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The Board:

Ontario Energy Board
 P.O. Box 2319, 27th floor
 2300 Yonge Street
 Toronto, ON M4P 1E4
ATTENTION: Board Secretary

RE: File No. EB-2013-0015 McLean's Mountain Wind Limited Partnership Application for a Feed-In-Tariff Program Electricity Generation Licence and the Decision on Oral Hearing and Procedural Order No.1 dated April 26, 2013;

In reference to the above noted application for approval of a Feed-in-Tariff Program electricity generation licence, we have been asked by the Wikwemikong Unceded Indian Reserve to represent their interests in relation to McLean's Mountain Wind Limited Partnership's Application for a Feed-in-Tariff Program Electricity Generation Licence. (File No. EB-2013-0015)

As you are aware, McLean's Mountain Wind Limited Partnership ("McLean's") filed an application with the Ontario Energy Board ("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.

On February 26, 2013, the Wikwemikong Unceded Indian Reserve No. 26 ("Wikwemikong"), through Chief Duke Peltier, filed a request with the Board for an oral hearing. Wikwemikong asked for an oral hearing so that its Band members, particularly elders of the community might have the opportunity to provide oral evidence to the Board on how they believe the McLean's Project and how the granting of the electricity generation licence might potentially infringe or interfere with the exercise of their aboriginal or treaty rights. Wikwemikong also raised the issue of the adequacy of consultation in the request of February 26, 2013.

On April 26, 2013, the Ontario Energy Board ("Board") issued a Decision on the Oral Hearing Request and also issued Procedural Order No. 1. In that Decision, the Board ordered that if Wikwemikong wished 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.



By letter dated May 3, 2013, we notified the Board Secretary of the Ontario Energy Board that Wikwemikong needed additional time to provide the written submissions and comply with the Order and that this was the earliest opportunity to notify the Board of this difficulty in complying with the time frame imposed by the Board's Order as required by Rule 7.03 of the Rules of Practice and Procedure.

In the April 26, 2013, Ontario Energy Board's Decision on the Oral Hearing Request and Procedural Order No. 1, the Board canvassed the issue of duty to consult and the scope of the Board's authority to assess the adequacy of consultation. It reaching the conclusion it did, it relied on the Yellow Fall Power Limited Partnership Leave to Construct proceeding (EB-2009-0120) and the ACH Limited Partnership and AbiBow Canada Inc.'s combined Licence Amendment proceeding (EB-2011-0065/EB-2011-0068). 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 in the ACH/AbiBow decision went on to describe the limited nature of a licence application proceeding and described the parameters of the jurisdiction conferred by the *Act* as follows:

"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."

Our client is respectfully of the view that there is in fact is a nexus between the granting of a license to generate electricity, which is a matter before the Board and the circumstances giving rise to the (possible) duty to consult. In 2010, the Supreme Court of Canada considered the scope and nature of the legal duty of consultation in the context of decisions made by Administrative boards generally in the *Beckman v. Little Salmon First Nation* case and stated generally, that decision makers (including decisions made by the Ontario Energy Board) are required to take into account the impact of allowing applications to proceed without considering the concerns and interests of members of First Nations. The court went on to say that the concerns and interests could not be taken into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the regular administrative law duties that apply to Boards generally, was the added legal burden on the Ontario Energy Board to uphold the honour of the Crown in its dealings with all First Nations.

In other words, what our client is saying is that notwithstanding the limited jurisdiction conferred by section 57 of the *Act*, on the issue of whether or not there is a legal duty of consultation owed to First Nations, there is always a legal duty of consultation owed by decision makers who purport to grant licenses (including electricity generation licences)



that have the potential to interfere with or infringe the aboriginal and treaty rights of First Nations and this duty is not grounded in whether the Act provides for adequate consultation or not, but rather the duty is grounded in upholding the honour of the Crown.

Our client filed an action against Canada and Ontario in part, for breaches of promises made in the Bond Head Treaty of 1836. They want an opportunity to share these concerns with the Board and were asking for an oral hearing is 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. The elders of the community are more comfortable speaking in their own Anishinaabe language and can express views about their historical understanding of the aboriginal perspective of the purpose and intent of the Bond Head Treaty of 1836 and how the project potentially interferes with the exercise of the guarantees set out in that treaty more comfortably, orally.

With respect, the electricity generation licence itself does more than "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." It is main license granted by a Board that justify the construction of all other related electricity generation related infrastructure.

To suggest that simply granting the electricity generation licence in and of itself would not raise any consultation requirements or that section 57 of the *Act* limits the jurisdiction of the Board in relation to the question of the adequacy of consultation does a grave injustice to the purpose and intent of incorporating the protections afforded to aboriginal people in section 35 of the *Constitution Act, 1982*.

Sincerely,

WEAVER SIMMONS ^{LLP}

R. Martin Bayer
RMB/py

Cc: Sushil Samant, McLean's Mountain Wind Limited
Ogiima Duke Peltier, Wikwemikong Unceded Indian Reserve