



EB-2013-0268

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

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Dufferin Wind
Power Inc. for authority to expropriate interests in certain
lands for the purpose of constructing a new transmission
line and associated facilities.

BEFORE: Ken Quesnelle
Presiding Member

Peter Noonan
Member

**PROCEDURAL ORDER NO. 2
AND
DECISION ON MOTIONS TO STAY**

December 16, 2013

In Ontario Energy Board (the "Board") proceeding EB-2012-0365, Dufferin Wind Power Inc. (the "Applicant" or "DWPI") obtained an order granting it leave to construct a new electricity transmission line and associated facilities to connect its planned Dufferin Wind Farm to the provincial power grid. DWPI has been unable to negotiate land agreements with all affected landowners along the entire route.

Accordingly, DWPI filed an application (the "Application"), dated July 19, 2013, with the Ontario Energy Board (the "Board") under section 99 of the *Ontario Energy Board Act*

1998, S.O. 1998, c. 15 (Schedule B) (the "Act") for authority to expropriate interests in certain lands. The Board assigned File No. EB-2013-0268 to the Application.

There are 52 properties over which DWPI is seeking approval of the Board to expropriate interests in the lands needed to build, operate and maintain the new transmission line and associated facilities. DWPI is seeking temporary construction easements and, for a term of 45 years, transmission easements, distribution easements, and access and maintenance easements.

Five property owners are affected and all are parties to this proceeding. The Board determined in Procedural Order No.1, issued on October 30, 2013, that all those property owners are also eligible to apply for cost awards. DWPI did not object to any of the intervention requests.

Two of the property owners, James Daniel Black and Marian Arlene Black (the "Blacks") and the County of Dufferin (the "County"), filed preliminary motions with the Board for an order granting a stay of the Application. The grounds for the motions, and positions of the parties, are set out below.

In accordance with Procedural Order No.1, DWPI filed submissions on the motions on November 15, 2013. The Blacks and the County filed reply submissions on November 22, 2013. The remaining three property owners, Marc Atkinson, Atkinson Farms and David Coe, jointly filed a letter in support of the motions of the Blacks and the County. Board staff and Hydro One did not make any submissions.

THE BLACKS' MOTION

The Blacks' Position

The Blacks have been engaged in an arbitration proceeding with DWPI since November 2013 respecting two leases (collectively, the "Leases") on farms that the Blacks own in the Township of Melancthon. For the reasons set out below, the Blacks requested, in their Notice of Application for Intervention, a temporary stay of this proceeding until after completion of the arbitration and delivery of the arbitral award.

In their submission, the Blacks advised that the arbitration proceeding is underway and that oral argument is scheduled for January 7, 2014. Based on these timelines, the Blacks submitted that DWPI may not be able to start construction on the Blacks' farms by January 31, 2014, which may lead to a situation where the Blacks may be in a position to give notice to terminate the Leases.

The Blacks submitted that the arbitration could also see a decision where the Leases are deemed void, resulting in no property interest. Alternatively, the Blacks argued that the arbitration could see a decision that upholds the validity of the Leases but would require some modification, which may trigger other regulatory adjustments, including possibly adjustments to the Renewable Energy Approval.

Finally, the Blacks submitted that the interests in land which DWPI seeks to expropriate may not be accurate since there were two materially different site plans relative to the locations of turbines, access roads and electrical supply cables that were filed in this proceeding and the arbitration.

DWPI's Position

In its submission, DWPI noted that the interests in land which it seeks to expropriate from the Blacks are in respect of portions of the same two properties that are currently disputed in arbitration. The Applicant submitted that while the two proceedings deal with the same properties, the outcome of the arbitration, which it anticipated would be decided by the end of January 2014, would only impact this proceeding in that the Blacks' properties would either remain under an expropriation request, or would be withdrawn if the outcome of arbitration is such that the Leases were found enforceable.

For these reasons, the Applicant asked that the Board deny the Blacks' request for a temporary stay of this proceeding until after completion of the arbitration proceeding.

Board Findings

DWPI is legally entitled to proceed with an expropriation application before the Board. Section 99(1) of the Act states:

99. (1) The following persons may apply to the Board for authority to expropriate land for a work:

1. Any person who has leave under this Part or a predecessor of this Part.
2. Any person who intends to construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection and who is exempted from the requirement to obtain leave by the Board under section 95 or a regulation made under clause 127 (1) (f). 1998, c. 15, Sched. B, s. 99 (1).

With respect to the ongoing arbitration concerning the Leases, the Board notes that there is no statutory requirement that the Board temporarily stay the hearing of the Application until completion of the arbitration.

The Board may proceed to hear DWPI's expropriation application even while arbitration negotiations respecting necessary lands may be ongoing. The Board also notes that the arbitrator was appointed by both the Blacks and DWPI and that the arbitral award will not affect the current form or determine the outcome of this proceeding.

The Board finds that there is nothing determinative in the arbitration that would change the Board's expropriation process. The parallel progression of the two processes does not frustrate procedural justice.

The Board also finds that delaying this proceeding without legal reason would cause prejudice to DWPI as it might unnecessarily delay DWPI's Project timetable.

For the reasons set out above the Board denies the Blacks' motion to temporarily stay the Application until after completion of the arbitration proceeding.

THE COUNTY'S MOTION

The County's Position

The County filed a Notice of Motion (the "Dufferin Motion") asking for an order granting a stay of this Application pending a final determination of:

1. An appeal to the Divisional Court by Conserve Our Rural Environment ("CORE") of the Board's leave to construct approval in EB-2012-0365; and
2. Appeals to the Environmental Review Tribunal ("ERT") of six Renewable Energy Approvals ("REA") granted by the Ministry of the Environment to the Dufferin Wind project.

The County submitted that the ERT had broad powers to amend or entirely revoke an REA. The County noted that the ERT had done so in a prior case known as *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*¹ in which it revoked the REA in its entirety. The County added that based on the grounds for appeal, it would not be unreasonable to suggest that the REA related to this Application could be revoked in its entirety, making this proceeding moot. The County anticipated that the ERT would render its decision on or prior to December 24, 2013.

In relation to CORE's appeal, the County submitted that the Divisional Court could overturn the granting of leave to construct, and/or require review and rehearing, which could change the nature of the leave to construct request or even result in its termination.

More generally, the County submitted that the appropriate test for granting a temporary stay pending the resolution of another related proceeding rested on some central considerations, including: "whether there is substantial overlap of issues in the two proceedings; whether the two cases share the same factual background; whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and whether the temporary stay will result in an injustice to the party resisting the stay."

¹ *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* [20131 O.E.R.T.D. No. 40

The County argued that it met the test for the Board to grant a temporary stay of this proceeding. In its submission the County stated that this proceeding, the leave to construct and all the appeals share the same factual background. The County also advanced that there was an overlap of issues, and that a temporary stay may prevent unnecessary judicial processes since the appeals before the Divisional Court and the ERT may have a material impact on outstanding issues in this proceeding. Finally, the County asserted that DWPI did not provide any evidence of injustice that would result from a temporary stay.

For these reasons, the County requested a temporary stay of this proceeding pending the outcomes of the appeals to the Divisional Court and the ERT.

DWPI's Position

With respect to CORE's appeal, DWPI submitted that the Board's Order in EB-2012-0365 had not been stayed and that there were no statutory limitations attached to the leave to construct order that restricted the right of DWPI to bring an expropriation application before the Board.

DWPI also argued that CORE's appeal would likely be determined before the conclusion of this proceeding, and in case it was not, the Board could render a decision on the expropriation matters conditional upon the leave to construct being upheld.

Finally, the Applicant submitted that the interconnection of CORE's appeal with this proceeding had to a large extent already been considered by the Board as demonstrated by DWPI's correspondence of August 21, 2013, and August 26, 2013 and by the subsequent issuance of a Notice of Application.

