

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B; and in particular sections 36.1(1), 38(1), 38(3), 40(1), 90(1), thereof;

AND IN THE MATTER OF an Application by Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (collectively the “Applicants”) for an Order or Orders granting leave to construct a natural gas transmission pipeline in the County of Huron and in the County of Middlesex;

AND IN THE MATTER OF an Application by the Applicants for an Order designating the area known as the Bayfield Pool and the Stanley 4-7-XI Pool, in the Geographic Township of Stanley, Municipality of Bluewater, County of Huron, as a gas storage area;

AND IN THE MATTER OF an Application by the Applicants for authority to inject gas into, store gas in and remove gas from the areas designated as the Bayfield Pool and the Stanley 4-7-XI Pool;

AND IN THE MATTER OF an Application by the Applicants for a license to drill wells in the said areas;

AND IN THE MATTER OF an Application by the Applicants for the determination of just and equitable compensation payable to any owner of any gas or oil rights or the right to store gas within the Bayfield Pool and the Stanley 4-7-XI Pool with whom the Applicant does not have an agreement, and compensation for damage resulting from the exercise of the authority given by the order sought under section 38 of the said Act;

AND IN THE MATTER OF the eligibility of the Corporation of the Municipality of Bluewater for an award of costs.

MOTION RECORD

THE CORPORATION OF THE MUNICIPALITY OF BLUEWATER

**MOTION FOR REVIEW OF BOARD DECISION ON COST AWARDS
ISSUED BY LETTER 14 JUNE 2011**

FILED 4 JULY 2011

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Board Secretary

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Tab 1

EB-2011-0076

EB-2011-0077

EB-2011-0078

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B; and in particular sections 36.1(1), 38(1), 38(3), 40(1), 90(1), thereof;

AND IN THE MATTER OF an Application by Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (collectively the “Applicants”) for an Order or Orders granting leave to construct a natural gas transmission pipeline in the County of Huron and in the County of Middlesex;

AND IN THE MATTER OF an Application by the Applicants for an Order designating the area known as the Bayfield Pool and the Stanley 4-7-XI Pool, in the Geographic Township of Stanley, Municipality of Bluewater, County of Huron, as a gas storage area;

AND IN THE MATTER OF an Application by the Applicants for authority to inject gas into, store gas in and remove gas from the areas designated as the Bayfield Pool and the Stanley 4-7-XI Pool;

AND IN THE MATTER OF an Application by the Applicants for a license to drill wells in the said areas;

AND IN THE MATTER OF an Application by the Applicants for the determination of just and equitable compensation payable to any owner of any gas or oil rights or the right to store gas within the Bayfield Pool and the Stanley 4-7-XI Pool with whom the Applicant does not have an agreement, and compensation for damage resulting from the exercise of the authority given by the order sought under section 38 of the said Act;

AND IN THE MATTER OF the eligibility of the Corporation of the Municipality of Bluewater for an award of costs.

NOTICE OF MOTION

THE CORPORATION OF THE MUNICIPALITY OF BLUEWATER, a Party in this proceeding, will make a Motion to the Board, pursuant to Rules 1.03, 7.01, 7.02, 8.01, 8.02, 42.01, 42.03, 43.01, and 44.01(a) of the Board’s Rules of Practice and Procedure, for review of the Board’s Decision on intervenor status and cost eligibility dated the 14th of June 2011, on a

date and time to be determined by the Board, at the Board's hearing room on the 25th floor of 2300 Yonge St., Toronto, Ontario, M4P 1E4.

PROPOSED METHOD OF HEARING, THE CORPORATION OF THE MUNICIPALITY OF BLUEWATER requests the motion be in writing.

THE MOTION IS FOR AN ORDER

1. That the Board review and vary parts of the Decision on the Corporation of the Municipality of Bluewater's cost eligibility determining that:
 - (a) The Corporation of the Municipality of Bluewater is eligible for a costs award in this proceeding;
 - (b) The Corporation of the Municipality of Bluewater represents a public interest; and
 - (c) The Corporation of the Municipality of Bluewater is a person with an interest in land that is affected by the process.
2. Costs of this motion; and
3. Such further and other relief as counsel may request and that may seem just to the Board.

THE GROUNDS FOR THE MOTION ARE:

Background

4. Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. filed applications with the Ontario Energy Board (the "OEB") dated September 22, 2009, EB-2009-0338, EB-2009-0339, EB-20090340 (the "Tribute 2009 Applications").

5. The OEB issued Procedural Order No. 1, dated February 9, 2010, granting intervenor status and cost eligibility to the Corporation of the Municipality of Bluewater (the “February 2010 OEB Decision”).
6. The Corporation of the Municipality of Bluewater submitted its cost claims in relation to the Tribute 2009 Applications. The OEB issued Decision and Order on Cost Awards dated July 9, 2010 in relation to the Tribute 2009 Applications, approving the Corporation of the Municipality of Bluewater’s costs claims as filed, and ordering payment in the amount of \$2,608.20 (the “July 2010 OEB Decision”).
7. On March 18, 2011, the OEB accepted Tribute Resources Inc.’s request to withdraw the Tribute 2009 Applications.
8. Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. filed applications with the OEB dated April 20, 2011, EB-2011-0076, EB-2011-0077, EB-2011-0078 (the Tribute 2011 Applications”).
9. The Tribute 2011 Applications are fundamentally the same as the Tribute 2009 Applications.
10. On June 1, 2011, The Corporation of the Municipality of Bluewater requested intervenor status and requested eligibility for costs.

11. On June 14, 2011, the OEB confirmed the Corporation of the Municipality of Bluewater as a registered intervenor, but denied its eligibility for costs in relation to the Tribute 2011 Applications (the “OEB’s 2011 Eligibility Decision”).
12. The Corporation of the Municipality of Bluewater by motion respectfully requests that the OEB review and vary parts of the Decision on the Corporation of the Municipality of Bluewater’s cost eligibility to order that the Corporation of the Municipality of Bluewater is eligible for costs in respect of the Tribute 2011 Applications.

Threshold Issue

13. Pursuant to Rule 44.01(a) of the OEB’s Rules of Practice and Procedure, the grounds for this motion that raise a question as to the correctness of the OEB’s 2011 Eligibility Decision include:

- (a) The OEB’s 2011 Eligibility Decision in relation to the Tribute 2011 Applications is directly contradictory to the February 2010 OEB Decision and the July 2010 OEB Decision, despite being in relation to the same parties (the Applicants and the Corporation of the Municipality of Bluewater) and the same subject matter. The rule of law demands consistency of decisions, a demand that has not been met by the OEB’s 2011 Eligibility Decision;

- (b) The OEB's 2011 Eligibility Decision, in error, fails to recognize that the Corporation of the Municipality of Bluewater, as a body corporate, is a landowner directly affected by the Tribute 2011 Applications; and
- (c) The OEB's 2011 Eligibility Decision, in error, misapprehends the role of the Corporation of the Municipality of Bluewater as the municipal representative of the public interest and in error requires the local taxpayers, not ratepayers, to bear the cost of its participation in this process.

Detailed Grounds

Consistency and the Rule of Law

- 14. "[C]onsistency in decision making before any level of Court or Tribunal is a necessary and fundamental component of the rule of law" [Whitaker *et. al.*, *Consistency in Tribunal Decision Making: What Really Goes on Behind Closed Doors...*, Presented to the Canadian Institute for Administrative Justice Roundtable, Vancouver, May 4, 2007, hereinafter "Whitaker", at 3].
- 15. "Tribunal consistency in its broadest sense means that similarly situated litigants receive similar treatment and outcomes" [Whitaker, at 3].

16. The Tribute 2011 Applications are fundamentally the same as the Tribute 2009 Applications.
17. The February 2010 OEB Decision granted cost eligibility to the Corporation of the Municipality of Bluewater. This decision was neither appealed nor reviewed.
18. The July 2010 OEB Decision approved the Corporation of the Municipality of Bluewater's cost claims as filed, and ordered payment of costs. This decision was neither appealed nor reviewed.
19. The OEB's 2011 Eligibility Decision in relation to the Tribute 2011 Applications is directly contradictory to both the February 2010 OEB Decision and the July 2010 OEB Decision, despite being in relation to the Applicants and the Corporation of the Municipality of Bluewater, and despite being in relation to the same subject matter.
20. The same litigant, the Corporation of the Municipality of Bluewater, in relation to the same subject matter, the Tribute Applications, should receive the same result, eligibility for costs.

Corporate Nature of the Corporation of the Municipality of Bluewater

21. The Corporation of the Municipality of Bluewater is a body corporate [*Municipal Act, 2001*, s. 4].

22. The Corporation of the Municipality of Bluewater has the powers and obligations of a corporation. It has perpetual succession, can sue and be sued, can contract in its own name, can acquire, hold, and dispose of personal property [*Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 92].
23. The Corporation of the Municipality of Bluewater has the capacity, rights, powers and privileges of a natural person for the purposes of exercising its authority [*Municipal Act*, s. 9].
24. The Corporation of the Municipality of Bluewater, as a corporate body and a natural person has an interest in land that is directly affected by the Tribute 2011 Applications, including lands within the Bayfield Proposed Designated Storage Area (PIN 4152-0159LT and PIN 41452-0160LT), lands adjacent to the Proposed Stanley Designated Storage Area (PIN 41217-0003), and a portion of the road allowance required for the construction of the transmission pipeline (all collectively the “Bluewater Lands”)
25. The OEB’s 2011 Eligibility Decision states that “the use of municipal land is subject to various requirements which are largely within the control of the Municipality directly.” This is incorrect:
- (a) The Corporation of the Municipality of Bluewater is before the OEB as a corporation and a natural person in respect of the Bluewater Lands. The Corporation of the

Municipality of Bluewater falls squarely within the requirement of section 3.03(c) of the OEB Practice Direction on costs as a “person with an interest in land that is affected by the process.” The correct approach, as taken by the OEB in the February 2010 OEB Decision and the July 2010 OEB Decision, grants eligibility for costs to the Corporation of the Municipality of Bluewater for its participation in this process.

- (b) The Applicants are seeking the permission of the OEB, not the Corporation of the Municipality of Bluewater, in respect of the Tribute 2011 Applications that directly impact the Bluewater Lands. The permissions sought by the Applicants are largely within the control of the OEB, not the Corporation of the Municipality of Bluewater.

Role of the Corporation of the Municipality of Bluewater as the Municipal Representative of the Public Interest

26. The OEB’s 2011 Eligibility Decision, in error, misapprehends the role of the Corporation of the Municipality of Bluewater as the municipal representative of the public interest and in error requires the local taxpayers, not ratepayers, to bear the cost of its participation in this process.
27. The purpose of the Corporation of the Municipality of Bluewater is to be responsible and accountable and to provide good government [*Municipal Act, 2001*, s. 2].

28. The Corporation of the Municipality of Bluewater's authority includes powers respecting the economic, social and environmental well-being of the municipality, the health, safety and well-being of persons, and the protection of persons and property within the municipality [*Municipal Act, 2001*, s. 11].
29. To exercise this authority, the Corporation of the Municipality of Bluewater relies on revenues gained primarily from municipal taxation, fees and charges, and grants from senior government.
30. The OEB's 2011 Eligibility Decision states that the "Municipality of Bluewater has access to funds through the collection of taxes, and the board concludes that this constituent-based funding is the appropriate source of funds for participation in this proceeding." This is incorrect:
- (a) Municipal taxation is a regulated regime based on property ownership and assessment, not constituency within a municipality. A tax, fee, or charge imposed on an individual by reason only of his or her presence or residence in the municipality is expressly prohibited by the *Municipal Act, 2001* [*Municipal Act, 2001*, s. 393].
 - (b) A portion of the revenues of the Corporation of the Municipality of Bluewater are derived from fees and charges levied pursuant to section 391 of the *Municipal Act, 2001*. This power is circumscribed in respect of gas producers, distributors,

and storage companies. O. Reg. 584/06 provides that a municipality does not have the power:

to impose a fee or a charge on a generator, transmitter, distributor or retailer, as these terms are defined in section 2 of the *Electricity Act, 1998*, or on a producer, gas distributor, gas transmitter or storage company, as these terms are defined in section 3 of the *Ontario Energy Board Act, 1998*, for services or activities, costs payable or the use of property with respect to wires, cables, poles, conduits, pipes, equipment, machinery or other works that,

- (a) are or will be located on a municipal highway; and
 - (b) are or will be used as part of the business of the generator, transmitter, distributor, retailer, producer, gas distributor, gas transmitter or storage company, as the case may be.
- (c) The OEB's 2011 Eligibility Decision unfairly shifts the burden of the Corporation of the Municipality of Bluewater's participation in this process from the ratepayers, who may ultimately benefit from the works, to the local taxpayers, who may see their local resources and their municipal corporate resources consumed for the benefit of others.

31. Council of the Corporation of the Municipality of Bluewater represents the municipal public interest as described above.

32. The Corporation of the Municipality of Bluewater falls squarely within the requirement of section 3.03(b) of the OEB Practice Direction on costs as a party representing a public interest relevant to the Board's mandate. The correct approach, as taken by the OEB in the February 2010 OEB Decision and the July 2010 OEB Decision, grants eligibility for costs to the Corporation of the Municipality of Bluewater for its participation in this process.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Mr. Roderick R. MacDougall, and attached Schedules, sworn the 29th of June 2011.
2. Such further and other documentary evidence as Counsel may wish to use and the Board may accept.

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Solicitors for the Corporation of the Municipality of
Bluewater

Tab 2

EB-2011-0076
EB-2011-0077
EB-2011-0078

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B; and in particular sections 36.1(1), 38(1), 38(3), 40(1), 90(1), thereof;

AND IN THE MATTER OF an Application by Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (collectively the "Applicants") for an Order or Orders granting leave to construct a natural gas transmission pipeline in the County of Huron and in the County of Middlesex;

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AND IN THE MATTER OF an Application by the Applicants for authority to inject gas into, store gas in and remove gas from the areas designated as the Bayfield Pool and the Stanley 4-7-XI Pool;

AND IN THE MATTER OF an Application by the Applicants for a license to drill wells in the said areas;

AND IN THE MATTER OF an Application by the Applicants for the determination of just and equitable compensation payable to any owner of any gas or oil rights or the right to store gas within the Bayfield Pool and the Stanley 4-7-XI Pool with whom the Applicant does not have an agreement, and compensation for damage resulting from the exercise of the authority given by the order sought under section 38 of the said Act;

AND IN THE MATTER OF the eligibility of the Corporation of the Municipality of Bluewater for an award of costs.

AFFIDAVIT OF RODERICK R. MACDOUGALL

I, Roderick R. MacDougall, of the City of London, County of Middlesex, Province of Ontario, make oath and say as follows:

1. I am a partner in the law firm Strong MacDougall Oudekerk, solicitors in this matter for the Corporation of the Municipality of Bluewater, and as such have knowledge of the matters hereinafter deposed. Where statements are made on information and belief, or

where from the context it appears that I rely upon information provided by others, I verily believe such statements to be true.

2. The Corporation of the Municipality of Bluewater is a municipal corporation incorporated pursuant to the laws of Ontario. Council of the Corporation of the Municipality of Bluewater bears the responsibility of representing the municipal public interest.
3. Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. filed applications with the Ontario Energy Board (the "OEB") dated September 22, 2009, EB-2009-0338, EB-2009-0339, EB-20090340 (the "Tribute 2009 Applications").
4. The OEB issued Procedural Order No. 1, dated February 9, 2010, granting intervenor status and cost eligibility to the Corporation of the Municipality of Bluewater (the "February 2010 OEB Decision"). This decision was neither appealed nor reviewed. Attached hereto and marked as Exhibit "A" is a copy of the February 2010 OEB Decision.
5. The Corporation of the Municipality of Bluewater submitted its cost claims in relation to the Tribute 2009 Applications. The OEB issued Decision and Order on Cost Awards dated July 9, 2010 in relation to the Tribute 2009 Applications, approving the Corporation of the Municipality of Bluewater's costs claims as filed, and ordering

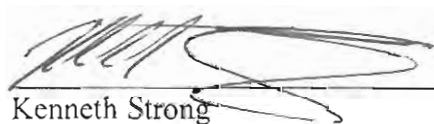
payment in the amount of \$2,608.20 (the “July 2010 OEB Decision”). This decision was neither appealed nor reviewed. Attached hereto and marked as Exhibit “B” is a copy of the July 2010 OEB Decision.

6. On March 18, 2011, the OEB accepted Tribute Resources Inc.’s request to withdraw the Tribute 2009 Applications. Attached hereto and marked as Exhibit “C” is a copy of the letter by the OEB accepting Tribute Resources Inc.’s request to withdraw.
7. Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. filed applications with the OEB dated April 20, 2011, EB-2011-0076, EB-2011-0077, EB-2011-0078 (the Tribute 2011 Applications”).
8. The Tribute 2011 Applications are fundamentally the same as the Tribute 2009 Applications.
9. On June 1, 2011, The Corporation of the Municipality of Bluewater requested intervenor status and requested eligibility for costs. Attached hereto and marked as Exhibit “D” is a copy of this intervenor request.
10. On June 14, 2011, the OEB confirmed the Corporation of the Municipality of Bluewater as a registered intervenor, but denied its eligibility for costs in relation to the Tribute 2011 Applications (the “OEB’s 2011 Eligibility Decision”). Attached hereto and marked as Exhibit “E” is a copy of the decision of the OEB.

11. The OEB's 2011 Eligibility Decision in relation to the Tribute 2011 Applications is directly contradictory to the February 2010 OEB Decision and the July 2010 OEB Decision, despite being in relation to the same parties (the Applicants and the Corporation of the Municipality of Bluewater) and the same subject matter.
12. The Corporation of the Municipality of Bluewater, as a corporate body and a natural person has an interest in land that is directly affected by the Tribute 2011 Applications, including lands within the Bayfield Proposed Designated Storage Area (PIN 4152-0159LT and PIN 41452-0160LT), lands adjacent to the Proposed Stanley Designated Storage Area (PIN 41217-0003), and a portion of the road allowance required for the construction of the transmission pipeline (all collectively the "Bluewater Lands")
13. The permissions sought by the Applicants are largely within the control of the OEB, not the Corporation of the Municipality of Bluewater.
14. To exercise its statutory authority, the Corporation of the Municipality of Bluewater relies on revenues gained primarily from municipal taxation, fees and charges, and grants from senior government. Municipal taxation is a regulated regime based on property ownership and assessment, not constituency within a municipality. A portion of the revenues of the Corporation of the Municipality of Bluewater are derived from fees and charges levied pursuant to section 391 of the *Municipal Act, 2001*. This power is circumscribed in respect of gas producers, distributors, and storage companies.

