Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0414

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 by the Electricity Distributors Association ("EDA") for a stay of the Decision and Order of the Ontario Energy Board ("the Board") in proceeding EB-2011-0120, pending the EDA's appeal of the Decision and Order to the Superior Court of Justice (Divisional Court)

BEFORE: Christine Long
Presiding Member

Ellen Fry
Member

DECISION

March 7, 2013

Introduction

This is a decision of the Board concerning an application by the EDA for a stay of the Board's decision (the "CANDAS Decision") in proceeding EB-2011-0120 (the "CANDAS Proceeding"), pending an appeal of the CANDAS Decision to the Divisional Court (the "Divisional Court Appeal").

In the CANDAS Proceeding the Canadian Distributed Antenna Systems Coalition ("CANDAS") applied, among other things, for a determination that the Board's decision in RP-2003-0249 (the "CCTA Decision") applies to the attachment of wireless equipment. In the CANDAS Decision the Board did make this determination, confirming

that the CCTA Decision gives access for wireless equipment to the power poles of Ontario electricity distributors for all Canadian carriers as defined in the *Telecommunications Act*, S.C. 1993, c. 38 and all cable companies operating in Ontario, at the rate of $22.35 per pole per year.

The EDA, which was an intervenor in the CANDAS Proceeding, has appealed the CANDAS Decision to the Divisional Court by Notice of Appeal dated October 12, 2012. This proceeding of the Board (the "Stay Application") is an application by the EDA for a stay of the CANDAS Decision pending the outcome of the Divisional Court Appeal.

In this proceeding the Board has granted intervenor status to the Vulnerable Energy Consumers Coalition ("VECC"). The Board received written submissions from the EDA, VECC and Board staff. VECC's written submissions stated that VECC concurred with the written submissions of Board staff. The Board held an oral hearing on January 23, 2013, at which the EDA, VECC and Board staff made oral submissions. CANDAS filed a letter stating that it endorsed the submissions of Board staff and did not participate in the oral hearing.

While EDA's counsel indicated that the EDA represents all electricity distributors in Ontario, the Board notes that Toronto Hydro-Electric Systems Limited ("THESL") has stated that it is not challenging the CANDAS Decision. Accordingly, the Board considers that for purposes of the Stay Application, THESL is not represented by EDA counsel. The Board notes that although the CANDAS Decision and CCTA Decision apply to all Ontario electricity distributors, the main impetus for the CANDAS Proceeding was a dispute between THESL and CANDAS.

Jurisdiction

The EDA's application is made pursuant to subsection 33(6) of the OEB Act, which provides as follows:

> (6) ... every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise...

All parties agree that the Board has jurisdiction under subsection 33(6) to deal with this application, and the Board concurs.

Test for Granting a Stay

All parties agree that the test the Board should apply to determine whether the Stay Application should be granted is the test set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*[1]. As set out in *RJR MacDonald,* all three stages of a three-stage test must be satisfied in order to grant the Stay Application. In order for the Stay Application to succeed, the Board must determine:

1) That there is a serious question to be tried;
2) That the EDA would suffer irreparable harm if the Stay Application were refused; and
3) That the "balance of inconvenience" favours the EDA.

1) Serious Question to be Tried

The Board is required to make a preliminary assessment of the merits of the Divisional Court Appeal to determine if there is a serious question to be tried. The threshold for this assessment is a low one. The test will be satisfied if the grounds for the appeal are not vexatious or frivolous.

The EDA bases the Divisional Court Appeal on two grounds. Its first ground is that, in its view, the Board declined to consider whether to refrain from exercising its authority, pursuant to subsection 29(1) of the OEB Act. Its second ground is that, in its view, the Board failed to consider the objectives set out in subsection 1(1) of the OEB Act in reaching its decision.

[1] [1994] 1 S.C.R. 311

Subsection 29(1)

Subection 29(1) of the OEB Act provides as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

During the CANDAS Proceeding, THESL brought a motion asking the Board, pursuant to subsection 29(1) of the Act, to refrain from exercising its powers, on the basis that sufficient competition existed or would exist in the market for siting wireless attachments sufficient to satisfy the public interest. The Board denied the motion and determined that this issue ("Forbearance") would not be heard as part of the CANDAS Proceeding because it dealt with issues outside the scope of the application brought by CANDAS.

