

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O.
1998, c. 15, (Schedule B);

AND IN THE MATTER OF an Application by the Canadian
Distributed Antenna Systems Coalition for certain orders under the
Ontario Energy Board Act, 1998

SUBMISSIONS OF THE ELECTRICITY DISTRIBUTORS ASSOCIATION

Summary

- 1 In Procedural Order No. 5 dated November 14, 2011, the Ontario Energy Board ("Board") called for submissions on whether a conflict of interest or a reasonable apprehension of bias arises by having a member of the Market Surveillance Panel ("MSP") appear as an expert witness before a panel of the Board in an application.
- 2 The Electricity Distributors Association ("EDA") submits that a reasonable apprehension of bias does arise as a result of a current member of the MSP appearing as an expert witness before the Board.
- 3 As a result of the applicant Canadian Distributed Antenna Systems Coalition ("CANDAS") engaging Dr. Roger Ware as an expert to assist it in persuading the Board in favour of its case, the Board is placed in a position of having to assess and weigh the expert evidence of one of the members of its own regulatory instrumentality. In carrying out this function, the Board cannot escape the appearance of partiality or potential bias in favour of Dr. Ware, even if preference is not in fact given to his evidence.
- 4 This is an important issue for the Board to carefully consider in order to maintain public confidence in its impartiality and credibility. There is also precedential value in the way the Board will address this issue.

The Circumstances

- 5 The Board's necessary confidence in MSP members it appoints is implicit in light of the important role the MSP plays within the Board. The MSP is empowered under the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A ("Electricity Act") to investigate and report on any activity related to Independent Electricity Systems Operator ("IESO")-administered markets or the conduct of a market participant. The MSP is given broad rights of investigation, including the power to compel testimony and authorize inspection of business records.¹
- 6 The MSP has significant influence over the Board's discharge of its market surveillance role. On completion of an investigation, the MSP reports to the Board and the IESO regarding its recommendations for any amendment to market rules or the licences of market participants. The Board may conduct a review and amend the licence of any market participant or direct the IESO to amend market rules in response to a MSP report or recommendation.²
- 7 The Board utterly relies on the MSP and takes its recommendations seriously. The MSP is the Board's primary market oversight and investigation arm. It is the chief source of information to the Board about how the market is operating and how market participants are behaving. The Board's Addendum to the Code of Conduct recognizes that MSP members are in effect, Board members by including them in the definition of "Member".³
- 8 Since January 1, 2005, the Board has been responsible for the oversight and appointment of members to the MSP through its management committee ("Management Committee"). The Management Committee is comprised of the chair and vice-chairs of the Board and acts as the board of directors of the Board. It is a statutorily-created body under section 4.2 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "OEB Act").

¹ Section 37 of the Electricity Act.

² Section 38 of the Electricity Act.

³ Article 1.4.1 of the Board's Addendum to the Code of Conduct ["Code of Conduct"].

- 9 The Management Committee is responsible to appoint the members of the MSP pursuant to section 4.3.1(2) of the OEB Act. The Management Committee has significant discretion in appointing MSP members. The Board's policies relating to the MSP are codified in By-Law #3, which provides the Management Committee with discretion to renew the appointments of MSP members for up to three consecutive terms of up to three years each. The Management Committee also has the discretion to remove any member of the MSP from office "at any time, with or without cause".⁴
- 10 Dr. Ware was appointed to the MSP effective August 26, 2010 for a three-year term. He is one of three members of the MSP.⁵
- 11 Other than disqualifying criteria, neither the OEB Act nor By-Law #3 sets out minimum qualifications or eligibility criteria of a MSP member. Accordingly, the Management Committee has broad discretion to select members whom it deems suitable for the MSP. On this basis, it can be inferred that any member of the MSP is highly regarded by the Board as having the expertise, judgment and experience required to sit on the MSP.

The Circumstances Create an Appearance of Partiality and a Potential for Actual Bias

- 12 In light of the important role played by the MSP and the total discretion the Management Committee has over which individuals to appoint to the MSP, there can be no doubt that the Board would have high regard for, and firm confidence in, any member of the MSP. Accordingly, the Board would have a difficult, if not impossible, task in attempting to weigh the evidence of one of its MSP members on an objective basis. One would expect the Board to be reluctant, whether consciously or unconsciously, to criticize and possibly dismiss Dr. Ware's evidence. In the extreme, the Board could be seen as inclined to prefer Dr. Ware's evidence in light of the confidence they have expressed in him, and need to express in him, as a MSP member.

⁴ Ontario Energy Board By-Law #3, *Market Surveillance Panel*, in force since January 5, 2005, as amended, Article 2.3.1 ["By-Law #3"].

⁵ Board Electricity Market Surveillance webpage.

- 13 In a similar case involving the Alberta Public Utilities Board,⁶ a consultant who was on a retainer to the board acted as an expert for an applicant in a case before the board. When asked to consider the possibility that this dual engagement presented a reasonable apprehension of bias, the Alberta Court of Appeal opined that a reasonably well-informed person could properly fear that the board has great confidence in the expert and his skills. While that fact alone may not always militate in favour of an apprehension that the board would unthinkingly prefer his evidence,⁷ the Court, importantly, was concerned with the fact that the expert was in an ongoing relationship with the board at the time of his testimony as an expert witness. Calling this a “legitimate concern”, the Court said: “it is a dangerous policy to put Mr. Drazen in the position where is at once advisor and witness.”⁸
- 14 Dr. Ware is at once both a witness and an advisor. Indeed, he is more than just an advisor to the Board. He is both an advisor and an instrumentality of the Board. He is one of three people who exercise the Board’s market oversight function and direct the Board’s attention to issues in the market.
- 15 Moreover, unlike in *Re: Public Utilities Board*, Dr. Ware is providing expert evidence on issues which overlap with the matters he is charged with considering in his role as a MSP member. The expertise for which he was retained by CANDAS is the same expertise for which he was selected to sit on the MSP. Dr. Ware’s evidence in this proceeding could not be rejected without impacting his credibility in the very same field in respect of which he reports to the Board in his capacity as a member of the MSP.
- 16 The Board’s own Code of Conduct suggests that this situation is inappropriate. The Code of Conduct provides, among other things:

⁶ *Public Utilities Board Rules of Practice (Alberta) Rule 13, Re* (1985), 21 Admin. L.R. 59 [“*Re: Public Utilities Board*”].

⁷ *Ibid.* at para. 18.

⁸ *Ibid.* at para. 20.

- (a) Members (defined to include MSP members) shall at all time abide by the requirements set forth in the Code as a term of their appointments;⁹
- (b) Each Member shall endeavour to avoid actual or apparent breaches of the Code;¹⁰
- (c) Full-time Members of the Board shall not deal with the Board on behalf of any person, whether in the course of an application, a proceeding, a policy initiative, or informally for one year after s/he ceases to be a full-time Member;¹¹ and
- (d) No Member shall participate in a proceeding if s/he is of the opinion that s/he would be unable to render an impartial decision, or his or her continuing or prior associations would reasonably be perceived as not enabling him or her to render an impartial decision in respect of such proceeding.¹²

17 If Dr. Ware, as a full-time MSP member, could not be an expert witness for CANDAS for one year following his term of service, *a fortiori* he could not do so during his term. Indeed, if the Code of Conduct does not deal directly with a Member acting as an expert witness during his service as a Member, it is surely because no one would have anticipated that a Member would even consider doing such a thing.

18 The Board panel hearing the present case may hesitate or be seen to hesitate to criticize or find against Dr. Ware in respect of matters within his expertise and directly relevant to his Board-appointed role. The potential impacts on his credibility as a member of the MSP, and the associated reflection on the Management Committee which appointed him, are too great to ignore.

The Board's Credibility is at Stake

19 The Board is an adjudicative tribunal with broad authority. It is important for the Board not to be seen as partial or possibly compromised in its decision-making. In particular,

⁹ Article 1.1.1 of the Board's Addendum to the Code of Conduct.

¹⁰ *Ibid.*, Article 2.1.1.

¹¹ *Ibid.*, Article 2.5.1.

¹² *Ibid.*, Article 3.1.1.

the Board's decision in this case will have far-ranging impact on electricity distributors and participants in the telecommunications industry.

- 20 The Board must not only do justice, but it must also be seen to do justice.¹³ It makes no difference if there is no bias in fact. A reasonable apprehension of bias arises where there is a reasonable probability that the decision-maker might not act in an entirely impartial manner.¹⁴
- 21 The determination of this issue is relevant beyond this proceeding alone. It is a policy issue that will reflect on the Board's public image. As the Supreme Court of Canada held in *Committee for Justice and Liberty v. Canada (National Energy Board)*, the test for a reasonable apprehension of bias "is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies", a concern all the more important in cases where the agency "is enjoined to have regard for the public interest", as is the Board.¹⁵
- 22 The Board's image must not be tarnished by the spectre of bias or partiality, regardless of the reality of the situation. The panel assessing Dr. Ware's evidence cannot be encumbered by other considerations related to his position on the MSP.
- 23 The Board is aware of the importance of its impartiality to the public's confidence in its regulation of the energy industry, as evidenced by the Code of Conduct. Accordingly, the Board must take appropriate steps to avoid the appearance of bias in this case and any future cases in which similar circumstances arise.

¹³ *R. v. Justices of Sussex*, [1924] 1 K.B. 256, per Lord Hewart, C.J.

¹⁴ *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (QL), p. 13 ["*Committee for Justice*"].

¹⁵ *Ibid.*, p. 13.