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November 27, 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. On November 22, 2013, Dufferin County (the "County") filed reply submissions in support of its motion for a stay in the present proceeding. At paragraphs 3, 8, 15, 17, 18, 23 and 24 of its reply submissions, the County relies upon the then outstanding appeal by Conserve Our Rural Environment ("CORE"), of the Board's decision in EB-2012-0365 granting leave to construct to DWPI, as a primary basis for its motion. The appeal by CORE was heard on November 25, 2013. Enclosed is the November 27, 2013 decision of the Divisional Court dismissing the appeal and upholding the Board's decision in EB-2012-0365.

Yours truly,

Jonathan Myers

Enclosure

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

CITATION: Conserve Our Rural Environment v. Dufferin Wind Power Inc., 2013 ONSC 7307
DIVISIONAL COURT FILE NO.: 356/13
DATE: 20131127

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

A.C.J.S.C. MARROCCO, THEN R.S.J. AND GORDON J.

BETWEEN:	
CONSERVE OUR RURAL ENVIRONMENT (CORE) INC. Appellant	*David Crocker*, for the Appellant
– and –	
DUFFERIN WIND POWER INC.	*Crawford Smith* and *Andrew Finkelstein*, for the Respondent, Dufferin Wind Power Inc.
-and –	
ONTARIO ENERGY BOARD Respondents	*Michael S. Millar,* for the Respondent, Ontario Energy Board
	HEARD at Toronto: November 25, 2013

GORDON J.

Overview

[1] Conserve Our Rural Environment (CORE) Inc. ("CORE") appeals a decision of the Ontario Energy Board (the "Board"), dated July 5, 2013. In that decision, the Board approved Dufferin Wind Power Inc.'s ("Dufferin") application to construct electricity transmission lines and associated facilities for the purposes of connecting its wind energy project to Ontario's

electricity grid. As part of the Board's decision, it approved the forms of agreement offered to each landowner affected by the approval.

[2] CORE argued before the Board that the independent legal advice ("ILA") clauses in the agreements were confusing, misleading and unfair. It argues the Board's subsequent approval of the forms of the agreement constitutes an error of law. CORE also submits that the Board failed to provide adequate reasons for its decision to approve the agreements.

Background Facts

[3] CORE is a not-for-profit corporation established to oppose proposed developments that might adversely impact the rural environment in or about Mulmer Township. It applied for and received intervenor status at the hearing before the Board.

[4] The Dufferin Wind Power Project (the "Project") is a planned wind energy farm. Dufferin applied to the Board pursuant to section 92 of the *Ontario Energy Board Act*, 1998 (the "Act") for an order granting it leave to construct approximately 47 kilometres of power lines and associated facilities for the purposes of the Project.

[5] Sections 92 and 96 of the Act require the Board to consider whether the construction of transmissions lines is in the public interest. Section 96(2) provides that in determining the public interest, the Board shall only consider the following:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service; and
2. Where applicable, the promotion of the use of renewable energy sources in Ontario.

[6] Section 97 provides that the Board shall only grant an application under section 92 if the applicant satisfies the Board that it has offered or will offer to each landowner affected by the approved route, an agreement in a form approved by the Board.

[7] Dufferin applied to the Board under Section 92 for approval of its plans to construct the power lines and associated facilities. It also sought an order approving the forms of land agreements offered to owners of the land affected by the proposed route. To this end, Dufferin sought approval for six forms of land agreements under section 97. Four of the forms contain ILA provisions. Two do not.

The Project Substation Lease and Transmission Lease contain the following ILA clause:

> With respect to this lease and all matters related thereto, the parties acknowledge that Shibley Righton LLP has acted as lawyers for the Landlord and Torys LLP has acted as lawyers for the Tenant.
>
> The Landlord confirms to the Tenant that the Landlord has reviewed this Lease with the Landlord's independent legal counsel and fully understands the Landlord's rights and obligations under this Lease. The Tenant confirms to the Landlord that the Tenant has reviewed this Lease with the Tenant's independent legal counsel and fully understands the Tenant's rights and obligations under this Lease.

The Turbine and Transmission Lease contains the following ILA clause:

> Each party acknowledges that this Lease has been prepared by the Landlord's lawyers [redacted]. With respect to this Lease and all matters related thereto,[redacted] has acted for the Landlord and is not acting as lawyers for the Tenant. The Tenant hereby acknowledges that the Tenant has had the opportunity and has been advised by the Landlord and its lawyers to review this Lease and all matters related thereto with independent legal counsel of the Tenant's own choice prior to the Tenant's execution of this Lease.
>
> The Tenant confirms to the Landlord that the Tenant has reviewed this Lease with the Tenant's independent legal counsel and fully understands the Tenant's rights and obligations under this Lease.