Board staff submits that because the Board left open the possibility that a Forbearance application could be made at a later date, the Board has not precluded a hearing on this matter. Board staff takes the position that by appealing the CANDAS Decision to the Divisional Court, instead of bringing an application under subsection 29(1) to the Board, the EDA has not taken the steps available to have the Board address Forbearance. Therefore, Board staff submits this is not a serious question to be tried.

The EDA disagrees with Board staff's submission. The EDA takes the position that the wording of subsection 29(1) required the Board to deal with the issue of Forbearance in the proceeding in which it was raised. In its view, the Board does not have the statutory authority to defer dealing with Forbearance to a later proceeding.

The Board's preliminary assessment of the merits of this ground of appeal, based on the submissions in this proceeding, is that this ground of appeal is unlikely to succeed.

The application for the CANDAS proceeding was filed by CANDAS as applicant on April 25, 2011 and the CANDAS Decision was rendered on September 13, 2012. During that time period, there were many procedural steps. Ultimately, the Board decided to proceed by dealing with the first claim for relief in the application by CANDAS: "Does the CCTA Decision apply to the attachment of wireless equipment ...to distribution poles"?

The Board decided not to hear the motion by THESL concerning Forbearance and articulated its reason for this decision as follows:

> Having concluded that the CCTA Order does apply to wireless attachments, the Board concludes that these issues relating to forbearance will not be heard within the CANDAS application. CANDAS has sought particular relief and the Board has addressed these issues. THESL's Motion raises other, different issues, which while related to the CANDAS application, have broader implications and considerations. Therefore the Board denies the motion on the basis that it is out of scope in the context of this proceeding. The Board will therefore not hear the motion on its merits at this time.[2]

The Board is master of its own procedure and is at liberty to organize its proceedings as it considers appropriate. It is for the Board, not the parties, to determine how the Board's proceedings are arranged, within the framework set by the OEB Act.

In making its decision in the CANDAS Proceeding, the Board did not refuse to exercise its jurisdiction under s 29(1) to consider Forbearance. It simply decided that it would not consider Forbearance as part of the CANDAS Proceeding, because this was outside the scope of the application before it. The Board left the door open to considering Forbearance in a future proceeding initiated concerning that issue.

[2] CANDAS Decision, p.20

The EDA submits that the wording of subsection 29(1) compels the Board to exercise its jurisdiction under subsection 29(1) in any proceeding where a party so requests. The Board's preliminary assessment is that this argument is not supported by the wording of subsection 29(1). However, taking into account the fact that the wording of subsection 29(1) does not address this issue directly, and that the threshold to satisfy this stage of the *RJR MacDonald* test is a low one, the Board concludes that EDA has established that there is a serious question to be tried.

Subsection 1(1)

Given that the Board has concluded that there is a serious question to be tried concerning subsection 29(1) of the OEB Act, it does not find it necessary to consider the issue argued by the EDA concerning subsection 1(1) of the OEB Act.

Accordingly, for the reasons outlined above, the Board is of the view that the EDA has established that there is a serious question to be tried in the Divisional Court Appeal and has met the first stage of the *RJR MacDonald* test.

2) Irreparable Harm

The Board is required to determine whether the EDA would suffer irreparable harm if the Stay Application were refused. The question is whether refusing the Stay Application would so adversely affect the EDA's interests that the harm could not be remedied if the Divisional Court Appeal decision does not accord with the Stay Application decision. "Irreparable" refers to the nature of the harm, rather than its magnitude, being harm that either cannot be quantified in monetary terms or that cannot be cured, usually because one party cannot collect damages from the other.

The EDA submits that its members would suffer irreparable harm if the Stay Application is not granted and the Divisional Court Appeal succeeds. This is because in its view, unlike the current situation, EDA members would be required to enter into agreements to attach wireless equipment to their poles. However, in its view if the Divisional Court Appeal succeeds, at that point EDA members could not

(a) Set aside the attachment agreements;
(b) Remove the wireless attachments; or
(c) Recover engineering and administrative costs incurred in processing the applications to attach.

The EDA submits that EDA members would not be able to provide for these contingencies contractually, because in its view the model agreement that is being used for attachment has been prescribed by Board decision. However, the EDA did submit that the Board could potentially address this issue by ordering that contracts contain provisions to deal with the contingency of a successful Divisional Court Appeal.

Board staff submit that there would be no irreparable harm to EDA members because in their view

(a) The CANDAS Decision merely confirms the *status quo*, namely that the CCTA Decision applies to the attachment of wireless equipment;
(b) The Board indicated in the CANDAS Decision that if EDA members incur costs for the attachment of wireless equipment that exceed the annual rate per pole established by the Board, they can apply to the Board for different rates; and
(c) EDA members can make contractual provision for the possibility that the Divisional Court Appeal will succeed, because the Board has not prescribed the form of the model attachment agreement that EDA members are using.

In the view of the Board, the CANDAS decision merely confirms the correct interpretation of the CCTA Decision, which is clear on its face. Accordingly, viewing the CANDAS Decision from a strictly legal perspective, the Board agrees with Board staff that it merely confirms the *status quo*. However, it is apparent that nonetheless some members of the EDA have refrained from accepting wireless attachments. Therefore, viewing the situation in operational terms rather than purely legal terms, the Board agrees with the EDA that the CANDAS Decision does change the *status quo*. Accordingly, the Board does not accept the argument of Board staff that there is not irreparable harm on the basis that there has been no change to the *status quo*.

However, it is clear from the CANDAS Decision that, as submitted by Board staff, the model agreement for wireless attachments being used by EDA members has not been prescribed by the Board and hence can be varied contractually by the parties entering into attachment agreements.

In the CANDAS Decision, the Board stated that;

> The Board accepted the agreement reached by the parties during settlement discussions that they should negotiate terms and conditions of access after the Board had determined whether access would be granted and, if so, the rate. The parties subsequently negotiated a model joint use [attachment] agreement. This agreement was filed with the Board but was never formally approved by the Board....
>
> ....a model joint use [attachment] agreement was negotiated and filed with the Board on August 3, 2005, but was not approved by the Board....
>
> ....The Board in the CCTA Decision left it to the parties to negotiate the terms and conditions of access (but not the charge) and indicated that if an agreement could not be reached then the Board would take further steps. As indicated, the Board did not approve the model joint use [attachment] agreement[3]

Therefore it is clear that EDA members could negotiate contractual terms to address the contingency of a successful appeal. These terms could include removing wireless attachments and/or rescinding attachment agreements, on appropriate terms, if the Divisional Court Appeal succeeds. Financial terms could be included to the extent that they are directed to making the distributors financially whole if a contract is rescinded as a result of a successful appeal. It would not be permissible to include financial terms that varied the pole access rate of $22.35 per pole per year that has been established by the Board. However, as submitted by Board staff, the Board has indicated that

[3] EB-2011-0120, pp5, 14, 15

individual electricity distributors could apply to have this rate varied if they consider it to be inappropriate.

Accordingly, the EDA has not established that EDA members would suffer irreparable harm if the Stay Application is not granted and has not met the second stage of the *RJR MacDonald* test.

3) Balance of Inconvenience

The Board is required to determine whether the "balance of inconvenience" favours the EDA. In other words, it must determine whether the EDA or CANDAS would suffer greater harm from the granting or refusal of the Stay Application pending the decision of the Divisional Court Appeal on its merits.

The EDA submits that generally the *status quo* should be maintained if it can be done without prejudicing the interest of the successful party. The Board does not agree. The EDA bases these submissions on *International Corona Resources Ltd. v. Lac Minerals Ltd.,* a 1986 Ontario Court of Appeal case.[4] However, in *RJR MacDonald*, which was decided subsequent to the *International Corona Resources* case, the Supreme Court expressed doubt concerning the usefulness of this approach:

> In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "It is a counsel of prudence to ...preserve the status quo". This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights....[5]

The EDA submits that electricity distributors

> ...stand to be more inconvenienced by the operation of the [CANDAS] Decision than telecommunications carriers would be by a stay. Allowing the wireless

[4] *International Corona Resources Ltd. v. Lac Minerals Ltd., [1986]* O.J. No.2128
[5] *RJR MacDonald, p.23*

> telecommunications carriers to secure attachment rights and attach represents a significant change from the current *status quo*. The attachment of wireless telecommunications equipment to utility poles would also be very costly, time-consuming, and irreversible even should the appeal succeed.
>
> ... In contrast, there is no basis to believe that any delay in attaching equipment pending the disposition of the appeal would cause any harm to telecommunications carriers.
>
> ... Moreover, any delay suffered by a would-be applicant for access is likely to be minimal. The Divisional Court Office has advised that a hearing date for the appeal is likely to be set in February or March 2013....It is unlikely that a delay of a few months will seriously prejudice the interests of any would-be applicant for access to utility poles, and there is no evidence that any party will suffer such prejudice if attachments are not allowed pending the disposition of the appeal. [6]

Board staff submits that if the Divisional Court Appeal is successful, the delay suffered by CANDAS members seeking to make wireless attachments would be greater than the few months argued by EDA counsel. Board staff submits that this is because a Board proceeding under section 29 is likely to be complex and consequently require significant time to reach decision.

If the Board grants the Stay Application, some or all EDA members will consider that they do not need to permit wireless attachments by CANDAS members in the period prior to the Divisional Court Appeal decision (the "Interim Period") and to incur the associated engineering, administrative and reconfiguration costs. EDA members that hold that view will also not consider themselves confined to charging the Board-approved fees for any wireless attachments they do permit. On the other hand, CANDAS members may not be able to obtain agreement from those EDA members to make wireless attachments, and may be required to pay fees in excess of the Board-

[6] EDA Submissions, pp 7-8

approved fees for any that are permitted. Both the EDA and CANDAS will be faced with the possibility that the outcome of the Divisional Court Appeal will change the situation that exists in the Interim Period.

Little evidence was provided concerning the likely financial impact on EDA members if they permitted wireless attachments at Board-approved rates during the Interim Period.

The evidence does not indicate whether a significant number of CANDAS members are likely to seek new wireless attachments in the Interim Period or whether a significant number of EDA members are likely to receive wireless attachment requests in the Interim Period.

There was also little evidence concerning the engineering, administrative and reconfiguration costs associated with new wireless attachments. The Board requested that EDA counsel provide references to any evidence in the CANDAS Proceeding concerning engineering, administrative and reconfiguration costs. However, EDA counsel was able to refer the Board to evidence concerning THESL only. The evidence in the CANDAS Proceeding does not indicate to what extent the operations of other EDA members (which number over 70 and vary considerably in size) are comparable to the operations of THESL with regard to the impact of wireless attachment requests. In addition, the relevance of this evidence is potentially limited by the fact that THESL has indicated it does not wish to participate in the Divisional Court Appeal.

The EDA also did not submit evidence concerning the difference between the rates approved by the Board and likely market rates for wireless attachments.

On the other hand, little or no evidence was available concerning the likely financial impact on CANDAS members if wireless attachments could not be made at Board-approved rates during the Interim Period. VECC and Board staff did not submit evidence in this regard or direct the Board's attention to any such evidence in the CANDAS Proceeding.

The Board agrees with Board staff that in the event of a successful appeal the length of the Interim Period is likely to be more than a few months. However, the evidence does not indicate whether a longer Interim Period would impact more on the inconvenience to CANDAS members or to EDA members.

Considering the above factors and the fact that the burden of proof rests with the EDA as the applicant, the Board finds that the EDA has not established that EDA members would suffer greater harm during the Interim Period from refusal of the Stay Application than CANDAS members would suffer from granting it.

Accordingly, the EDA has not established that the "balance of inconvenience" favours the EDA and has not met the third stage of the *RJR MacDonald* test.

Decision by the Board

The Board concludes that EDA has satisfied only one stage of the three-stage test required by *RJR MacDonald.* Therefore, the Board does not grant the application by the EDA for a stay of the CANDAS Decision pending the outcome of the Divisional Court Appeal.

Costs

During the oral submission phase of the proceeding, VECC requested costs.
VECC was granted intervenor status in the Stay Application because it was an intervenor in the CANDAS Proceeding. Intervenors in the CANDAS Proceeding were granted costs and therefore the Board grants VECC's costs in the Stay Application.
The Board expects that costs claimed by VECC will be reflective of the fact that VECC's written submissions were brief and that the oral hearing was less than a day. Costs will be borne by the EDA, as the applicant.

VECC shall submit its claim for costs by March 14, 2013. The EDA shall file any submissions with respect to costs by March 25, 2013. VECC shall file any reply submissions by April 1, 2013.

DATED at Toronto, March 7, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary