



Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada
Tel 416.865.0040
Fax 416.865.7380

Jonathan Myers
jmyers@torys.com
P. 416.865.7532

www.torys.com

November 15, 2013

EMAIL, RESS & COURIER

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

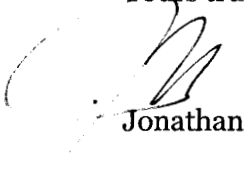
Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

**Re: Dufferin Wind Power Inc. - Application for Authority to Expropriate
(EB-2013-0268)**

We are counsel to the applicant, Dufferin Wind Power Inc. ("DWPI") in the above-referenced proceeding. In accordance with Procedural Order No. 1, enclosed are DWPI's submissions on (a) the Blacks' request dated October 15, 2013 for a stay of the Application, and (b) the County of Dufferin's Notice of Motion dated October 18, 2013 for a stay of the Application.

Yours truly,



Jonathan Myers

Tel 416.865.7532
jmyers@torys.com

cc: Mr. J. Hammond, Dufferin Wind
Mr. C. Smith, Torys LLP

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B) as amended (the “**Act**”);

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. (“**DWPI**”) for an Order pursuant to section 99(5) of the Act granting authority to expropriate land for the purposes of constructing, operating and maintaining transmission and distribution facilities that will connect DWPI’s planned Dufferin Wind Farm to the IESO-controlled grid.

APPLICANT SUBMISSIONS ON REQUEST AND MOTION FOR STAY

November 15, 2013

INTRODUCTION

1. Dufferin Wind Power Inc. (“Dufferin” or the “Applicant”) filed an application with the Ontario Energy Board (the “Board”) on July 19, 2013 (the “Application”) under section 99 of the *Ontario Energy Board Act, 1998* (the “OEB Act”) seeking authority to expropriate interests in certain lands for the purpose of constructing, operating and maintaining electricity transmission and distribution facilities necessary to connect the Applicant’s planned Dufferin Wind Farm to the IESO-controlled grid.

2. In Procedural Order No. 1, issued on October 30, 2013, the Board ordered that the Applicant, any other party and Board staff may file submissions in response to (a) the request made by James Daniel Black and Marian Arlene Black (the “Blacks”) in their intervention request letter dated on October 15, 2013 for an order on the preliminary issue of whether a stay of the Application should be granted, and (b) the Notice of Motion filed by the County of Dufferin (the “County”) on October 18, 2013 for an interim order staying the Application pending final determinations of (i) an appeal by Conserve Our Rural Environment (“CORE”) to the Divisional Court of the Board’s decision granting leave to construct, and (ii) appeals by six

individuals to the Environmental Review Tribunal (the “ERT”) regarding the Ministry of the Environment’s granting of a Renewable Energy Approval (“ERA”) to Dufferin.

3. The following are the Applicant’s submissions in response to the Blacks’ request and the County’s Motion. It is Dufferin’s submission that the Board should not stay the Application or otherwise delay the proceeding. Neither the Blacks’ request nor the County’s Motion raises any proper basis to stay the Application. Moreover, given the timing of the Application relative to the expected timing for the proceedings referred to by the Blacks and the County, there is no practical reason for the Board to stay the Application.

THE BLACKS’ REQUEST

4. In their October 15, 2013 request for intervenor status, the Blacks note that they and Dufferin are currently engaged in an arbitration proceeding in respect of two leases that Dufferin holds, which leases provide for rights to install wind turbines and related facilities, including electrical cables, on two properties owned by the Blacks (the “Blacks’ Arbitration”). The interests in land which the Applicant seeks to expropriate from the Blacks in the Application are in respect of portions of these same two properties. The hearing of the Blacks’ Arbitration commenced on November 11, 2013 and closing submissions are scheduled for January 7, 2014.

5. Having regard to the fact the decision in the Blacks’ Arbitration is outstanding, the Blacks have requested “an order or directions on the preliminary issue of whether a stay of the DWPI Application should be granted”.¹ For the reasons that follow, the Blacks’ request should be denied.

No Reasons Given for Blacks’ Request

6. Other than to note that the Blacks’ Arbitration relates to the same properties as certain aspects of the Application, the Blacks have not provided any reasons to support their request. Moreover, it is not clear from the Blacks’ request as to whether the Blacks’ are necessarily advocating for a stay of the Application. Rather, it appears that they intended only to bring to the Board’s attention the fact that they are parties to another proceeding with the Applicant which

¹ Blacks’ Intervention Request, October 15, 2013, para. 6.

relates to certain of the lands affected by the Application, and to raise this as an issue for the Board's consideration. At no point in the October 15th intervention request letter do the Blacks actually take the position that a stay should be granted.

Blacks' Arbitration Does Not Warrant Stay of Application

7. In its pre-filed evidence, Dufferin acknowledges that proceedings in respect of the leases with the Blacks are ongoing. Dufferin also discusses the relationship between the Blacks' Arbitration and the Application. In particular, Exhibit B, Tab 1, Schedule 1 states as follows:

With respect to the land interests required for Distribution Facilities, the Applicant has reached agreement to acquire on a voluntary basis the necessary interests in land from close to 50 directly affected private landowners. Although agreements are in place with all of these directly affected landowners, one of the landowners is currently disputing the enforceability of the relevant lease agreements in respect of two properties that they own. In particular, James and Marian Black filed a Statement of Claim on May 13, 2013 against DWPI and others seeking, amongst other things, a declaration that the relevant lease arrangements, which provide for the interests in lands required for distribution lines on their property, be declared null and void or, in the alternative, that the lease arrangements be amended to provide for placement of the underground cables and/or turbines only in particular locations specified by the Blacks. DWPI does not agree with the allegations that have been made and the matter is currently before the courts. Due to uncertainty in the timing and outcome of the Blacks' claim, including if the relevant lease arrangements in respect of the interests in lands required for distribution lines are found to be unenforceable, DWPI requires authority to expropriate distribution easements on certain portions of these properties to support its distribution lines, as well as temporary easements for purposes of construction on certain portions of the properties.²

8. Dufferin anticipates that the lease dispute with the Blacks will be determined by the end of January 2014, which will be prior to the Board being in a position to issue a final decision and order on the present Application. If Dufferin's interests under the leases in the lands necessary to support the construction, operation and maintenance of distribution lines on the Blacks' properties are found to be enforceable, then the Applicant intends to withdraw its request under the present Application for authority to expropriate interests in land from the Blacks. However,

² Dufferin Wind Power Inc., Application for Leave to Expropriate (EB-2013-0268), Exhibit B, Tab 1, Schedule 1, pp. 8-9. Note: Since the Application was filed, Dufferin and the Blacks have agreed that their dispute under the leases will be determined by way of arbitration pursuant to the dispute provisions in the leases, rather than through the Ontario Superior Court of Justice pursuant to the original statement of claim.

if Dufferin's interests under the leases in the lands necessary to support the construction, operation and maintenance of distribution lines on the Blacks' properties are found to be unenforceable, or in the event the dispute under the leases becomes protracted such that it impacts Dufferin's project schedule, then Dufferin would continue to seek authority to expropriate distribution easements on certain portions of the Blacks' properties to support its distribution lines, as well as temporary easements for purposes of construction on certain portions of the properties, all as described in the Application.

9. Given these two potential outcomes for the Blacks' Arbitration and their implications for the present Application, a stay of the Application is not warranted and would be of no practical value. If authority to expropriate from the Blacks is not needed because the outcome of the Blacks' Arbitration confirms that Dufferin has the necessary interests in land under the leases, then Dufferin would withdraw that portion of the Application relating to the Blacks but the remainder of the Application would continue to be before the Board. Alternatively, if the relevant portions of the leases are found to be invalid, Dufferin would need authority to expropriate the necessary interests in land to support the installation of its distribution lines on the Blacks' properties. In this circumstance, the Board would continue to hear the Application in its present form. It would be unreasonable to stay the Application until such time as the Blacks' Arbitration is concluded, at which point the only change in circumstance for the present Application would be that the Board will then have certainty as to whether that portion of the Application relating to the Blacks will ultimately need to be considered by the Board, in which case the Board would continue to hear the application in its present form, or whether that portion would be withdrawn and thereafter disregarded by the Board. Given the project schedule, as described in the leave to construct proceeding EB-2012-0365, the potential harm to Dufferin caused by a delay in the proceeding would far outweigh any potential benefits of holding up the entire Application for this very limited purpose.

