National Energy Board

Office national de l'énergie

File OF-Fac-Oil-E101-2012-10 02
3 June 2015

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Dear Mr. Robertson, Mr. Ho and Mr. Crowther:

Line 9B Reversal and Line 9 Capacity Expansion Project (the Project)
Application from the Chippewas of the Thames First Nation seeking a stay of Board Order OH-002-2013 (Stay Application)

On 21 May 2015, the Chippewas of the Thames (Chippewas FN) applied pursuant to subsection 47(2) of the *National Energy Board Rules of Practice and Procedure, 1995* (the Rules)[1] on an urgent and expedited basis to request that the National Energy Board (the Board):

1. issue an interlocutory order staying Order OH-002-2013[2] pending the appeal of that Order to the Federal Court of Appeal which is scheduled to be heard on June 16, 2015; and
2. grant any other relief that it considers appropriate in the circumstances.

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[1] SOR/95-208.
[2] Chippewas FN sought a stay of Order OH-002-2013. However, that Order is a Hearing Order that set out the Board's process for considering Enbridge's application for authorization for the Project. The Board has considered the Stay Application as a request to stay Reasons for Decision OH-002-2013, including Order XO-E101-003-2014, which was issued pursuant to that decision. This letter hereinafter refers to the OH-002-2013 Reasons for Decision and Order XO-E101-003-2014 as the "Order."

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On 22 May 2015, the Board set out a process for considering the Stay Application. Enbridge Pipelines Inc. (Enbridge) had the opportunity to respond to the Stay Application by noon (Calgary time) 26 May 2015 and Chippewas FN had the opportunity to respond to Enbridge's reply submissions by 4:00 p.m. (Calgary time) 27 May 2015.[3]

Position of the Parties

Chippewas FN asked that the Board issue its decision on the Stay Application by 29 May 2015. It noted that a request from Enbridge for leave to open the Project has been filed. Chippewas FN argued that the Stay Application satisfies the tri-partite test for a stay set out by the Supreme Court of Canada[4] for, among other reasons:

1. there is a serious issue to be determined – Chippewas FN claims that its appeal is of significant importance to it and that the Crown's constitutional duty to meaningful consult in good faith is a serious issue. It contends that the Board's failure to properly assess and consider the seriousness of the Chippewas FN's Aboriginal and Treaty rights and the impact of the infringement of those rights amounts to an error of law. Chippewas FN noted that if the Order were not stayed, then Chippewas FN's pending appeal would be rendered moot;

2. it would suffer irreparable harm if the stay were not granted – Chippewas FN contends that if a stay were not granted before the 16 June 2015 hearing of its appeal, and Enbridge were granted leave to open the Project, then it would not have means to obtain the relief it requests from the Federal Court of Appeal and its appeal would be moot. It contends that the loss of requested relief constitutes irreparable harm because the unique opportunity to accommodate their constitutionally protected rights will be lost and also because of any adverse impact on its Aboriginal and Treaty rights that may result. It noted that once the pipeline is operational, the expectation of consultation by the Crown and an opportunity for a complete examination of the manner in which the Applicants Aboriginal and Treaty rights can be accommodated will have passed; and

3. the balance of convenience favours the granting of a stay – Chippewas FN submits that the public interest in the reconciliation of Aboriginal rights with the assertion of Crown sovereignty favours granting a stay. It notes that Enbridge has not yet been granted leave to open the Project and that the requested stay may not cause any inconvenience to Enbridge because it might not obtain leave to open the pipeline before 16 June 2015.

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[3] Chippewas FN's reply argument to Enbridge was filed on 1 June 2015. The 1 June 2015 filing was attributable to separate administrative errors committed by the Board and Enbridge. The Board considers Chippewas FN's reply to have been filed in a timely manner consistent with its process letter.

[4] *Manitoba (A.G) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

In response, Enbridge submitted that the Stay Application is abusive and prejudicial to Enbridge and failed to satisfy the tri-partite test. Enbridge noted that there was no explanation about why the Stay Application was filed more than one year after the Board issued the Order and Chippewas FN's leave to appeal application was filed. Enbridge cited *Eli Lilly Canada Inc. v. Apotex Inc.*,[5] where the Court dismissed a stay application that was delayed without justification for more than one year.