15. I make this Affidavit in support of a motion to review the OEB's 2011 Eligibility
Decision, and for no other or improper purpose.


Sworn before me at the City of
London, in the County of Middlesex,
This 29th day of June 2011

A handwritten signature in dark ink, appearing to read 'Kenneth Strong', written over a horizontal line.

Kenneth Strong
A Commissioner etc.

A handwritten signature in dark ink, appearing to read 'Roderick R. MacDougall', written over a horizontal line.

Roderick R. MacDougall

This is Exhibit "A" referred to in the affidavit
of RODERICK R MACDONALD
sworn before me, this 29th day of
JUNE, 2011

A Commissioner for Taking Affidavits

24

Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2009-0338
EB-2009-0339
EB-2009-0340

IN THE MATTER OF the Ontario Energy Board Act,
1998, S.O. 1998, c.15, Schedule B; and in particular
sections 36(1), 38(1), 40(1), 90(1).

PROCEDURAL ORDER No. 1

Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (the "Applicants") have filed applications with the Ontario Energy Board, (the "Board") dated September 22, 2009. These applications were subsequently amended on December 15, 2009. The applications were filed under sections 36.1(1), 38(1), 38(3), 40(1) and 90(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "Act") and would, if granted, allow the Applicants to develop natural gas storage pools located in the geographic area of the County of Huron and in the County of Middlesex Ontario (the "Project").

The Board issued a Notice of Application and Hearing dated January 13, 2010
The Board received requests for intervenor and observer status from a number of parties and has determined that it will grant intervenor status to the following: McKinley Farms Ltd. ("McKinley"); 2195002 Ontario Inc. ("Ontario"); Zurich Landowners Association ("Zurich Landowners"); Union Gas Limited ("Union"); Municipality of Bluewater ("Bluewater"); the Huron County Federation of Agriculture ("HCFA"); and Stanley Bayfield Landowners Group ("SBLG").

A number of the parties that requested intervenor status also requested eligibility to claim an award of costs.

On January 27, 2010 the Applicants responded to the Letter of Intervention by McKinley Farms and Ontario. The Applicants did not have any objection to the intervenor status being granted but objected to the cost award eligibility of Ontario. The Applicants submitted that Ontario should not be eligible pursuant to Article 3.05 of the Boards Practice Direction on Cost Award.

On February 5, 2010, Mr. Jed Chinneck, Legal Counsel for McKinley Farms and Ontario replied.

The Board reviewed the submissions by the Applicants and Mr. Chinneck and has determined that it will grant cost eligibility status to Ontario.

The Board will grant cost eligibility to the following: McKinley, Ontario, Zurich Landowners, Bluewater, HCFA and the SBLG.

It should be noted that granting cost eligibility status does not predict in any manner or degree the extent to which the Board may grant costs claims. At the appropriate time the Board will review all cost claims filed by the eligible intervenors and will determine the appropriate quantum, if any, of cost awards, based on the contribution the respective intervenors make in the case and the extent that their intervention proves to be of assistance to the Board. Eligible intervenors with similar interests should coordinate their activities to the fullest extent possible so as to limit costs incurred.

The Board will grant observer status to: the City of Kitchener the County of Huron.

A list of intervenors in the proceeding is attached as Appendix A to this order.

In a letter of Intervention dated January 15, 2010, Mr. Jed Chinneck, Legal Counsel for McKinley and Ontario raised a number of issues relating to his clients ownership interest of the majority of storage rights for the Stanley Reef. He stated that his clients are not opposed to the designation of the Stanley Pool and that they have an interest in ensuring that the pipeline capacity is sufficient to service Stanley Pool. Mr. Chinneck also challenged Tribute's right to apply for authority to operate the Stanley Pool; for compensation to be determined by the Board; and for a favourable report to the MNR on granting drilling licences in Stanley Pool.

In a letter dated January 27, 2010 the Applicants disagreed with Mr. Chinneck's statements concerning the percentage of storage rights owned by Ontario.

The Board notes that the issue of the percentage interest that each party has in the Stanley Pool can be addressed by the Board in the course of the proceeding once the discovery process commences.

That being said, the Board notes that the Ontario Court of Appeal ("CA"), on January 26, 2010, heard an appeal of a judgment of the Superior Court of Justice involving the Applicants and one of the intervenors, McKinley/Ontario, with respect to the validity of the Gas Storage Lease held by Tribute over the Stanley 4-7-XI reef on the lands of McKinley Farms. In a decision dated June 29, 2009 Superior Court of Justice found that both the Oil and Gas Lease as amended by the Unit Operation Agreement and Gas Storage Lease Agreement on the McKinley land over the Stanley reef had been void and vacated. The CA reserved its decision.

The Board is considering whether the proceeding should be stayed until the CA decision on Tribute's appeal is rendered. To assist with this consideration the Board will give an opportunity to all intervenors, the Applicants and Board Staff to file written submissions on the question of whether or not to stay this proceeding. More specifically:

- *Should the Board stay the EB-2009-0338/0339/0340 proceeding until the CA decision on the storage rights ownership in Stanley 4-7-XI is rendered?*

The timeline for submissions is set by this procedural order.

At this time the Board considers it necessary to make provision for the following procedural matters. Please be aware that this procedural order may be amended, and further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. Written submissions related directly to the following question should be filed in accordance with the timeline as set out in paragraphs (a) – (d) below:

Should the Board stay the EB-2009-0338/0339/0340 proceeding until the CA decision on the storage rights ownership in Stanley 4-7-XI is rendered?

- a. The Applicants shall file written submissions on the question of stay with the Board and deliver it to the intervenors by **February 12, 2010**;
- b. Board staff shall file written submissions on the question of stay with the Board and deliver it to the Applicants and other intervenors by **February 19, 2010**;

- c. Intervenor wishing to make written submissions on the question of stay shall file the submissions with the Board and deliver it to the Applicants and other intervenors by **February 23, 2010**;
- d. The Applicants shall file with the Board reply submissions on the question of stay and deliver them to the intervenors no later than **February 26, 2010**.

All filings to the Board must quote file numbers EB-2009-0338/0339/0340 be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the BoardSec@oeb.gov.on.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required."

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, February 9, 2010

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

EB-2009-0338
EB-2009-0339
EB-2009-0340

Procedural Order No. 1

Appendix A

List of Participants

Tribute Resources Inc.
EB-2009-0338 / EB-2009-0339 / EB-2009-0340
APPLICANT & LIST OF INTERVENORS

February 10, 2010

APPLICANT	Rep. and Address for Service
Tribute Resources Inc.	<p>William Blake</p> <p>Vice President Tribute Resources Inc. 309 Commissioners Road West, Suite E London, ON N6J 1Y4</p> <p>Tel: 519-657-2151 Fax: 519-657-4296 wblake@tributerresources.com</p>
Bayfield Pipeline Corp.	<p>Mr. William Blake</p> <p>Bayfield Pipeline Corp. Vice President 309 Commissioners Road West, Suite E London ON N6J 1Y4</p> <p>Tel: 519-657-2151 Fax: 519-657-4296 wblake@tributerresources.com</p>
Giffen and Partners	<p>Mr. C.A. Lewis</p> <p>Giffen and Partners</p> <p>465 Waterloo Street London ON N6B 1Z4</p> <p>Tel: 519-679-4700 Fax: 519-432-8003 lewis@giffens.com</p>
INTERVENORS	Rep. and Address for Service
2195002 Ontario Inc.	<p>Jed Chinneck</p> <p>Counsel Chinneck Law Professional Corporation 37 Ridout Street S. London ON N6C 3W7 Tel: 519-679-6777 Fax: 519-633-6214 jed@chinneck.ca</p>

Tribute Resources Inc.
EB-2009-0338 / EB-2009-0339 / EB-2009-0340
APPLICANT & LIST OF INTERVENORS

- 2 -

February 10, 2010

**Huron County Federation of
Agriculture**

Paul Nairn

Huron County Federation of Agriculture
P.O. Box 429
Clinton ON N0M1L0
Tel: 519-482-9642
Fax: 519-482-1416
paul.nairn@ofa.on.ca

McKinley Farms Ltd.

