

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 21, 2005

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3.

-and-

IN THE MATTER OF a Notice of Appeal filed by the Mikisew Cree First Nation with respect to Approval No. 00151636-00-00 issued under the *Water Act* to TrueNorth Energy L.P. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Mikisew Cree First Nation v. Director, Northern Region, Regional Services, Alberta Environment re: TrueNorth Energy L.P.* (21 April 2005), Appeal No. 02-141-D (A.E.A.B.).

BEFORE:

William A. Tilleman, Q.C., Chair.

PARTIES:

Appellant: Mikisew Cree First Nation, represented by Mr. Donald P. Mallon, Prowse Chowne LLP.

Director: Mr. Kem Singh, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

Approval Holder: TrueNorth Energy L.P., represented by Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* to TrueNorth Energy L.P. The Approval authorized TrueNorth Energy L.P. to carry out activities as defined in the *Environmental Protection and Enhancement Act* for the purposes of developing the Fort Hills Oil Sands Processing Plant and Mine at SE 11-96-11-W4M in the Municipality of Wood Buffalo, Alberta.

The Board received a Notice of Appeal from the Mikisew Cree First Nation, appealing the Approval. The Notice of Appeal with respect to the Approval was filed after the 7-day appeal deadline.

As the Notice of Appeal was filed late and special circumstances did not exist to warrant extending the filing deadline, the Board dismissed the appeal of the Mikisew Cree First Nation.

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I. BACKGROUND

[1] On December 30, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”) issued Approval No. 00151636-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to TrueNorth Energy L.P. (the “Approval Holder”).¹ The Approval authorizes the development of the Fort Hills Oil Sands Processing Plant and Mine (the “Project”) at SE 11-96-11-W4M in the Municipality of Wood Buffalo, Alberta.

[2] On February 12, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Mikisew Cree First Nation (the “Appellants” or the “MCFN”), objecting to the Approval. The Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the appeal. In the same letter, the Board stated:

“With respect to the *Water Act* Approval, please be advised that the normal time limit prescribed in the *Water Act* for filing such an appeal is 7 days. As the Approval was issued on December 30, 2002, Ms. Evans’ [(the MCFN’s)] Notice of Appeal appears to be significantly outside the time limit prescribed in the *Water Act*, Ms. Evans [(the MCFN)] is requested to advise the Board if she wishes to request an extension of time to appeal? Please indicate to the Board the reasons for the extension of time to appeal and provide an explanation as to why the appeal of the Approval was filed outside of the 7-day time limit. The granting of the extension is at the discretion of the Board and is not routinely granted.”² (Emphasis omitted.)

In addition, the Parties were requested to provide available dates for a mediation meeting or hearing, and the Director was requested to provide the Board with a copy of the record (the “Record”) relating to the Approval.

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. On February 28, 2003, the NRCB responded in the negative. The AEUB provided documents to the Board on March 11 and 19, 2003, with respect to the hearing held by the

¹ The Director issued Licence No. 00190012-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to TrueNorth Energy L.P. on December 30, 2002. The Appellants filed a Notice of Appeal in relation to the Licence. The Board’s decision in respect to the Licence and motions received regarding the Licence are provided in *Mikisew Cree First Nation v. Director, Northern Region, Regional Services, Alberta Environment re: TrueNorth Energy L.P.* (21 April 2005), Appeal No. 01-142-D (A.E.A.B.).

AEUB regarding the Project and, in particular, the submission and correspondence of the MCFN to the AEUB. On February 18, 2003, the Director also advised the Board that the Appellants appeared before the AEUB at a hearing in this matter.

[4] On February 21, 2003, the Board wrote to the Parties requesting written submissions in response to a letter it received from the Appellants requesting a time extension in order to file the Notice of Appeal.

[5] On February 21, 2003, the Board received a letter and documents from the Director with respect to the AEUB hearing, advising that the Appellants had provided a written submission to the AEUB, but they did not appear at the hearing. The Director also attached a copy of the MCFN's submission to the AEUB indicating they were withdrawing their Statement of Concern. With respect to the Record, the Director advised: "As this is an extensive document, its reproduction will involve substantial effort. If the Board wishes further documentation prior to deciding upon its jurisdiction, please advise."³

[6] The Board forwarded a copy of the documents provided to the Parties and set a written submission schedule to determine whether the Appellants had an opportunity to participate in a process before the AEUB in this matter and if their issues were adequately dealt with. The Board set a separate submission process regarding the late filed Notice of Appeal. In addition, the Board requested the Parties provide submissions on whether the matter had been the subject of a review under the *Canadian Environmental Assessment Act*.⁴

[7] Between February 20, 2003, and March 28, 2003, the Board received submissions from the Parties with respect to the late filed Notice of Appeal.

² Board's letter dated February 13, 2003.

³ Director's letter, dated February 18, 2003.

⁴ The issue of the Appellants' participation in the AEUB process and whether the matter had been dealt with under the CEAA are issues determined in the decision: *Mikisew Cree First Nation v. Director, Northern Region, Regional Services, Alberta Environment re: TrueNorth Energy L.P.* (30 June 2005) Appeal No. 01-142-D (A.E.A.B.).

Section 95(5)(b)(ii) of the *Environmental Protection and Enhancement Act* ("EPEA") states:

"The Board shall dismiss a notice of appeal if in the Board's opinion the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all the matters included in the notice of appeal."

[8] On September 9, 2003, the Board notified the Parties that the appeal was dismissed as it was filed out of time. The following is the Board's reasons.

II. SUBMISSIONS

A. Appellants

[9] The Appellants, in their letter of February 20, 2003, and reiterated in their submission, outlined the events and timeline leading to the filing of the Notice of Appeal.

[10] The Appellants stated that the MCFN received notice of the Approval from the Director on January 13, 2003, and even though the Director knew the agent acting on behalf of the MCFN was Ms. Bonnie Evans, he did not make any effort to ensure she received notice of the Approval letter. As a result, Ms. Evans did not receive the letter until January 28, 2003. Ms. Evans was required to consult with the MCFN leadership prior to filing an appeal. Upon reviewing the Approval, the Appellants determined that the 7-day timeline had expired, but on January 30, 2003, Ms. Evans was directed to file an appeal with respect to the Approval on behalf of the MCFN. The Appellants contacted the Board on February 3, 2003, to obtain a Notice of Appeal form, and on February 12, 2003, the Notice of Appeal was filed with the Board. They stated that due to the timing of the issuance of the Approval, specifically that the MCFN offices were closed from December 20, 2002, to January 6, 2003, combined with the logistics, postal services, and their limited understanding of the appeal process, they were unable to respond within the 7-day timeline.⁵

[11] The Appellants submitted that an extension should be granted on the following grounds:

- “(a) The Crown's fiduciary obligation to the MCFN and duty to consult was not satisfied;
- (b) There is a serious matter to be heard;
- (c) Certainty and the balance of convenience favour environmental protection; and,
- (d) The Precautionary Principle should be applied;

⁵ See: Appellants' letter of February 20, 2003, and Appellants' submission, dated March 5, 2003.

(e) There would be no prejudice to True North Energy.”⁶

[12] The Appellants stated they were “...admittedly unsophisticated...” with respect to the appeal procedures and had previously notified the Director that they had not become involved sooner due to their limited knowledge of the process, limited capacity to deal with these types of issues, and limited resources.

[13] The Appellants confirmed that a Community Partnership Agreement (the “Agreement”) had been entered into with the Approval Holder, and subsequently the MCFN withdrew from the AEUB process.

[14] The Appellants stated they held meetings with Alberta Environment in October 2002 and January 23, 2003,⁷ to discuss water rights and upstream projects, and as these meetings were still taking place, the Appellants did not expect a decision would be made regarding the Approval. The Appellants stated they “...believed that the consultation process was still underway and they were ongoing participants.”⁸ They submitted they were in consultation with the Director, and “...it would not be unfair to allow the appeal to have been filed a few days late.”⁹

[15] The Appellants submitted that the Crown has a fiduciary duty to consult with aboriginal peoples when government action infringes upon aboriginal rights. The Appellants argued that the duty to consult had not been satisfied in this case, as the Approval was issued before the consultation process was complete. They further argued that withdrawing from the AEUB process did “...not remove the responsibility on the part of the Crown to act in a fiduciary capacity with respect to aboriginal people.... [T]he Crown had an ongoing obligation to continue consulting with the MCFN in order to ensure that their best interests were being accommodated.”¹⁰

[16] The Appellants argued that because the Crown owes a fiduciary duty to aboriginal peoples, the Director should have made an extra effort to ensure Ms. Evans had received the

⁶ Appellants’ submission, dated March 5, 2003, at paragraph 3.

⁷ A December 2002 meeting was postponed until January 23, 2003.

⁸ Appellants’ submission, dated March 5, 2003, at paragraph 13.

⁹ Appellants’ submission, dated March 5, 2003, at paragraph 27.

¹⁰ Appellants’ submission, dated March 5, 2003, at paragraph 19.

letter notifying them of the issuance of the Approval. They further argued that a Notice of Appeal form should have been included with the letter as well as an actual copy of the Approval to allow the MFCN to determine if an appeal should be filed.

[17] The Appellants submitted that there is a serious matter in this appeal that needs to be dealt with, and “due to the uncertainty of the effects of new and unproven technology, it is possible that the MCFN community could suffer irreparable harm if the matters inherent in this appeal are not effectively considered.”¹¹ Therefore, according to the Appellants, the precautionary principle should apply.¹²

[18] The Appellants concluded by submitting that there would be a “...great deal of prejudice to MCFN if the matter is not heard and irreparable harm may be the result.” They stated the balance of convenience lies with the Appellants rather than the Approval Holder for the following reasons:

- “(a) there were ongoing consultations;
- (b) there is uncertainty as to the environmental impacts of the Water Licence approval;
- (c) there are potential negative and irreversible effects on the way of life of the whole community of MCFN; and
- (d) True North Energy has put this project on hold for an indefinite time period and as such there is no certainty necessary for them at this time regarding the Water Licence.”¹³

B. Approval Holder

[19] The Approval Holder submitted that the appeal period contained in section 116(1)(a) of the *Water Act* should not be extended as there were insufficient grounds to do so,

¹¹ Appellants’ submission, dated March 5, 2003, at paragraph 33.

¹² See: Appellants’ submission, dated March 5, 2003, at paragraph 31. The Appellants quoted paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development (1990) to define the precautionary principle:

“In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

¹³ Appellants’ submission, dated March 5, 2003, at paragraph 35.

and there are no exceptional circumstances that warrant bringing uncertainty into the appeal process.

[20] The Approval Holder argued the meeting the Appellants held with Alberta Environment on January 28, 2003, "...does not constitute a basis which the appeal period ought to be extended. In any event, the appeal was not filed until February 12, 2003, 16 days after the meeting with Alberta Environment."¹⁴

[21] The Approval Holder submitted that the reasons given by the Appellants for filing the appeal late, including "...challenges such as 'logistics, postal services and understanding of the process'" are challenges faced by any person who intends on appealing a *Water Act* approval. Therefore, according to the Approval Holder, these "...do not constitute grounds upon which the Board may form the opinion that the appeal period ought to be extended, especially not by more than 20 days as would be required in this case."¹⁵

[22] The Approval Holder disagreed with the Appellants' submission that the Approval Holder would not be prejudiced should the appeal period be extended. The Approval Holder stated that it and UTS Energy Corp. are in discussions with other parties interested in becoming involved with the development of the Project. The Approval Holder stated that extending the appeal period would result in greater uncertainty that could adversely impact the discussions.¹⁶

C. Director

[23] The Director opposed any extension of time to allow the Appellants to file a Notice of Appeal. The Director submitted that the short time frame was established to ensure certainty for the Approval Holder.

[24] In response to the Appellants' reference to the meeting involving Alberta Environment staff and the MCFN, the Director stated the meeting was held to provide information with respect to water rights and to discuss a number of projects upstream of Fort

¹⁴ Approval Holder's submission, dated February 27, 2003.

¹⁵ Approval Holder's submission, dated February 27, 2003.

¹⁶ See: Approval Holder's letter, dated March 14, 2003.

Chipewyan. The Director further stated that, although the Approval was referred to and the MCFN was aware the Approval had been issued prior to the meeting, the Appellants did not discuss any appeal at that time.

[25] The Director stressed that even though the Appellants admitted to being aware of the Approval on January 28, 2003, and the 7-day time limit to file an appeal, the Appellants did not file a Notice of Appeal until February 12, 2003.¹⁷

[26] In response to the Appellants' submission, the Director argued there was no issue related to consultation, as the Appellants had all the information and fully participated in the regulatory processes that led to the issuance of the Approval, including submitting a Statement of Concern.

[27] The Director also argued that as part of the Environmental Impact Assessment, the Approval Holder was required to meet with and consult directly with directly affected First Nations, including the MCFN, and this information became part of the application for the Approval. The Director submitted that the process resulted in an Agreement between the MCFN and the Approval Holder, and as the MCFN withdrew from participating in the AEUB hearing, the Director argued that "...if there was a duty to consult, the MCFN waived any need to further consultation...."¹⁸

[28] The Director clarified the purpose of the meeting in October 2002 between Alberta Environment and the MCFN was to provide information with respect to water legislation and issues, and it was not intended to specifically discuss the Approval Holder's application. The Director stated the Appellants did not indicate they wanted any further discussions with respect to the Approval Holder's application, nor did they indicate further information was required prior to the Director making his decision. The Director further stated that the Appellants did not provide any indication that they were not expecting any decision to be made while there were ongoing discussions. According to the Director, the MCFN had attended a meeting of the Surface Water Working Group of the Cumulative Environmental Management Association on November 22, 2002, at which time a senior department official advised those in

¹⁷ See: Director's submission, dated February 28, 2003.

¹⁸ Director's submission, dated March 7, 2003.

attendance that a decision regarding the Approval Holder's application would be made in December 2002.

[29] The Director explained that a copy of the letter advising of the issuance of the Approval was forwarded to the Chief of the MCFN as well as their agent, Ms. Evans. The Director stated the letter was sent to the Chief as the last correspondence received from the Appellants was from the Chief. The Director explained the letter to Ms. Evans was sent to the address indicated on the correspondence sent by her and as stated on her business card.

[30] With respect to whether there are issues of a serious matter to be dealt with and the application of the precautionary principle, the Director stated that he seeks input from people who may be directly affected to ensure the best decision is made. The Director continued:

“The MCFN had every opportunity to provide information to assist the Director in coming to his decision and that the certainty and balance of convenience mitigates in terms of certainty for an Approval Holder. The process and time frames prescribed by the legislation are designed to achieve and meet this important balance.”

Therefore, according to the Director, the Appellants did not provide “...any further information or argument to allow the Board to exercise its discretion and extend the time for filing an appeal.”¹⁹

III. ANALYSIS

A. Late Filed Appeal

[31] Under the *Water Act*, a notice of appeal must be filed within seven days after receiving notice of the decision regarding an approval, but the legislation provides the Board with the discretion to extend the filing period if the Board considers the circumstances warrant it. Section 116 of the *Water Act* provides:

- “(1) A notice of appeal must be submitted to the Environmental Appeals Board
 - (a) not later than 7 days after ...
 - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from; ...

¹⁹ Director's submission, dated March 7, 2003.

- (2) The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

[32] Under section 116(1)(ii) of the *Water Act*, the appeal period starts from the date the notice was received. What is important in determining the appeal period is that it starts “...after receipt of notice of the decision...” In this case, the Approval was issued on December 30, 2002, and the Appellants stated the notice was received on January 13, 2003. If the Board accepts this date as the start of the appeal period, the Notice of Appeal should have been filed by January 20, 2003.

[33] The Appellants submitted that their agent, Ms. Evans, did not receive actual notice until January 28, 2003. Based on this date, the Appellants should have filed their Notice of Appeal by February 4, 2003. In her letter, Ms. Evan’s indicated she was directed by the Mikisew Leadership to proceed with filing a Notice of Appeal on January 30, 2003; however nothing was filed with the Board until February 12, 2003. Despite realizing the time limit had expired, Ms. Evans decided to wait an additional eight days to file the Notice of Appeal with the Board. Even if the Board accepted the date the Appellants’ agent received a copy of the Notice of Appeal form, February 3, 2003, the appeal was still filed beyond the appeal period. The appeal period starts once an individual receives notice of the Director’s decision, not from the time an individual finally decides to file an appeal.

[34] The Board will extend the deadline for filing an appeal, but only when exceptional circumstances exist to warrant it. The Board, in its previous decision of *O’Neill*,²⁰ discussed when it would consider extending deadlines:

“Though seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a legislated part of the appeal process, the late filing of a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern had not been filed—due to an extremely unusual case (e.g. directly affected party being hospitalized) where a person’s intent to file is otherwise established in advance.”²¹

²⁰ *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (12 March 1999), Appeal No. 98-230-D (A.E.A.B.) (“*O’Neill*”).

²¹ *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (12 March 1999), Appeal No. 98-230-D (A.E.A.B.) at paragraph 14.

Although the Board was discussing the deadlines in respect to filing a Statement of Concern, a similar framework applies to filing a Notice of Appeal. Both circumstances require the Board to waive legislated timelines. The circumstances that call for the granting of an extension are highly fact-specific and exceptionally rare.²² One of the major purposes of abiding with the legislated timeframes is to provide certainty in the appeal process.

[35] The Appellants argued that the Director should have provided a Notice of Appeal form with the notice of his decision regarding the Approval. The Director's letter did provide the information as required under the legislation, specifically to notify individuals of their right to appeal. Although the Board does have an appeal form available, the Board will consider a letter with the relevant information as a valid notice of appeal. It does not have to conform to a set format; what is important is the content of the notice of appeal. As the Board operates at arm's length from the Director, it is appropriate the form not be provided with the Director's letter. Also, the Director had not received any indication that the MCFN was considering appealing the Approval, particularly in light of their participation, and withdrawal, from the AEUB hearing and the subsequent meetings held with Alberta Environment staff.

[36] Under section 2 of the *Water Act*, there is a responsibility for all Albertans to take an active role in "...providing advice with respect to water management planning and decision-making..."²³ It is not unreasonable for those wanting to file an appeal to take the initiative to contact the Board to find out more information regarding the appeal process or if deadlines are unclear.

²² See: *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113-115-D (A.E.A.B.)

²³ Section 2 of the *Water Act* states:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act."

[37] The Appellants were aware of the impending issuance of the Approval. They attended meetings with Alberta Environment, and even though the specifics of the Approval were not discussed, the Approval was mentioned, providing an opportunity for the Appellants to raise their concerns. According to the Director's letter of February 28, 2003, the "...True North licence and approval were referred to in the discussion of the licences that authorized diversion of water upstream of Fort Chipewyan. There was no discussion with respect to any appeal of the True North licence or approval." If the Director was aware of the Appellants' intent to file an appeal, the Board would assume the representatives from Alberta Environment at those meetings would surely have explained the process, and the timelines, to the Appellants.

[38] The Board is of the opinion the Appellants were aware of the issuance of the Approval, given ongoing discussions between the Appellants and Alberta Environment, and, therefore, should have been able to file their Notice of Appeal with the Board within the legislated appeal period. No exceptional circumstances have been shown that warrant an extension of the appeal deadline.

B. Fiduciary Obligation to the MCFN and Duty to Consult

[39] The Appellants argued the Director has a fiduciary obligation to consult with First Nations, including the Appellants, in matters that may infringe on aboriginal rights.

[40] In this case, the Director required the Approval Holder to consult with First Nations as part of the environmental impact assessment undertaken by the Approval Holder prior to the AEUB hearing, and the information provided was considered when the Director made his decision to issue the Approval. The Appellants do not disagree that extensive consultation did take place with the Approval Holder, and this consultation resulted in an agreement being signed.

[41] The Appellants argued the withdrawal of their participation in the AEUB process did not remove the Crown's fiduciary responsibility to the MCFN. The Director stated that meetings were being held with the MCFN to explain water legislation and issues, and presumably the Appellants' rights under the specific legislation. It is unclear how much more would have been required to meet the fiduciary obligation of the Crown. The Director was doing what he considered was appropriate to assist the MCFN, not only with this specific Approval, but generally for approvals and licences issued in the area.

[42] The Appellants, during these meetings with Alberta Environment, did not express any concerns in relation to the Approval. According to the Director, the MCFN did not indicate they wanted any further discussion regarding the Approval, even though the opportunity was there. There was no indication from any of the Parties that the Appellants were discouraged or forbidden to ask questions regarding the Approval during these meetings.

[43] Whether the Director's actions meet the level of consultation contemplated by the Supreme Court of Canada is a matter that would have to be determined by the Courts. The Board previously discussed the Director's duty to consult in *Chipewyan Prairie First Nation*,²⁴ where the Board concluded:

“Whether in the Courts or before the Board, the threshold question of the Appellants’ treaty and constitutional rights needs to be determined. The Board has no processes equivalent to the Rules of Court to handle such complex questions and proceedings. The Appellants suggest an urgency. However, we note that despite knowing for several months of this pending development, they did not resort to the Court. Should they choose to do so, they could apply for an interim order from the Courts either preserving the status quo or imposing consultation obligations upon the Crown. This Board could and would be guided by any such order in exercising its powers under section 97 of EPEA and more generally.

Even if the Board needs to ultimately decide the constitutional question for its own purposes, the Courts can nonetheless exercise their inherent jurisdiction to assist an inferior tribunal like the Board by dealing with the question of interim relief.²⁵

Requiring the Appellants to first assert its claimed constitutional and treaty rights in the ordinary Courts would:

²⁴ Preliminary Motions: *Chipewyan Prairie First Nation v. Director, Bow Region, Regional Services, Alberta Environment re: Enbridge Pipelines (Athabasca) Inc.* (22 March 2002), Appeal No. 01-110-ID (A.E.A.B.).

²⁵ See: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583 at paragraph 57 which states:

“It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of *Estey J.* in *St. Anne Nackawic* (at p. 723), is a ‘real deprivation of ultimate remedy’.”

1. Allow the Attorney General to be notified and to be present to represent the full interests of the Crown on this important constitutional question, the effect of which extends well beyond the office of the Director involved in this case.

2. Allow the Approval Holder to present its arguments in opposition to the application on the basis of the common law of injunctions, the scope of which extend beyond the simple power of a Stay given to this Board under, and only for the purposes of proceedings under, EPEA. If it is appropriate, the Courts can grant any injunction subject to terms beyond which this Board has the ability to consider or impose.

3. Leave the Board to carry out its assigned statutory mandate of advising the Minister on what the Director could or should have done without entering into an inquiry as to fundamental constitutional and treaty rights customarily and constitutionally the task of a section 96 Court.”²⁶

[44] The issues of the duty to consult and fiduciary obligations owing to First Nations are matters best left to the Courts. Although it appears the Director did consult with the Appellants, again it is the Courts that would have to determine if the Director satisfactorily fulfilled any obligations he may have with the MCFN.²⁷

C. Certainty, Balance of Convenience, and No Prejudice to the Parties

[45] The Board, in its letter of February 13, 2003, advised the Parties that appeals filed outside the legislated time period were “at the discretion of the Board and not routinely granted.” In response, the Appellants referred to the issues of certainty, balance of convenience, and prejudice to the parties.

[46] In their submission of March 5, 2003, the Appellants advised that, since the Approval Holder “...has put this project on hold for an indefinite time period...there is no certainty necessary for them at this time.” The Appellants went on to note “...there is no prejudice at all to them in reconsidering this matter.” However, according to the Approval Holder, if the Board extends the appeal period, there will be greater uncertainty associated with the Project, which could adversely impact discussions with those interested in assisting with the

²⁶ Preliminary Motions: *Chipewyan Prairie First Nation v. Director, Bow Region, Regional Services, Alberta Environment re: Enbridge Pipelines (Athabasca) Inc.* (22 March 2002), Appeal No. 01-110-ID (A.E.A.B.) at paragraphs 46 to 48.

²⁷ The Board notes the Supreme Court of Canada decision of *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, which was issued after the Board made its decision. The Board does not believe the Supreme Court of Canada decision affects the Board’s decision in this matter.

development of the Project. None of the Parties provided an explanation as to why the Project has not progressed sooner, but the delay has enabled those directly affected to have the opportunity to be involved in the process, and the Approval Holder was required to obtain approvals from the Director as well as from the AEUB, all processes that require time.

[47] Time limits are set by the legislation to protect the interests of all parties involved in an appeal. Legislated timelines are established to provide the appellants a reasonable timeframe to file a Notice of Appeal and to provide the approval holder with some degree of certainty that the terms and conditions of their approval or licence are the ones it will have to operate under and that the approval will not be appealed and potentially altered.

[48] In these circumstances, the Appellants have failed to provide sufficient reasons as to why the Approval Holder would not be prejudiced. The rate at which an approval holder proceeds with a project is a matter for them to decide, and proceeding slowly should not adversely affect their ability to rely on legislated timeframes for others to file a Notice of Appeal.

[49] Therefore, the Board believes this Approval Holder, as with any other approval or licence holder, requires certainty in this process and the appeal period timeframes.

[50] The Board recognizes the concerns of the Appellants, in particular their concerns with respect to the watershed, aquatic environment, and their traditional lands, as well as the potential for affecting the social fabric of the MCFN. However, the Board also recognizes the financial concerns of the Approval Holder should the appeal period be extended. In addition to the Parties' concerns, the Board must also take into consideration the public interest. The Agreement signed by the Approval Holder and the Appellants clearly states that the purpose of the agreement is "...to develop a long-term partnership that supports the social, cultural, economic and environmental goals of the Community."²⁸ It further provides the MCFN with the opportunity to identify key concern areas that are to be given priority in the Annual Action Plan, a plan to be jointly developed with the Approval Holder. The terms and conditions of the agreement are also to be reviewed yearly in addition to twice-yearly reviews to assess the implementation of the Agreement. These terms indicate the Appellants are not prejudiced by the Project, and if concerns are raised in the future, they have two mechanisms in which to broach

²⁸ See: Director's Record, Community Partnership Agreement.

the issue – they can discuss their concerns with the Approval Holder through the Agreement to determine if something can be done to alleviate their concerns and, if required, the Approval Holder can seek an amendment of the Approval, or if it is a matter of non-compliance with the Approval, the Appellants can file their complaint with the Director.

[51] Based on the information provided, the Board considers the balance of convenience weighs in favour of leaving the appeal period as stated in the legislation. With respect to the issue of prejudice to the Parties, the Board acknowledges any potential prejudice suffered by the Approval Holder, if any, could in all likelihood be compensated monetarily. However, the Board is of the opinion that the status quo should prevail in these circumstances.

D. The Precautionary Principle Should Apply

[52] With respect to the precautionary principle, the Appellant's argued in their submission that "...uncertain effects of unproven technology on the environment are such that irreparable harm could occur if they are not adequately dealt with. As such the Precautionary Principle should be applied." After reviewing the Approval, the Board notes a number of the terms and conditions in the Approval incorporate the cautionary principle. These include conditions that require the Approval Holder to notify the Director 60 days prior to commencing construction and 60 days prior to the start of any activities as defined in the *Water Act*.²⁹ In addition, the Director required the Approval Holder to maintain stability of the Athabasca River valley wall. In the Approval, the Director requires the Approval Holder to provide an operational plan that must be approved by the Director.³⁰ The operational plan must contain

²⁹ Conditions 9 and 10 of the Approval provide:

- "9. The approval holder shall submit to the Director for approval, at least 60 days before the beginning of construction, all detailed engineering plans and analysis reports for major structures within the fenceline with the potential to impact water, including but not limited to: dams, dykes, tailings ponds, settling ponds, stream re-alignment, ditches and its related structures such as drops, chutes, spillways and outfalls.
10. The approval holder shall provide an updated project water management plan to the Director for approval at least 60 days prior to the start of activities as defined in the Act. This plan shall include but not be limited to management of surface drainage waters, and depressurization waters down to the top of the McMurray formation."

³⁰ Conditions 12 and 13 of the Approval state:

- "12. The approval holder shall submit to the Director for approval, at least six years prior to ditching or draining for mine preparations in the McClelland Lake watershed, a proposal to develop an operational plan for the sustainability of the non mined portion of the

baseline conditions, monitoring programs, mitigation measures, as well as a detailed schedule for implementation of each component of the plan.³¹ The Approval Holder is also required to provide to the Director information regarding water pumped from the wells and water management generally on the site.³² These are all indicative of the precautionary principle being applied within the Approval. The Approval Holder must comply with all of the conditions, and the Director has the authority to take any required steps to ensure compliance. Although it is virtually impossible to predict all potential effects of a project, the Director has incorporated these conditions into the Approval in order to respond to situations that may arise that were not anticipated, thus following the precautionary principle.

MLWC [(“McClelland Lake Wetlands Complex”)] in accordance with the IRP [(“Fort McMurray – Athabasca Oil Sands Subregional Integrated Resources Plan”)].

13. Beginning on January 31 of the year after the proposal referred to in condition 12 has been submitted, and each year thereafter until the operational plan is approved by the Director, the approval holder shall submit to the Director, for written authorization, a report summarizing the progress on the preparation of the operational plan for the sustainability of the MLWC and the proposed work for the subsequent year.”

³¹ See: Condition 14 of the Approval which provides:

“The operational plan referred to in conditions 12 and 13 shall contain, at a minimum

- (a) physical and biological baseline conditions in the MLCW;
- (b) design features or measures, and other as required for the protection of the non-mined portions of the MLWC;
- (c) a wetlands monitoring program containing as a minimum a yearly survey of vegetation species distribution, abundance, health, and string and flark configuration as compared to baseline studies;
- (d) a monitoring program to study groundwater and surface water levels and water quality in overburden and muskeg; flow measurements of polishing ponds, and level monitoring in McLelland Lake;
- (e) proposed investigation and monitoring necessary to verify the model prediction that the MLWC will not drain towards the dewatered area through the groundwater flow system;
- (f) indicators to evaluate the tolerance of the MLWC to project effects;
- (g) the necessary contingency mitigation measures to maintain the water table, water chemistry and water flow within limits as indicated by natural fluctuations to maintain ecosystem diversity and function of the non-mined portions of the MLWC during operation and reclamation of the project; and
- (h) a detailed schedule for the implementation of each component of the plan.”

³² See: Condition 17 of the Approval which states:

“The approval holder shall record and submit to the Director, on or before April 30 in each year, the following information for the preceding calendar year

- (a) monthly readings of the number of cubic metres of water pumped from wells,
- (b) total annual quantity of water pumped from the wells, in cubic metres,
- (c) final destination of the water pumped from the wells,
- (d) total monthly quantity of water released to water bodies within the fenceline,
- (e) source and final destination of the water released to water bodies, and
- (f) any other information requested in writing by the Director.”

[53] The Board is of the opinion the Director has taken the appropriate measures in the Approval to ensure potential problems are identified quickly, and the risk of any harm to the Appellants or the public in general, and the environment would be minimized, and thereby the precautionary principle has been integrated into the Approval.

IV. CONCLUSION

[54] The Board finds the statutory prerequisite of filing a Notice of Appeal has not been met, and as outlined in the reasons above, no special circumstances exist to extend the appeal deadline. Therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal filed by the Mikisew Cree First Nation.

Dated on April 21, 2005, at Edmonton, Alberta.



William A. Tilleman, Q.C.
Chair