

March 3, 2014

EMAIL

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

Dear Ms. Walli:

Re: EB-2013-0268

We are counsel for Dufferin Wind Power Inc., the applicant, in the above-noted matter.

We are writing further to counsel for Messrs. Coe and Atkinson and Atkinson Farms' (together, "Coe and Atkinson") letter dated February 28, 2014. We are seeking a direction from the Board precluding Coe and Atkinson from calling Jack Kottelenberg as a witness at the hearing returnable March 10, 2014. As discussed below, Coe and Atkinson have failed to comply with Procedural Order No. 4 as well as the Board's *Rules of Practice and Procedure* and it is now too late to cure these failings.

Relevant Facts

Dufferin commenced this application on July 19, 2013. By Procedural Order No. 2, the Board established a timetable for interrogatories to Dufferin, and set a hearing date of February 18, 2014.

On February 11, 2014, long after interrogatories had been completed and just one week before the hearing, counsel for Coe and Atkinson wrote to the Board seeking an adjournment to permit the filing of evidence by his clients. Counsel wrote, "we propose to produce witness statements and an expert report, should we decide to call an expert, two weeks before the date set for the hearing."¹

In result, the Board granted the requested adjournment. The Board, in Procedural Order No. 4, "determined that some limited additional time to produce written evidence....would be appropriate." The Board ordered that intervenors that wanted to file evidence with the Board do so on or before February 28, 2014. The Board also ordered that intervenors wanting to file

¹ Throughout, underlining represents emphasis added.

expert evidence advise the Board and Dufferin of that fact no later than February 21, 2014.

On February 21, 2014, counsel for Coe and Atkinson wrote to the Board indicating that they intended to rely on expert evidence from Jack Kottelenberg, President and CEO of Avertex Utility Solutions Inc. Counsel further indicated that Mr. Kottelenberg's evidence would be compelled by way of summons.

Following receipt of the above letter, we wrote on Dufferin's behalf to counsel for Coe and Atkinson seeking confirmation that they would comply with Procedural Order No. 4 and, in particular the requirement to provide their evidence by February 28, 2014. Counsel responded as follows, "Of course we intend to comply with the Procedural Order."

On February 28, 2014, counsel served witness statements from Coe and Atkinson. Counsel also purported to provide a "Statement of Anticipated Evidence of Mr. Jack Kottelenberg". Contrary to its name, this six paragraph document provides no information as to Mr. Kottelenberg's anticipated evidence beyond the topics counsel intends to ask him about. Specifically, the statement indicates that Mr. Kottelenberg will be asked to give evidence about the feasibility of burying transmission lines generally; the feasibility of burying the lines that are proposed to be constructed on the Coe and Atkinson properties; and the interests in land required to construct and maintain and assess buried transmission lines during the life of a transmission project. The statement provides no information as to what Mr. Kottelenberg might say in relation to those topics.

Relevant Law

Where a party intends to submit evidence at a hearing it is required to do so in writing. Rule 13.01 of the Board's *Rules of Practice and Procedure* provides, in relevant part, that:

- (1) Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in the form approved by the Board.

Rule 13A sets out further mandatory requirements in relation to expert evidence. In addition to the requirement that the evidence be in writing, rule 13A.03 provides that an expert's evidence shall, at a minimum, include the following:

...

- (c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;
- (d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of all of the documents relied on by the expert in preparing the evidence.

Rules 13 and 13A of the Board's *Rules* are analogous to rule 53.03(1) and (2.1) of the Ontario *Rules of Civil Procedure*. Those rules provide, in relevant part, that:

(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1)

...

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

...

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and reasons for the expert's own opinion within that range.

Recently, the Divisional Court commented on the importance of the requirements of rule 53.03(2.1) in deciding whether to exclude certain non-conforming expert evidence. The Court held:

It is through reliance on this rule that the court can be assured that expert witnesses are aware of their responsibilities to the court. The preparation of the report according to the directive found in the rule confirms that the witness is prepared to provide the opinion and the other parties will not be taken by surprise by what is said.²

Analysis

Coe and Atkinson have failed to comply with Procedural Order No. 4. They have also failed to meet the requirements of Rules 13 and 13A of the Board's *Rules of Practice and Procedure*. Dufferin submits that in the circumstances, the Board should direct that Mr. Kottelenberg is not permitted to testify at the hearing.

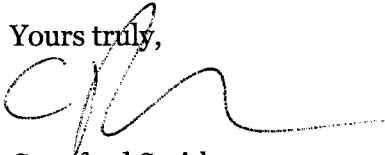
Coe and Atkinson obtained an adjournment on the basis that they intended to file additional evidence; that this evidence could include expert evidence; and that, if it did, the evidence would be in writing provided in advance of the hearing. The Board granted their request ordering that any such evidence be filed, in writing, by February 28, 2014. Coe and Atkinson subsequently confirmed that, "of course" they intended to comply with the Board's order. They did not. As set out above, the Statement of Anticipated Evidence provides no information as to Mr. Kottelenberg's opinion in relation to any of the topics Coe and Atkinson intend to ask him about. This failing is more than a mere formality; as the Divisional Court has confirmed, it is a matter of fairness.

² *Westerhof v. Gee Estate*, 2013 ONSC 2093 at para. 6

Dufferin will be prejudiced if Mr. Kottelenberg is permitted to testify. Coe and Atkinson have had months to prepare for this hearing. They were provided with Dufferin's evidence in writing in July of last year. They were afforded an opportunity by the Board to ask a full range of written interrogatories to which Dufferin has provided full and complete answers. By comparison, one week from the hearing, Dufferin is now in a position where it has been advised that Coe and Atkinson intend to adduce expert evidence but it (1) has been given no indication as to what that evidence will be; (2) has been given no meaningful opportunity to ask interrogatories in relation to that evidence; (3) been denied the opportunity to respond with evidence of its own, if appropriate; and (4) will be severely hampered in its ability to prepare for cross-examination at the hearing.

To be clear, Dufferin does not seek an adjournment to permit Coe and Atkinson a further chance to adduce expert evidence. Coe and Atkinson have had that chance. The hearing should not be further delayed.

Yours truly,

A handwritten signature in black ink, appearing to read 'C/S', with a long horizontal flourish extending to the right.

Crawford Smith

CS
Enclosure