BEFORE THE NATIONAL ENERGY BOARD

IN THE MATTER OF AN APPLICATION BY
CHIPPEWAS OF THE THAMES FIRST NATION
PURSUANT TO PART III OF THE
NATIONAL ENERGY BOARD RULES OF PRACTICE AND PROCEDURE,
***1995* AND SECTION 22(1) OF THE**
NATIONAL ENERGY BOARD ACT
TO STAY THE ORDER OF THE NATIONAL ENERGY BOARD, OH-002-2013,
PENDING THE OUTCOME OF AN APPEAL BEFORE THE FEDERAL
COURT OF APPEAL

CHIPPEWAS OF THE THAMES REPLY TO ENBRIDGE INC.

01 JUNE 2015

A. APPLICATION PROPERLY SUBMITTED UNDER THE RULES

[1] Contrary to Enbridge Inc.'s response Chippewas of the Thames First Nation (Chippewas of the Thames) have properly submitted an application for a stay in accordance with Part III, Section 47(2) of the *National Energy Board Rules of Practice and Procedure* (the *Rules*).

[2] Contrary to Enbridge's claim, there is no time limit for an application to stay and therefore Chippewas of the Thames should not be prejudiced by the timing of filing the within application.

[3] Section 47(2) of the *National Energy Board Rules of Practice and Procedure* sets out the process for applying for a stay:

> (2) Where an application for leave to appeal to the Federal Court of Appeal pursuant to subsection 22(1) of the Act has been made, any party may apply to the Board for an order staying the decision or order in respect of which leave to appeal is sought, pending the outcome of the appeal.

[4] The *Rules* are silent on setting out a time limit for filing an application for a stay. As such there is no requirement on a party to expeditiously file an application for a stay. Moreover, the filing of the application for a stay in this proceeding was somewhat delayed on account of the "Without Prejudice" discussions that took place between Chippewas of the Thames and Enbridge.

[5] Unlike the decision that Enbridge relies on to support its claim for undue delay (*Eli Lilly Canada Inc. v Apotex Inc.*, 2009 FCA 65), the Chippewas of the Thames have justification for the delay in seeking a stay and Enbridge is a party to that delay.

B. NO PREJUDICE TO ENBRIDGE

[6] The filing of Chippewas of the Thames' application for a stay at this time is not prejudicial to Enbridge indeed the opposite is true since the stay requested is minimal in the amount of time required. The Appeal is to be heard on June 16, 2015.

[7] In addition, as set out in the application for a stay, it is unknown at this time if the NEB will grant Enbridge leave to open the pipeline prior to the Appeal date. If leave to open the pipeline is not granted in advance of the Appeal there is no prejudice to Enbridge whatsoever.

[8] Enbridge claims that in the balance of convenience, the NEB should consider the impact of a stay on the Canadian public. Chippewas of the Thames does not take issue with the effects of the stay on the Canadian public but rather that Canada failed to conduct a meaningful consultation process.

[9] As set out by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, the test for interlocutory injunctions does not properly consider Aboriginal rights and interests:

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 31, and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after Delgamuukw: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination. (emphasis added).

[10] In considering the balance of convenience the NEB should uphold the duty and honour of the Crown to protect Chippewas of the Thames constitutional rights versus the potential prejudice to Enbridge if a stay is granted pending the Appeal.

C. THE NEB SHOULD GRANT THE APPLICATION FOR A STAY

[11] The NEB should grant the Chippewas of the Thames' application for a stay. Enbridge's contrary submissions fail to address the reason for this application namely, that Chippewas of the Thames will not be able to seek the relief requested on Appeal if Enbridge is granted leave to open its pipeline prior to the Appeal being heard.

[12] The honour and expectation of Crown consultation and the potential impact to the constitutionally protected Aboriginal and Treaty rights of Chippewas of the Thames is the subject of the pending Appeal.

[13] At this point in the proceedings the opportunity for Chippewas of the Thames to be meaningfully consulted and accommodated by the Crown, prior to Enbridge being granted leave to open the pipeline, can only be ordered by the Federal Court of Appeal. In the event the NEB's Order is not stayed Chippewas of the Thames' pending Appeal would essentially be rendered moot.

[14] Rather than risk the Chippewas of the Thames losing the right to Appeal a decision of the NEB that infringes their Aboriginal and Treaty rights, the NEB should grant the stay application and await the outcome of the pending Appeal. At this point in time, the Parties are uncertain as to when Enbridge will be granted leave to open the pipeline. Therefore, the Parties are not able to determine what if any prejudice such a stay would have on Enbridge or the Canadian public.

[15] The timing of Chippewas of the Thames' application does not impact the necessity for granting the requested stay and therefore does not provide justification for denying the stay as claimed by Enbridge.

[16] All of which is respectfully submitted.

Dated at Rama First Nation this 1ST day of June, 2015

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