Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0065
EB-2011-0068

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

AND IN THE MATTER OF an application by ACH Limited Partnership for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an application by AbiBow Canada Inc. for a licence amendment pursuant to section 74 of the *Ontario Energy Board Act, 1998.*

AND IN THE MATTER OF a request by the First Nations Group to stay the Board's order pursuant to section 33(6) of the *Ontario Energy Board Act, 1998.*

BEFORE: Paul Sommerville
Presiding Member

Cynthia Chaplin
Vice Chair

DECISION

BACKGROUND

ACH Limited Partnership ("ACH") filed an application on March 3, 2011 for an amendment to Schedule 1 of its electricity generator licence EG-2006-0124 to reflect a change to ACH's status as owner of eight hydroelectric generating stations to owner and operator.

AbiBow Canada Inc. (“AbiBow”, and, together with ACH, the “Applicants”), filed an application on March 7, 2011 for an amendment to its electricity generation licence EG-2003-0204 to change the name on the licence from Abitibi Consolidated Company of Canada to AbiBow Canada Inc., and to remove eight hydroelectric generating stations, which AbiBow currently operates, from Schedule 1 of its licence.

On May 20, 2011, after considering the applications and submissions from the Applicants and Keshen Major Law firm (“Keshen Major”) on behalf of twelve First Nations (the “First Nations group”), the Board issued a decision and order (the “Decision”) granting the Applicants the requested amendments pending confirmation from the Applicants that the commercial transaction has closed and operation of the eight generation stations has been transferred to ACH from AbiBow.

On May 24, 2011 Keshen Major on behalf of the First Nations group filed a letter notifying the Board of the First Nations group’s intention to appeal the Board’s Decision to the Divisional Court and requesting the Board to stay its order pending appeal of the Decision.

On May 24, 2011 counsel for the Applicants filed a response on the stay application of the First Nations group objecting to the First Nations group’s request for a stay with reasons.

On May 27, 2011 the Applicants filed a letter advising the Board that the commercial transaction to buy and sell the interest in ACH closed on May 27, 2011.

On May 27, 2011 the First Nations group filed further submissions in response to the Applicants’ submissions. The First Nations group asserted that its request for a stay did meet the applicable test. Specifically, it asserted that the precedent relied upon by the Applicants respecting the “serious issue to be decided” component held that the threshold for the seriousness of the issue is a low threshold. In addition, the First Nations group argues that the Board ought not to make a finding that there is no serious issue to be decided on the basis of presumed, rather than established facts.

As to the “irreparable harm” component of the test, the First Nations group re-asserts in its Reply submission that irreparable harm ought not to be the standard applied where the duty to consult is in issue and that the “potential adverse impact test” is the appropriate test, with reference to passages from the Haida Nation decision.

Finally, the Reply submission contends that with respect to the "balance of convenience" component of the test, that the Applicants have not substantiated through evidence their claims of financial harm.

DECISION

The Board will not grant a stay of its order as requested by the First Nations group.

The test

The three part test to determine whether a stay application should be granted was set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*[1]:

a. There is a serious issue to be decided,
b. The applicant for the stay will suffer irreparable harm if a stay is not granted, and
c. The balance of convenience favours the granting of a stay because the harm to the applicant outweighs any potential harm to the respondent.

All three components of the test must be met.

Both the First Nations group and the Applicants agree that this is the appropriate test (with a caveat from the First Nations group with respect to the irreparable harm portion of the test, which is discussed below).

Serious issue to be decided

The First Nations group argues that the seriousness of the Crown's duty to consult with First Nations where their interests may be adversely affected can hardly be doubted. The Board does not dispute that. However, the general existence of the duty to consult is not the issue in this case. The issue to be considered in an application for a stay is whether there is a serious case to be made that the Board erred in its decision.

The Board is not convinced that the First Nations group has established that there is a serious matter to be decided in this case, however low the threshold. The arguments made by the First Nations group are that the duty to consult itself is important, and that

[1] (1994), 111 D.L.R. (4th) 385 (S.C.C.) ("RJR MacDonald")

the standard of review that will be applied by the courts to the Board's decision will in all likelihood be correctness. While both of these statements may be true, they are not directly relevant to the issue of whether there is a serious issue to be decided. The decision at issue here, that is the subject of the application for stay, relates exclusively to the identity of the license holder. The Board's Decision does not have any implications with respect to any other aspect of the license. The operational considerations which motivate the First Nations group's interest in this case are not in any way affected by the Board's Decision. This falls below any arguable standard of "seriousness". There is simply no relation between the Board's Decision in this case and the interest of the First Nations group in the operation of the facilities.

Irreparable harm

The First Nations group suggests that the irreparable harm component of the test should be modified in this case to "potential adverse impact". They submit that that any higher test would undermine the purpose of the duty to consult as explained in *Haida Nation v. British Columbia (Minister of Forests)*[2]. While no authority for this proposition was provided by the First Nations group, its Reply submission pointed to some passages of Haida Nation which it asserted supported by implication its view.
The Appellants submission asserted that no modification to the irreparable harm test is warranted. They point out that the RJR MacDonald test is referred to in Haida Nation itself, and that there have been no cases indicating that a different standard is to apply in an Aboriginal context.

The Board finds that the irreparable harm portion of the test applies as described in RJR MacDonald, and that the First Nations group has not demonstrated that it will suffer irreparable harm if a stay is not granted. As described in the Decision, any adverse impacts to an Aboriginal right to harvest wild rice will arise only if there are changes to water levels or flows. The Decision authorizes no such changes, and indeed the Board has no authority over such matters in any event. Any possible future changes to water levels or flows must be authorized by a separate authority, according to its own processes, and are not imminent. The First Nations group has not demonstrated, or even argued, that there will be irreparable harm if the Decision is not stayed.

[2] [2004] 3 S.C.R. 511 ("Haida Nation")

In the alternative, the Board is not convinced that even if the standard advanced by the First Nations group, that is "potential adverse effect" were to be adopted, that the application for a stay should succeed.

The Board's Decision in no way affects the interests of the First Nations group. The Board's Decision has the sole effect of changing the identity of the owner and operator of the facilities. It has no effect, and no potential to affect, any of the rights associated with the license, the operation of the facilities pursuant to the license, or any other aspect associated with the facilities.

Balance of convenience

The First Nations group states that it has not been established through evidence that the Applicants will suffer any harm as a result of a stay pending appeal. The First Nations group therefore argues that the status quo should be maintained, and cite a decision of the Court of Appeal:

> I am of the view that as a general rule it is in the interest of justice that the "status quo" be maintained pending an appeal where such can be done without prejudicing the interest of the successful party.[3]

The Applicants in their submissions assert that AbiBow will suffer significant financial harm if the Decision is stayed. As they indicated in a letter filed with the Board on April 21, 2011:

> Unless the Board brings this matter to a resolution shortly, the Applicant AbiBow will face significant financial harm. Specifically, June 9, 2011 is the last date on which Abitibi may redeem at a fixed price US$100MM of note using the proceeds of the sale of ACH. If the redemption does not occur by then, Abitibi would be required to use such proceeds to repurchase the notes on the open market or to continue to pay interest on such notes. … In order to be in a position to exercise its redemption right by June 9, 2011, it requires a decision by May 20, 2011.

The Appellants further note that there is no indication that the First Nations group will suffer any harm if the Decision remains in place during the appeal. As noted above, the

[3] *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1986) 21 C.P.C. 2(d) 252, para. 12.

sole effect of the Board's Decision is to change the identity of the owner and operator of the facilities. There are no other implications flowing from the Decision.

The Board finds that the balance of convenience favours the Appellants. The risk of financial harm appears to be real, and while the Applicants have not filed, and not been required to file specific evidence to this effect, the Board has no reason to question their assertions on this aspect. On the other hand, given the substantially administrative nature of the Board's Decision in this case, there is no apparent harm of any kind to the First Nations group if the Decision is not stayed.

Conclusion

The First Nations have not met the test as established in RJR MacDonald, and the request for a stay of the Decision is denied.

DATED at Toronto, May 27, 2011

ONTARIO ENERGY BOARD

Original signed by

Paul Sommerville
Presiding Member

Original signed by

Cynthia Chaplin
Vice Chair