



EB-2007-0051
EB-2007-0050

IN THE MATTER OF the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF an Application by Hydro One Networks Inc., pursuant to subsection 98 of the *Ontario Energy Board Act, 1998*, for an Interim Order granting access to land in connection with the Applicant's request for leave to construct a new transmissions line in southwestern Ontario and the Greater Toronto Area, from Bruce Power Complex on Lake Huron to the town of Milton.

**BOARD STAFF'S RESPONSE TO MOTIONS FILED BY
POWERLINE CONNECTIONS AND LANDOWNERS REPRESENTED
BY FALLIS FALLIS & McMILLAN**

Introduction

1. On March 29, 2007, Hydro One Networks Inc. ("Hydro One" or the "applicant") filed a leave to construct application (the "section 92 application" or the "leave to construct application") pursuant to section 92 of the *Ontario Energy Board Act, 1998* (the "Act"). On March 30, Hydro One filed an application for an interim order for access to land pursuant to section 98 of the Act (the "section 98 application" or the "access to land application").
2. On June 11, 2007, preliminary motions (the "Motions")were filed by Powerline Connections and landowners represented by Fallis Fallis & McMillan ("Fallis") (together the "Moving Parties") relating to the application for early access to land pursuant to s. 98 of the Act by Hydro One. Procedural Order No. 1 requires that all parties wishing to respond to these motions must file written responses with the Ontario Energy Board (the "Board") by June 18, 2007. The following is the submission of Board staff.

3. The Motions request several forms of relief from the Board. Board staff will limit its submissions to the request made by both Motions that the section 98 proceeding be stayed or dismissed.

The Grounds for a Stay as Described in the Motions

4. Powerline Connections request for a stay is grounded in its view that the section 98 application is premature. Its motion record sets out 5 reasons why the application is premature:
 - a) No attempt has been made to negotiate a voluntary Permission to Enter agreement with the directly affected landowners;
 - b) The EA process is far from complete and the TOR have not yet been made public. Moreover, meaningful study of alternative routes is lacking and Hydro One intends to promote a route it has already selected, despite the EA requirement that there be discussion on that very issue;
 - c) The Board has not yet completed its review of the Ontario Power Authority's IPSP as required by section 25.30(5) of the *Electricity Act, 1998*;
 - d) The Minister's Letter explicitly mandated that the IPSP comply with O. Reg. 424/04, which in turn mandated that all IPSPs comply with the *Environmental Assessment Act*. The OPA does not have the authority to advance projects that do not comply with O. Reg. 424/04 or the *Environmental Assessment Act*;
 - e) No expropriation proceeding has been commenced under either the *Ontario Energy Board Act*, or the *Expropriations Act*, and therefore provide no assistance to Hydro One in its efforts to gain access to the lands of the directly affected landowners. The request for early access for the purpose of property appraisal is premature and contrary to the procedure set out in s. 10(3) of the *Expropriations Act*.
5. The Fallis motion requests 13 orders from the Board, the first of which is an order staying both the section 98 and section 92 proceedings. The individual grounds for the motion as set out starting on page 5 of the motion record are not specifically referenced to the individual orders requested. For this reason, it is not possible to determine exactly which grounds are meant to be in support of the request for an order staying the proceedings. The Fallis motion, however, appears to be in agreement with the Powerline Connections

motion in that it suggests the Hydro One section 98 application is premature. In particular, the Fallis motion notes that the Environmental Assessment has not been completed.

The Statutory Framework

6. Section 98 of the Act states:

98. (1) The following persons may enter on land at the intended location of any part of a proposed work and may make such surveys and examinations as are necessary for fixing the site of the work:

1. Any person who has leave under this Part or a predecessor of this Part to construct the work.
2. Any person who is exempted under section 95 from the requirement to obtain leave to construct the work.
3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
4. The officers, employees and agents of a person described in paragraph 1, 2 or 3.

Interim order

(1.1) The Board may, upon application, issue an interim order authorizing a person and the officers, employees and agents of that person to enter on land at the intended location of any part of a proposed work and to make such surveys and examinations as are necessary for fixing the site of the work and as are specified in the order if,

- (a) the person has applied for leave under section 90 or 92 and has complied with section 94;
- (b) the person has applied to the Board for an exemption under section 95;
or
- (c) the Board has commenced a proceeding to determine whether to require the person, pursuant to a condition of the person's licence, to expand or reinforce a transmission or distribution system.

Damages

(2) Any damages resulting from an entry onto land carried out under subsection (1) or pursuant to an order under subsection (1.1) shall be determined by agreement or, failing agreement, in the manner set out in section 100.

The Test for a Stay Application

7. The granting of a pre-hearing stay is an unusual remedy that has rarely been ordered by the Board. In the civil context, the case law suggests that the power to stay a proceeding should be exercised sparingly and only in the clearest of cases.
Canadian Express Ltd. v. Blair., [1995] O.J. No. 2029 (Gen. Div.)
8. The granting of a stay amounts to a finding by the Board that there is a flaw in the application that is so serious the case cannot continue at the current time.
9. The Motions are grounded in the assertion that Hydro One has not completed certain requirements relating to the *Environmental Assessment Act*, the IPSP, and the *Expropriations Act*. There is no legal requirement, however, that the section 98 application be delayed for either an Environmental Assessment, the completion of the IPSP, or the filing of an application pursuant to the *Expropriations Act*.
10. There is only one formal requirement in order to file a section 98 application: the applicant must first have filed an application pursuant to section 92 of the Act.
11. A completed Environmental Assessment may be a requirement before an applicant is granted a final leave to construct approval under section 92 of the Act, but there is no requirement that the Environmental Assessment be completed prior to the filing of a section 98 application.
12. With regard to the IPSP, neither the section 98 nor the section 92 applications have been filed pursuant to the IPSP. There is no requirement in any legislation that Hydro One must await the outcome of the IPSP before filing leave to construct applications. The requirements surrounding the IPSP, therefore, do not apply to the applications currently before the Board.
13. With regard to the arguments by moving parties that request for access for the purpose of appraisal is premature because no application has yet been filed under the *Expropriations Act*, this appears to be a matter that can be addressed through the hearing itself. If the Moving Parties are successful in

making this argument at the hearing, then the Board can attach appropriate conditions to ensure that the early access to land is not used for the purpose of conducting an appraisal.

The Rules of Civil Procedure

14. Neither the Act nor the Board's Rules of Practice and Procedure have any provisions relating to requests for a pre-hearing stay. In light of this, it is helpful to review the practice before civil courts. Section 106 of the *Courts of Justice Act* and Rule 21.03 of the Rules of Civil Procedure relate to requests for stays. Section 106 states:

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Rule 21.01(3) states:

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

(a) the court has no jurisdiction over the subject matter of the action;

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

15. Although the statutes and rules relating to civil proceedings are not binding on the Board, it is submitted that they can assist the panel in its consideration of this issue in the absence of direction from the Board's own statute or rules.
16. The Rules make it clear that in civil proceedings pre-trial stays will be granted only under certain specific circumstances. It appears that none of these circumstances apply in the present case.
17. None of the grounds in the Motions appear to relate to the grounds set out in Rules 21.01(3)(a), 21.01(3)(b), or 21.01(3)(d).

18. The Moving Parties may suggest that the Hydro One applications are already the subject of other proceedings in Ontario: namely, the Environmental Assessment and the yet to be filed IPSP application. It is the view of the Moving Parties that the section 98 application should await the completion of these proceedings.
19. As noted above, however, both the Environmental Assessment and the IPSP are separate proceedings, and there is no requirement that the applicant await the outcome of either prior to filing its section 98 application.

Conclusion

20. A stay (or dismissal) is an unusual remedy that should be granted only in the clearest of cases. There is no legal requirement that the applicant await the outcome of the Environmental Assessment, the IPSP, or file an application under the *Expropriations Act* prior to having its section 98 application considered by the Board. That is not to say that some of the issues raised by the Moving Parties in support of their request for a stay will not be relevant in the section 98 hearing. All parties will be entitled to make their submissions, and the Board will make its ultimate determination based on those submissions and the evidence before it. It is not appropriate, however, to stay the proceedings at this stage. The applicant has met the legal requirements in filing its application. The ultimate decision regarding whether or not granting the application is appropriate will be considered at the completion of the hearing.

Request for Stay in the Section 92 Proceeding

21. Both Moving Parties requested that the section 92 proceeding be stayed as well, relying on essentially the same grounds that were presented in requesting the stay of the section 98 proceeding. For the reasons listed above, Board staff is also opposed to the granting of a stay in the section 92 proceeding.