements in Procedural Order No. 1 demonstrate that its author is predisposed to reject the First Nations group's arguments. In particular, the First Nations group argues that the Board had already determined that there was no Crown involvement in the applications, and that the Board had already essentially determined that there could be no adverse impacts arising from the applications before the Board.

As the Applicants noted in their submissions on this issue, the standard for demonstrating bias is a high one. The Court of Appeal stated:

> The threshold for a finding of real or perceived bias is high. Mere suspicion is insufficient to support an allegation of bias. Rather, a real likelihood or probability of bias must be demonstrated. As stated in *Wewaykum* at para. 76, citing de Grandpre J. in Committee for Justice and Liberty at p. 395, the grounds for the alleged apprehension of bias must be "substantial". [16]

The Court of Appeal has further held that it is not improper for the decision maker to express tentative views on a matter:

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[13] [1978] 1 S.C.R. 369 ("Committee for Justice and Liberty")
[14] [1999] 2 S.C.R. 817
[15] Committee for Justice and Liberty, p. 394.
[16] *Canadian College of Business and Computers Inc. v. Ontario* , 2010 ONCA 856 (CanLii), para. 24.

> …we do not consider it as inappropriate, at the conclusion of the case for the Crown, for the trial judge to canvas with defence counsel the defence which the accused intends to present and to express his, or her, tentative views concerning the viability of the defence…[17]

With respect to the argument that it had already determined that there was no Crown involvement in the applications, the Board disagrees that it demonstrated any level of bias or predetermination. The statement in the Procedural Order is factually correct – there is no Crown actor directly involved in the applications before the Board, nor the transaction (i.e. the sale) that will apparently follow approvals from the Board. No Crown actor has intervened or otherwise participated in this proceeding, nor (to the Board's knowledge) is any Crown actor a signatory to whatever sale arrangement will follow.

Regardless, the Board has paid careful attention to the First Nations group's submissions with regard to the Crown's involvement with the potential infringement. The First Nations group's letter seeking intervenor status says virtually nothing about the involvement of any Crown actor. It states that the Government of Ontario has a duty to consult, but it provides no information describing how that duty to consult is engaged with respect to the applications. Only in its response to the Procedural Order did the First Nations group describe its views on the connection between the Crown's duty to consult and the applications. As discussed above, the Board has accepted that it is possible that the Crown's conduct has triggered the duty to consult. The Board has ultimately determined that there was not a sufficient connection between the Crown conduct and the Board's proceeding, but this does not indicate that the Board did not have an open mind with respect to the issue of the Crown's involvement.

With respect to the allegation that the Board had already determined that there was no infringement arising from the applications, the Board again disagrees. The very purpose of Procedural Order No. 1 was to receive submissions on this issue. The Board's *Rules of Practice and Procedure* (and the common law) allow only parties that have a legitimate interest in the outcome of a proceeding to intervene. The Board has a responsibility to applicants and the process to ensure that proceeding time and parties' resources are used efficiently, and must therefore ensure that proposed intervenors have a legitimate interest in the outcome of the proceeding.

[17] *R. v. Parker*, 1998 CanLii 4792 (ON CA), para. 2

It was not clear to the Board upon reviewing the First Nations group's letter seeking intervenor status what the exact nature of the potential infringement was or whether the First Nations group had a legitimate interest in the outcome of these proceedings. For example, the Aboriginal right to harvest wild rice, which the Board learned through the submissions following the Procedural Order is the Aboriginal right that might be infringed, is not even mentioned in the initial correspondence. In that light, the Board provided the First Nations group with the opportunity to clarify and elaborate on the exact nature of its interest in the proceedings before the Board. There is nothing at all improper about such an approach; indeed it was necessary for the Board to understand and consider all the information relevant to the intervention request.

For these reasons, the Board rejects the First Nations group's arguments that the panel has demonstrated a reasonable apprehension of bias, and it has therefore not appointed a different panel to consider the submissions arising from Procedural Order No. 1.

IV. Decision with Respect to the Applications

Aside from the issues raised by the First Nations group and dealt with above, there were no further submissions in these proceedings. There are no intervenors.

After considering the Applications, the Board finds it to be in the public interest to grant the requested amendments because no adverse impacts have been identified. The amended licences will be issued when the Board receives confirmation from the Applicants that the commercial transaction has closed and operation of the eight generation stations has been transferred to ACH from AbiBow, and will be effective from the date of closing.

IT IS THEREFORE ORDERED THAT:

1. The name on electricity generation licence EG-2003-0204 is changed to AbiBow Canada Inc.

2. Schedule 1 of the electricity generator licence EG-2003-0204 will be amended to delete Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station,

Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station when the Board receives confirmation from AbiBow Canada Inc. that the commercial transaction has closed.

3. Schedule 1 of the electricity generator licence EG-2006-0124 will be amended to replace “owned” with “owned and operated” for Iroquois Falls Generating Station, Twin Falls Generating Station, Island Falls Generating Station, Calm Lake Generating Station, Sturgeon Falls Generating Station, Fort Frances Generating Station, Kenora Generating Station and Norman Generating Station when the Board receives confirmation from ACH Limited Partnership that the commercial transaction has closed.

DATED at Toronto, May 20, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary