

**mccarthy
tétrault**

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

George Vegh
Direct Line: 416 601-7709
Direct Fax: 416 868-0673
Email: gvegh@mccarthy.ca

February 17, 2011

Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto ON M4P 1E4

Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

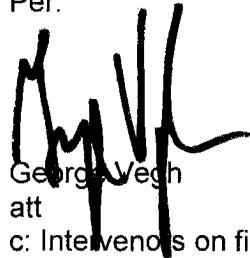
**Re: In the matter of an Application for Leave to Bring a Motion to Review the
Board's Decision EB-2009-0187 and a Motion to Review and Vary the Board's
Decision EB-2009-0187.
Board File: EB-2011-0024**

With reference to the above-noted matter, attached please find a submission filed on behalf of
The York Energy Centre LP

Yours very truly,

McCarthy Tétrault LLP

Per:



George Vegh
att
c: Intervenor's on file
10091727

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

AND IN THE MATTER OF an Application for Leave to Bring a Motion to Review the Board's Decision EB-2009-0187 and a Motion to Review and Vary the Board's Decision EB-2009-0187.

SUBMISSIONS BY THE YORK ENERGY CENTRE LP

George Vegh

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

gvegh@mccarthy.ca

Tel: (416) 601-7709
Fax: (416) 868-0673

Counsel for the York Energy Centre LP

Introduction and Summary

1. These are the submissions of York Energy Centre LP ("YEC"). YEC has the legal authority to own and operate a gas-fired generation facility in the Township of King (the "Township"). It has complied with all legal and regulatory requirements. The Township, which describes itself as an "unwilling host" to the facility has resisted accepting YEC's legal entitlements. It is now seeking to undermine the facility by delaying the construction of the OEB approved gas distribution pipeline that is required to serve it.
2. For the reasons set out below, it is submitted that the Township has not made out its case for extending the time for review of the Board's original decision or obtaining a review on the merits. Before addressing these legal submissions, however, it is important to put the Township's activities in the context of provincial energy policy, for which the Board, as a provincial agency, is charged with implementing. In the seminal *Township of Dawn* case, the Divisional Court struck down municipal by-laws seeking to regulate the location of gas pipelines because the provincial interest in energy supply would be frustrated if municipalities could prevent energy infrastructure from being built:¹

"I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of ***the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need*** if by reason of powers vested in each and every municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal."

3. This caution is even more relevant today than it was when the Divisional Court first pronounced it in 1977. If Ontario municipalities are permitted to use OEB proceedings to gratuitously stall, delay and even block lawful energy projects, then the "chaos" and "total frustration" of meeting the province's energy needs will be inevitable. The Board should not allow its processes to be used for this purpose.

¹ *Union Gas Ltd. v. Township of Dawn* (1977), 15 O.R. (2d) 722 (Div. Ct.) (Emphasis Added)

The Township's Conduct in These Proceedings

4. The Township had the opportunity to participate in the initial proceeding, but it failed to do so. Despite this, the Township has now made two attempts to block the OEB's grant of legal authority to construct the gas pipeline. Like the first attempt, the Township is acting in disregard of the Board's Rules of Practice and the rights of other parties.
5. The first attempt to block the legal construction of the gas distribution line was in response to the Board's consideration of whether to extend the start date of the pipeline construction (the "extension case"). In the order initiating the extension case, the Board specifically stated that the extension case would address only the request for an extension of time and that "matters related to the location, construction, operation or impacts of the generating station are not within the scope of the Board's review."²
6. The Township completely disregarded the Board's order and, in defiance of that order, requested that the Board reconsider the route for the proposed pipeline.³ The Board responded to this request by stating that "This proceeding is closed and as such your request is denied."⁴
7. The Township then brought the current motion to reconsider the Board's original decision. Like the first request, this motion is not in compliance with the Board's rules. Specifically, the OEB Rules of Practice and Procedure provide that a party has 20 days from the date of a decision to request a review. The Township applied for this review over 9 months after the decision; the Board has never granted an extension of this magnitude.

Whether the Time to Commence the Motion Should be Extended

8. Although the Board does have the authority to grant an extension of time for a motion to review, it has only done so where the applicant has an adequate explanation for the delay and can demonstrate that other parties are not prejudiced by the delay. As the Board noted in its reasons for accepting an application for review that was filed *less than two weeks* after the decision to be reviewed, "adherence to the Board's deadlines is not

² EB-2010-0310, Notice of Application and Procedural Order No. 1, p.2 (October 28, 2010)

³ Letter from the Township to OEB Secretary, November 3, 2010.

⁴ Letter from OEB Secretary to the Township, November 5, 2010.

a matter to be treated lightly, and that the inability to comply should be brought to the attention of the Board promptly.”⁵

9. Here, the Township has not provided *any* explanation for the delay in bringing this motion and the prejudice to YEC is considerable. As the Board is aware, construction of both the generation facility and the gas distribution line has already commenced. This construction was started on the good faith reliance of the Board’s order. The Township’s casual disregard of both the parties and the process demonstrates contempt for both.
10. YEC obviously faces financial harm if the project is not completed in a timely manner. We underscore the urgency of completing the pipeline according to the timelines set out in the evidence filed by Enbridge under proceeding EB-2009-0187.

The Threshold Issue

11. Even apart from the timeliness issue, the Township has not met the requirements of demonstrating that its motion for review should be considered in accordance with Rule 45 of the Board’s Rules of Practice and Procedure. The standard for this requirement has been addressed by the Board as follows.⁶

“... [T]he grounds must ‘raise a question as to the correctness of the order or decision’. In the panel’s view, the purpose of the threshold test is to determine whether the grounds raise such a question. The panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

⁵ EB-2007-0797, Decision with Reasons on Motion to Review Transmission Connection Decision, pp. 24-25 (November 26, 2007)

⁶ Motions to Review the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, p. 18.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review."

12. The Township's motion puts forward no credible reason or evidence why the decision should be reviewed other than it is an "unwilling host" of the facility.
13. The Township's motion states that the issues it seeks to reconsider relate to (i) whether the location of the pipeline route is too close to a school; and (ii) whether the Board should have proceeded prior to the completion of a hearing before the Ontario Municipal Board (the "OMB").
14. With respect to the proximity of the route and the school, the Board's original decision expressly addressed this issue (which was raised by York Region District School Board on behalf of Kettleby Public School) and concluded that the concerns were satisfied and that the pipeline "adheres to the regulatory requirements for safe operation."⁷
15. With respect to the OMB hearing, the Township's own motion material notes that the OMB hearing did not go forward because the YEC project was exempted from the *Planning Act*. Thus, whether the OEB should have waited for the OMB hearing to conclude before starting its proceeding is entirely academic. It is inconceivable that this would have varied the outcome of the decision.⁸

⁷ EB-2009-0187, Decision and Order, April 5, 2010, at p. 10.

⁸ In any event, there is no merit to the argument that the Board cannot proceed with matters that are also being addressed in proceedings before other tribunals. Thus, in EB-2007-0050, the Board refused to stay or adjourn a leave to construct proceeding pending an environmental assessment proceeding. As the Board noted:

"Both the Leave to Construct and the EA approval are required before the project may proceed, but neither process is completely dependent upon the other. There is the potential for conflicting results, but that potential arises no matter which process goes first. Therefore, the proponent and the agencies involved must manage these applications in an appropriate manner." (Decision on Motion, July 4, 2007).

It should be noted that this practice was established where both regulatory authorities were addressing the same facility – the transmission line. Here, the cancelled OMB proceeding related to the generation facility while the leave to construct related to the gas pipeline, thus making the Township's weak argument even weaker.

Conclusion

16. For the foregoing reasons, it is submitted that the Board should not extend the time to apply for the Motion and, in the alternative, should dismiss the motion for failing to meet the threshold requirement in Rule 45.

All of Which is Respectfully Submitted

Date: February 17, 2011.

George Vegh

McCarthy Tétrault LLP

Telephone 416-601-7709

Email: gvegh@mccarthy.ca

Counsel for the York Energy Centre LP