Jed Chinneck

Counsel
Chinneck Law Professional Corporation
37 Ridout Street S.
London ON N6C 3W7
Tel: 519-679-6777
Fax: 519-633-6214
jed@chinneck.ca

Municipality of Bluewater

Lori Wolfe

CAO
Municipality of Bluewater
P. O. Box 250
14 Mill Avenue
Zurich ON N0M 2T0
Tel: 519-236-4351 Ext: 235
Fax: 519-236-4329
planninginfo@town.bluewater.on.ca

Dave Johnston

General Manager
Municipality of Bluewater
P. O. Box 250
14 Mill Avenue
Zurich ON N0M 2T0
Tel: 519-236-4351
Fax: 519-236-4329
planninginfo@town.bluewater.on.ca

Tribute Resources Inc.
EB-2009-0338 / EB-2009-0339 / EB-2009-0340
APPLICANT & LIST OF INTERVENORS

- 3 -

February 10, 2010

Municipality of Bluewater

Arlene Parker

Municipality of Bluewater
P. O. Box 250
14 Mill Avenue
Zurich ON N0M 2T0
Tel: 519-236-4351
Fax: 519-236-4329
planninginfo@town.bluewater.on.ca

Stanley Bayfield Landowners Group

Bev Hill

Stanley Bayfield Landowners Group
38631 Mill Road
RR#1
Varna ON N0M 2R0
Tel: 519-233-3218
Fax: 519-233-3440
bev.hillhill@tcc.on.ca

Union Gas Limited

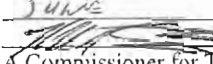
Mark Murray

Manager, Regulatory Projects and Lands Acquisition
Union Gas Limited
50 Keil Drive North
Chatham ON N7M 5M1
Tel: 519-436-4601
Fax: 519-436-4641
mmurray@uniongas.com

Zurich Landowners Association

Heather Redick

Zurich Landowners Association
P.O. Box 304
Zurich ON N0M 2T0
Tel: 519-236-4945
Fax: Not Provided
zurichlandowner@hay.net

This is Exhibit '18' referred to in the affidavit
of RODECK & MACDONALD
sworn before me, this 29th day of
JUNE, 2011

A Commissioner for Taking Affidavits

33

Ontario Energy
Board

Commission de l'énergie
de l'Ontario



EB-2009-0338
EB-2009-0339
EB-2009-0340

IN THE MATTER OF the Ontario Energy Board Act, 1998,
S.O. 1998, c.15, Schedule B; and in particular sections
36.1 (1), 38(1), 38(3), 40(1), 90(1);

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Paul Sommerville
Member

DECISION AND ORDER ON COST AWARDS

Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (the "Applicants") have filed applications with the Ontario Energy Board, (the "Board") dated September 22, 2009. These applications were subsequently amended on December 15, 2009. The applications were filed under sections 36.1(1), 38(1), 38(3), 40(1) and 90(1) of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B (the "Act") and would, if granted, allow the Applicants to develop natural gas storage pools located in the geographic area of the County of Huron and in the County of Middlesex Ontario. The Board assigned the application file number EB-2009-0338/0339/0340.

On February 9, 2010, the Board issued Procedural Order No. 1 granting McKinley Farms Ltd. ("McKinley"); 2195002 Ontario Inc. ("Ontario"); Zurich Landowners Associations ("Zurich Landowners"); Union Gas Limited ("Union"); Municipality of Bluewater ("Bluewater"); the Huron County Federation of Agriculture ("HCFA"); and Stanley Bayfield Landowners Group ("SBLG") intervenor status. The Board determined that the following intervenors are eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards*: McKinley; Ontario; Zurich Landowners, Bluewater; HCFA; and SBLG.

On March 30, 2010, the Board issued Procedural Order No. 3, in which it set out the process for intervenors to file their cost claims and to respond to any objections raised by the Applicants.

The Board received cost claims from McKinley and Ontario (combined) and Bluewater.

On April 29, 2010, the Applicants raised concerns with the cost claims of McKinley and Ontario. The Applicants objected that:

1. The time dockets in Appendix A, Form 1, do not agree with the time claimed by the Intervenors;
2. The hourly rate being claimed by Mr. Chinneck and Mr. Mitches, representing both McKinley and Ontario, exceeds the cost award tariff;
3. G.S.T. should not be included in the costs claim as the Intervenor is a registrant; and
4. No time prior to February 9, 2010 should be compensable.

On May 17, 2010, McKinley and Ontario replied to the Applicants' letter and noted that:

1. The time claimed by the Intervenors was in all cases less than the time spent on the matter as disclosed by the dockets. More specifically, the time claimed by the Intervenors for Mr. Mitches' time was intentionally reduced in an effort to be more reasonable;
2. The Intervenors seek the time claimed at the maximum allowable rate under the tariff;
3. The Intervenors are G.S.T. registrants and will no longer be claiming the G.S.T.; and
4. All time claimed (based on the tariff rates) should be recoverable in accordance with the OEB Practice Direction on Costs and the OEB jurisdiction to award costs.

On May 6, 2010, the Applicants raised concerns with the cost claims of Bluewater and noted that Bluewater did not provide supporting time dockets and invoices from the law firm Strong, MacDougall, Oudekerk Professional Corp. On May 26, 2010, Bluewater replied to the Applicants' letter and submitted the missing time dockets and invoices from law firm Strong, MacDougall, Oudekerk Professional Corp.

Board Findings

The Board has reviewed the combined McKinley and Ontario cost claims and that of Bluewater.

The Board finds that McKinley and Ontario combined cost claim should be limited to the costs incurred after they were recognized as intervenors on February 9, 2010. The Board will therefore reduce the claim respecting Mr. Jed M. Chinneck and Mr. William D. Mitches to 2.15 hours and 7.25 hours respectively. The Board has also adjusted the cost claim of McKinley and Ontario to appropriately reflect the correct tariff for their counsel. This reduces McKinley's and Ontario's combined total claim to \$1,942.00.

Bluewater's claim is approved as filed.

The Board finds that each party's claims, adjusted as described above, are reasonable and Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. shall reimburse these parties accordingly.

THE BOARD ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Huron Bayfield Limited Partnership and Bayfield Pipeline Corp shall immediately pay:

- McKinley Farms Ltd. and 2195002 Ontario Inc. \$1,942.00; and
- Municipality of Bluewater \$2,608.20.

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Huron Bayfield Limited Partnership and Bayfield Pipeline Corp shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, July 9, 2010

ONTARIO ENERGY BOARD

Original Signed by

Kirsten Walli
Board Secretary

Ontario Energy
Board
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

Commission de l'énergie
de l'Ontario
C.P. 2319
27^e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273



BY EMAIL

March 18, 2011

Mr. Chris Butler
Manager, Project Development
Tribute Resources Inc.
309-D Commissioners Road West
London, Ontario N6J 1Y4

Dear Mr. Butler:

**Re: Tribute Resources Inc. - Huron Bayfield Storage Project
Board File Numbers EB-2009-0338, EB-2009-0339 and EB-2009-0340**

By way of letter dated March 4, 2011, the Board received a letter from Tribute Resources Inc. requesting that the Board allow it to withdraw applications filed with the Board assigned Board file numbers EB-2009-0338/0339/30340. The Withdrawal request is made pursuant to the Board's Rules of Practice and Procedure, specifically Rule 20.01(a). Tribute Resources Inc. indicated that it will be re-filing new applications in March 2011.

This letter confirms that the Board accepts Tribute's request to withdraw its applications and that the above files are closed effective March 4, 2011.

Yours truly,

Original signed By

Kirsten Walli
Board Secretary

cc: Chris Lewis, Counsel for the Applicants
McKinley Farms Ltd., Intervenor
2195002 Ontario Inc., Intervenor
Zurich Landowners Associations, Intervenor
Union Gas Limited, Intervenor
Municipality of Bluewater, Intervenor
Huron County Federation of Agriculture, Intervenor
Stanley Bayfield Landowners Group, Intervenor
City of Kitchener, Observer
County of Huron, Observer
Petroleum Resources Centre, MNR London

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This is Exhibit "D" referred to in the affidavit
of RODERICK D. MACDONALD
sworn before me, this 29th day of
JUNE, 2011
[Signature]
A Commissioner for Taking Affidavits



June 1, 2011

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

Attn: Kirsten Walli
Board Secretary

Re: Board File Numbers: EB-2011-0076, EB-2011-0077, EB-2011-0078

Dear Kirsten Walli:

Kindly find enclosed the Corporation of the Municipality of Bluewater's request for intervenor status in the Energy Board Proceedings EB-2011-0076, EB-2011-0077 and EB-2011-0078.

Yours truly,

Lori Wolfe
Chief Administrative Officer
Municipality of Bluewater

Encl.

cc: Tribute Resources Inc.
309-D Commissioners Road West
London, ON N6J 1Y4

Attn: Mr. Chris Butler
e-mail: cbutler@tributeresources.com

Tel: (519) 657-2151
Fax: (519) 657-4296

*The Corporation of the Municipality of Bluewater
P.O. Box 250, 14 Mill Ave. Zurich, ON N0M 1G0
Ph: (519) 236-4351 F: (519) 236-4329*

Giffen and Partners
465 Waterloo Street
London, ON N6B 1Z4

Attn: Mr. C.A. Lewis, Counsel for the Applicants
e-mail: lewis@giffens.com

Tel: (519) 679-4700
Fax: (519) 432-8003

Petroleum Resources Centre
Ministry of Natural Resources
659 Exeter Road
London, ON N6E 1L3

Attn: Mr. Dan Elliott, Manager

Tel: (519) 873-4635
Fax: (519) 873-4645



EB-2011-0076

EB-2011-0077

EB-2011-0078

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B; and in particular sections 36.1(1), 38(1), 38(3), 40(1), 90(1), thereof;

AND IN THE MATTER OF an Application by Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (collectively the "Applicants") for an Order or Orders granting leave to construct a natural gas transmission pipeline in the County of Huron and in the County of Middlesex;

AND IN THE MATTER OF an Application by the Applicants for an Order designating the area known as the Bayfield Pool and the Stanley 4-7-XI Pool, in the Geographic Township of Stanley, Municipality of Bluewater, County of Huron, as a gas storage area;

AND IN THE MATTER OF an Application by the Applicants for authority to inject gas into, store gas in and remove gas from the areas designated as the Bayfield Pool and the Stanley 4-7-XI Pool;

AND IN THE MATTER OF an Application by the Applicants for a license to drill wells in the said areas;

AND IN THE MATTER OF an Application by the Applicants for the determination of just and equitable compensation payable to any owner of any gas or oil rights or the right to store gas within the Bayfield Pool and the Stanley 4-7-XI Pool with whom the Applicant does not have an agreement, and compensation for damage resulting from the exercise of the authority given by the order sought under section 38 of the said Act.

REQUEST FOR INTERVENOR STATUS

OF THE

CORPORATION OF THE MUNICIPALITY OF BLUEWATER

1. The Corporation of the Municipality of Bluewater ("Bluewater") applies with this letter of intervention for Intervenor Status in the above noted proceedings, EB-2011-0076, EB-2011-0077, and EB-2011-0078 (the "Applications"), in accordance with section 23 of the Ontario Energy Board Rules of Practice and Procedure.
2. Bluewater received the Notice of Applications on the 26th of May 2011
3. Bluewater is a local municipality.
4. Bluewater will be directly affected by these Applications:
 - (a) Bluewater is the municipality in which many of the works contemplated by the Applications will be located and constructed, and has an ongoing municipal public interest in these Applications;
 - (b) Bluewater has an ownership interest in lands and/or lands adjacent to the lands which form the subject matter of the Applications.
5. Bluewater requests one copy of the evidence and submissions respecting these Applications, in respect of the Applicants, other Intervenor, and any notices or correspondence, and any amendments to the Applications.
6. Bluewater cannot fully predict the extent of its participation in this matter, but Bluewater intends to participate fully in the hearing of the Applications, including, without limitation, adducing evidence, submitting interrogatories, cross-examining witnesses, and advancing argument to ensure that its rights and the municipal public interest in relation to the Applications are adequately addressed.
7. Communications relating to this intervention should be directed to:

Ms. Lori Wolfe, C.A.O.
 c/o Ms. Arlene Parker
 The Corporation of the Municipality of Bluewater
 14 Mill Avenue
 P.O. Box 250
 Zurich, ON N0M 2T0

Telephone: 519 236 4351 Ext. 235
 Fax: 519 236 4329

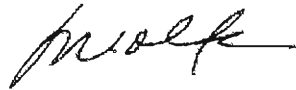
E-mail: planninginfo@town.bluewater.on.ca

8. Bluewater prefers a written hearing on the basis that a written hearing would likely be more cost effective.

9. Bluewater seeks costs from the Applicants both on the basis as the municipal representative of the public interest and as a person with an interest in and affected by the process, pursuant to sections 3.03(b) and (c), respectively, of the Ontario Energy Board's practice direction on costs.

DATED at the Municipality of Bluewater this 1st day of June, 2011.

THE CORPORATION OF THE MUNICIPALITY OF BLUEWATER



Per: L. Wolfe, Chief Administrative Officer

Ontario Energy
Board
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
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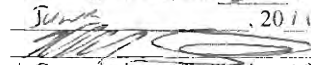
Commission de l'énergie
de l'Ontario
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273



BY E-MAIL

June 14, 2011

Mr. Chris Butler
Tribute Resources Inc.
309-E Commissioners Road West
London, ON N6J 1Y4

This is Exhibit "E" referred to in the affidavit
of RODERICK R. MACDONALD
sworn before me, this 29th day of
June, 2011

A Commissioner for Taking Affidavits

Dear Mr. Butler:

**Re: Tribute Resources Inc.
Application for Huron Bayfield Storage Project Development
Board File Nos. EB-2011-0076; EB-2011-0077; EB-2011-0078**

The Board confirms the following parties as registered intervenors in the above noted proceeding, subject to Tribute Resources Inc.'s ("Tribute") right to object within 14 calendar days from the issuance of this letter:

- 2195002 Ontario Inc.
- Howard and Judith Daniel
- Huron County Federation of Agriculture
- Mary Erb
- McKinley Farms Ltd.
- Ministry of Natural Resources
- Municipality of Bluewater
- Stanley Bayfield Landowners Group
- TransCanada Pipelines Ltd.
- Union Gas Ltd.
- Zurich Landowners Association.

The Board has determined that the following parties, who applied for cost eligibility, are eligible to apply for an award of costs under its Practice Direction on Cost Awards:

- 2195002 Ontario Inc.
- Huron County Federation of Agriculture
- McKinley Farms Ltd.
- Stanley Bayfield Landowners Group
- Zurich Landowners Association.

This determination is subject to Tribute's right to object within 14 calendar days from the issuance of this letter.

The Municipality of Bluewater also requested cost eligibility and it was on the basis that it is "the municipal representative of the public interest and as a person with an interest in and affected by the process, pursuant to sections 3.03(b) and (c), respectively, of the Ontario Energy Board's practice direction on costs." Section 3.03 reads as follows:

A party in a Board process is eligible to apply for a cost award where the party:

- a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to regulated services;
- b) primarily represents a public interest relevant to the Board's mandate; or
- c) is a person with an interest in land that is affected by the process.

Although the Municipality of Bluewater represents its constituents, the Board does not agree that this constitutes a public interest which should be funded by ratepayers. To the extent that the Municipality of Bluewater has a direct interest in lands affected by the application, the use of municipal land is subject to various requirements which are largely within the control of the Municipality directly. The Board concludes that it would not be appropriate for ratepayers to fund the Municipality of Bluewater's participation in this application. The Municipality of Bluewater has access to funds through the collection of taxes, and the Board concludes that this constituent-based funding is the appropriate source of funds for participation in this proceeding.

The Practice Direction on Cost Awards and related forms are available on the Board's website at www.ontarioenergyboard.ca.

The Board confirms that the Mellville United Church is a registered observer in the above noted proceeding.

Yours truly,

Original Signed By

Kirsten Walli
Board Secretary

Tab 3

Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B

Costs

30. (1) The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board. 2004, c. 23, Sched. B, s. 8.

Same

- (2) The Board may make an interim or final order that provides,
- (a) by whom and to whom any costs are to be paid;
 - (b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and
 - (c) when any costs are to be paid. 2003, c. 3, s. 25 (1).

Rules

(3) The rules governing practice and procedure that are made under section 25.1 of the *Statutory Powers Procedure Act* may prescribe a scale under which costs shall be assessed. 2003, c. 3, s. 25 (1).

Inclusion of Board costs

(4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board. 1998, c. 15, Sched. B, s. 30 (4).

Considerations not limited

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court. 1998, c. 15, Sched. B, s. 30 (5).

Application

(6) This section applies despite section 17.1 of the *Statutory Powers Procedure Act*. 2003, c. 3, s. 25 (2).

Tab 4

ONTARIO ENERGY BOARD

Rules of Practice and Procedure (Revised November 16, 2006 and July 14, 2008)

PART I - GENERAL

1. Application and Availability of Rules

- 1.01 These Rules apply to all proceedings of the Board. These Rules, other than the Rules set out in Part VII, also apply, with such modifications as the context may require, to all proceedings to be determined by an employee acting under delegated authority.
- 1.02 These Rules, in English and in French, are available for examination on the Board's website, or upon request from the Board Secretary.
- 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.

2. Interpretation of Rules

- 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.
- 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.
- 2.03 These Rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.
- 2.04 Unless the Board otherwise directs, any amendment to these Rules comes into force upon publication on the Board's website.

3. Definitions

- 3.01 In these Rules,

"affidavit" means written evidence under oath or affirmation;

"appeal" has the meaning given to it in **Rule 17.01**;

ONTARIO ENERGY BOARD

Rules of Practice and Procedure (Revised November 16, 2006 and July 14, 2008)

or

(c) order the party to pay costs.

5.02 Where a party fails to comply with a time period for filing evidence or other material, the Board may, in addition to its powers set out in **Rule 5.01**, decide to disregard the evidence or other material that was filed late.

5.03 No proceeding is invalid by reason alone of an irregularity in form.

6. Computation of Time

6.01 In the computation of time under these Rules or an order:

(a) where there is reference to a number of days between two events, the days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens; and

(b) where the time for doing an act under these Rules expires on a holiday, as defined under **Rule 6.02**, the act may be done on the next day that is not a holiday.

6.02 A holiday means a Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed.

7. Extending or Abridging Time

7.01 The Board may on its own motion or upon a motion by a party extend or abridge a time limit directed by these Rules, *Practice Directions* or by the Board, on such conditions the Board considers appropriate.

7.02 The Board may exercise its discretion under this Rule before or after the expiration of a time limit, with or without a hearing.

7.03 Where a party cannot meet a time limit directed by the Rules, *Practice Directions* or the Board, the party shall notify the Board Secretary as soon as possible before the time limit has expired.

ONTARIO ENERGY BOARD

Rules of Practice and Procedure (Revised November 16, 2006 and July 14, 2008)

written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

40. Media Coverage

- 40.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.
- 40.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

PART VI - COSTS

41. Cost Eligibility and Awards

- 41.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.
- 41.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 41.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

PART VII - REVIEW

42. Request

- 42.01 Subject to **Rule 42.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.
- 42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.
- 42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

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- 42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.
- 42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.
- 42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

43. Board Powers

- 43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.
- 43.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

44. Motion to Review

- 44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:
- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - (i) error in fact;
 - (ii) change in circumstances;
 - (iii) new facts that have arisen;
 - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and
 - (b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

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45. Determinations

- 45.01 In respect of a motion brought under **Rule 42.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Tab 5



ONTARIO ENERGY BOARD

Practice Direction

On

Cost Awards

“Secretary” means the Board Secretary and any Assistant Board Secretary;

“Tariff” means the Cost Award Tariff contained in Appendix A to this Practice Direction on Cost Awards;

“transmitter” means a person who owns or operates a transmission system; and

“wholesaler” means a person who purchases electricity or ancillary services in the IESO-administered markets or directly from a generator or who sells electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer.

2. COST POWERS

2.01 The Board may order any one or all of the following:

- (a) by whom and to whom any costs are to be paid;
- (b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed;
- (c) when any costs are to be paid;
- (d) costs against a party where the intervention is, in the opinion of the Board, frivolous or vexatious; and
- (e) the costs of the Board to be paid by a party or parties.

3. COST ELIGIBILITY

3.01 The Board may determine whether a party is eligible or ineligible for a cost award.

3.02 The burden of establishing eligibility for a cost award is on the party applying for a cost award.

3.03 A party in a Board process is eligible to apply for a cost award where the party:

- (a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to regulated services;
- (b) primarily represents a public interest relevant to the Board’s mandate; or
- (c) is a person with an interest in land that is affected by the process.

3.04 In making a determination whether a party is eligible or ineligible, the Board may also consider any other factor the Board considers to be relevant to the public interest.

3.05 Despite section 3.03, the following parties are not eligible for a cost award:

- (a) applicants before the Board;
- (b) transmitters, wholesalers, generators, distributors, and retailers of electricity, either individually or in a group;
- (c) transmitters, distributors, and marketers of natural gas, and gas storage companies, either individually or in a group;

- (d) the IESO; and
- (e) the Ontario Power Authority.

- 3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award if it is a customer of the applicant.
- 3.07 Also notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.
- 3.08 The Board may, in appropriate circumstances, award an honorarium recognizing individual efforts in preparing and presenting an intervention or submission. The amount of the honorarium will be specified by the Board panel presiding.

4. COST ELIGIBILITY PROCESS

- 4.01 A party that will be requesting costs must submit its reasons as to why the party believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria (see section 3), at the time of filing of its notice of intervention or, in the case of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, at a date specified by the Board. For information on filing and serving a request for intervention, refer to the Board's Rules of Practice and Procedure.
- 4.02 An applicant in a process will have 14 calendar days from the filing of the notice of intervention and request for cost eligibility to submit its objections to the Board, after which time the Board will rule on the intervention and request for eligibility.
- 4.03 The Board may at any time seek further information and clarification from any party that has filed a request for cost eligibility and may provide direction to such parties as to any matter that the Board may consider in determining the amount of a cost award, and, in particular, combining interventions and avoiding duplication of evidence.
- 4.04 A direction mentioned in section 4.03 may be taken into account in determining the amount of a cost award under section 5.01.

5. PRINCIPLES IN AWARDING COSTS

- 5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:
- (a) participated responsibly in the process;
 - (b) asked questions on cross examination which were unduly repetitive of questions already asked by other parties;
 - (c) made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by other parties;
 - (d) made reasonable efforts to co-operate with other parties in order to reduce the duplication of evidence and questions on cross-examination;
 - (e) made reasonable efforts to combine its intervention with that of similarly interested

Tab 6

Municipal Act, 2001, S.O. 2001, c. 25

Purposes

2. Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters. 2006, c. 32, Sched. A, s. 2.

Body corporate

4. (1) The inhabitants of every municipality are incorporated as a body corporate. 2001, c. 25, s. 4.

Non-application

(2) The *Corporations Act* and the *Corporations Information Act* do not apply to a municipality. 2006, c. 32, Sched. A, s. 4.

Broad authority, lower-tier and upper-tier municipalities

11. (1) A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public, subject to the rules set out in subsection (4). 2006, c. 32, Sched. A, s. 8.

By-laws

(2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

1. Governance structure of the municipality and its local boards.
2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.
3. Financial management of the municipality and its local boards.
4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.
5. Economic, social and environmental well-being of the municipality.
6. Health, safety and well-being of persons.
7. Services and things that the municipality is authorized to provide under subsection (1).

8. Protection of persons and property, including consumer protection. 2006, c. 32, Sched. A, s. 8.

By-laws re: matters within spheres of jurisdiction

(3) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting matters within the following spheres of jurisdiction:

1. Highways, including parking and traffic on highways.
2. Transportation systems, other than highways.
3. Waste management.
4. Public utilities.
5. Culture, parks, recreation and heritage.
6. Drainage and flood control, except storm sewers.
7. Structures, including fences and signs.
8. Parking, except on highways.
9. Animals.
10. Economic development services.
11. Business licensing. 2006, c. 32, Sched. A, s. 8.

By-laws re: fees and charges

391. (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,

- (a) for services or activities provided or done by or on behalf of it;
- (b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or any local board; and
- (c) for the use of its property including property under its control. 2006, c. 32, Sched. A, s. 163 (1).

Local board

(1.1) A local board may impose fees or charges on persons,

- (a) for services or activities provided or done by or on behalf of it;
- (b) for costs payable by it for services or activities provided or done by or on behalf of any municipality or other local board; and
- (c) for the use of its property including property under its control. 2006, c. 32, Sched. A, s. 163 (1).

Deferred benefit

(2) A fee or charge imposed for capital costs related to services or activities may be imposed on persons not receiving an immediate benefit from the services or activities but who will receive a benefit at some later point in time. 2006, c. 32, Sched. A, s. 163 (2).

Costs related to administration, etc.

(3) The costs included in a fee or charge may include costs incurred by the municipality or local board related to administration, enforcement and the establishment, acquisition and replacement of capital assets. 2006, c. 32, Sched. A, s. 163 (3).

Fees for mandatory services, etc.

(4) A fee or charge may be imposed whether or not it is mandatory for the municipality or local board imposing the fee or charge to provide or do the service or activity, pay the costs or allow the use of its property. 2006, c. 32, Sched. A, s. 163 (3).

Conflict

(5) In the event of a conflict between a fee or charge by-law and this Act, other than this Part, or any other Act or regulation made under any other Act, the by-law prevails. 2006, c. 32, Sched. A, s. 163 (3).

Restriction, poll tax

393. No fee or charge by-law shall impose a poll tax or similar fee or charge, including a fee or charge which is imposed on an individual by reason only of his or her presence or residence in the municipality or part of it. 2001, c. 25, s. 393; 2006, c. 32, Sched. A, s. 165.

Tab 7

Municipal Act, 2001

ONTARIO REGULATION 584/06

FEES AND CHARGES

Electricity and gas services and activities

9. A municipality and a local board do not have power under the Act to impose a fee or charge on a generator, transmitter, distributor or retailer, as these terms are defined in section 2 of the *Electricity Act, 1998*, or on a producer, gas distributor, gas transmitter or storage company, as these terms are defined in section 3 of the *Ontario Energy Board Act, 1998*, for services or activities, costs payable or the use of property with respect to wires, cables, poles, conduits, pipes, equipment, machinery or other works that,

- (a) are or will be located on a municipal highway; and
- (b) are or will be used as part of the business of the generator, transmitter, distributor, retailer, producer, gas distributor, gas transmitter or storage company, as the case may be. O. Reg. 584/06, s. 9.

Fees or charges, permits for works described in ss. 8 and 9

10. Nothing in subsection 8 (1) or section 9 prevents the imposition of fees or charges to recover the municipality's or local board's reasonable costs for issuing permits with respect to the works described in those provisions,

- (a) to place the works on a municipal highway; and
- (b) to cut the pavement of or otherwise dig up a municipal highway for the works. O. Reg. 584/06, s. 10.

Tab 8

Legislation Act, 2006, S.O. 2006, c. 21, Schedule F

Corporations, implied provisions

92. (1) A provision of an Act that creates a corporation,

- (a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;
 - (b) gives a majority of the members of the corporation power to bind the others by their acts; and
 - (c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them.
- 2006, c. 21, Sched. F, s. 92 (1).

Tab 9

***Consistency in Tribunal Decision Making:
What Really Goes On Behind Closed Doors...***

Kevin Whitaker, Chair, Ontario Labour Relations Board,
Colleges Relations Commission
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Facilitator, Agency Cluster Project

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The views expressed in this paper are those of the authors alone and do not reflect the policies or views of the Ontario Government.

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I

The Imperative of Consistency

“As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of law.”

L'Heureux-Dube J. in *Domtar Inc. v. Quebec (Commission d'appel en matiere del lesions professionnelles)*, 1993 CanLII 106 (S.C.C.) at page19.

“It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one.”

Gonthier J. in *I.W.A. v. Consolidated Bathurst packaging Ltd.* 1990 CanLII 132 (S.C.C) at page 28.