[8] CORE argues that the ILA provisions are false and misleading because: (a) Shibley Righton LLP acts as counsel for a minority shareholder of Dufferin, who is the tenant; (b) As it is the Landlord's property that is proposed to be encumbered, the Landlord is the party requiring independent legal advice; (c) ILA is stated to be for Dufferin, the Tenant, when the agreements were prepared by it. In addition, CORE submits that because the agreements contain misleading language and permit the distortion of the balance of power between the parties, their approval is not in the public interest.

[9] The Board granted leave to Dufferin to construct the transmission lines. It acknowledged CORE's argument that the ILA clauses contained inaccuracies in form and content. Nonetheless, it felt that the proposed land agreements were acceptable and held that to the extent the ILA clauses raised questions involving professional ethics, they are best left to the Law Society of Upper Canada, the licensing body governing the legal profession in Ontario.

Jurisdiction of this Court

[10] Section 33 of the Act provides as follows:

> 33. (1) An appeal lies to the Divisional Court from:
>
> (a) an order of the Board;
>
> (2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

[11] The initial question, then, is whether CORE has raised an issue of law or jurisdiction. In our view, it has not.

[12] When considering agreements to be offered to affected landowners, the Board approves a standard form of agreement in the context of the application in which it has been filed. Once approved, the parties are free to negotiate whatever terms they believe to be necessary to protect their specific interests. The Board does not become involved in the detailed negotiations between one landowner and the Applicant. [See *EB-2006-0305*, Decision and Order dated June 1, 2007].

[13] The authority of the Board to approve the form of a contract is discretionary. As this court has held in Natural Resources Gas Limited v. Ontario Energy Board, 2012 ONSC 3520 (quoting the Alberta Court of Appeal in Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board), 2007 ABCA 192) an arguably unreasonable exercise of a discretion is not an error of law or jurisdiction.

[14] In the event we are mistaken in that regard, we make the following additional findings with respect to the issues raised in this appeal.

Standard of Review

[15] In the event CORE has indeed raised an issue of law or jurisdiction, it is necessary to consider the applicable standard of review. We are of the view that the appropriate standard is reasonableness. The Board was interpreting its home statute and the issues raised in this appeal are not of central importance to the legal system. Our decision reflects the principles set out in *Alberta (Information & Privacy Commissioner)* v. *Alberta Teachers' Association*, 2011 SCC 61, and reflects similar findings by this court in *Goldcorp Canada Ltd. v. Ontario Energy Board*, 2012 ONSC 3097.

[16] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law [see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (SCC)].

Was the Decision of the Board Reasonable?

[17] We find that the decision of the Board was reasonable. It is important to understand that what the Board approved was a *form* of agreement which is the subject of subsequent negotiation between the parties. It represents terms from which the party propounding the project may not unilaterally resile.

[18] Although it may have been more appropriate to leave blank spaces for the names of legal counsel offering ILA to the landowners, the inclusion of the name of a particular firm cannot bind that firm to act, nor can it excuse that firm from its professional and ethical obligations to act without conflict. The Board, alive to the conflict issue raised by CORE, appropriately determined that those professional and ethical obligations are best addressed in the context of the regulation of the legal profession.

[19] Although counsel for CORE urged us to find the form of the agreements to be unconscionable we are not persuaded this is so. Indeed, there is a complete lack of evidence in this regard. There is no evidence that any landowner was confused by the wording of the ILA provisions, or that any of them perceived an inequality of bargaining power, or that any of the terms of the agreements would have unconscionable consequences. We find it telling that none of the landowners have taken issue with the forms of agreement approved by the Board.

Adequacy of Reasons

[20] CORE argued that the Board erred by failing to provide adequate reasons. It submits that the path taken by the Board to reach its decision is unclear or non-existent. We do not agree. The required standard is set out in *Newfoundland & Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, as follows:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses' Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is in the range of acceptable outcomes, the Dunsmuir criteria are met.

[21] On review of the written closing submissions made to the Board by CORE and the reply by Dufferin, we are satisfied that the Board was alive to the issues raised by CORE and dealt with each issue in its reasons. We have no difficulty understanding why it made its decision and are content that the conclusion is within the range of acceptable outcomes.

Conclusion

[22] In conclusion, the appeal by CORE is dismissed. In the event the parties are unable to

agree on costs, they may make written submissions to us within 15 days. Each party's submissions shall be limited to three pages exclusive of attachments.

A.C.J.S.C. MARROCCO

THEN R.S.J.

GORDON J.

Released: November 27, 2013

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BETWEEN:

CONSERVE OUR RURAL ENVIRONMENT (CORE) INC.

Appellant

– and –

DUFFERIN WIND POWER INC.

-and –

ONTARIO ENERGY BOARD

Respondents

REASONS FOR JUDGMENT

GORDON J.

Date of Release: November 27, 2013