



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. 3
AND
DECISION ON ISSUES
February 7, 2014**

BACKGROUND

The Application

Dufferin Wind Power Inc. has applied to the Ontario Energy Board under section 99 of the *Ontario Energy Board Act* (the "Act") for authority to expropriate interests in certain lands. The purpose of the expropriation is to allow the Applicant to implement an

authorization from the Board granting it leave to construct an electrical transmission line, and associated facilities, to connect its planned Dufferin Wind Farm to the provincial power grid. Dufferin Wind Power Inc. has negotiated easement agreements with many, but not all, of the landowners along the proposed route of its transmission line. In those instances where a negotiated agreement has been impossible to obtain Dufferin Wind Power Inc. has decided to seek authority from this Board to expropriate the interests in the affected lands that it requires to construct its transmission line. In this decision Dufferin Wind Power Inc. will be referred to by name, or as the Applicant, or DWPI.

There are fifty-two properties over which DWPI is seeking approval of the Board to expropriate interests in land 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.

The Board received and granted six intervention requests¹. Of the intervenors, five are directly affected property owners:

- The Corporation of the County of Dufferin (the “County”)
- David Coe
- Atkinson Farms Ltd.
- Marc Atkinson
- James Daniel Black & Marian Arlene Black (the “Blacks”)

The Proceeding

On December 16, 2013, the Board issued Procedural Order No. 2 and a Decision denying Motions for a Stay of Process pending the outcome of other proceedings. The Board’s Order established dates for the filing of proposed issues by Board staff and intervenors, and set dates for a Pre-hearing Conference on Issues and Process, and for an Oral Hearing.

¹ Along the listed five intervenors, the Board also granted Hydro One Inc. intervenor status.

In accordance with Procedural Order No.2, Board staff submitted on January 17, 2014 a Draft Issues List. Counsel for Atkinson Farms Ltd., Marc Atkinson, and David Coe in correspondence to the Board dated January 22, 2014, did not oppose the proposed list put forward by Board staff but also proposed two additional sub-issues, and one additional issue. On January 23, 2014, DWPI filed submissions on the Draft Issues list in which it stated that it concurred with the Board staff proposal and did not propose the addition of any new issue or revision to the Draft Issues List. However, the Applicant opposed the additional issues proposed by counsel for the intervenors, Atkinson and Coe.

The Draft Issues List

The Draft Issues List proposed by Board Staff is as follows:

Issue 1

To the extent that the public interest has not already been considered in the Board's decision in Board File No. EB-2012-0365, are the proposed expropriations in the public interest?

Issue 2

What specific interests in lands for which the authorization to expropriate is requested, are appropriate in the circumstances?

Issue 3

Has DWPI taken appropriate and reasonable steps to minimize the impact of the proposed expropriations on the subject properties?

Issue 4

Has DWPI taken appropriate steps to minimize the disruption to landowners by requesting easements that are no larger and no more extensive than necessary?

Issue 5

If approval to expropriate lands is granted, what conditions, if any, should be attached to the Board's Order?

Additional Issues proposed by Atkinson and Coe are as follows:**Issue 3.1**

Do appropriate and reasonable steps to minimize the impact of the proposed expropriations on the Atkinson Farms, Atkinson, and Coe properties include burying the transmissions lines designed to traverse these properties?

Issue 4.1

Does minimizing the disruption to Atkinson Farms, Atkinson and Coe require that DWPI request an easement that would only permit transmission lines to traverse the Atkinson Farms, Atkinson, and Coe properties if those lines are buried?

Issue 6

Is it contrary to the Ontario Energy Board's decision in EB-2012-0365 to require now that any transmission lines traversing the Atkinson Farms, Atkinson, and Coe properties be buried?

On January 24, 2014, the Board held a Pre-hearing Conference on Issues and Process. DWPI, Board staff, counsel for Atkinson Farms Ltd., Mr. Atkinson, and Mr. Coe, counsel for the Blacks, and counsel for the County of Dufferin, took part in the Pre-hearing Conference.

For the reasons set out below, the Board finds Board staff's Draft Issues List to be appropriate and finds that Additional Issues 3.1 and 4.1 ought to be added to the list of issues.

SCOPE OF THE EXPROPRIATION PROCEEDING

The Board's power to grant an applicant authority to expropriate is derived from section 99 of the Act. Under that section, any person who has been granted leave by the Board under section 92 of the Act may apply to the Board for authority to expropriate land for a work.

Section 99(5) of the Act establishes the test for approving an expropriation: "If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land."

The transmission line and related facilities were approved in the predecessor Leave to Construct proceeding (Decision No. EB-2012-0365 dated July 5, 2013).

