



EB-2008-0050

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B); and in particular section 99, thereof;

AND IN THE MATTER OF an application by Canadian Renewable Energy Corporation for authority to expropriate interest in certain lands for the purpose of constructing an electricity transmission line to connect the wind plant on Wolfe Island in the Township of Frontenac Islands, County of Frontenac, Province of Ontario.

BEFORE: Cathy Spoel
Presiding Member

Cynthia Chaplin
Member

DECISION AND ORDER

APPLICATION

Canadian Renewable Energy Corporation (“CREC” or the “Applicant”) filed an application dated February 20, 2008 and amended on March 7, 2008, 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 approval to expropriate lands for the purpose of constructing transmission facilities including an underground transmission line to connect a wind plant on Wolfe Island in the Township of Frontenac Islands, County of Frontenac, Province of Ontario (“Wolfe Island Wind Plant”).

THE PROPOSED TRANSMISSION LINE

On October 12, 2007 CREC was granted an order of the Board (EB-2007-0034) under section 92 of the Act for leave to construct the transmission facilities to connect the

Wolfe Island Wind Plant to the Ontario electricity transmission grid. CREC was planning to start construction of the transmission line in the Summer of 2008.

THE INTERVENORS AND THE PROPERTIES TO BE EXPROPRIATED

CREC has been unable to secure all of the necessary easement rights to construct the transmission line. In particular, the Applicant requests that the Board make an order granting the Applicant authority to expropriate:

- a permanent easement through land owned by Carylanne Martin in trust¹, having an approximate area of 101 square meters, designated as Part 10 on the draft reference Plan of Survey prepared by Leslie M. Higginson Surveying Limited bearing File No. KI'N2-10 LMH 27-1, being part of Lot 10, Concession 2, in the City of Kingston (formerly the Geographic Township of Kingston) in the County of Frontenac;
- a permanent easement through land owned by R. Paul Martin Construction Co. Ltd., having an approximate area of 104 square meters, designated as Part 11 on the draft reference Plan of Survey prepared by Leslie M. Higginson Surveying Limited bearing File No. KI'N2-10 LMH 27-1, being part of Lot 10, Concession 2, in the City of Kingston (formerly the Geographic Township of Kingston) in the County of Frontenac;

In its original application, CREC also sought to expropriate a permanent easement through land owned by Globe Realty Holdings Ltd. On May 28, 2008 CREC withdrew this portion of the application because settlement was reached with the Globe Realty Holdings Ltd.

PROCEEDING

The Notice of Application was issued on April 2, 2008. The Applicant served the Notice of Application as directed by the Board.

¹ In the pre-filed evidence CREC indicated that the lands were owned by Carylanne Martin in trust, but a later title search indicated that title is registered in the name of Carylanne Martin.

On April 18, 2008 the Board received an intervention and cost award eligibility request from R. Paul Martin Construction Group Co. Ltd. (the "Martin Group"). The Martin Group, in its letter, explained that it owns two out of the three properties subject to this application. A request was also made that the application proceed by way of an oral hearing. By way of letter dated April 24, 2008 the Board granted intervenor status and cost award eligibility to the Martin Group. The Applicant did not object.

On May 16, 2008, the Board issued Procedural Order No. 1 which provided reasons for the Board's decision to proceed by way of written hearing and also set out the schedule for the written proceeding.

Written interrogatories on the Applicant's pre-filed evidence were due May 30, 2008. No interrogatories were filed. The Applicant filed its argument-in-chief on June 12, 2008. Final written arguments by the parties were to be filed by June 27, 2008. Neither the Martin Group nor Board Staff filed any submissions by the set date.

On July 3, 2008 the Martin Group requested an extension of time to file its final argument. The Board granted an extension to July 7, 2008 and indicated that any reply submission must be filed by July 11, 2008. On July 7, 2008, Mr. Martin filed the final argument and the Applicant filed its response on July 8, 2008. This completed the record of the proceeding.

POSITIONS OF THE PARTIES

The Applicant's Argument-in-Chief

The Applicant argued that it was in the public interest to authorize the expropriation of the said lands because it would enable CREC to construct the transmission line along the route approved by the Board in EB 2007-0034. Furthermore, CREC submitted the transmission line construction would enable it to deliver electricity to the provincial transmission grid and meet its supply obligations to the Ontario Power Authority. CREC stated:

The proposed expropriation will promote the Board's objectives under s. 1 of the Act to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service and facilitate the maintenance of a financially viable electricity industry because the expropriation

is needed to connect the generating capacity from the Wolfe Island Wind Plant to the provincial transmission grid. “ (para. 11)

The Applicant further submitted that section 8(3) of the *Expropriations Act* required the Board as the approving authority² certify its approval of the expropriation in the form prescribed by Ontario Regulation 363 under the *Expropriations Act*.

As part of the pre-filed evidence CREC filed a draft Plan of Survey, prepared by Leslie M. Higginson Surveying Limited (attached at Tab 6 of the Pre-Filed Evidence). In its argument-in-chief CREC filed another plan of survey from Leslie M. Higginson Surveying Limited (“Expropriation Plan”). CREC asked that the Board, pursuant to s. 1(5) of Regulation 363, endorse a Certificate of Approval on the Expropriation Plan intended for registration. CREC has inscribed the certificate of approval on the Expropriation Plan in the following terms:

² The Board is the approving authority pursuant to s. 5(5) of the *Expropriations Act*.

