

Court File No.

**ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

GRAND RENEWABLE WIND LP

Applicant
(Respondent in Appeal)

- and -

SIX NATIONS COUNCIL on its own behalf
and on behalf of the SIX NATIONS OF THE GRAND RIVER

Respondent
(Appellant)

APPLICATION UNDER sections 92 and 97 of the
Ontario Energy Board Act, 1998, S.O. 1998, c.15

NOTICE OF APPEAL

Six Nations Council of the Six Nations of the Grand River ("Six Nations")
APPEALS to the Divisional Court from the Decision and Order EB-2011-0063 (the
"Decision") of the Ontario Energy Board (the "OEB" or the "Board") dated December 8,
2011, made at Toronto, granting leave to construct a transmission line and associated
facilities to Grand Renewable Wind LP (the "Leave to Construct").

THE APPELLANT ASKS:

1. that the Leave to Construct be struck or set aside and a order be granted
remitting the application of Grand Renewable Wind LP ("GRWLP") for leave to
construct back to the OEB with directions requiring the OEB to defer its

consideration of GRWLP's leave to construct application until after the following occur:

(a) GRWLP has obtained its Renewable Energy Approval (the "REA") for both the Wind Project and the Solar Project (as those terms are defined below) from the Ontario Ministry of the Environment (the "MOE") and the REA is final; and

(b) the Board has been fully satisfied that the Ontario Crown has properly consulted and accommodated the Six Nations on matters affecting Six Nations' treaty or aboriginal rights, with respect to any aspect of the Overall Project (as defined below) associated with the leave to construct transmission facilities including GRWLP's Wind Project and the Solar Project.

2. In the alternative to the relief requested in the preceding paragraph, the Conditions of Approval, attached as Appendix "A" to the Decision, should be varied as follows:

(a) To clarify the meaning of the word "Project" as used throughout Appendix "A", Condition 1.1 should be varied to refer to the definition of "Project"

used throughout the Decision, to read:

1.1 Grand Renewable Wind LP ("GRWLP") shall construct the Project, ***as described in the first paragraph of section II. titled "SCOPE OF APPLICATION" in the Decision and Order,*** in accordance with its Leave to Construct application, and evidence, except as modified by this Order and these Conditions of Approval.

(requested new wording in bold italics)

- (b) Condition 1.6 should be varied to read as follows:

1.6 GRWLP shall obtain all necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the Project ***and required to construct, operate and maintain the Wind Project and the Solar Project, as described in the second paragraph of section II. titled "SCOPE OF APPLICATION" in the Decision and Order, including the Renewable Energy Approval for both the Wind Project and the Solar Project,*** and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

(requested new wording in bold italics)

- (c) The following new conditions of approval should be included in Appendix

"A" to the Decision:

- i) The Ontario Crown has properly consulted and accommodated Six Nations with respect to the effects of the Transmission Facilities, the Wind Project and the Solar Project on Six Nations'treaty or aboriginal rights; and
- ii) The Leave to Construct will become effective only when and from the date the Board has stated that it is fully satisfied that all of the conditions to the approval have been completed, and the Board will invite evidence and submissions from the Applicant, the Ontario Crown (including the Ministry of Infrastructure, the Ministry of Energy, and the Ministry of Environment), and the parties to the Leave to Construct proceeding (including Six Nations) as to whether the conditions of approval have been fulfilled, before the approval is made final and effective.

3. The costs of this appeal.

THE GROUNDS OF APPEAL are as follows:

- 1. GRWLP applied to the Board for leave to construct electricity transmission facilities (the "Transmission Facilities"). The purpose of the transmission facilities is to connect a proposed wind powered generating facility to be owned by the

Applicant (the “Wind Project”) and a proposed solar photovoltaic generating facility (the “Solar Project”) to be owned by a different entity called Grand Renewable Solar LP (“GR Solar LP”). The proposed Transmission Facilities would be used to transmit electricity generated from both the Wind Project and the Solar Project to the electricity transmission grid that is controlled by the Independent Electricity System Operator.

2. Both the Wind Project and the Solar Project require a renewable energy approval from the MOE. The Wind Project and the Solar Project cannot be constructed without a REA. To date, the Applicant has not obtained the required REA. Without a REA for both the Wind Project and the Solar Project, the underlying basis for the application to the Board and premise upon which leave to construct was requested does not exist. There is no need for the Transmission Facilities if the proposed Wind Project and Solar Project are not permitted to be built.
3. The Board committed an error of law and jurisdiction in granting the Leave to Construct without first considering and determining that the Ontario Crown’s duty to consult and accommodate the Six Nations in respect of the Transmission Facilities, the Wind Project and the Solar Project (collectively the “Overall Project”) has been fulfilled.
4. Statutory decision makers, such as the Board, are required to respect both legal and constitutional limits on the exercise of their authority or jurisdiction. This includes limits imposed by the Crown’s constitutional duty to consult which lie

upstream of the specific statutory mandate or limits on tribunals such as the Board.