Enbridge contended that Chippewas FN failed the tri-partite test for a stay because:

1. Chippewas FN failed to show that it would be irreparably harmed if a stay were not granted. It cited *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*,[6] for the proposition that speculation, assumption and fear cannot support the granting of a stay. Enbridge contended that Chippewas FN did not explain what, if any, of its rights could be impacted or how an opportunity to accommodate those rights would be lost if the reversed flow operation of an existing pipeline were allowed while its appeal was heard. Enbridge claimed that the Board's decision to grant leave to open would have no impact on the expectation of Crown consultation or whether a potential impact to Chippewas FN's Aboriginal and Treaty rights could be accommodated; and

2. the balance of convenience favours dismissing the Stay Application. Enbridge asserted that the balance of convenience should account for ascertainable members of the public, and in particular Valero Energy Inc. (Valero). Enbridge noted that Valero is a committed shipper on the reversed Line 9B that has made significant investments in anticipation of receiving deliveries. Enbridge noted that Valero is therefore incurring significant monthly expenses and had a stay been granted, steps could have been taken to mitigate them.

In reply, Chippewas FN contended that it properly submitted an application for a stay pursuant to subsection 47(2) of the Rules. It noted that the Rules are silent on setting out a time limit for a stay and contended that there is no requirement on a party to expeditiously file an application for a stay. Chippewas FN further noted that the filing of an application for a stay in this proceeding was somewhat delayed by the prejudice discussions that took place between it and Enbridge. Therefore, Chippewas FN said that it had justification for its delay.

Chippewas FN stated that the timing of its stay application was not prejudicial to Enbridge because the stay requested is minimal – until the appeal is heard on 16 June 2015. Chippewas FN pointed out that it is currently uncertain whether the Board would grant Enbridge leave to open the Project before that date. Chippewas FN submitted that Enbridge does not suffer any prejudice if leave to open is not granted in advance of the appeal date. Chippewas FN indicated that because the date the Board will grant leave to open the pipeline is uncertain, the parties are unable to determine what, if any, prejudice such a stay would have on Enbridge or the Canadian public.

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[5] 2009 FCA 65.
[6] [2007] O.J. No 1841.

Chippewas FN noted that the test for an interlocutory injunction does not properly consider Aboriginal rights and interests.[7] Chippewas FN noted that in considering the balance of convenience the NEB should uphold the duty and honour of the Crown to protect Chippewas FN's constitutional rights versus the potential prejudice to Enbridge if a stay were granted.

Board Decision

The Board has decided to dismiss the Stay Application for the reasons that follow.

In the Board's view, Chippewas FN failed to adequately explain its delay in making the Stay Application. That application was filed over one year since the Order was issued.[8] While Chippewas FN indicated in its reply submission that without prejudice discussions "somewhat" delayed its Stay Application, the explanation does not set out:

1. when the without prejudice discussions took place. Therefore, the Board could not determine the length of delay attributable to the without prejudice discussions; or

2. how the without prejudice discussions constrained Chippewas FN's ability to bring the Stay Application. It would have been helpful to know, in general terms, whether the without prejudice discussions were taking place on the condition that Chippewas FN refrain from making a stay application.

It is impossible for the Board to determine how much, if any, of the delay can be attributable to the without prejudice discussions based on Chippewas FN's submissions.

It is the Board's view that delay can be a defence to a stay applicant even though Rule 47(2) does not set out time limit for applicants to make a stay application. This is especially the case when the stay applicant's delay is accompanied by prejudice to the respondent.[9] The most common form of prejudice involves a respondent to a stay application incurring an expense or liability, such as spending money to erect buildings or improve property.[10] Here, after the Order was issued, Enbridge incurred the cost associated with construction and modification of facilities authorized by the Order. Had the stay application been brought in a timely manner, the cost and work associated with the Project may have been avoided.

The Board is not persuaded that Chippewas FN would suffer irreparable harm if the stay were not granted. Chippewas FN claims that its appeal would be moot in the absence of a stay, but did not explain how this would be the case. All physical facility construction and modification

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[7] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
[8] The Order was issued on 6 March 2014, leave to appeal was obtained 4 June 2014, and Chippewas filed its application for a stay on 21 May 2015.
[9] Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (consulted on 2 June 2015), (Toronto, Ontario: Canada Law Book, 2013), ch. 1 at 1-38 to 1-50.
[10] *Ibid*. at 1-44.

required to bring the project into service has already taken place. If a stay were not granted and Chippewas FN were successful on appeal, such that a Court ordered Line 9B to cease operation, Chippewas FN would be in its current position: an already constructed pipeline would remain in its current location and would not be in operation.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board