“Certificate of Approval

The Ontario Energy Board hereby Certifies that approval was given to Canadian Renewable Energy Corporation on the _____ day of _____, 2008, to expropriate a permanent easement through the lands designated as Part 1 and Part 2 on this plan (the Easement Lands) for the surveying, construction, installation, operation, use, inspection, patrol, removal, replacement, alteration, reconstruction, repair, renewal, movement and maintenance of underground cables and wires, conduits, conduit structures, markers, manholes, fixtures, and equipment and all appurtenances thereto as Canadian Renewable Energy Corporation may from time to time deem requisite for the purpose of electric transmission services together with the free and unimpeded right of ingress and egress at any time and at all times over, along, upon, under and through the Easement Lands and over the other lands of the owners of the Easement Lands as are open for passage or not improved with buildings and structures by Canadian Renewable Energy Corporation, its servants, agents, employees, those engaged in its business, contractors, and subcontractors, on foot and/or with vehicles, supplies, machinery and equipment necessary or incidental to the exercise and enjoyment of the rights, privileges and easements transferred.”

Submissions by the Martin Group

The Martin Group, in its submissions put forward the following questions:

- How does the Ontario Energy Board makes its decision for expropriation?
- What is section 99 of the Ontario Energy Board Act 1998, S.O. 1998, C. 15 (Schedule B) (the “Act”)?
- Why is it the Board’s opinion that it is in the public interest to expropriate our land?
- Please explain subsection 99(5) of the Act?

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- Why is the Board able to recommend expropriation but it is not involved with compensation?
- Please explain section 100 of the Act and section 27 of the Expropriation Act.
- Please also explain how the Ontario Municipal Board process works.

The Martin Group raised land use planning and routing issues and asked "...is it in the public's best interest to keep our electricity and utilities services in one utility path instead of having it strung out all over..."

If the Board approved this expropriation for easement, the Martin Group submitted that it should only be done for a single 20 year period and then reverted back to no encumbrances or easements. It should not be a permanent easement.

Applicant's Reply Submissions

In its reply submission dated, July 8, 2008, the Applicant noted that the Martin Group mostly reiterates the concerns expressed orally during the Leave to Construct hearing that was held in Kingston on September 24, 2007.

CREC requested that the Board deny the request that the expropriation be limited to only a 20 year period. The Applicant argued that granting this request would limit the useful life of both the transmission line and the wind plant that the transmission line serves. The Applicant supported this position by pointing out that limiting the useful life of the transmission line to 20 years would not be in line with the Board's statutory objective in s. 1(1).2 of the Act and Ontario's 2005 Provincial Policy Statement. The Applicant also noted that the expected useful life of the wind plant is 40 years and that once CREC's 20 year energy supply agreement with the Ontario Power Authority expires the electricity generated from the Wolfe Island Wind Plant CREC may be transmitted into the Ontario system using various arrangement that may be made.

THE BOARD'S AUTHORITY AND FINDINGS

The Legislative Scheme

The exercise of the Board's powers is informed by the objectives contained in the Act.

The objectives in relation to electricity are found in subsection 1(1) which reads as follows:

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

The Board derives its authority to deal with matters of expropriation under section 99 of the Act.

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).
- (2) The Board shall set a date for the hearing of the application, but the date shall not be earlier than 14 days after the date of the application.
- (3) The applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land.
- (4) Repealed.
- (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.

Prior Board and Court Decisions Involving the Public Interest

Section 99 (5) of the Act provides that 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.

This Board has previously considered the phrase “the public interest”. In one decision the Board noted:

Clearly there are no firm criteria for determining the public interest which would hold good in every situation. Like 'just and reasonable' and 'public convenience and necessity', the criteria of public interest in any given situation are understood rather than defined, and it may well not serve any purpose to attempt to define these terms too precisely. Rather, it must be left to those who have to arrive at a conclusion to strike the balance of puts and takes, pluses and minuses, that at the particular point in time are considered appropriate.

The public interest is dynamic, varying from one situation to another, if only because the values ascribed to the conflicting interests alter. It follows that the criteria by which the public interest is served may also change according to the circumstances.³

In another decision, the Board made the following observations regarding the definition of “the public interest”:

In the opinion of the Board, the public interest can only be more particularly defined by examining the facts and nature of the situation in which the test is to be used. The public interest will consistently take the form of the facts to which it is applied, moulding itself to the specific use to which it is to be put.

Having determined that the public interest is not generally definable, the Board would add that in spite of its elusiveness, when it is applied to a specific set of facts the reasonable man of the common law has no trouble determining if a particular act meets the test. A transmission tower, by this test, might be located in a productive, peaceful countryside, in spite of the residents' objections, if the tower is found to be in the public interest of a nearby population centre. The public interest of the urban residents may be said to outweigh the local interests of the rural public in those circumstances.

Lord Coke put it succinctly when he wrote: 'The law prefers the public good to the

³ 2 E.B.R.O 1985, cited in Robert W. Macaulay, Q.C. and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, Vol. 1, Ch. 8, “The Public Interest”, p. 8-4. The cite for the decision, taken verbatim from the textbook, is incomplete.

private good, and if it has to choose between prejudice to the many and mischief particular to the individuals, the individuals must suffer.⁴

In *Union Gas Ltd. v. Township of Dawn* the Divisional Court dealt with an appeal of a Board decision made in the public interest, and in its reasons stated: “The words ‘in the public interest’...would seem to leave no room for doubt that it is the broad public interest that must be served.”⁵

As noted previously, section 99 (5) of the Act provides that 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.

As was stated in its prior decisions, in forming this opinion the Board cannot rely on predetermined criteria and must consider the specific facts and circumstances of the case before it.

The Board must take into account the objects and purposes of its 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.

The Board finds that the landowners (as represented by the Martin Group) have been treated fairly throughout the expropriation process. They were notified of the route selection process and had an opportunity to participate in it; similarly, they were properly notified of and participated in this hearing. While the Martin Group may disagree with the route selected and the decision to issue an order expropriating certain of its lands, the Board is satisfied that the processes have been fair. The Board notes that the Martin Group’s procedural questions (both in its letter of intervention and its submission) were addressed by Board staff through telephone communications throughout the proceeding, including a call on July 3, 2008.⁶

⁴ Re E.B.O, 118, 119, reported January 1985, cited in Robert W. Macaulay, Q.C. and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, Vol. 1, Ch. 8, “The Public Interest”, p. 8-5.

⁵ [1997] O.J. No. 2223 (Div. Ct.), para. 29,

⁶ Communications between Board staff and the Martin Group are documented in the Board’s letter of July 15, 2008 to Mr. Martin.

The only substantive issues raised by the Martin Group were with respect to the route selection which has already been approved by the Board, and the term of the easement. As the Board stated in Procedural Order No. 1:

The Board notes that the route of the approved transmission line was previously approved in the EB-2007-0034 proceeding. That proceeding was conducted by way of an oral hearing held in Kingston on September 24, 2007. The Martin Group and Mr. Paul Martin, as an intervenor, participated actively at the oral hearing in Kingston. The Martin Group cross-examined the CREC witnesses and provided submissions on the issues of construction and routing impacts of the transmission line on the affected properties. Because the route has already been approved in a prior proceeding, ***routing is not within the scope of this expropriation proceeding.*** (emphasis added)

The Board has previously determined that the route is appropriate and that the Applicant should be granted leave to construct. The Board therefore concludes that it is in the public interest for the expropriation to be granted in order that the Applicant may be able to complete the project.

With respect to the term of the easement, the Board finds that a permanent easement is appropriate. It would not be in the public interest to require the Applicant to remove its underground facilities after a period of 20 years and face the expense and uncertainty of negotiating an extension to the easement agreement or applying for another approval to expropriate.

The Board finds that the terms proposed by the Applicant for the certificate of approval on the Expropriation Plan are appropriate.

Conclusion

The Board finds that, in this case the broader public interest of constructing the electricity transmission line to connect the wind plant on Wolfe Island outweighs the private interests of the landowners affected by the easements requested by the Applicant. The Board is of the opinion that the expropriation of the lands is in the public interest and will make an order authorizing the expropriations.

THE BOARD ORDERS THAT:

1. The Applicant is permitted to expropriate:
 - a. a permanent easement through land owned by Carylanne Martin, being part of Lot 10, Concession 2, in the City of Kingston (formerly the Geographic Township of Kingston) in the County of Frontenac having an approximate area of 101 square meters, designated as Part 1 on a plan of survey obtained from Leslie M. Higginson Surveying Limited, to be registered upon certification by the Ontario Energy Board as approving authority, pursuant to s. 9(1) of the *Expropriations Act*; and
 - b. a permanent easement through land owned by R. Paul Martin Construction Co. Ltd., being part of Lot 10, Concession 2, in the City of Kingston (formerly the Geographic Township of Kingston) in the County of Frontenac having an approximate area of 104 square meters, designated as Part 2 on a plan of survey obtained from Leslie M. Higginson Surveying Limited, to be registered upon certification by the Ontario Energy Board as approving authority, pursuant to s. 9(1) of the *Expropriations Act*.
2. Parties that were found eligible for an award of costs in this proceeding shall submit their cost claims **15 days of the date of this Decision**. A copy of the cost claim must be filed with the Board Secretary and one copy is to be served on CREC. The cost claims must be done in accordance with section 10 of the Board's *Practice Direction on Cost Awards*.
3. CREC shall have **30 days of the date of this Decision** to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board

Secretary and one copy must be served on the party against whose claim the objection is being made.

4. The party whose cost claim was objected to will have **45 days of the date of this Decision** to make a reply submission as to why its cost claim should be allowed. Again, a copy of the submission must be filed with the Board Secretary and one copy is to be served on CREC.
5. CREC shall pay the Board's costs of the proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, July 18, 2008

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary