Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0120

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF a review of an application by Yellow Falls Power Limited Partnership for an Order granting leave to construct a transmission line connecting a 16 megawatt waterpower project to the transmission system of Hydro One Networks Inc.

DECISION ON QUESTIONS OF JURISDICTION AND PROCEDURAL ORDER NO. 4

Yellow Falls Power Limited Partnership (the "Applicant" or "YFP") has filed an application with the Ontario Energy Board (the "Board") dated April 27, 2009 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B. The Applicant has applied for an order of the Board granting leave to construct transmission facilities (the "Project") connecting a 16 megawatt run-of-the river waterpower generation station located at Yellow Falls to the transmission system owned by Hydro One Networks Inc.("Hydro One").

The Application was assigned Board File No. EB-2009-0120.

Introduction

On July 24, 2009, the Board issued Procedural Order No.1, in which the Board granted the Wabun Tribal Council ("WTC") intervention status as well as its request for cost eligibility, subject to various restrictions described in that Order. The Procedural Order called for interrogatories on the pre-filed Applicant evidence to be submitted by August

7, 2009, and for WTC to indicate by August 7, 2009 if it is their intention to file evidence. The Applicant was ordered to file responses to interrogatories by August 17, 2009.

On August 5, 2009 the Board received a letter from the WTC questioning the limits imposed by the Board on the scope of the proceeding, and asked that the Board reconsider its decision to proceed by way of a written hearing. WTC also indicated that it wishes to present both written and oral evidence in this proceeding.

On August 17, 2009 the Board issued Procedural Order No. 2 setting out the procedural steps for submission and examination by parties of WTC's written evidence. The Board indicated that it would make a determination on the necessity of oral evidence at a later date. WTC was ordered to file evidence by August 28, 2009, and interrogatories on that evidence were ordered filed by Friday September 4, 2009. Responses from WTC were to be received by September 11, 2009.

On August 20, 2009 the Board issued a letter to all parties to address issues raised by WTC in two letters dated August 13, 2009 and August 18, 2008, and the Applicant in a letter dated August 19, 2009. The main issue raised by WTC in these letters concerned its view of the Board's role in assessing the Crown's duty to consult Aboriginal peoples (specifically the WTC) for the Project. The Board directed that parties could make argument on this issue at the conclusion of the evidentiary portion of the proceeding. In this respect, WTC would be permitted to file any evidence which it wished to rely upon for purposes of its argument on this issue. The Board also confirmed that the filing deadlines established in Procedural Order No. 2 remained in effect.

Board staff submitted interrogatories on the application. YFP provided responses to the interrogatories by August 17, 2009. WTC submitted evidence on August 27, 2009. YFP and Board staff submitted interrogatories to WTC. WTC provided responses to the interrogatories by September 11, 2009.

On September 21, 2009 the Board received a letter from Mr. Merv McLeod on behalf of the Taykwa Tagamou Nation ("TTN"), requesting an opportunity to prepare a detailed written response to the evidence submitted by WTC with regard to the respective interests in the lands potentially affected by the Project. TTN requested two weeks to prepare the submission.

The Board granted TTN intervenor status to participate in this proceeding going forward.

The interest of WTC and TTN focused exclusively on the adequacy of the Aboriginal consultation undertaken by the relevant Crown agencies and the related land interests. The Board concluded that it should not make provision for additional procedural steps relating to additional evidence on this issue (whether it be the oral hearing requested by the WTC or the request by the TTN to file a response to the WTC's written evidence) without first determining the extent of its jurisdiction to consider such issues.

On September 29, 2009, the Board issued Procedural Order No.3 which solicited submissions from the parties with respect to three questions:

1. What is the scope of the Board's jurisdiction to consider issues relating to the duty to consult in a section 92 leave to construct application?
2. Is the Board's jurisdiction to consider the adequacy of the consultation and possible accommodation limited to the public interest criteria governing the Board's assessment of a leave to construct application (price, reliability, and quality of electrical service)?
3. Does the Board have the jurisdiction to consider the adequacy of the consultation, and possible accommodation, in relation to approvals and processes beyond the leave to construct proceeding, including the environmental assessment, the various permitting processes of the Ministry of natural resources, and any other activity or approval undertaken by a Crown entity in connection with the project? If the board does have the requisite jurisdiction how should be exercised and how should it be aligned with the other related approval and permitting processes, for example the environmental assessment process.

The applicant, Yellow Falls Limited Partnership, the intervenor Wabun Tribal Council ("WTC"), and Board staff made submissions on these questions.

This decision and order contains the Board's findings on these issues and makes provision for the next procedural steps in this application.

Background

The Yellow Falls Limited Partnership proposes to build transmission facilities associated with a hydroelectric generation project to be located on the Mattagami River in northern Ontario. Section 92 of the *Ontario Energy Board Act* (the "Act") requires proponents of

such projects to procure an order of the Board authorizing construction of such transmission facilities.

The statute also contains the criteria that the Board is required to consider in making its determination. Put simply, the Board is directed by the statute to limit its consideration of the public interest associated with the project to issues directly related to the price of electricity, and the quality and reliability of the electricity system, and whether the application is consistent with government policy in the area of renewable energy sources.

The sole focus of all of the materials filed in this case by WTC is the assertion that the proponent and the relevant provincial agencies have to date failed in their respective obligations to consult with and possibly accommodate WTC. WTC cites decisions of the Supreme Court of Canada creating obligations to consult and accommodate Aboriginals where Aboriginal or treaty rights may be impacted by projects.

None of the materials filed by WTC address the issues stipulated by section 96(2) of the Ontario Energy Board act referred to above, that is the price, reliability or quality of electrical service, and whether the application is consistent with government policy in the area of renewable energy sources.

Given this circumstance, the Board decided to consider, as a preliminary matter, the scope of its jurisdiction to address Aboriginal consultation issues in this proceeding, which is the sole issue of interest to WTC.

The evidence filed by the applicant in support of its application reveals the following information. The applicant has filed a final environmental assessment for stakeholder, Aboriginal, and Ministry of Environment review. This final version of the Environmental Assessment incorporated a number of changes that had been adopted by the applicant in response to community and government agency comments and concerns.

The final environmental assessment was subject to a review and comment period. During that comment period the WTC requested that the Ministry of the Environment not approve the project and requested that the assessment be elevated or “bumped up” for

a more searching and detailed review. The grounds for the WTC request related exclusively to WTC's view that the company and the province had failed in their respective obligations to consult and accommodate Aboriginals in a manner consistent with the guidance provided by the Supreme Court of Canada.

It is to be noted that the proponent, Yellow Falls Limited Partnership has entered into an arrangement, described as a "business to business agreement" with the Taykwa Tagamou Nation ("TTN"), also an intervenor. TTN is another Aboriginal organization asserting rights associated with the lands upon which the transmission facilities will be built. From the materials filed it can be said that WTC and TTN each assert that their traditional lands include lands impacted by the application.

Positions of the Parties

Board staff's submission is that the Board lacks jurisdiction to consider matters relating to the adequacy of consultation and accommodation beyond those related to the criteria in section 96(2) of the Act. This view is rooted in the interpretation of the relevant statutes and the direction provided by the Supreme Court of Canada.

Section 92 of the Ontario Energy Board Act provides as follows:

> ***92. (1)*** *No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.*

The criteria which the Board may consider in its consideration of leave to construct applications are described in section 96:

> **96. (1)** If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

Applications under s. 92

> **(2)** In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

Section 19 of the Act provides that the Board is empowered to determine questions of fact and law within its jurisdiction.

In providing its direction the Supreme Court of Canada indicated that, where the tribunal has been endowed with the power to determine questions of law it has an innate jurisdiction to consider constitutional issues, such as the adequacy of consultation, even though its enabling statute does not bestow any specific authorization for the exercise of such jurisdiction. In Board staff's view, the authority of a tribunal to determine questions of law serves as kind of essential qualification for the exercise of the innate jurisdiction to determine constitutional issues.

It is Board staff's view that because the legislature has so closely prescribed the matters which may be considered in its disposition of a leave to construct application, all other factors fall outside of its jurisdiction. Board staff submits that the power to determine questions of law therefore does not apply to any matter outside of the criteria enumerated under section 96(2) of the Act. In Board's staff's view this has the effect of removing the Board's authority to determine questions of law with respect to any other matter, and it has no innate authority, in cases subject to this limitation, to address any constitutional issues, such as the adequacy of consultation with Aboriginals in any area outside of the enumerated criteria.

As to Question 3, Board staff argues that the Board has no jurisdiction to supervise the actions of Crown agencies, nor would it be efficient for it to do so.

WTC rejects Board staff's argument. WTC's position can perhaps best be represented by a brief quotation from its submission:

> *Irrespective of the strict statutory interpretation issue, it is submitted that, as a constitutional duty, the duty to consult, where applicable, overlies statutory provisions and informs their construction.*

In other words, WTC asserts that the limits placed on the Board's jurisdiction with respect to leave to construct cases have no effect on the Board's obligation to address disputes related to the duty of Crown agencies to consult and possibly accommodate Aboriginals. In its view, the duty to assess the adequacy of consultation stands alone, unaffected by limitations imposed on the Board's consideration of the public interest. As a corollary to this point of view WTC asserts that the assessment of the adequacy of consultation and accommodation of Aboriginals does not form part of the Board's consideration of the public interest.

