

Mining and Lands Tribunal
Tribunal des Mines et des Terres



ISSUE DATE: November 20, 2018

CASE NO.:

LR 001-17

PROCEEDING COMMENCED UNDER section 11 of the *Lakes and Rivers Improvement Act*, R.S.O. 1990, c. L. 3, as amended

Applicant: Lizard Creek Power Inc.
Respondent: Ministry of Natural Resources and Forestry
Subject: An Inquiry as to Whether the Refusal of Approval for the Location of the Proposed Dam and Hydroelectric Facility is Fair, Sound and Reasonably Necessary to Achieve the Purposes of the Act

Property Address/Description: UTM NAD 83, Zone 17, 5119078N 384022E
Lizard Creek System, North Shore Township

MLT Case No.: LR 001-17
MLT Case Name: Lizard Creek Power Inc. v. Ontario (Natural Resources and Forestry)

Heard: In writing

APPEARANCES:

Parties

Counsel

Lizard Creek Power Inc.

R. Douglas Elliott, N. Joan Kasozi and Sakina Babwani

Ministry of Natural Resources and Forestry

Zachary D'Onofrio and Jane Thompson

ORDER DELIVERED BY MAUREEN CARTER-WHITNEY AND HELEN JACKSON

REASONS

Background

[1] Lizard Creek Power Inc. (“LCPI”) proposes a dam and hydroelectric facility to be located at UTM NAD 83 Zone 17, 5119078N 384022E within the Lizard Creek System, in the North Shore Township, 20 kilometres southeast of the City of Elliot Lake (“Project”). On June 2, 2017, the Minister of Natural Resources and Forestry (“Minister”) received LCPI’s application for approval of the location of the Project (“Application”) under s. 14 of the *Lakes and Rivers Improvement Act* (“*LRIA*”). On December 15, 2017, the Minister issued a Notice of Intent to refuse the Application under s. 11(1) of the *LRIA*. On December 21, 2017, LCPI requested an inquiry into this matter, pursuant to s. 11(4) of the *LRIA* (“Inquiry”).

[2] The Inquiry is scheduled to take place on December 3 to 7, 10 and 11, 2018 at the Mining and Lands Tribunal, 24th Floor, 700 Bay Street, Toronto, Ontario. Maureen Carter-Whitney and Helen Jackson have been appointed Inquiry Officers under s. 11(6) of the *LRIA*. Pursuant to s. 11(10), the purpose of the Inquiry is to inquire as to whether the refusal of approval for the location of the Project is fair, sound and reasonably necessary to achieve the purposes of the *LRIA*.

[3] On September 12, 2018, the Inquiry Officers asked the parties to advise as to whom the Notice of Inquiry should be provided so that anyone with a direct interest in the matter would be made aware of the Inquiry and could seek to be added as a party to the proceeding, in accordance with s. 11(7) of the *LRIA*. On September 28, 2018, the Inquiry Officers received responses from the LCPI and the Minister identifying persons to whom, in their respective views, notice of the Inquiry should be provided.

[4] In the Notice of Inquiry issued on October 5, 2018, the Inquiry Officers sought to identify persons with a direct interest in the matter and who might wish to be a party to the proceeding, and requested submissions from any such persons by November 2,

2018, stating the nature of their direct interest in the matter and providing other information as requested in the Notice. The Inquiry Officers provided the Notice of Inquiry to the persons identified by the LCPI and the Minister, and directed LCPI to give general notice of the Inquiry in three local newspapers.

[5] On October 15, 2018, Paul Norris, President of the Ontario Waterpower Association (“OWA”), responded to the Notice of Inquiry, seeking to take part in the Inquiry as a party and providing submissions in support of this request.

[6] The Inquiry Officers did not receive any further requests for party status.

[7] The Inquiry Officers asked LCPI and the Minister to provide submissions on the OWA’s request by November 7, 2018, and both parties did so by that date. By email on November 7, the Minister provided his submissions, and LCPI sent and relied upon its September 28, 2018 submission to the Inquiry Officers, in which it previously had made submissions as to why the OWA should be added as a party. Later on November 7, LCPI sent a second email containing additional submissions that responded to the Minister’s submissions provided earlier that day.

[8] On November 8, 2018, the Minister noted that the Inquiry Officers had directed the parties to make submissions in response to the OWA’s party status request but had not provided an opportunity for reply submissions. The Minister provided a partial response to LCPI’s reply submissions and requested that LCPI’s reply submissions be rejected or that the Minister be permitted to respond fully.

[9] Notwithstanding that, in providing reply submissions, LCPI did not precisely follow the procedure set out for submissions, the Inquiry Officers have reviewed all of the submissions provided by the Minister and LCPI, including LCPI’s reply submissions. Given the Inquiry Officers’ disposition of the OWA’s request for party status, as described below, it was not necessary to invite further submissions from the Minister.

Issue

[10] The issue is whether the OWA has a direct interest in the Inquiry and should be added as a party.

Relevant Legislation

[11] The relevant legislative provisions are as follows:

Lakes and Rivers Improvement Act

11(7) An inquiry officer shall establish the parties to the inquiry, shall fix a time and place for the inquiry, giving adequate notice in the circumstances, and shall hold the inquiry specified.

(8) The following are parties to an inquiry:

1. The person who requested the inquiry.
2. The Minister.
3. Any person whom the inquiry officer determines has a direct interest and should be added as a party.

Submissions, Analysis and FindingsSubmissions

[12] The OWA states that it represents the common and collective interests of the province's waterpower (hydroelectricity) sector, noting that LCPI is a member of the OWA. The OWA submits that it has a direct interest in this matter because the findings from this proceeding have the potential to establish a precedent for the entire industry in Ontario regarding the application of the *LRIA* to waterpower projects across the province. The OWA outlines its experience in relation to waterpower development in Ontario, including being the proponent of the Environmental Assessment ("EA") process for waterpower, providing input and advice in the development of the Location Approval for Dams Technical Bulletin ("Bulletin") by the Ministry of Natural Resources and Forestry ("MNR"), and being an active participant in a number of MNR committees

such as the Dam Owners Advisory Committee (“DOAC”).

[13] The OWA further submits that its participation in this hearing will contribute to the Inquiry Officers’ determination by providing information and perspective related to the practical application of the policy framework for waterpower development in Ontario in this case. The OWA states that in its view, having met the requirements of the MNRF’s Waterpower Site Release and Development Review Policy and completed the EA process, it is unprecedented that the Applicant should be refused location approval.

[14] LCPI submits that the OWA has a direct interest in this proceeding and should be added as a party or an intervenor in this proceeding. LCPI argues that the OWA’s participation will assist the parties and the Inquiry Officers in arriving at a just, fair and reasonable decision in these proceedings, observing that the OWA has been included in a number of discussions relating to LCPI’s Application. LCPI notes that the OWA has been actively involved in key policies and procedures relating to waterpower since its inception, and has extensive knowledge about the permitting and approvals process for waterpower projects. LCPI asserts that the OWA has a direct interest in the subject matter of the proceedings due to the extensive work it conducts with respect to water and natural resources in Ontario.

[15] In the alternative, LCPI submits that if the OWA is found to not have a direct interest, it nevertheless meets the test for intervenor status in *West Moberly First Nations v. McLeod Lake Indian Band* 2014 BCCA 283 (CanLII) (“*West Moberly 2014*”), at para. 13. LCPI further asserts, citing *West Moberly 2014*, that the decision to grant intervenor status is discretionary and attracts deference. LCPI cites additional case law in which courts granted intervenor status to intervenors with a unique perspective, and submits that the OWA has such a perspective because: it has extensive experience dealing with issues related to application approval; it is the proponent of the EA process for waterpower; and it provided advice in the development of the Bulletin, which is central to LCPI’s Application.

[16] The Minister objects to the OWA being added as a party, submitting that the test for the Inquiry Officers to answer is whether this specific intended refusal is fair, sound and reasonably necessary to achieve the purposes of the *LRIA*. The Minister characterizes this as a technical question that will turn on the details of the Application and the evidence of experts familiar with those details.

[17] Observing that the OWA's request to be added as a party is based on the fact that it provided input and advice during the development of the Bulletin under the *LRIA*, the Minister notes that many other stakeholders beside the OWA were involved in providing comments and input to develop the Bulletin and submits that its participation does not give the OWA, as an organization, a direct interest in the matter. The Minister points out that the OWA has not identified any special knowledge in relation to the application of the Bulletin beyond what the parties to this proceeding possess. Similarly, the Minister asserts that the fact that the OWA relies on its role as one of a number of members of the DOAC does not give it a direct interest in this Application, and the OWA has not identified any special knowledge distinct from what the parties to the proceeding can provide.

