

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** sections 70 and 78 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B);

**AND IN THE MATTER OF** a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

**REPLY**

(Motion for Review of Board Decision and Order on Costs Awards issued October 1, 2013)

December 13, 2013

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## I. OVERVIEW

1. On October 1, 2013, the Ontario Energy Board (“**OEB**”) released its Decision and Order Cost Awards related to the costs incurred by intervenors to a proceeding to designate an electricity transmission transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie line (the “**Proceeding**”).

2. The OEB reduced Ojibways of Pic River First Nation’s (“**PRFN**”) from the actual \$130,715.24 plus disbursements that were incurred to an award of \$40,000.00 on the basis that those incurred costs were “excessive”. This evaluation was based almost entirely on a comparison of the costs of PRFN to the costs incurred, or claimed, by other intervenors to the Proceeding.

3. In response to PRFN’s motion, Board Staff submit that the motion should be denied. Board Staff assert that the cost the award of costs is entirely discretionary and based solely on the “value” of the contribution of the party. According to Staff, it is the Crown and not the transmitters that benefit from the consultation with PRFN to date.

4. PRFN submits that for the purposes of designating an electricity transmitter to undertake development work for the East West Tie line, the OEB is the Crown actor.

## II. LAW AND ARGUMENT

5. The OEB is an entity created by statute. It is charged with certain responsibilities and obligations. In the fulfillment of those responsibilities and obligations the OEB is an agent of

Her Majesty in right of Ontario and its powers may be exercised only as an agent of Her Majesty.<sup>1</sup>

6. The power and authority granted to the OEB by statute is subject to the *Constitution Act*, 1867. This includes Section 35 of the *Constitution Act*, 1867 from which flows a duty to consult and accommodate the aboriginal rights and treaty rights of aboriginal peoples of Canada. This duty arises where the Crown has real or constructive knowledge, of the potential existence of an aboriginal or treaty right and contemplates conduct that might adversely affect it.<sup>2</sup> This duty cannot be legislated away. Nor can the duty be avoided by delegation of various responsibilities to agents/administrative bodies.

7. The OEB has recognized its obligation, as agent of the Crown, to take responsibility for aboriginal consultation that relate to matters before it.<sup>3</sup> The costs relating to aboriginal consultation are an inherent component of aboriginal consultation and therefore properly within the responsibility of the OEB.

8. Board Staff's position that the transmitters do not benefit from consultation with First Nations but rather that "the Crown" benefits, fails to consider that the OEB is agent of the indivisible Crown.<sup>4</sup> The OEB as agent of the Crown, therefore, benefits by discharging the Crown's responsibility to consult and accommodate aboriginal peoples.

9. In plain words, the "value" that PRFN added to the Proceeding cannot be compared to that of other intervenors because it discharged, at least partially, the OEB's responsibility to

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<sup>1</sup> *Ontario Energy Board Act*, 1998, R.S.O. 11998, c. 15 Sch. B, s. 4(4)

<sup>2</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 550

<sup>3</sup> Decision and Order of the OEB, dated September 15, 2008, Bruce Milton Transmission Project, p. 69.

<sup>4</sup> Decision and Order of the OEB, dated September 15, 2008, Bruce Milton Transmission Project, p. 68 which states that there is only one Crown.

consult and accommodate aboriginal peoples whose treaty rights might be affected.

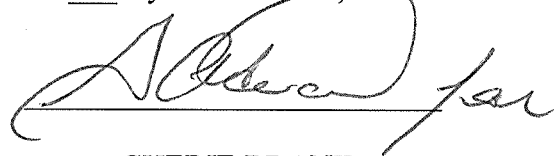
10. Board Staff's suggestion that the permissive or discretionary nature of a cost award absolves the OEB of its responsibility to consider its duty to consult and accommodate completely fails to consider that any exercise of discretion must be done within the statutory framework which created the OEB and the constitutional framework of Canada. If the OEB fails to consider the duty to consult the OEB will improperly exercise its discretion.

11. Put simply, the OEB properly brought PRFN into the Proceeding to fulfill its responsibility to consult, it would now be improper for the OEB to exercise its discretion in a such a way that it forces PRFN to bear the costs of consultation.

### III. CONCLUSION

12. PRFN again respectfully requests an order setting aside the Decision and Cost Award of October 1, 2013 as it relates to PRFN and awarding in its place, costs in the amount of \$130,715.24 together with costs of \$6,500.00 for this motion.

ALL OF WHICH IS respectfully submitted this 13<sup>th</sup> day of December, 2013.

A handwritten signature in black ink, appearing to read 'Cherie Brant', written over a horizontal line.

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**IN THE MATTER OF** sections 70 and 78 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B);

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