The Purpose of this Paper

In this paper we have drawn on our own experiences in the administrative justice system to describe the different methods, tools and practices used to address issues of consistency within adjudicative administrative Tribunals across all Canadian jurisdictions. As there are literally hundreds of such Tribunals with adjudicator membership in the thousands (one thousand in Ontario alone), this is of necessity, an exercise of generalization.

Notwithstanding our efforts to paint all Tribunals with the same brush, the reality on the ground is that every Tribunal has its own unique features. It should be understood that there are significant variations in the extent to which any one Tribunal conforms to our overall description of trends and directions.

We have tried to reflect what we would consider to be the general “state of the nation” without necessarily identifying any particular Tribunal.

The Necessity of Consistency

The two passages from *Domtar* and *Consolidated Bathurst* above suggest that consistency in decision making before any level of Court or Tribunal is a necessary and fundamental component of the rule of law.

There is little judicial comment on the various ways in which Tribunals attempt to achieve consistency. The Supreme Court of Canada has discussed the practice of holding “Full Board” meetings to discuss the application of law and policy to Tribunal decisions (*Consolidated Bathurst* (above), *Tremblay v. Quebec (Commission des affaires sociales)* 1992

CanLII 1135 (S.C.C.) and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 CanLII 4 (S.C.C.)) The Federal Court has commented on the practice of using guidelines issued by a Tribunal Chair which govern the conduct of hearings (*Thamotharem* (2006 CanLII FC 16) and *Benitez* (2006 CanLII FC 461)).

These practices are but only two of a much broader range of Tribunal activity, undertaken in the pursuit of consistency. Within the administrative justice community, the tools used to achieve consistency are now understood to address the entire range of Tribunal management and conduct, from the appointment of adjudicators, to the case management of files and the hearing and decision making process.

The Notion of Consistency

Tribunal consistency in its broadest sense means that similarly situated litigants receive similar treatment and outcomes. This in turn means that litigants with comparable disputes, experience the similar range of procedural treatment, from case management broadly, to mediation and different forms of hearing processes more specifically. It also means having matters adjudicated according to the same matrix of law and policy.

Consistency does not mean that all adjudicators in a given Tribunal share identical views and perspectives on all issues. Rather, a healthy and “consistent” Tribunal has a complement of adjudicators who within the group, represent the entirety of the diverse and varied backgrounds and perspectives that make up or are reflected in the sector or industry for which the Tribunal is responsible.

Consistency is best achieved when the Tribunal is able to consider, acknowledge and take advantage of all of the various and sometimes competing priorities and viewpoints around any given issue - and to then arrive at a consensus around the best or most advantageous set of principles to be applied in both questions of process and substance. Adjudicators within the Tribunal should complement each other so that together, all “bases are covered”.

Consistency is enhanced where:

- (1) All adjudicators share a common understanding of the range of acceptable views on all significant issues of procedure, law and policy;
- (2) An individual adjudicator dealing with a particular case wishes to depart from the commonly understood range of views, there is an agreed upon process that permits an opportunity for all adjudicators to discuss the departure before it occurs; and
- (3) Any departure from the commonly understood range of views is thoroughly explained and justified in the reasons for the decision.

Building a Culture of Consistency

The “full board” processes discussed in *Consolidated Bathurst* and *Ellis Don* display only the tip of the iceberg in terms of what is done within Tribunals to achieve the type of consistency described here. Consistency cannot be simply obtained by requiring adjudicators to attend full board meetings. Rather, it is something that all adjudicators must voluntarily commit to. This commitment is achieved by building up over

time, an internal adjudicative culture that values consistency twinned with the free and open exchange and expression of competing views.

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Tribunal Challenges

While the Courts have their own challenges in the pursuit of consistency, there are some common historical features of Tribunal operations that determine and shape the different ways in which Tribunals attempt to achieve consistency. In our view, there are a number of significant areas in which Tribunals differ in this way from the Courts.

Skills and Experience

Most Tribunal adjudicators have no legal training or experience. This means that adjudicators do not bring to the work of adjudication, the same set of consistent and coherent legal skills and experiences brought to the work of judging. Not only does this require significant training and guidance while in the job, but it means that there is no common set of understandings about adjudication that can be relied upon to build the Tribunal's processes.

Very often, adjudicators begin "on the job" with little or no understanding of procedure, evidence, or administrative law principles. This means that the required degree of Tribunal training and guidance is considerable for individual adjudicators at the commencement of their terms.

Nature of the Appointment

There are differences from the Courts in the nature of the appointment. Most Tribunal adjudicators are appointed on a part time basis and for a fixed term and may be regionally isolated with little or no interaction with colleagues. This means that the work of the Tribunal is not necessarily the adjudicator's first priority, either during the term of their appointment or generally as a career path step. For a part time adjudicator, the work of the Tribunal usually takes second place to a longer term career or business.

With a short fixed term appointment without an expectation of reappointment, the adjudicator will understandably be focused on maintaining links with their outside interests. Where adjudicators are regionally based and function independently, it may be difficult for them to share and discuss their experiences with others in the Tribunal.

Finality of Decision Making

Tribunal decisions are for the most part, final and not easily subject to appeal or review. Some tribunals have robust privative clauses or constrained appeal provisions. Even where neither of these are present, most litigants before Tribunals are unrepresented persons with limited resources. For these parties, the expense of appeal or judicial review is prohibitive.

The consequences of adjudicator error are not easily remedied. This means that the task of getting the right outcome in the first instance, is of critical importance.

The Significance of Discretion

Much of the adjudication done by Tribunals consists of exercising discretion, presumably on the basis of expertise and a particular knowledge of the industry or sector being dealt with. This means that the work is not so much determining questions of law as it is deciding how to structure and exercise broad but undefined statutory discretion. Many different and potentially competing answers to the same adjudicative questions may be permissible under governing legislation. The task of achieving consistency then is one of maintaining a line through multiple shades of gray. This is a different type of exercise than determining “questions of law”.

The Users and Volume of Activity

Many Tribunals deal primarily with high volumes of applications with unrepresented parties who have time sensitive disputes that require resolution. In Ontario for example, the Tribunal that governs landlord and tenant matters is almost always dealing with unrepresented parties who require a hearing and decision within days of the filing of the application. This Tribunal deals with roughly 60,000 cases each year.

III

Striking the Balance – Natural Justice Concerns

Given the preoccupation with consistency within the administrative justice community, there is surprisingly little jurisprudence for guidance. As noted above, the Supreme Court of Canada in *Consolidated Bathurst, Trembley* and *Ellis Don* and the Federal Court in *Thamotharem* and *Benitez*

make it fairly clear that there are limits and constraints within which Tribunals must operate.

Essentially, Tribunal processes designed to achieve consistency must ensure and safeguard two things:

- (1) that the adjudicator who hears a matter is (and appears to be) independent and unbiased (*nemo judex in causa sua*); and
- (2) the adjudicator who hears decides (*audi alteram partem*).

These decisions all reflect a judicial acceptance that Tribunals must adopt unique and particular practices in order to achieve a degree of quality control over their processes. It is understood that there is a dynamic tension between consistency in the application of procedure, law and policy – and the need for adjudicators to be and to be seen to be, independent and unbiased, and to be able to decide cases themselves, without institutional interference or constraint.

IV

Measures for Achieving Tribunal Consistency

Generally speaking, Tribunals achieve consistency through the creation of an internal culture which places value on both consistency and the free and unhindered expression of individual views. This culture is something which must be built up incrementally over time. It is created through a network of various practices that include particular recruitment

processes, training, the use of rules, guidelines and directions, through case management techniques, the creation of consistent user and community expectations, internal rules around how issues are debated and discussed and how reasoning is expressed in written decisions.

Recruitment and Re-appointment

As noted earlier, the vast majority of Tribunal adjudicator positions are part time and candidates are predominantly lay persons without legal training. Historically, many appointments were made without regard to merit.

Recently, the Tribunal community has attempted to meet these challenges by working with the executive branch of government, to obtain some degree of input in or control over, the appointment process.

Increasingly, Tribunals in different jurisdictions are able to interview and test prospective candidates for appointments and to be able to advertise for vacancies. Through the use of written core competencies, position descriptions and competitive merit-based interviewing and screening, Tribunals are able to make appointment recommendations to the executive branch. See for example the Position Description for Vice Chairs appointed to the Human Rights Tribunal of Ontario attached as Appendix 1 to this paper.

Many Tribunals are also seeking a shift towards full time as opposed to part time appointments and are increasingly able to offer compensation and other conditions of employment designed to attract candidates with legal training.

By obtaining some degree of control over the appointment process, Tribunals are able to identify individuals who share the same set of understandings and values which in turn permit the Tribunal to achieve internal consistency. When interviewing prospective candidates, Tribunal Chairs are able to assess whether the candidate is likely to be committed to the values which will contribute to Tribunal consistency

Tribunals are increasingly inserting themselves into the adjudicator recruitment process for the purpose of obtaining decision makers who will adhere most readily to the Tribunal's established practices and views. This ranges from the general ability to meld with the internal culture of the Tribunal - to the degree of coherence between the candidate's understanding of particular issues of law and policy that need to be addressed in the adjudicative process.

The significance of this gradual change in the Tribunal's role is great. If a Tribunal can exercise control over the recruitment process then the task of achieving consistency is vastly easier than it would otherwise be.

As the majority of Tribunal adjudicator positions are for fixed terms, there is also the issue of re-appointment. Again, increasingly, Tribunals are being asked by the executive branch to play a role in re-appointments. This provides not only a further degree of control over the composition of the adjudicator complement, but it also underscores the significance of an adjudicator's ongoing commitment to adhere to the Tribunal's expectations around consistency during the term of an appointment.

Tribunals are also beginning to develop codes of conduct and performance standards which are provided to candidates in the selection

process to signal with some clarity, the Tribunal's expectations around adjudicator behavior. These may also be used to review adjudicator performance on an ongoing basis as well as in advance of making re-appointment recommendations.

Training

Like the Courts, Tribunals are increasingly placing an emphasis on both initial and ongoing training for adjudicators. This includes not only instruction about hearing processes, evidence, and principles of administrative law but extends to continuing updates on developments in law and policy within the particular Tribunal and others which perform related work either in the sector or other jurisdictions.

It is not unusual for a Tribunal to have regularly scheduled training sessions for all adjudicators, but also to have designated training officers responsible for supporting and dispensing educational material to adjudicators on a regular – even daily basis.

Increasingly, other tools might include competency based learning plans. These require regular discussions between the Chair and each adjudicator to identify a personal training and education plan linked to core competencies. These discussions provide an opportunity for the Chair and the adjudicator to clarify and acknowledge adjudicator strengths and achievements as well as weaknesses and areas for improvement.

Community Expectations

The management of community expectations is a tool used by Tribunals to achieve consistency from adjudicators. If the community or sector regulated by the Tribunal has a very clear set of expectations

around process and issues of law and policy, these expectations will be expressed in the way in which cases are prepared and presented to adjudicators and will assist adjudicators in adhering to consensus views.

Community expectations are managed through written formal communications such as Rules of Practice, Notices to the Community, Information Bulletins, Guidelines and information posted on web sites.

More informally, Tribunals communicate with their user groups through regular speaking engagements and participation in Canadian Bar Association section meetings. Increasingly, Tribunals are creating Community Advisory Committees which meet regularly to permit direct discussions between users and the Tribunal around all aspects of Tribunal conduct and practice.

The fact that a Chair, or a senior Adjudicator, or Tribunal Counsel is out in the community explaining what parties can anticipate in terms of policy or procedure when they appear before the Tribunal will be known to adjudicators. This knowledge of community expectations will in turn serve to shape and contour the range of normative options around issues of law, policy and procedure.

The community should also understand how it is that differences of view within the Tribunal are resolved. There should be a high degree of transparency for example around the use of internal discussions, whether they are of the “full board” variety, or more focused discussions between the Chair and individual adjudicators. The community of users should know that all major issues of law, policy and procedure are thoroughly discussed internally as “Tribunal” issues, but that at the end of the day, each adjudicator decides these questions for themselves in the context of each matter being dealt with.

Internal Discussions

This area is perhaps the most significant in terms of obtaining consistency in issues of law and policy. The issues of what is discussed and how matters are discussed internally have attracted the most attention in judicial oversight of Tribunal operations.

The rapid development of electronic document management has increased the capacity for interaction between adjudicators. As a result, the quantity and quality of discussion around issues of process, law and policy, has increased significantly over the past decade.

Despite the fact that tribunal adjudicators are often part time and regionally separated, there is increasingly daily discussion in electronic forums about all aspects of the ongoing day to day work of a Tribunal. Draft decisions and commentary are regularly circulated for electronic discussion on a continual basis.

Most Tribunals schedule regular meetings for more formal discussions and it is not unusual where adjudicators are primarily full time and based in one location for there to be weekly or in some cases, daily meetings where drafts are exchanged and where issues of process, law and policy are discussed.

The importance of fostering opportunities for the ongoing and casual interaction between adjudicators cannot be over-emphasized. Successful internal Tribunal cultures foster open environments where all adjudicators are free to express opinions on issues of process, law and

policy but at the same time permit those who hear individual cases to freely decide them according to their own judgment.

The balance that must be maintained in the area of internal consistency is one where the individual who hears the case remains solely responsible for the choice of outcome, but that where an outcome may depart from the range of what might be normally anticipated, the Tribunal as a whole has an opportunity to discuss the matter internally. Consequently, where a decision departs from the accepted range of potential outcomes, the rationale for the departure should be explained in the reasons for the decision.

This culture of ongoing discussion can be described as a system of “assertive collegiality” - where there can be vigorous debate internally within the complement of adjudicators, but once the discussion is complete, the person hearing the case is free to make their own decision.

Discussions also occur regularly between Tribunal Chairs and individual adjudicators at any stage in the hearing process. For example, particular types of cases which raise significant or novel issues may be flagged at the intake stage. Once identified, they are brought to the attention of the Chair who will then choose a particular adjudicator to deal with the case. The Chair may have a discussion with the adjudicator before the assignment is made in order to canvass the procedural, law and policy issues that might be presented in the case. During the course of the hearing, the adjudicator and the Chair may continue the discussion, so that the adjudicator understands the issues in the context of the Tribunal's institutional views. Once the hearing is completed, the Chair and the adjudicator may then continue their discussion throughout the decision writing process.

Guidelines, Standard Decisions

Internal written guidelines and standard proposed draft decisions are common features of most Tribunals. It is also now common practice for there to be some form of draft decision review. The Chair or the Chair's designate (usually counsel to the Tribunal) will review draft decisions for style and a common adherence to the same form of expression for reasoning. Decisions are not reviewed for outcome but rather to ensure that there is an adherence to format and that the reasons appropriately explain the result.

Case Management

Increasingly, Chairs and senior staff are making case management decisions about how and when mediation is offered, preliminary issues are heard or scheduled and when hearings or meetings are scheduled. These decisions are made before assignments to individual adjudicators. This permits for the streaming of different types of matters into consistent case treatment patterns with the result being an extremely high level of consistency of process. From a procedural perspective, like cases are treated similarly and the community of users develop a very well defined set of expectations as to how a case will be managed and scheduled according to type.

Reconsideration and Judicial Review

Reconsideration is used by some Tribunals as a tool for maintaining consistency. Where a Tribunal has the ability to reconsider its decisions either on its own motion or on the application of a party, a

Tribunal may use the opportunity to correct or redirect a particular set of conclusions dealing with law and/or policy. The *Consolidated Bathurst* case illustrates this device where the Chair wrote a reconsideration decision explaining the full board discussion process in order to explain the adjudicative outcome.

Tribunals may also participate in judicial review proceedings in various ways to ensure consistency in the application of principles of law and policy. The degree of participation varies according to the nature of the statutory scheme and the jurisdiction of operation.

Tribunal Integration

Grouping together Tribunals which operate in similar sectors or industries for the purpose of sharing administrative, operational, and professional support or “clustering” is now being explored as a device to further increase consistency in law and policy in a broad area of law. This is taken a step further where there are cross appointments of Chairs, adjudicators and staff between clustered Tribunals.

Similarly, opportunities are being explored within Tribunal clustering environments for harmonizing common Rules of Practice and Procedure, case management processes, technology infrastructures, community interfaces and adjudicator development to further contribute to administrative, procedural and professional consistencies within a sector. See for example the Interim Report of the Cluster Facilitator attached as Appendix 2 to this paper.

V

Summary and Inventory

The challenges faced by Tribunals in obtaining consistency are different from those which confront the courts. This stems from a variety of reasons including their different roles in the justice system and the particular nature of Tribunal membership.

Consistency in the application of law and policy is but one aspect of a broader concern about consistency across the entire range of Tribunal activity and conduct.

Perhaps the most significant determining factor is the ability of the Tribunal to recruit members who have the skills to accomplish this goal and share a commitment to obtaining consistency as a fundamental feature of the Tribunal's core function.

Consistency is obtained by creating a common culture of 'assertive collegiality' designed to take advantage of and exploit the full range of knowledge and experience with the Tribunal.

The following is an inventory of "tools" used in the pursuit of consistency:

1. Recruitment and Re-appointment

- (a) Full time versus part time appointments
- (b) Written core competencies

- (c) Position Descriptions
- (d) Competitive merit based appointment practices
- (e) Performance review in advance of re-appointment
- (f) Improvements in compensation and length of term in order to attract legally trained adjudicators

2. Training

- (a) Training retreats or in-house sessions
- (b) Day to day education and support

3. Community Expectations

- (a) Rules of Practice
- (b) Information Bulletins
- (c) Notices to the Community
- (d) Practice Guidelines
- (e) Speaking and meeting engagements
- (f) Community Advisory Committee

4. Internal Discussions “Assertive Collegiality”

- (a) Regular adjudicator meetings
- (b) Electronic circulation of drafts and commentary
- (c) Casual opportunities (lounge or lunchroom) for interaction and discussion
- (d) Ongoing discussions between adjudicators and Chair
- (e) The assignment of work by the Chair

5. Internal Guidelines

- (a) Internal written protocols or policies
- (b) Standard draft decisions
- (c) Decision review before release

6. Case Management

- (a) Chair and senior staff review for use of mediation and scheduling of mediation, preliminary issues and hearings
- (b) Streaming of matters for similar procedural treatment based on case type

7. Decision and What Follows

- (a) Written reasons
- (b) Reconsideration
- (c) Participation in judicial review or appeal

8. Structural

- (a) Clustering of Tribunals
- (b) Cross appointments