[18] The Minister relies on the proposition at para. 8 of *West Moberly First Nations v. British Columbia*, 2013 BCSC 2059 (CanLII) ("*West Moberly 2013*"), citing *Halalt First Nation v. British Columbia (Minister of Environment)*, 2012 BCCA 191 (CanLII) ("*Halalt First Nation*"), that a direct interest "requires more than a concern about the precedential effect of a judicial decision: the decision must directly impose a prejudicial legal obligation upon, or affect the legal rights of, the applicant." The Minister submits that the OWA has not established any interest beyond the precedent that this Inquiry may set.

[19] The Minister further states that the OWA is not in a position to make a relevant contribution to the Inquiry, asserting that the OWA's submissions do not show that it could add anything beyond what will already be addressed by the parties through the total of nine witnesses to be called at the Inquiry to provide evidence on the details of

the proposal, the history of the processing of the Application and Ontario's policy framework for waterpower development. The Minister submits that the OWA has not been involved in the Application in any significant way and has not demonstrated that it can add anything beyond the evidence that the nine witnesses already proposed to be called will provide.

[20] Noting that LCPI's reply submissions suggest granting intervenor status to the OWA, the Minister asserts that the issue before the Inquiry Officers is whether the OWA is to be granted party status in accordance with the "direct interest" test set out in the *LRIA*. Citing *United States v. Emery*, 2005 BCSC 1192 (CanLII), the Minister further asserts that tribunals derive their powers from statute and do not have the inherent jurisdiction of the superior courts to appoint intervenors.

Analysis and Findings

[21] The Inquiry Officers observe that the language in s. 11(8) of the *LRIA* is specific in setting out the parties to an inquiry. Those parties are limited to the person who requested the Inquiry, the Minister and any person whom the Inquiry Officers determine has a direct interest in the intended refusal of approval for the location of the Project and should be added as a party. The Legislature chose to use the term "direct interest" in this context rather than the more general "interest", and the significance of that choice must be considered. The cases cited by the parties in their submissions are of some assistance in interpreting this phrase, particularly the two decisions discussed above relating to the West Moberly First Nations proceedings, but it is important to recognize that those decisions interpret "direct interest" in the context of a two-branch intervenor status test.

[22] In *West Moberly 2013*, a British Columbia ("BC") Supreme Court judge addressed applications for intervenor status according principles set out at para. 5 of the *Halalt First Nation* decision; one of the ways to be granted intervenor status is to demonstrate a "direct interest" in a matter. As discussed above, the Court in *West*

Moberly 2013, citing *Halalt First Nation*, stated that a “direct interest” requires more than a concern about the precedential effect of a judicial decision in that the decision must directly impose a prejudicial legal obligation on, or affect the legal rights of, an applicant. That decision was appealed and, in dismissing that appeal in *West Moberly 2014*, the BC Court of Appeal affirmed, at para. 13, that to establish a direct interest, it must be shown that the proceeding will directly and adversely affect the applicant’s legal rights or interests or impose additional legal obligations on it. The Court of Appeal further affirmed that a concern that the prospective decision will have a precedential effect is insufficient to establish a direct interest.

[23] The Inquiry Officers agree with the interpretation of “direct interest” adopted by the BC courts. To establish a direct interest, an applicant must show that its legal rights will be directly and adversely affected by the outcome of the specific dispute between the parties, and not merely that it may be affected by a legal precedent. The OWA submits that its interest in the Inquiry is based on the potential that the findings of the Inquiry will establish a precedent for the waterpower industry in Ontario. The Inquiry Officers find that the OWA’s concern about the potential precedential effect of this matter is not sufficient for it to be added as a party as it does not meet the test of having a direct interest in the intended refusal of approval for the location of the Project.

[24] To conclude, the Inquiry Officers find that the OWA has not demonstrated that it has a direct interest in this Inquiry and, therefore, should not be added as a party.

ORDER

[25] The Inquiry Officers order that the Ontario Waterpower Association’s request for party status is denied.

“Maureen Carter-Whitney”

MAUREEN CARTER-WHITNEY
INQUIRY OFFICER

“Helen Jackson”

HELEN JACKSON
INQUIRY OFFICER

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Mining and Lands Tribunal

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