ERCB Energy Resources Conservation Board
Calgary Office Suite 1000, 250 – 5 Street SW, Calgary, Alberta, Canada T2P 0R4 Tel 403-297-8311 Fax 403-297-7336 www.ercb.ca

Via E-mail

August 24, 2012

Witten LLP
2500, 10303 Jasper Ave. NW
Edmonton AB T5J 3N6

Attention: Garry Appelt

Norton Rose Canada LLP
3700, 400 - 3rd Avenue SW
Calgary AB T2P 4H2

Attention: Don G. Davies

Alberta Justice – Aboriginal Law
10th Floor City Centre Place
10025 – 102A Avenue
Edmonton AB T5J 2Z2

Attention: Douglas B. Titosky

Dear Sirs:

Application No. 1636580
Applicant: Osum Oil Sands Corp.
Taiga Project
Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law

This decision arises in the context of an application by Osum Oilsands Corp ("Osum") for a commercial crude bitumen recovery scheme approval (the "Osum Application"). The proposed bitumen recovery scheme involves a Steam Assisted Gravity Drainage ("SAGD") project to be located near Cold Lake, Alberta and known as the Taiga Project.

The Board received an objection to the Osum Application from the Cold Lake First Nations ("CLFN"). The Board subsequently granted standing to CLFN pursuant to section 26(2) of the *Energy Resources Conservation Act*. A public hearing with respect to the Osum Application commenced in Cold Lake, Alberta on July 18, 2012, but was concluded on the same date as CLFN withdrew its objection to the Osum Application.

On June 5, 2012, CLFN filed a Notice of Question of Constitutional Law ("NQCL") with the Board. This notice was also provided to Osum and the Attorneys General of Alberta and Canada.

The question posed in the NQCL was:

> Has the Crown in Right of Alberta discharged its duty to consult and accommodate CLFN with respect to adverse impacts arising from the Osum Taiga Project upon CLFN's Treaty Rights?

The relief sought by CLFN was a determination and declaration by the Board that the Crown had not met its constitutional duty to consult and accommodate CLFN and therefore the Taiga Project was not in the public interest.

In a preliminary submission dated June 14, 2012, the Minister of Justice and Attorney General for Alberta ("Alberta") requested that the Board make a preliminary determination of its jurisdiction to determine the issue raised in the NQCL.

The Board received and considered extensive written submissions from both Alberta and CLFN on the question of its jurisdiction to consider the NQCL. Preliminary submissions were made by Osum in relation to the NQCL, but not with regard to the Board's jurisdiction. While in receipt of all of the submissions made with regard to the NQCL, the Attorney General of Canada ("Canada") did not provide submissions.

On July 17, 2012, the Board released its decision that it did not have the jurisdiction to hear and decide the particular constitutional question raised by the NQCL (the "Decision"). On the same date and subsequent to the Board issuing the Decision, Alberta advised that it would not be participating in the hearing of the Osum Application.

The following are the Board's reasons for the Decision.

A. Issue before the Board

As noted above, the NQCL raised the issue of whether Alberta had discharged its duty to consult and accommodate CLFN with regard to adverse effects upon CLFN's Treaty Rights arising from the Taiga Project.

Alberta did not challenge in its submissions that it owed a duty to consult CLFN.[1] Thus, whether that duty existed was not an issue the Board was asked to determine.

B. The Parties' Positions

In the Preliminary Submissions, Alberta submitted that:

> 3. Prior to the ERCB addressing Osum's application, Alberta is seeking to have the Board make a preliminary determination respecting its jurisdiction to consider and determine the consultation adequacy issues raised in the CLFN's NQCL and Written Submissions. It is Alberta's submission that the ERCB has no jurisdiction to assess the adequacy of Crown consultation in determining Osum's application for approval of its Taiga Project.
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> 4. The Board has no authority to determine the adequacy of Crown consultation as it has no jurisdiction over the Crown, the subject matter or any potential remedy.

[1] Preliminary Submissions by the Minister of Justice and the Attorney General of Alberta Respecting the Jurisdiction of the Energy Resources Conservation Board dated June 14, 2012 at para. 31.

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13. The ERCB is a statutory creation. As such, the Board's jurisdiction is confined to the areas over which the legislature has assigned it authority and it has no inherent jurisdiction to determine issues falling outside of that authority.

14. The fact that the Board must exercise its decision-making functions in accordance with the *Constitution Act* and has the ability to consider constitutional questions pursuant to the *APJA* does not extend the scope of subjects over which the ERCB has jurisdiction. While the Board has the expertise and authority to decide constitutional questions as they relate to its legislative mandate, that mandate does not extend to reviewing the Crown's consultation with respect to aboriginal or treaty rights.[2]

In response to Alberta's submission, CLFN submitted that:

....the ERCB has both the jurisdiction and the duty to determine CLFN's Constitutional Question. To summarize:

a. The Alberta legislature expressly granted such jurisdiction over all questions of constitutional law when it included the ERCB in Schedule 1 of the *APJA*. Relying upon *Kelly,* this may be sufficient for the ERCB to determine that it has jurisdiction over CLFN's Constitutional Question;
b. A thorough analysis of the Board's jurisdiction in accordance with *Paul, Conway* and *Carrier Sekani* confirms without question that the Board has the jurisdiction over CLFN's Constitutional Question and the jurisdiction to grant the remedy sought by CLFN;
c. The Supreme Court of Canada confirmed through its analysis in *Carrier Sekani* that a tribunal's statutory mandate to consider the public interest in its decision making authorizes the tribunal to determine constitutional issues such as the duty to consult;
d. The Alberta public has an important interest in having constitutional matters determined in an efficient and accessible process which limits duplication, delay and expense. This interest is not met by bifurcating constitutional issues from other issues before the ERCB.[3]

C. The Board's Legislation

The ERCB's enabling statute is the *Energy Resources Conservation Act* ("*ERCA*"). Section 2 of the *ERCA* sets out that act's purpose as being:

a) to provide for the appraisal of the reserves and productive capacity of energy resources and energy in Alberta;

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[2] Preliminary Submissions by the Minister of Justice and the Attorney General of Alberta, supra,
[3] Response of Cold Lake First Nations dated June 29, 2012 at para. 3 ; *Kelly v. Alberta (Energy and Utilities Board)* 2008 ABCA 52, *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, *R v Conway, supra, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*

b) to provide for the appraisal of the requirements for energy resources and energy in Alberta and of markets outside Alberta for Alberta energy resources or energy;

c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;

d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;

e) to secure the observance of safe and efficient practices in the exploration for, processing, development, and transportation of the energy resources of Alberta;

f) to secure the observance of safe and efficient practices in the exploration for and use of underground formations for the injection of substances;

g) to provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta;

h) to provide agencies from which the Lieutenant Governor in Council may receive information, advice and recommendations regarding energy resources and energy.

Section 3 of the *ERCA* provides for consideration by the Board of the public interest. It states:

> Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

The Osum Application was made pursuant to section 10 of the *Oil Sands Conservation Act* (*"OSCA"*). Section 3 of the *OSCA* provides the following purposes of that act:

a) to effect conservation and prevent waste of the oil sands resources of Alberta,

b) to ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta,

c) to provide for the appraisal of Alberta's oil sands resources,

d) to provide for appraisal of oil sands, crude bitumen, derivatives of crude bitumen and oil sands product requirements in Alberta and in markets outside Alberta,

e) to assist the Government in controlling pollution in the development and production of the oil sands resources of Alberta,

f) to provide for the recording and for the timely and useful dissemination of information regarding the oil sands resources of Alberta, and

g) to ensure the observance, in the public interest, of safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of oil sands, discard, crude bitumen, derivatives of crude bitumen and oil sands products.

Section 10 states that:

(1) No person shall

a) Construct facilities for a scheme or operation; or

b) Commence or continue a scheme or operation for the recovery of oil sands or crude bitumen, unless the Board, on application, has granted an approval in respect of the scheme or operation.

(2) The Board shall, on receiving an application referred to in subsection (1), make any investigation or inquiries and hold any hearings that it considers necessary or desirable in connection with the application.

(3) The Board may, with respect to an application referred to in subsection (1)

a) if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the Board considers appropriate,

b) refuse to grant an approval,

c) defer consideration of the application on any terms and conditions that the Board may prescribe, or

d) make any other disposition of the application that the Board considers appropriate.

(4) An authorization of the Lieutenant Governor in Council is subject to any terms and conditions prescribed by the Lieutenant Governor in Council.

D. The ERCB's Jurisdiction to Decide Constitutional Questions

The Board is satisfied that it has the power to consider questions of constitutional law pursuant to both the *Administrative Procedures and Jurisdiction Act* and the common law.

(i) Under the *Administrative Procedures and Jurisdiction Act*

Pursuant to the provisions of the *Administrative Procedures and Jurisdiction Act* and its associated regulations,[4] the Board has the authority to decide "all questions of constitutional law" which are defined as:

> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights,* to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
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> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights.*

(ii) Under the common law

The power to decide questions of law implies a power to decide constitutional issues that are linked to matters properly before a tribunal, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power.[5]

It is clear that the ERCB has the power to decide questions of law.[6] Further, there is nothing which suggests the legislature of Alberta intended to exclude from the ERCB's jurisdiction the authority to decide constitutional issues generally. The above noted provisions of the *APJA* demonstrate just the opposite.

(iii) The extent of this jurisdiction

In light of the above, the ERCB is satisfied that it has the power to decide constitutional questions both pursuant to the *APJA* and by virtue of the common law. However, the Board is not persuaded that it has the jurisdiction to decide every constitutional question. It would create an absurd result if the ERCB had jurisdiction under the *APJA*, or otherwise, to consider constitutional questions outside its mandate and thus outside its area of intended expertise.

The ERCB is a statutory creation and like all tribunals is confined to the powers conferred on it by its constituent legislation. It does not have inherent powers apart from those powers granted to it by statute. The fact that the Board must exercise its decision making functions in accordance with the *Constitution Act* and has the ability to consider constitutional questions pursuant to the *APJA* or common law does not extend the scope of subjects over which the ERCB has jurisdiction.

As stated by the Supreme Court of Canada:"[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates".[7]

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[4] Sections 10(c) and (d), *Administrative Procedures and Jurisdiction Act,* RSA 200 c A-3; Schedule 1, Designation of Constitutional Decision Makers Regulation AR 69/2006 (Consolidated up to 254/2007).
[5] *R. v Conway*, 2010 SCC 22 at para 81.
[6] *ERCA* sections 16, 20 and 41(1).
[7] *Conway*, at para 6.

E. The ERCB's Mandate

The Supreme Court of Canada has indicated that the authority of a tribunal to consider consultation depends on the mandate conferred by the legislation creating the tribunal. Tribunals considering resource issues touching on Aboriginal interests may have the duty to assess the Crown's consultation or to conduct consultation on the Crown's behalf, or both, or neither.[8] Administrative tribunals have only the authority given to them by the legislature and must confine their analysis and orders to the ambit of the questions properly before them on a particular application. Questions over which the Board does not have jurisdiction cannot be properly before the Board.

The Board sees nothing in its mandate, as set out in the *ERCA* or even in the *OSCA,* which extends its authority to reviewing the Crown's consultation with respect to aboriginal or treaty rights in circumstances where the Crown is not the applicant. The Board's mandate requires it to assess impacts of projects; the Board's mandate does not allow or require the board to assess and supervise Crown conduct, including consultation with First Nations.

The Alberta Court of Appeal in *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*[9] determined that there is no legal basis for the proposition that the Board's predecessor, the Alberta Energy & Utilities Board (the "EUB"), had a supervisory role over Alberta and its duty to consult on aboriginal or treaty rights. The EUB's mandate with regard to energy and resource development was identical to the ERCB's mandate and the Board is persuaded that the Court's statements with regard to the EUB apply equally to the ERCB.

CLFN has urged the Board to accept that its "public interest mandate" is broad enough to allow the Board to consider the adequacy of Crown consultation in assessing the public interest. CLFN relies upon the Supreme Court of Canada's decision, *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,*[10] to support this proposition.

In *Carrier Sekani*, the Court found that, in the context of a Crown proponent which itself owed the duty to consult, the duty to consult created a "special public interest" which fit within the tribunal's obligation to consider factors relevant to the public interest. As recognized by the Court, the subject of the application before the tribunal, which was a contract formed by the applicant Crown agent which breached a constitutional duty upon the Crown, could not be in the public interest.

The Board is not satisfied that in this matter, where the proponent is not the Crown or a Crown agent and thus does not owe the constitutional duty[11], the ERCB's public interest mandate extends to assessing the adequacy of Crown conduct (consultation) which has yet to be completed. For these reasons, the Board is not persuaded that the question of Crown

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[8] *Rio Tinto Alcan Inc. v Carrier Sekani Tribunal Council,* 2010 SCC 43 at paras 55 and 58.
[9] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* 2005 ABCA 68 at para 28.
[10] *Carrier Sekani.*
[11] *Carrier Sekani,* at paras 79, 81

consultation properly arises in the course of the Osum proceeding and thus the Board cannot have jurisdiction over it.[12]

The ERCB application process places broad consultation obligations upon project proponents which ensure that First Nations can learn about projects and participate in the Board's process. Both the application and hearing process provide an opportunity for the Board to hear from First Nations regarding potential effects of projects upon them and allow the Board to assess those effects. In this way, the Board's own process is just one component of a much broader consultation process and will provide the Crown with an opportunity to determine what, if any, further consultation and accommodation is required with regard to the overall Taiga Project. Ultimately and separate and apart from ERCB approval, Crown approvals will have to be obtained before the Taiga Project can proceed.[13] In the Board's view, the public interest cannot be determined by an assessment of the adequacy of matters to be completed in the future by a stranger to the Osum Application, the Crown, over which the Board has no power to supervise or compel to consult or accommodate.

In relation to questions of constitutional law as defined in the *APJA*, that Act deems Alberta to be a party in any proceeding relating to the determination of a question of constitutional law as defined in that act. The Board is satisfied that this "party" status under the *APJA* does not extend the mandate of the Board to supervising the Crown's conduct when the Crown would not otherwise be a "party" to an application before the Board, as either the applicant or objector. As a party under the *APJA,* the Crown does not seek to support or oppose the application before the Board or to have "standing" to fully participate in the Board's consideration of the Application. It would be the case that, as occurred here, if the NQCL were withdrawn from the Board's consideration, so would the Crown's participation in the proceeding.

The Board also considers that it does not have the authority to grant to CLFN the remedy sought. The remedial powers granted to a tribunal by the legislature are relevant to determining the contours of that tribunal's jurisdiction.[14] The relief sought by CLFN was:

> That the [Board] Panel determines and declares that the Crown has not met its constitutional duty to consult and accommodate CLFN and therefore the Project is not in the public interest.

The Board could find that the Taiga Project is not in the public interest. However, it cannot make a declaration that the Crown has not met its constitutional duty to consult and accommodate CLFN. This is so first because, as noted above, the Crown's process is not complete so that such a declaration would be premature. Second, while the Board has the power to make orders it deems necessary, this authority is specifically limited to making orders and directions necessary to effect the purposes of the *ERCA* and *OSCA*. The Board finds that a declaration such as the one sought by CLFN does not fall within the scope of the Board's mandate as set out in those enactments.

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[12] *Conway* at paras 78 and 79.
[13] For example approval under the *Environmental Protection and Enhancement Act.*
[14] *Conway,* at para 58.

F. Assessment of Crown Consultation by the Courts

In its submissions, CLFN noted that if the ERCB did not decide the issue in the NQCL, it would be decided by the Courts. CLFN further submitted that this Court process would not be in the public interest because it would lead to expense and delay. However, where the legislature has determined not to give the Board the legislative mandate to deal with Crown consultation, a concern over the cost in time or money associated with the Courts addressing the issue cannot create for the ERCB a jurisdiction that does not otherwise exist.

The Board also notes that the Supreme Court of Canada has indicated that it is appropriate for First Nations to pursue the issue of Crown consultation and the effect of government decisions on their interests in the Courts where a tribunal cannot deal with the issues.[15]

G. Conclusion

The Board acknowledges that "an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction".[16] However, assessing Crown conduct where the Crown is not the applicant does not fall within the Board's specialized jurisdiction and therefore the Board cannot assess and make a declaration regarding the adequacy of the Crown's consultation with CLFN in this matter.

The Board finds that its jurisdiction to consider constitutional questions generally must be tempered by its statutory mandate, and therefore that it does not have jurisdiction to consider the constitutional question put before it in this proceeding.

T.L. Watson, P. Eng.
Presiding Member

A. H. Bolton, P. Geo.
Board Member

B. T. McManus, Q.C.
Board Member

cc: Department of Justice Canada Attn: Kirk Lambrecht, Q.C. kirk.lambrecht@justice.gc.ca

[15] *Conway* at paras 63 and 75.
[16] *Conway* at para 79.