It is important to note that WTC considers that it is the Board's duty to assess the adequacy of consultation and accommodation because, in its view, the Board is the "final Crown decision maker". Elsewhere in its submissions WTC refers to the Board as conducting a "comprehensive final review" of the various authorizations required to complete the project, and identifies it as "the Crown agency with final responsibility for approval."

WTC suggests that in order to exercise its jurisdiction to assess the adequacy of consultation the Board should, at some point in the future, when the various authorizations and permits have been approved by various agencies of government, including the finalization of the environmental assessment, inquire from the parties as to whether adequate consultation has been accomplished. If there is a dispute on this issue at that time the Board should re-convene to hear evidence and adjudicate the matter.

Any other approach, WTC suggests, would lead to a "checkerboard of authorizations made without adequate consultation…"

Yellow Falls takes the position that the Board has no jurisdiction to consider issues related to the adequacy of Aboriginal consultation, not even within the confines of the criteria enumerated in section 96(2). The applicant points to the mandatory nature of

the provisions in sections 92 and 96(2) and concludes that the Board may consider no other factors or questions of law, including Aboriginal consultation, when considering applications under section 92. The applicant states:

> *In a hypothetical case, if an Aboriginal group raised a concern relating to one of the Governing Criteria the Board would certainly have the jurisdiction and the duty to consider the substance of that concern and make a determination as to whether the proposed transmission line was in the public interest with respect to the Governing Criteria at issue. However, the Board would not have the jurisdiction to refuse the application on the basis that there was insufficient consultation with the Aboriginal Group with respect to the Governing Criteria at issue. Nothing in the Act give the Board jurisdiction to consider the sufficiency of Aboriginal Consultation as it relates to section 92 applications.*

Yellow Falls also submits that the Board lacks jurisdiction to consider the adequacy of consultation because the proponent in this case is a private enterprise, and not a Crown agency, or an agent of the Crown. In its view, the Supreme Court in creating the duty to consult with Aboriginal peoples in *Haida Nation v. British Columbia (Minister of Forests)*[1] strictly limited the duty to consult to the Crown and its agents. Insofar as the instant application is an application by a private enterprise, questions relating to the duty to consult are inherently beyond the Board's jurisdiction in the Applicant's view.

Board Findings

It is a well-established principle of administrative law that administrative tribunals have only the powers bestowed upon them explicitly by their enabling statutes, or those which arise by necessary implication. This principle has been applied by supervising courts in numerous cases so as to prevent creeping, unintended jurisdiction in such tribunals. An exception to that principle has been introduced by the Supreme Court with respect to constitutional and constitution-like issues. Specifically, the Supreme Court of Canada has decided that tribunals that have been endowed with the express power to determine questions of law, have a residual or presumed jurisdiction to resolve constitutional issues that come before them in the normal course of their work.[2]

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[1] [2004] S.C.R. 511

[2] *Paul v. British Columbia (Forest Appeals Commission),* [2003] S.C.J. 34, *Nova Scotia (Workers' Compensation Board) v. Martin,* [2003] S.C.J. 54.

The issue here is the extent to which the Legislature has endowed the Board with the power to determine questions of law with respect to leave to construct applications. Because the Board's power to determine questions of law is specifically limited in section 19 to areas within its jurisdiction, the Board finds that it has no authority to determine constitutional issues, such as the adequacy of consultation with Aboriginals, in relation to any matters beyond the criteria in section 96(2). This is consistent with case law referenced above.

In the Board's view this finding is sufficient to dispose of this issue in this case because none of the issues raised by WTC relate to the criteria in section 96(2). The Board finds however that there is another reason, also related to its jurisdiction, which supports its determination that it ought not consider the adequacy of consultation.

In its submissions WTC relied heavily on the proposition that the Board was in some senses the central or final decision-maker with respect to this project.

That proposition is simply not true. With respect to applications under section 92 the Board does not make, and is not empowered to make, any decisions with respect to Crown land rights of way, environmental protection and assessment, protection of species, community or worker safety, socio-economic effects, or any one of a significant number of approvals and permits required by the proponent with respect to such projects. Board approval is but one milestone on the path to project completion.

Each of the approvals and assessments has its own drivers and requires distinct expertise. In our review of the materials filed with this application, it became clear that issues respecting accommodation and consultation with Aboriginal peoples have typically been considered within the rules and protocols associated with the environmental assessment. In this case, it appears to be common ground that the environmental assessment is the appropriate context for the consideration of Aboriginal treaty and land rights. WTC specifically indicated in the evidence that it filed that it considered such matters to fall within the scope of the environmental assessment.

In accordance with the rules and procedures governing the environmental assessment process the Minister of Environment will make a decision. The Board has no mandate or jurisdiction of any kind to suggest that it is empowered to review, assess, or adjudicate upon the adequacy of the Minister's consultation and accommodation of Aboriginal peoples. If WTC continues to have concerns respecting the adequacy of

such consultation with the environmental assessment process the appropriate measure for it to take is to challenge the Minister, and if necessary, invoke the supervision of the courts. The same is true for each of the other permitting and approvals processes undertaken by various government agencies with respect to this project.

To assume such jurisdiction over other government agencies, would, in the Board's view, be insupportable from a legal point of view, and also grossly inefficient and unsatisfactory from a practical point of view.

In its submissions WTC argues that if the Board does not conduct "…a comprehensive final review of all of the authorizations needed for the project there is a danger that the project would have been approved in the absence of adequate consultation, leaving affected First Nations with little recourse but litigation, conducted only after the project was underway, at which point some issues may become moot." With respect, the Board finds that the various existing approval processes are sufficiently interdependent so as to avoid the scenario depicted by WTC.

Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. In fact, the statute enabling the environmental assessment process prohibits any approval by any authority that is not conditional on the prior completion of the environmental assessment process.

In fact, in the Board's view, the only way to ensure that the appropriate measure of consultation and accommodation occurs with respect to any of the requisite permits, approvals, and assessments of the relevant government agencies is to follow the Board's typical process to make its approval of the leave to construct conditional upon completion of those processes and procurement of those permits. It is clear to the Board that the assessment of the adequacy of consultation and accommodation is best conducted by the various government agencies sponsoring those processes, informed as it is with intimate knowledge of the context, with the possibility or threat of supervision by the courts if deficiencies are thought to exist. For the Board to engage in

an ex post facto review of the adequacy of consultation by any of these government agencies would be inefficient, ineffective, and insupportable.

Finally, in the Board's view, if it does have any jurisdiction at all to consider matters relating to the adequacy of consultation with Aboriginal peoples, section 96(2) operates to expressly constrain the Board's discretion, and limits its jurisdiction to the determination of matters of law arising exclusively in connection with the prescribed criteria, namely price, quality, reliability, and the government's policies with respect to renewable energy projects. The Board finds that the Legislature's unequivocal intention was to limit the scope of such proceedings to the enumerated criteria, and to preclude any other considerations of whatever kind, from influencing its determination of the public interest. The Board's authority to determine questions of law is not open-ended, but rather has been strictly prescribed by section 96(2).

The Board has already determined that the issues related to the adequacy of the Crown consultation with Aboriginal peoples in this application are beyond the scope of the section 96(2) criteria and therefore clearly beyond the Board's jurisdiction. The Board therefore does not need to address the arguments of Yellow Falls which are that the Board has no jurisdiction to consider the adequacy of Aboriginal consultation with respect to the criteria in section 96(2) and no jurisdiction to consider adequacy of Crown consultation in cases where the applicant is not a Crown corporation. Yellow Falls acknowledged this in its submissions.

Having made this finding, the Board has determined that it does not need to hear oral evidence from WTC. Similarly, there is no requirement for responding evidence from TTN. The Board will now make provision for the filing of submissions on the application itself. TTN may file a submission if it chooses, and it will be eligible for an award of costs to the extent its submission goes to the issues which are within the scope of the Board's proceeding, namely the criteria established in section 96(2).

THE BOARD ORDERS THAT:

1. Board staff and Intervenors shall file with the Board and deliver to the Applicant a copy of its final submission on any matters outstanding in this proceeding on or before Tuesday November 24, 2009.

2. The Applicant shall file with the Board and deliver to all parties its reply submission by December 1, 2009.

3. All filings to the Board noted in this Procedural Order must be in the form of 2 hard copies and must be received by the Board by 4:45 p.m. on the stated dates. An electronic copy of the filing must also be provided. If you already have a user ID, the electronic copy of your filing should be submitted through the Board's web portal at www.errr.oeb.gov.on.ca. If you do not have a user ID, please visit the "e-Filing Services" page on the Board's website at www.oeb.gov.on.ca and fill out a user ID password request. For instructions on how to submit and naming conventions, please refer to the RESS Document Guidelines also found on the "e-Filing Services" webpage. If the Board's web portal is not available, the electronic copy of your filing may be submitted by e-mail at Boardsec@oeb.gov.on.ca. Those who do not have internet access are required to submit the electronic copy of their filing on a CD or diskette in PDF format.

ISSUED at Toronto on November 18, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary