



**Fraser Milner Casgrain LLP**

77 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, ON, Canada M5K 0A1

MAIN 416 863 4511

FAX 416 863 4592

**FILED ELECTRONICALLY AND VIA COURIER**

November 28, 2011

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
PO Box 2319, 27th Floor  
Toronto, ON M4P 1E4

**Helen T. Newland**

Helen.Newland@fmc-law.com

Direct : 416-863-4471

Dear Ms. Walli:

**RE:           Application by Canadian Distributed  
              Antenna Systems Coalition ("CANDAS");  
              Board File No.: EB-2011-0120**

We write on behalf of the Canadian Distributed Antenna Systems Coalition ("**CANDAS**") and in accordance with Procedural Order No. 5 in respect of the Ontario Energy Board's (the "**Board**" or "**OEB**") request for submissions as to whether a conflict of interest or reasonable apprehension of bias arises by virtue of Dr. Roger Ware, a member of the Market Surveillance Panel ("**MSP**"), appearing as an expert witness before an adjudicative panel of the Board hearing this matter ("**Adjudicative Panel**").

In its submissions dated November 20, 2011, Toronto Hydro-Electric System Limited ("**THESL**") alleges that Dr. Ware has breached the conflict of interest rules governing MSP members by accepting a retainer from CANDAS.<sup>1</sup> THESL also suggests that members of the Adjudicative Panel will be biased, or appear to be biased, when considering the evidence of Dr. Ware, by virtue of his position with the MSP.<sup>2</sup> The Electricity Distributors Association (the "**EDA**") makes similar submissions.

An allegation of conflict of interest or bias should not be made lightly. The onus is on THESL and the EDA to demonstrate a real likelihood or probability of bias.<sup>3</sup> The threshold for a finding of real or perceived bias is high.<sup>4</sup> THESL and the EDA have not met this threshold, for the reasons set out below.

---

<sup>1</sup> THESL's Submissions dated November 20, 2011 ("THESL's submissions") at para. 15.

<sup>2</sup> THESL's submissions at para. 14.

<sup>3</sup> *Canadian College of Business and Computers Inc. v. Ontario*, 2010 ONCA 856 (CanLii), para. 24.

<sup>4</sup> *Ibid.*

The submissions of THESL and the EDA are deficient in four material respects and should accordingly be rejected:

1. The sections of the Board's Conflict of Interest Policy and Addendum ("**Addendum**") on which THESL and the EDA rely do not apply to MSP members.
2. THESL alleges that Dr. Ware breached section 8 of *Ontario Regulation 381/07 – Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)* (the "**Regulation**"). Section 8 contains six subsections and it appears that THESL relies on subsection 5 which is engaged only when a third party derives a benefit by virtue of the public servant being employed by the third person. There is no evidence to support any allegation that CANDAS, by retaining Dr. Ware to testify on its behalf, would derive a benefit by reason of Dr. Ware's status as a public servant. If it were otherwise, no public servant could ever testify before an administrative tribunal. Moreover, all of the cases cited by THESL (in paragraph 13) involved the impugned witness acting for the decision-maker and one of the litigants. This is not the case here.
3. THESL's submissions assume, erroneously, that Dr. Ware (by virtue of his role as a member of the MSP) is also a member of the Adjudicative Panel that will decide this Application. As a matter of law, both are separate panels with distinct functions.
4. This distinction is confirmed by the provisions of OEB By-law #3 ("**By-law #3**") and the Protocol Between the IESO and OEB dated April 25, 2005 (the "**Protocol**") which prescribe how the MSP submits information to the staff and Chair of the Board. THESL and the EDA have misapprehended that these provisions in fact reflect the intended separation of the MSP and Board *qua* adjudicator in regulatory proceedings such as this Application.

Each of these deficiencies is discussed below in the context of CANDAS' submissions on the conflict of interest and apprehension of bias issues.

**(i) Conflict of Interest**

The Addendum and the Regulation provide the framework for assessing the conflict of interest issues raised by THESL and the EDA.

THESL incorrectly applies sections 2.5 of the Addendum to Dr. Ware. The EDA incorrectly applies both sections 2.5 and 3.1.1 of the Addendum to Dr. Ware.

Section 1.4.2 of the Addendum provides that only sections 1 and 2.1 to 2.4 of the Addendum apply to MSP members. Section 1.4.2 provides as follows:

As may be directed by the Chair, Section 1 and section 2.1 to 2.4 (inclusive) of Section 2 of this Code apply to the members of Market Surveillance Panel. The application of Section 1 and sections 2.1 to 2.4 (inclusive) of Section 2 of this Code is in addition to, and not in lieu of, the provisions of sections 2.1.4 and 2.3.2 of By-law #3 of the Board.

Sections 2.5 and 3 of the Addendum do not apply to MSP members. These exclusions recognize that, as part-time panel members, the MSP members will necessarily seek further employment within their area of expertise. Accordingly, the arguments of THESL (at paragraphs 20 and 21) and the EDA (at paragraphs 16(c), 16(d) and 17) to the effect that Dr. Ware has breached sections 2.5 and 3.1.1 of the Addendum are patently incorrect and should be rejected.

THESL (in paragraph 19 of its submissions) also incorrectly applies section 2.2.3 of the Addendum to Dr. Ware. Section 2.2.3 of the Addendum states that MSP members shall not have a direct or indirect financial interest in “a person or affiliate of a person whose conduct, rates, or revenues are regulated by the Board.” Section 2.3.1(c) defines “a person or affiliate of a person whose conduct, rates, or revenues are regulated by the Board” as various electricity and gas players.<sup>5</sup> CANDAS does not fall within this definition, so section 2.2.3 of the Addendum does not apply. In fact, CANDAS members fall outside the jurisdiction of the MSP altogether. There is no possibility that CANDAS members would ever be subject to an investigation by the MSP.

THESL (in paragraph 18 of its submissions) refers to section 8 of the Regulation as another basis for its allegation that Dr. Ware is in a conflict of interest without explaining why. Section 8 of the Regulation provides as follows:

8. A public servant shall not become employed by or engage in a business or undertaking outside his or her employment by the Crown in any of the following circumstances:
  1. If the public servant’s private interests in connection with the employment or undertaking could conflict with his or her duties to the Crown.
  2. If the employment or undertaking would interfere with public servant’s ability to perform his or her duties to the Crown.
  3. If the employment is in a professional capacity and is likely to influence or detrimentally affect the public servant’s ability to perform his or her duties to the Crown.
  4. If the employment would constitute full-time employment for another person. However, this paragraph does not apply with respect to a public servant who is employed part-time by the Crown. This paragraph also does not apply with respect to a public servant who is on an authorized leave of absence from his or her position, but only if the employment is not

---

<sup>5</sup> These are: gas distributors, gas transmitters, gas storage companies, gas marketers, electricity distributors, electricity transmitters, electricity generators, electricity retailers and electricity smart sub-metering providers.

contrary to or inconsistent with the terms of the leave of absence.

5. If, in connection with the employment or undertaking, any person would derive an advantage from the public servant's employment as a public servant.
6. If government premises, equipment or supplies are used in the employment or undertaking. O. Reg. 381/07, s. 8.

Of the circumstances set out in section 8, only that in subsection 8(5) could possibly be relevant. The question, then, is whether CANDAS would derive any advantage from Dr. Ware's position on the MSP. THESL does not identify any such advantage because there is none. The MSP does not have jurisdiction over telecommunications carriers or over any matter which is in issue in this proceeding. THESL (in paragraph 14, first bullet of its submissions) alleges that the MSP routinely considers abuse of market-power issues, such as the one alluded to in the CANDAS application. At best, this allegation is disingenuous. The Application has to do with an LDC's exercise of its monopoly power over distribution assets. The MSP is concerned about abuses in the electricity commodity market, an entirely different matter.

In sum, the conflict of interest allegations made by THESL and the EDA against Dr. Ware are unfounded and are based on an inaccurate reading of the relevant instruments and an incorrect understanding of the nature of conflicts of interest.

**(ii) Reasonable Apprehension of Bias**

In their submissions, THESL and the EDA conflate the Adjudicative Panel of the Board with the MSP and erroneously assume that Dr. Ware has the authority to adjudicate this Application or somehow influence its outcome. Specifically, THESL states (at paragraph 13 of its submissions) that "the retainer by a party of an expert who is also a member of a panel of the adjudicating body clearly gives rise to a reasonable apprehension of bias."<sup>6</sup>

Dr. Ware is not a member of the Adjudicative Panel for this Application, nor does he have influence over the members of the Board's Adjudicative Panel (or any other member, for that matter). The MSP was initially a panel of the Independent Electricity System Operator. It was continued under the *Ontario Energy Board Act, 1998* in 2004 as a panel of the Board with limited jurisdiction to monitor and investigate Ontario's electricity markets pursuant to sections 37 and 38 of the *Electricity Act, 1998* and By-law #3. The MSP has no regulatory function and is

---

<sup>6</sup> The same misconception is reflected in the cases on which THESL relies. For example, *Li v. The College of Physicians and Surgeons of Ontario*<sup>6</sup> dealt with a situation where an expert testified before a disciplinary tribunal and was subsequently appointed to the same disciplinary tribunal before the decision was released. The Court found that there was a reasonable apprehension of bias. The situation in this Application is different. Dr. Ware is not testifying as an expert before the MSP.

separate and distinct from panels struck by the Board to hear matters within the Board's regulatory jurisdiction.<sup>7</sup>

A reasonable apprehension of bias does not arise merely because Dr. Ware was appointed to the MSP by the Board's Management Committee.<sup>8</sup> The Alberta Court of Appeal in *Re Public Utilities Board Act*<sup>9</sup> has held that a reasonable apprehension of bias does not arise merely because an expert testifying before an adjudicative body is also a consultant to the adjudicative body in respect of the same subject matters:

We agree that a reasonably well-informed person could properly fear - based solely on the fact of the retainer - that the Board has great confidence in Drazen and his skills. We do not accept that this fact alone permits a reasonable apprehension that the Board thinks he is better than other experts; he may have been chosen over others for many reasons, as for example availability. Moreover, the respect shown by the retainer would not, of itself, raise an apprehension in the mind of a reasonable and well-informed person that the Board would, as a result of its high opinion of Drazen, pre-judge a case by unthinkingly preferring his evidence... Past expressions of respect, whether by hiring or by acceptance of testimony, surely do not lead to a reasonable fear of a future ... reliance on later testimony by the same expert.<sup>10</sup>

In considering the issue of apprehension of bias, it is noteworthy that there are safeguards in place between the MSP and Board members that limit and control the sharing of information between the two. Generally, the MSP meets every two weeks at the offices of the Independent Electricity Market Operator. Dr. Ware usually attends meetings by phone from Kingston, Ontario. A senior Board staff member sometimes attends these meetings. Members of the Board do not attend meetings of the MSP nor do MSP members participate, in any way, in the decision-making process of Board.<sup>11</sup>

The Protocol and By-law #3 set out what and how the MSP must communicate with the Board. MSP status and investigative reports and related information are submitted to Board Chair, Ms. Leclair,<sup>12</sup> by MSP Chair, Dr. Campbell, who is the designated representative of the MSP in relation to the MSP's relationship with the Board.<sup>13</sup> Section 8 of By-law #3 describes the circumstances in which confidential information may be disclosed by the MSP. Section 8.2.2, in particular, provides that confidential information may be disclosed by the MSP to the Board Chair pursuant to the MSP's reporting obligations or to an adjudicative panel of the Board, upon

---

<sup>7</sup> See, in particular, section 1.1.1 of By-law #3, which provides separate definitions for the "Board" and the "Panel".

<sup>8</sup> *Re Public Utilities Board Act*, 1985 ABCA 282 (CanLII) at para. 11.

<sup>9</sup> 1985 ABCA 282 (CanLII).

<sup>10</sup> *Re Public Utilities Board Act*, 1985 ABCA 282 (CanLII) at para. 11.

<sup>11</sup> Unless the adjudicative panel of the Board was considering the results of an MSP investigation, in which case the MSP may provide information or other assistance to the panel. That is not the case here.

<sup>12</sup> For examples setting out the provision of information to the Board Chair only, please see sections 4.2, 5.1, 7.1, 7.2 and 7.3 of the By-law.

<sup>13</sup> OEB By-law #3, s. 2.4.2.

a summons or direction from the Board panel. Generally, the Chair of the Board does not sit on adjudicative panels of the Board and, to date, Ms. Leclair has not done so. Dr. Ware has not had contact with members of the Board, nor does he have a personal or professional relationship with any of the Board members.

***(iii) Withdrawal of Ware Evidence***

It is regrettable that the mere fact of an adverse party, such as THESL, raising an issue of apprehension of bias resulted in a postponement of the oral hearing. It is also regrettable that THESL and the EDA have chosen to take such an adversarial position in this proceeding. CANDAS believes that Dr. Ware's independence in this proceeding has been tainted to the point that even if the Board dismisses THESL's and the EDA's objections as unfounded (which it should), no rehabilitation of the witness would be possible.

In the light of all of these circumstances, CANDAS is compelled to withdraw the evidence Dr. Ware (including his responses to interrogatories). CANDAS' withdrawal of Dr. Ware is done without admitting that Dr. Ware's retainer resulted in either a conflict of interest or a reasonable apprehension of bias. Indeed, it is clear on the evidence and on the law that Dr. Ware does not have any conflict of interest nor does any reasonable apprehension of bias arise in this matter.

Dr. Ware's withdrawal is conditional on the Board granting leave to CANDAS to file replacement reply evidence by a new expert in respect of the economic basis for mandating telecommunications attachments to distribution poles. CANDAS undertakes to file such evidence as soon as possible and in any event no later than December 16, 2011. CANDAS requests that the Board, as soon as possible, establish a new procedural schedule for the balance of this proceeding, including dates for the receipt of interrogatories on CANDAS' replacement evidence and responses thereto and the oral hearing.

Yours very truly,

***(signed) Helen T. Newland***

***(signed) Michael D. Schafler***

HTN/ko

cc. All Intervenors