THE COUNTY'S MOTION

10. The County's Motion of October 18, 2013 seeks an interim order staying the Application pending final determinations of (i) an appeal by CORE to the Divisional Court of the Board's decision granting leave to construct in EB-2012-0365 (the "LTC Appeal"), and (ii) appeals by

six individuals to the ERT regarding the Ministry of the Environment's granting of a REA to Dufferin (the "REA Appeals").

11. The County argues that a stay of the Application should be granted because the LTC Appeal and the REA Appeals are currently underway and their outcomes may impact Dufferin's proposed transmission facilities, which in turn may impact the interests in land needed for its construction. In particular, the County suggests that the LTC Appeal could result in the decision granting leave to construct being overturned or subjected to review or rehearing. The County also suggests that the REA Appeals could result in the Dufferin Wind Farm project being discontinued, thereby eliminating the need for the transmission line and related easements, or alternatively that the ERT could determine that the transmission line must be installed underground. For the reasons that follow, the County's Motion should be denied.

The LTC Appeal

12. Despite the filing of the LTC Appeal by CORE, Dufferin continues to hold a valid and fully operational order of the Board granting leave to construct in EB-2012-0365. Moreover, the LTC Appeal is reasonably expected to be determined prior to the Board issuing a final decision and order on the Application. In addition, the Board already considered the issues being raised by the County in response to correspondence filed prior to issuance of the Notice of Application. These points are discussed below.

Order Granting Leave to Construct Has Not Been Stayed

13. The Application is brought under section 99 of the OEB Act, which provides that a person may apply to the Board for authority to expropriate interests in land for a work where that person has leave under Part VI of the OEB Act, including leave to construct electricity transmission facilities pursuant to sections 92 and 96. As noted, Dufferin received an order of the Board granting leave to construct under sections 92 and 96 of the OEB Act on July 5, 2013 in EB-2012-0365.

14. Although CORE is not an intervenor in the present Application, CORE was an intervenor in EB-2012-0365. On August 2, 2013 CORE filed the LTC Appeal pursuant to section 33 of the OEB Act. Section 33 provides that an appeal from an order of the Board may be made to the

Divisional Court upon a question of law or jurisdiction. Importantly, subsection 33(6) provides that “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”. In short, there is no automatic stay of the order granting leave to construct. Moreover, CORE has not sought a stay of the order granting leave to construct. Consequently, the Board’s order in EB-2012-0365 continues to be operational and there are no statutory restrictions on Dufferin’s right to bring an Application for authority to expropriate under section 99 of the OEB Act.

LTC Appeal Will Likely Be Determined Before Board Issues Decision on the Application

15. The LTC Appeal is scheduled to be heard by the Divisional Court on November 25, 2013. A decision is expected by as early as mid-December, but by no later than February 2014. A review of the timelines in prior expropriation proceedings before the Board indicates that the LTC Appeal will likely be determined in advance of the Board determining the present Application for authority to expropriate. This is particularly so due to the delays in the present proceeding caused by the extended period it took for the Board to issue the Notice of Application and by the time needed for submissions and responding submissions on the County’s Notice of Motion and the Blacks’ request.

16. Given the likelihood that the Board will be aware of the outcome of the LTC Appeal before it will be ready to issue a decision and order on the present Application, the Board will be able to address the consequences, if any, arising from the Court’s findings on the LTC Appeal before granting any authority to expropriate. Moreover, in the unlikely circumstances where the LTC Appeal remains outstanding and the Board is otherwise ready to issue its decision and order on the present Application, the Board could consider granting expropriation authority conditional upon the leave to construct being upheld in all material respects or such other conditions as the Board may determine to be necessary.

Board Considered Same Issues Prior to Issuing Notice of Application

17. In response to correspondence filed by Dufferin and CORE during the period prior to the Board issuing the Notice of Application, the Board has already considered issues similar to those raised in the County’s Motion and concluded that there is no basis for not proceeding with the

Application. In particular, Dufferin filed a letter with the Board on August 21, 2013 in response to indications that the Board was then considering the procedural implications for the Application, if any, of the LTC Appeal that had been filed by CORE. In the letter, Dufferin set out the reasons for its view that the Board should not hold in abeyance or delay its consideration or administration of the Application. These reasons included that there is no automatic stay of the leave to construct decision, that no such stay was requested and that Dufferin therefore meets the requirements for bringing the Application under section 99 of the OEB Act. Dufferin also discussed the timing of the LTC Appeal relative to the hearing of the Application, and referred to the Board's practice in similar circumstances where an application has been filed despite there being an outstanding appeal of a prior related decision of the Board.

