ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION

Application for Feed-in Tariff Program Electricity Generation Licence

McLean's Mountain Wind Limited Partnership

Board File No.: EB-2013-0015

May 17, 2013

BACKGROUND

On January 17, 2013, McLean's Mountain Wind Limited Partnership ("McLean's") filed an application with the Board for an electricity generation licence, as a Feed-in Tariff ("FIT") Program participant.

The application indicates, among other things, that in April 2010, McLean's was awarded two FIT Program contracts from the Ontario Power Authority ("OPA") relating to the purchase by the OPA of electricity generated by McLean's at its proposed McLean's Mountain Wind Farm in Little Current, Ontario (the "Project").

The application also indicates that, in November 2012, McLean's was provided with a Notice to Proceed from the OPA in relation to the Project. The OPA website states that a Notice to Proceed is intended to provide a FIT Program participant with the certainty it needs to begin building its project(s). As a prerequisite to obtaining a Notice to Proceed, the OPA must have evidence that the proponent has already completed its impact assessments (connection impact, system impact and customer impact, as applicable) and obtained a renewable energy approval ("REA"); and must be satisfied with the proponent's domestic content plan (if applicable) and financing plan.

Electricity generation licences granted by the Board to FIT Program participants typically state that: "The Licensee is authorized, under Part V of the Act and subject to the terms and conditions set out in this licence, to generate electricity or provide an ancillary service for sale under a contract with the Ontario Power Authority and the contract is entered into as part of a standard offer program offered by the Ontario Power Authority." A generation licence also authorizes the licensee only in respect of those facilities set out in Schedule 1, attached thereto.

THE PROCEEDING

The Board issued its Notice of Application and Written Hearing on February 13, 2013.

On February 26, 2013, the Wikwemikong Unceded Indian Reserve No. 26 ("Wikwemikong") filed a submission with the Board requesting an oral hearing. The submission also stated, among other things, that Wikwemikong could find no

evidence of being provided with information about the Project, that it would like to know the full scope of the Project and how the related activities might have an impact on the exercise of its rights, that it wished to canvass the question of how any interferences might be mitigated or accommodated and that, to date, the Board had not consulted with it on the application.

On March 5, 2013, the Manitoulin Coalition for Safe Energy Alternatives provided a letter in support of Wikwemikong's request for an oral hearing and in objection to the granting of an electricity generator licence to McLean's. The Board also received submissions from two individuals: Anne Marie General and Emily Weber who generally submitted that the Project and projects like it are not in the best financial, environmental, health nor strategic interests of citizens in Ontario.

On March 8, 2013, McLean's filed its reply submission with the Board. McLean's submitted that there was no good reason to proceed with this matter by way of an oral hearing and reiterated that it had obtained all the necessary governmental approvals to proceed with the Project.

McLean's argued that the issue of consultation is not within the scope of this proceeding and that it should not be required to provide full details of the consultation because the role of the Board in this proceeding is not to approve the generation facility. Although Mclean's stated that "this information is not required for the Board to make a determination of this matter", McLean's proceeded to specifically dispute Wikwemikong's assertion that there had not already been proper consultation. McLean's submitted that (i) the Project and related infrastructure was the subject of significant public and Aboriginal consultation since 2004 and was ultimately approved through the REA process, and (ii) the details of the extensive consultation with Wikwemikong are available in the Consultation Report that was filed as part of the REA process and is available online in its entirety.

On April 26, 2013, the Board issued its Decision on Oral Hearing and Procedural Order No. 1 (the "April 26 Decision"). The Board denied the request for an oral hearing and made, among others, the following findings:

i. A generation licence permits the licensee to participate in the Ontario energy market. It does not grant approval to build a generation facility.

ii. The Board's review of a generator licence application is a process for licensing an applicant, and not any particular generation facility. 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.

iii. 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 and the Board has no jurisdiction with respect to the siting, contracting, construction or impacts of a generation facility, and only limited jurisdiction over the transmission line which connects the facility to the electricity grid.

iv. The Board will grant a generator licence to an applicant if the Board finds that, with a view to the applicant's financial viability, technical capability and business conduct, the applicant has the requisite ability to own and/or operate a generation facility and to participate reliably in Ontario's energy market.

v. When an applicant for an electricity generation licence is a FIT Program participant, the applicant may provide evidence of having received a Notice to Proceed from the OPA for its FIT-related generation facility to the Board and, because of the rigour of the OPA's assessment process, the Board will generally grant a generation licence to an applicant if it has received a Notice to Proceed from the OPA.

vi. Wikwemikong had identified no issue related to the Crown's duty to consult which is within the Board's jurisdiction in this licence proceeding. (On this point, the Board referenced a prior Board decision in the ACH Limited Partnership and AbiBow Canada Inc. combined Licence Amendment proceeding, EB-2011-0065/EB-2011-0068, which provided 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 April 26 Decision provided Wikwemikong with a further opportunity to file a written submission "in accordance with the scope of this proceeding" and an opportunity for McLean's to file a reply submission.

On May 8, 2013, Wikwemikong filed its submission, wherein it argued that the issue of Aboriginal consultation is within the scope of this proceeding. Wikwemikong stated:

i. There is a nexus between the granting of a licence to generate electricity and circumstances giving rise to the (possible) duty to consult.

ii. The Board should reject the application for the principal reason that the Project triggers the duty to consult, and that the Crown has yet to discharge this duty.

iii. Notwithstanding the limited jurisdiction conferred by section 57 of the *Ontario Energy Board Act, 1998*, 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 licences (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 grounding in upholding the honour of the Crown.

iv. An electricity generation licence does more than simply authorize the licensee to generate electricity for purchase and sale on the IESO administered markets because, it is the "main license granted by a Board that justify [sic] the construction of all other related electricity generation related infrastructure".

v. Wikwemikong should be permitted to share its concerns with the Board in relation to an action it has filed with Canada and Ontario, in part, for breaches of promises made in the Bond Head Treaty of 1836.

On May 14, 2013, the Board issued its Procedural Order No. 2 in this proceeding, providing Board staff with an opportunity to file a written submission, and extending McLean's deadline for filing a written reply submission.

This submission is being provided by Board staff following a review of the application and evidence filed in this proceeding.

STAFF SUBMISSION

The Board's Licensing Mandate with respect to Electricity Generators

The Board's mandate with respect to electricity generator licensing is set out in section 57 of the Act, which simply provides, in part, that no person shall, unless licensed to do so, generate electricity for sale through the IESO-administered markets or directly to another person.

The Board's process for hearing generator licence applications is guided by the Board's objectives in section 1 of the Act and the Board's powers in section 19 of the Act. Board staff submits that this process is well-established and that it was correctly summarized by the Board at page 2 of its April 26 Decision, as follows [emphasis added]:

> 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.

The Duty to Consult

It is well-established law that the Crown has a duty to consult and in some cases accommodate affected Aboriginal groups (First Nations and/or Métis and/or Inuit) before taking any steps that may adversely impact an Aboriginal or treaty rights. The case law on duty to consult was established in three Supreme Court of Canada decisions: *Haida Nation* v*. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 ("Haida"), *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 ("Taku"), and *Mikisew Cree First Nation* v*. Canada (Minister of Canadian Heritage)*, [2005] SCC 69 ("Mikisew"). These cases confirmed that the Crown has a duty to consult with Aboriginal peoples both where there are existing treaty rights and where a land claim has only been asserted, and not proven; and they explain that the exact extent of this duty will vary based on the facts of each situation.

Since Haida, Taku and Mikisew, other cases have examined whether a duty to consult was triggered and, assuming it was owed, whether it was properly carried out or discharged; and whether a certain party owes a separate duty to consult, such as a Crown actor, tribunal, board or municipality.

The Supreme Court has also been clear that the duty to consult can be triggered by "higher level" decisions that may not themselves directly impact an Aboriginal or treaty right. The courts have further adopted a broad approach when considering whether the honour of the Crown has been upheld. In Haida, for example, the

decision in question was the transfer of a tree harvesting licence from the Crown to a private entity. The licence itself did not directly permit the harvesting of trees; separate cutting permits were required before any trees could be cut down. The Court concluded, however, that consultation was required at the higher, strategic level.

In 2010, the Supreme Court of Canada, in *Rio Tinto Alcan Inc.* v *Carrier Sekani*, 2010 SCC 43 ("Rio Tinto"), further clarified the law surrounding the duty to consult and accommodate Aboriginal groups, elaborating on (i) when the duty to consult is triggered; and (ii) the role of administrative and statutory tribunals (such as the B.C. Utilities Commission) in addressing Aboriginal consultation and accommodation issues.

The Role of a Tribunal

There have been several cases which discuss the role of a regulatory tribunal such as the Board with respect to the duty to consult.

It is now settled law that where a tribunal has the power to decide questions of law, it has the concomitant power to decide Constitutional issues, including issues relating to the duty to consult. As the Supreme Court stated in Rio Tinto, "The [British Columbia Utilities Commission] is a quasi-judicial tribunal with authority to decide questions of law. As such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged."

Section 19(1) of the *Ontario Energy Board Act, 1998* states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact." The Board therefore has the power (and the obligation) to consider duty to consult issues that arise within matters over which it has jurisdiction.

Rio Tinto further clarified that the power to decide questions of law on its own does not provide a tribunal with the ability to conduct Aboriginal consultation itself:

> 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 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 the consultation.[1]

In the current case there does not appear to be a request that the Board undertake consultation itself. Instead Wikwemikong asks the Board to deny the application on the grounds that the Crown has not discharged the duty to consult.

In Rio Tinto, the Court applied the test in Haida in the form of a three part test to determine if consultation is required, and whether consultation should be at the low or high end of the "spectrum":

i. There must be real or constructive knowledge of a potential Aboriginal claim or right.

ii. There must be Crown conduct or decision.

iii. There must be a possibility that the conduct may affect Aboriginal rights and there must be a causal relationship between the Crown conduct or decisions and the adverse impact. Moreover, the adverse impact must be from the current conduct or decisions and not from the larger project (speculative impacts or adverse impacts on future negotiating positions will not suffice).[2]

The first part of the test relates to the Crown's knowledge of a potential Aboriginal claim or right. This part of the test appears to have been met. Wikwemikong was a participant in the REA process relating to the wind farm project, where it appears to have raised consultation issues. Wikwemikong has also raised this issue before the Board, although the nature of the exact potential infringement to an Aboriginal or treaty right is vague.

[1] *Rio Tinto*, paragraph 60.
[2] *Ibid.*, paragraphs 44-46.

The second part of the test also appears to have been met. The Board is an agent of the Crown. A Board approval of a licence can be considered Crown conduct.[3] There may also have been other Crown conduct which triggers the duty, such as the OPA's issuance of the Notice to Proceed.

The final part of the test asks whether there is a possibility that the Crown conduct may impact Aboriginal or treaty rights. There must be a causal relationship between the conduct in question and the potential adverse impact. The question the Board should ask, therefore, is what is the Crown conduct being contemplated, and is it causally related to a potential adverse impact to an Aboriginal or treaty right?

The Crown conduct in this case appears to be the approval of the licence application. The question then turns on: what exactly does a Board licence authorize? As noted above, section 57(c) provides that "no…person shall, unless licensed to do so under this Part, generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person."

It is the submission of Board staff that the conduct authorized under section 57(c) focusses on the person (i.e. the entity) being licensed, as opposed to any actual generation facility. As discussed above and in the Board's April 26th Decision, the Board has traditionally taken a narrow view with respect to its responsibilities under section 57(c). The Board does not license actual generation facilities, and no Board approval is required to build a generation facility. The Board has no direct authority over the siting of generation facilities. The Board licenses a "person", and not a facility. Indeed, where a single operator runs several generation facilities, the Board issues only one licence (though the names of the specific facilities are listed in an appendix). Therefore there is no causal connection between the conduct of the Crown and any potential infringement to Aboriginal or treaty rights.

[3] The Courts have not always been entirely clear on what exactly constitutes "Crown conduct". In Rio Tinto, for example, it was not the tribunal's decision to approve a transmission line that constituted Crown conduct, it was the applicant's decision to build the transmission line which triggered the duty. In that case, however, the applicant was itself an agent of the Crown. In *Beckman v. Little Salmon First Nation* [2010] SCC 53, a private citizen applied for an agricultural land grant before the Yukon's Land Application Review Committee (an administrative decision maker, though not strictly speaking a "tribunal"). The Court held in that case that the administrative decision maker's decision could (and did) trigger the duty to consult.

Next Steps

If the Board determines that the authorization under section 57(c) of the Act relates only to the sale of generated electricity, then Board staff submits that the duty to consult is outside the scope of this proceeding. No further process is required, and the Board can consider the record before it (exclusive of the duty to consult issues) and make a determination on whether to grant the licence.

If the Board determines instead that there is a need for it to assess the adequacy of the Crown's consultation efforts, there are a number of processes through which the Board might make this determination. It appears that the Crown has already engaged in consultation for the entire project through the REA process. Under these circumstances, Rio Tinto suggests that it is the Board's responsibility to ensure that the Crown adequately discharged the duty through the REA process. To be clear, the Board would only need to consider consultation issues relating to the generation of electricity, and not with regard to the broader issues examined in the REA (such as the associated transmission facilities). The Board could allow for the filing of the REA and associated materials, and then allow submissions regarding whether the Crown's process had been adequate.

Board staff stresses that it is not necessarily submitting that there is no duty to consult relating to the Project. Rather, staff is submitting that any duty to consult issues that arise are not within the scope of the Board's licensing review.

All of which is respectfully submitted.