INTERVENORS AND BOARD STAFF'S POSITIONS

County's Position

The County of Dufferin submitted that the Draft Issues List as proposed by Board staff is acceptable. It took no position concerning the request by certain of the intervenors for the inclusion of additional issues. The County also noted that it has been negotiating with DWPI and there is a possibility that the County and the Applicant may resolve their differences, in which case expropriation of the County's lands may not be required. Counsel for the County advised that he would be able to further update the Board on the status of negotiations after February 13, 2014.

The Blacks' Position

Mr. Thom, counsel for the Blacks submitted that they did not have any additions or revisions to the Draft Issues List but they generally took the view advanced by counsel for the intervenors, Atkinson and Coe. Mr. Thom also indicated that the nature of the Black's involvement going forward will depend on the outcome of ongoing discussions with DWPI, following the recent release of an arbitral award between Blacks and DWPI. The Blacks advised that by the time the Board's hearing commences, they would be in a position to further advise the Board on their intended participation in this proceeding.

Board Staff's Position

Ms. Helt on behalf of staff supported the Applicant and stated that the issue of an underground vs. an overhead alignment was canvassed in the leave to construct proceeding and "as such, Board staff takes the position in this particular case that the matter has been fully dealt with or considered in the leave to construct process, and in that process the Board determined it was something to be dealt with in the REA process."

Joint Position of Atkinson and Coe

In their submissions, Atkinson and Coe indicated that they did not have any issues with the Draft Issues List but wished to complement it with the additional issues described above.

Atkinson and Coe submitted that the Additional Issues would help particularize the issues to their specific properties, and would allow for an examination of whether burying the transmission line in these particular properties would be appropriate.

During the Pre-Hearing Conference, Mr. Crocker, on behalf of Atkinson and Coe argued that the Board possesses a different jurisdictional mandate under section 99 then it does under section 92 of the Act. He asserts that the Board, when acting under section 99, is not constrained by a previous decision made under section 92 of the Act. The Board must “consider the appropriateness of the expropriation in the context of the public interest and we believe that the farming operations of these two people in particular are captured in the issue of public interest. That’s a different jurisdictional boundary that the leave – that the Board dealing with the leave-to-construct hearing didn’t have.”

Mr. Crocker further argued that the Board has jurisdiction to consider whether the taking of the lands will render the farming operations uneconomic and, if so, whether the impact of the taking could be alleviated by placing the lines underground. He stated that “whether or not these lines should be buried affects the issue of the footprint of the easement, which is within your jurisdiction to consider on a question of expropriation. And secondly, whether [...] having above-ground lines versus burying the lines with respect to these two properties would make these properties uneconomic, which is also, in my respectful submission, within your jurisdiction to consider on an application to expropriate...”.

DWPI’S POSITION

DWPI submitted that the Draft Issues List was appropriate and it had no additional issues or revisions. However, DWPI argued that the Additional Issues submitted by Atkinson and Coe, all of which relate to building certain segments of the transmission line underground on their respective properties, were unnecessary.

Mr. Myers on behalf of DWPI argued that “it’s well established in expropriation proceedings before the Board that the Board will not revisit issues it has already considered and determined in the leave to construct proceeding...”. His assertion is that the Board dealt with the subject of whether the proposed transmission line should be an overhead structure or buried in the leave to construct proceeding and determined that the appropriate configuration was an overhead structure.

Mr. Myers submitted that the Board received submissions, considered the matter and determined that the line should be an overhead structure, save and except for certain parts where the Applicant proposed to bury the line. He further argued that the Board held that in a section 92 application the Board could only consider the question of whether an overhead or underground line was appropriate based on considerations of reliability and that any broader considerations with respect to the subject of overhead or underground structures should form part of the Renewable Energy Approval (REA) process administered by the Minister of the Environment pursuant to the *Environmental Assessment Act*. He also pointed out that the approval of the Board was subject to conditions, including a condition that the transmission line be constructed in accordance with the contents of the application and the evidence on the record.

Accordingly, Mr. Myers submitted that the focus of the expropriation proceeding ought to be “on potential minor route refinements within the approved corridor laterally” and that the section 99 proceeding “does not include the ability to direct Dufferin Wind to construct the project differently than has already been approved, such as a fundamental change like requiring it to be built underground in certain areas that were not previously contemplated”. Mr. Myers noted that it would be procedurally inefficient to cover the same ground in two different applications, and that the Applicant would have to consider the technical feasibility of an underground placement.

Mr. Myers submitted that the question of whether the farms would be rendered uneconomic by the construction of the overhead transmission line is a matter for compensation (which is determined by the Ontario Municipal Board). The views of Dufferin Wind Power Inc. are more fully set out in its written submissions on file with the Board.

For these reasons, the Applicant asked that the Board deny Atkinson and Coe’s request to include the additional issues for consideration in this proceeding.

BOARD FINDINGS

The issue that the Board must determine in this matter is as follows:

In an expropriation proceeding under section 99 of the Act is the Board empowered to consider whether the transmission line should be buried if the panel that decided to grant the leave to construct order under s. 92 of the Act previously considered the same matter?

The relevant portions of sections 92 and 99 of the Act are set out in the Appendix. Both Mr. Myers and Mr. Crocker cited three of the Board's past decisions to define the Board's jurisdiction pursuant to section 99; *Re Bruce to Milton* EB-2010-0023, *Re Hydro One Service to Toyota Canada Inc.* EB-2006-0352, and *Re Canadian Renewable Energy Corp.* EB-2008-0050.

In both section 92 and in section 99 the Board must apply a public interest test in deciding a leave to construct application, and subsequently, an expropriation of lands. However, public interest is specifically defined for the purposes of section 92 by subsection 96(2) and that definition is a restrictive one. The Board is constrained in applying a public interest test for the purposes of deciding whether to grant a leave to construct order pursuant to section 92. In contrast, under section 99 the Board appears to apply an unconstrained public interest test in order to determine whether to permit an expropriation.

It is of first importance to determine if the findings and order of the Board issued at the conclusion of the leave to construct proceeding are determinative of any of the issues in the expropriation proceeding. The statutory scheme embodies a first proceeding in which an applicant obtains authority to construct a transmission or distribution line. In deciding whether to grant such authority the Board must weigh the Applicant's proposal against any contrary evidence showing that the proposal would be harmful to the public, based on statutory considerations involving the price the electricity, the quality of the electricity provided to Ontarians, and the impact that the new facilities will have on the reliability of the electrical system serving Ontario. Assuming that the project passes that test a second stage involves applications by the project proponent to acquire the necessary lands to carry out the project through expropriation. There, the test is whether the application is consistent with the public interest generally, and in the

absence of specific factors the Board has discretion to include those factors that it considers to be within the concept of the public interest in section 99.

However, that does not mean that the Board is wholly unconstrained in deciding what constitutes the public interest for the purposes of an expropriation case. In *Union Gas v Dawn* (1977) 76 DLR (3d) 613 (Div. Ct.) Keith J., in considering the concept of the public interest in the context of what was then section 41(3) and is now section 99(5) of the Act, stated:

“In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas... are under the exclusive jurisdiction of the Ontario Energy Board...”

“These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words “in the public interest” ... which I have quoted would seem to leave no room for doubt that it is the broad public interest that must be secured.”

Local interests are not the [exclusive] public interest for the purposes of determining the merits of an expropriation request. The broader public interest must also be considered. In that context, the Board must also consider its statutory objectives. Subsection 1(1)(5) of the Act articulates the statutory objectives of the Board and includes among them the desirability of promoting renewable energy². That broad public interest consideration must be taken into account by the Board in applying the public interest test set out in section 99 (5) of the Act.

What then of Atkinson and Coe and their ability to assert their claims in this section 99 proceeding? Neither of them took part in the leave to construct proceeding even though they received notice of it. According to Mr. Crocker; “... they and other farmers have come to the realization after the fact that the location of these above-ground lines will have more impact on their operations than the actual location of the turbines.” Despite their current views it is clear that Atkinson and Coe cannot collaterally challenge in this proceeding the Board’s previous grant of a leave to construct order. The position at

² Section 1(1)(5) states: “To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.”

common law was set out by Wigram V.C. in *Henderson v Henderson* (1843), 3 Hare 100 at 114, where he stated:

“where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

In the present context, the leave to construct order including the grant of authority to construct, the general route of the transmission line, and the findings made by the leave to construct panel with respect to the component factors of the public interest under subsection 96(2) of the Act (price, reliability, and quality) are all immune to impeachment in this expropriation proceeding. Those matters must now be considered to be *res judicata* (meaning already decided).

Nevertheless, that does not mean that Atkinson and Coe are prevented from raising the issues that they wish to raise in this section 99 proceeding. The Board has previously ruled that the scope of public interest under section 99 is extensive. In *Re Hydro One Service to Toyota Canada Inc.* EB-2006-0352 the Board stated:

“The Board must take into account the objects and purposes of the Act, the broad public interest, the interests of each of the parties to the application ...”. (pg. 12)

Similarly, in *Re Canadian Renewable Energy Corp.* EB-2008-0050 the Board held:

“The Board must take into account the objects and purposes of the Act, the broad public interest, and the interests of each of the parties to the application (the landowners and the Applicant). The Board must consider and weigh each of the competing interests in forming its opinion.” (pg. 9)

Finally, in *Re Bruce to Milton* EB-2010-0023 the Board noted that “Both section 92 and section 99 of the Act are to be administered in the public interest. The purposes of the two sections of the Act are distinct ...” and “The individual and parcel specific project requirements were not considered within the scope of the section 92 application.” (pg. 8)

The Board's cases give a clear understanding that the Board's approach to the question of scoping the section 99 case allows the interests of landowners with respect to their individual parcels to be considered in comparison to the interests of the Applicant and the broader interests of Ontario. As the Board alluded to in *Re Bruce to Milton* the focus of the public interest test in section 99 is, at least in part, on the parcel specific impacts of the taking of the lands, which is an element that is not part of the public interest determination in the leave to construct proceeding. While the leave to construct order cannot be challenged in a section 99 proceeding, the intervenors are entitled to raise the issue of whether an unduly negative impact will occur as a result of the taking, and whether there are practical solutions that would alleviate the impact of the taking on a particular parcel of land.

Accordingly, the Board concludes that the intervenors Atkinson and Coe may raise the question of whether the transmission line should be buried on their properties in order to avoid an unduly negative impact on their farming operations. That will involve submissions concerning the profile of the line, which, for the purposes of section 99, is an element of the determination of the specific route that the line must follow within the general route established by the leave to construct order. An agricultural landowner facing expropriation is entitled to propose minor changes to the specific route of the line within an established general route in order to avoid a deleterious effect on farming operations. That scope is in accord with the test articulated in past Board precedents.

A final point concerns the reliance placed by DWPI on the condition contained in the leave to construct order that mandates the Applicant to construct the line in accordance with the application and the evidence in the proceeding. It seems clear from the condition itself that the Board's leave to construct panel contemplated that minor changes to the project could occur without violating the permission given by the leave to construct order. For example, condition (f) to the order specifically contemplates changes to the route, construction techniques “or any other material impacts of construction.”

Therefore the Board concludes that the condition in the leave to construct order does not preclude an intervenor from requesting, in a section 99 order, that a portion of the transmission line be placed underground on their property. However, the onus will rest with the intervenor to show why such a result should be ordered by the Board.

PROCEDURAL MATTERS

The Board grants the request of Atkinson and Coe to add the two additional sub-issues that they have proposed. The last issue that they proposed is essentially resolved by this procedural decision and it is therefore unnecessary to add it.

Counsel for D&G Ferguson Farms requested during the Pre-hearing Conference that its client's application for intervenor status that has been held in abeyance since October 29, 2013 be withdrawn. The Board accepts the request.

The Board will hold an oral hearing on the Application. The Board considers it necessary to make provision for the following procedural matters.

THE BOARD ORDERS THAT:

1. An Oral Hearing will be held on **February 18, 2013 at 1:30 p.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, February 7, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX “A”

TO PROCEDURAL ORDER NO. 3 & DECISION ON ISSUES

BOARD FILE NO. EB-2013-0268

February 7, 2014

FINAL ISSUES LIST

Issue 1

To the extent that the public interest has not already been considered in the Board's decision in Board File No. EB-2012-0365, are the proposed expropriations in the public interest?

Issue 2

What specific interests in lands for which the authorization to expropriate is requested, are appropriate in the circumstances?

Issue 3

- a. Has DWPI taken appropriate and reasonable steps to minimize the impact of the proposed expropriations on the subject properties?
- b. Do appropriate and reasonable steps to minimize the impact of the proposed expropriations on the Atkinson Farms, Atkinson, and Coe properties include burying the transmissions lines designed to traverse these properties?

Issue 4

- a. Has DWPI taken appropriate steps to minimize the disruption to landowners by requesting easements that are no larger and no more extensive than necessary?
- b. Does minimizing the disruption to Atkinson Farms, Atkinson and Coe require that DWPI request an easement that would only permit transmission lines to traverse the Atkinson Farms, Atkinson, and Coe properties if those lines are buried?

Issue 5

If approval to expropriate lands is granted, what conditions, if any, should be attached to the Board's Order?

APPENDIX "B"
TO PROCEDURAL ORDER NO. 3 & DECISION ON ISSUES
BOARD FILE NO. EB-2013-0268

February 7, 2014

STATUTORY PROVISIONS

Section 92(1) of the Act states:

- (1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

Section 96(2) of the Act states:

(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

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

Section 99(1) of the Act states:

- (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).

Section 99(5) of the Act states:

- (5) If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.