18. Although CORE did not request intervenor status in the present proceeding, on August 26, 2013 it filed a response to Dufferin's August 21st letter. CORE argued that the Board should not consider Dufferin to have leave to construct until such time as its appeal to Divisional Court has been determined. CORE acknowledged that it did not seek a stay of the leave to construct decision and noted that a stay of Dufferin's REA was sought instead (which stay request has subsequently been denied by the ERT). Dufferin responded by filing a letter on August 26th reiterating the points made in its August 21st letter and asking the Board to issue the Notice of Application and Letter of Direction so that the hearing of the Application could proceed.

19. Given the correspondence of August 21 and August 26, and the unusually long period it took for the Board to issue the Notice of Application and Letter of Direction, being two months from the date the Application was filed, it is apparent that the Board has already considered whether the filing of the LTC Appeal by CORE should affect the Board's hearing and administration of the expropriation application. That the Board ultimately decided to issue the Notice of Application and Letter of Direction on September 17, 2013 is an indication of the Board's conclusion that it does not. The questions raised in the County's Motion are substantially the same as those raised by CORE.

The REA Appeals

20. In its Motion, the County further argues that the Application should be stayed on account of there being outstanding appeals of Dufferin's REA to the ERT. In particular, the County

suggests that because some of the REA appellants have requested that the Dufferin Wind Farm project be discontinued entirely, and because some of the REA appellants have requested that the ERT order Dufferin to install its transmission line underground, that the transmission line and the easement rights for which Dufferin seeks authority to expropriate may ultimately not be required at all, or may need to be changed.

21. The potential outcomes of the REA Appeals that the County describes are not reasonable. The ERT does not have the authority to determine that the Dufferin Wind Farm project should be discontinued entirely. It may only confirm, alter or revoke the REA. Even if the REA were to be revoked, this would not necessarily discontinue the project as Dufferin would have the right to appeal the ERT's decision and/or of changing its project or mitigating the issues in order to resubmit its REA application. Moreover, it is highly unlikely that the ERT would alter the REA so significantly as to require the entire transmission line to be installed underground. To reach this conclusion, the ERT would need to find that the line as currently proposed, and as approved by the Board in EB-2012-0365, would cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment along the entire length of the transmission line. The ERT has not previously altered the conditions of any REA that has been the subject of an appeal.

22. From a timing perspective, it is reasonably expected that the ERT will issue a decision on the REA Appeals in advance of the Board making its decision and order in the present Application. There is a requirement under section 59 of Ontario Regulation 359/09 for the ERT to issue its decision within six months of the notices of appeal having been filed. As such, the decision on the REA Appeals is expected by mid-December 2013. The Board will therefore be in a position to address the implications of the REA Appeals decision, if any, on Dufferin's Application for authority to expropriate.

CONCLUSION

23. The Board should refuse the Blacks' request for a stay due to the pending dispute concerning their lease with Dufferin. The Blacks have given no reasons to support their request and they do not appear to have actually advocated for a stay. If the Application is stayed until the Blacks' Arbitration is determined, the only change in circumstance would be that the Board

will then have certainty as to whether that portion of the Application relating to the Blacks will ultimately need to be considered by the Board in its present form, or whether it will be withdrawn and could thereafter be disregarded. The potential harm to Dufferin caused by a delay in the proceeding would far outweigh any potential benefits of holding up the entire Application for this very limited purpose.

24. The Board should also refuse the County's Motion for a stay due to the pending LTC Appeal and REA Appeals. Dufferin continues to hold a valid order of the Board granting leave to construct and thereby meets the requirements under section 99 of the OEB Act. The LTC Appeal will likely be determined prior to the Board issuing its decision on the Application. Furthermore, the Board has already considered the issues that are raised by the County and in issuing the Notice of Application showed that the LTC Appeal is not an impediment to the Application. With respect to the REA Appeals, the potential impacts on the Application have been overstated by the County and the REA Appeals will likely be determined prior to the Board issuing its decision on the Application.

All of which is respectfully submitted this 15th day of November, 2013.

DUFFERIN WIND POWER INC.

By its counsel

Torys LLP



Jonathan Myers