5. As the Board's statutory jurisdiction is limited by the Crown's constitutional duty, (which lies "upstream"), it is a condition precedent to the existence of the Board's jurisdiction to grant leave to construct to GRWLP that the Ontario Crown has first satisfied its duty of aboriginal consultation. The Board does not have jurisdiction to rule on GRWLP's application for leave to construct unless the Board first considers and determines that the Ontario Crown has satisfied its obligations to consult and if necessary accommodate the Six Nations on matters affecting Six Nations' treaty or aboriginal rights, with respect to any aspect of the Overall Project.
6. Pursuant to s. 19 (1) of the *Ontario Energy Board Act, 1998*, the Board has in all matters within its jurisdiction authority to hear and determine all questions of law. Accordingly, the Board has the power and the obligation to decide constitutional issues properly before it.
7. As a matter of law, it was not open to the Board to wash its hands of the aboriginal consultation and accommodation issue by saying that the appropriate forum for considering the Crown's duty to consult is the REA process. Nor was it sufficient for the Board to find that Six Nations can pursue remedies in Court at some point in the future if Six Nations is not satisfied with the REA process (see p. 20 of the Decision). As a body to which powers have been delegated by the

Crown, the Board must not deny the Appellant timely access to a decision-maker with authority over the subject matter.

Alternative Relief

The Condition the Board Intended to Impose

8. On page 12 of the Decision, the Board reviewed the issue of project need, referring to both the Wind Project and the Solar Project (the two generation projects). The Board then concluded in the last paragraph of that page as follows:

“The Board accepts that the Project is needed in order to transmit the electricity generated by the two generation facilities. The Board’s approval will be conditioned, however, **on the two generation projects receiving the REA** and any other approvals necessary for their construction.”

(emphasis added)

The Actual Order made by the Board

9. The Conditions of Approval for the leave to construct order made by the Board are attached as Appendix A to the Order (see paragraph 1(a) of the Order). Appendix A, however, did not include either specifically or even within another general condition the above-noted condition that the Board intended to impose as expressed at page 12 of its Decision.
10. Section 1.6 of Appendix A to the Order contained the following general condition:

1.6. **GRWLP shall obtain all necessary approvals**, permits, licences, certificates and easement rights required **to construct**, operate and maintain **the Project**, and shall provide copies of all

such written approvals, permits, licences and certificates upon the Board's request.

(emphasis added)

However, this condition did not incorporate the Board's intended condition because the general condition only requires the "Project" to receive all necessary approvals. As defined in the Board's Decision and Order, "Project" did not include the two generation facilities (the Wind Project and the Solar Project) which GRWLP proposes to connect to the Transmission Facilities.

11. Page 2 of the Board's Decision and Order defined "Project" as follows:

The transmission facilities consist of approximately 19 kilometres of 230 kilovolt ("kV") transmission line, a collector substation consisting of two step-up transformers (34.5kV:230 kV), two transition stations to accommodate construction of an underground portion of the proposed 230 kV transmission line, and an interconnection station to connect to an existing Hydro One Networks Inc. owned 230 kV transmission line (collectively referred to as the "Transmissions Facilities" or the "Project").

12. The Board's intended condition was that the Leave to Construct was to be conditional on the two generation projects (not the Transmission Facilities) receiving REA approval and any other approvals necessary for their construction.
13. If the Court does not set aside the Leave to Construct in its entirety, then the Appellant requests that the OEB be ordered to vary its Order to incorporate the condition the Board stated on page 12 (last paragraph) of its Decision that it was imposing but inadvertently did not actually carry through to its formal Order.

Conditions the Board Failed to Impose

14. Although the Board imposed conditions of approval, the Board failed to provide parties and intervenors with an opportunity to make submissions as to whether the conditions have been fulfilled prior to the Leave to Construct becoming fully effective. The Board's failure in this regard was an error of law in the circumstances of this case where the question of whether the Crown has fulfilled its duty of aboriginal consultation and accommodation is a live and continuing issue.
15. After Six Nations had submitted its Final Argument to the Board, GRWLP filed as evidence with the Board a copy of the Consultation Report (regarding its Aboriginal Community Correspondence) that it had prepared for the REA application. Six Nations was not afforded an opportunity to make submissions to the Board on the accuracy of such report after it was prepared and filed with the Board. It was an error of law for the Board to permit GRWLP to file this report for the Board's consideration without Six Nations and the other intervenors being given an opportunity to file responding evidence and submissions.
16. *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 21.1, and Rule 43 of the *Ontario Energy Board Rules of Practice and Procedure*.
17. Such further and other grounds as counsel may advise and this Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Pursuant to ss. 33 (1) and (4) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, an appeal lies to the Divisional Court from an order of the Board on questions of law or jurisdiction, and leave to appeal is not required, and the Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with the opinion.
2. The Order appealed from is final.

The Appellant requests that this appeal be heard at Toronto.

January 4, 2012

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