On November 27, 2013, DWPI confirmed to the Board that the Divisional Court dismissed CORE's appeal and upheld the Board's decision in EB-2012-0365.

As far as the REA appeals are concerned, DWPI submitted that even in the worst-case scenario where the ERT would revoke the REA, DWPI could appeal the decision and/or change its project or mitigate the issues in order to resubmit its REA application.

DWPI further argued that in the event the ERT required some modification, it did not expect any revisions to affect the entire transmission line as this would necessitate the ERT to find that the current line as approved by the Board in EB-2012-0365 would cause serious harm to human health, to plant life, to animal life or the natural environment along the entire length of the transmission line.

The Applicant also submitted that the ERT has not previously altered the conditions of any REA that has been the subject of an appeal. DWPI anticipated a decision on the appeals by mid-December 2013.

For these reasons, the Applicant asked that the Board deny the County's request for a temporary stay of this proceeding until after completion of the leave to construct appeal and appeals in front of the ERT.

Board Findings

The Board's decision in EB-2012-0365, granting the Applicant leave to construct a new electricity transmission line and associated facilities to connect its planned Dufferin Wind Farm to the provincial power grid was upheld by the Divisional Court on November 27, 2013. Based on the Divisional Court's dismissal of CORE's appeal, the Board finds that the grounds of the Dufferin Motion with respect to the CORE appeal to be moot.

With respect to the REA appeals, the Board notes that based on the ERT's standard timelines a decision is expected in December 2013. Several REAs have been appealed with varied outcomes. In this case, as presented by both parties, the outcome of the appeals may be such that it requires fundamental changes to the REA or not.

The Board notes that while an order granting leave to construct is conditional on the applicant obtaining an REA, an ongoing appeal at the ERT is not grounds for staying a live application before the Board for expropriation. Section 99(1) of the Act allows any person who "has leave under this Part" to bring an application for expropriation; that is, any person that has leave to construct even if it is conditional. The Board reiterates that DWPI continues to hold a valid leave to construct order, and is legally entitled to proceed with an expropriation application. The Board finds that there is no statutory

requirement that compels the Board to stay this proceeding pending the hearing of an appeal by the ERT.

Finally, the Board notes that it is well established that a regulatory tribunal should not postpone the determination of an application brought within its jurisdiction by matters not relevant to the proper discharge of its duty to make such determination. To do so could, in effect, amount to a declining of jurisdiction².

For the reasons set out above the Board denies the County's motion to temporarily stay the Application until after completion of the REA appeals.

PROCEDURAL STEPS

The Board will hold an oral hearing on the Application. The Board considers it necessary to make provision for the following procedural matters. Please be aware that further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. Intervenors and Board staff who wish information from DWPI that is in addition to the evidence pre-filed with the Board and that is relevant to the hearing shall request the information by means of written interrogatories filed with the Board and delivered to DWPI, all intervenors and Board staff on or before **December 23, 2013**.
2. DWPI shall, no later than **January 10, 2014** file with the Board and deliver to all intervenors and Board staff, a complete response to each of the interrogatories.
3. Board staff shall file with the Board and deliver to DWPI and all intervenors a Draft Issues List on or before **January 17, 2014**.

² *Canadian Pacific Railway v. The Province of Alberta et al.*, [1950] S.C.R. 25 at p. 33.

4. DWPI and intervenors may file written submissions on the Draft Issues List with the Board and serve all parties on or before **January 24, 2014**.
5. A Pre-Hearing Conference on Issues and Process will be held on **January 24, 2014** beginning at 9:30 a.m. in the Board's West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto, ON.
6. An Oral Hearing will be held on **February 18, 2014 at 9:30 a.m.**, and will continue as necessary, in the Board's West Hearing Room on the 25th floor at 2300 Yonge Street, Toronto, ON.

All filings to the Board must quote the file number, EB-2013-0268, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

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

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, December 16, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary