EB-2011-0361
EB-2011-0376

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

SUBMISSIONS OF ENERSOURCE HYDRO MISSISSAUGA SERVICES INC.

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I. NATURE OF PROCEEDING

1. By Notice of Combined Hearing and Procedural Order No. 1 dated November 25, 2011 ("Order No. 1"), the Ontario Energy Board (the "Board") has announced that it will hold a hearing to address the following threshold questions:

   B1 Is there a statutory basis for the Langley Utilities Application (as defined in Order No. 1) under the *Ontario Energy Board Act, 1998* (the "Act")?

   B2 If the Act does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4) of the Act?

II. OVERVIEW

2. With respect to the first threshold question, Enersource Hydro Mississauga Services Inc. ("EHMSI") submits that there is no statutory basis for the Board to hear the Langley Utilities Contracting Ltd. ("Langley") application. Indeed, Part VII.1 and, in particular, section 112.2 of the Act is clear – a motion to prevent or remedy an alleged failure to comply with section 73 of the Act can only be brought "on the Board's own motion". The legislature has expressly provided that third parties are not permitted to bring enforcement applications against local distribution companies ("LDCs").

3. With respect to the second threshold question, this question has already been answered by the Board. The Board considered, and declined, to convene a hearing arising out of the Powerline Complaint (as defined below). The Act clearly vests that discretion exclusively in the Board and it has exercised its discretion not to do so. Putting that very same question to a hearing at the request of Langley would be a reversal of that exercise of discretion, for no good reason, and an improper delegation to Langley of the discretionary power granted exclusively to, and clearly exercised by, the Board.

4. The submissions of the Applicant fundamentally mischaracterize the issue to be decided by the Board with respect to the threshold questions. The issue is not whether the Board has the power to grant declaratory relief on an application before it. It may or may not have that power, but that is irrelevant. The question afoot is whether the application can be brought at all by Langley. Subsection 112.2 of the Act plainly says it cannot. The failure of either of the Applicants to even address subsection 112.2 is a tacit acknowledgement that there is no answer to it.

III. BACKGROUND TO THRESHOLD QUESTIONS

a. History of the Board's Consideration of the Issues Raised in the Langley Utilities Application

5. On or about August 13, 2008, the Corporation of the City of Brampton ("Brampton") issued a request for proposal to invite vendors to pre-qualify to perform routine and emergency maintenance for street lighting and related devices within Brampton through Contract No. 2008-087 (the "Contract").

6. Following the pre-qualification process, Brampton received four bids on or about October 9, 2008 on the Contract.

7. EHMSI was the winning bidder for the Contract.

8. Langley Utilities Contracting Ltd. ("Langley") and the intervenor, Powerline Plus Ltd. ("Powerline"), were two of the losing bidders.

9. On December 23, 2008, Powerline filed a claim in the Ontario Superior Court of Justice (the "Powerline Action") against EHMSI, among others, claiming damages of over $3.75 million on the basis that EHMSI is not lawfully permitted, by virtue of section 73 of the Act, to perform the services contemplated under the Contract.

10. In response to the Powerline Action, it was the position of EHMSI that subsection 19(6) granted the Board the exclusive authority to deal with complaints concerning compliance

with the Act. On August 18, 2009, Powerline and EHMSI agreed to an order staying the Powerline Action pending Powerline bringing its complaint to the Board.

11. On September 10, 2009, Powerline filed a complaint (the "Powerline Complaint") with the Board. In a covering letter from James T. Hunt, counsel for Powerline, attaching a copy of the Powerline Complaint, Mr. Hunt advised counsel for EHMSI as follows:

> I have been advised by staff of the OEB to use the consumer on-line inquiry and complaint form in order to present my application to the OEB for a ruling on the judgment of the court. In spite of my efforts to find alternative means to do this, this was the only vehicle offered within which to present this matter for consideration by [*sic*] OEB.[1]

12. The Powerline Complaint provided as follows:

> I James T. Hunt have been advised by staff members at the Ontario Energy Board to apply for a ruling by the Ontario Energy Board using this website.
>
> On or about December 23, 2008 an action was started by Powerline Plus Ltd. as Plaintiff against Enersource Corporation, Enersource Hydro Mississauga Inc., and Enersource Hydro Mississauga Services Inc. and the Corporation of the City of Brampton. For damages arising from a failure to grant the Plaintiff, Powerline Plus Ltd. a contract for which it was the lowest compliant bidder. The contract had been awarded to Enersource Hydro Mississauga Services Inc. which is an affiliate of Enersource Hydro Mississauga. Enersource Hydro Mississauga Services Inc. is governed by subsection 73(1) of the Ontario Energy Board Act, so1998,cC.15 [*sic*].
>
> The contract at issue is a contract for the repair and maintenance of street lighting within the Corporation of the City of Brampton. The City of Brampton is outside a service area of the Hydro Mississauga Inc. [*sic*] which is a regulated company under the Ontario Energy Board Act.
>
> The Plaintiff claims among other things that section 73 of the Ontario Energy Board Act gets [*sic*] out a number of business activities which a distributor's affiliates can carry out. Enersource Hydro Mississauga Services Inc. is governed by section 73. The

[1] September 14, 2009 letter from James T. Hunt to Jennifer Teskey, EHMSI's Book of Authorities, Tab C1.

> provision of maintenance serviees for the provision of street lighting in other municipalities is not a permitted use within that list.
>
> The court ordered that the action be stayed pending a deeision by the Ontario Energy Board including any appeal there from, on whether the services contemplated under the eorporation of the city of Brampton contract number 2008/087 are permitted business activities which in [*sic*] affiliate of a municipally owned electricity distributor can lawfully carry on under section 73 of the Ontario Energy Board Aet, 1998 so1998c. 15 schedule B [*sic*].
>
> The date of the order was August 18, 2009 and the Plaintiff was given 30 days from the date of the order to file an application with the OEB.
>
> This was the means of filing such an application that was recommended by staff of the Ontario Energy Board to Plaintiff's counsel James T. Hunt...[2]

13. On September 17, 2010, Langley filed a virtually identical claim to that filed in the Powerline Action in the Ontario Superior Court of Justice (the "Langley Action") against EHMSI seeking damages in the amount of $1.25 million and injunctive relief restraining EMHSI from entering into any agreement with any municipality or presenting tenders for, *inter alia*, street lighting services.

14. On November 5, 2010, Board staff issued a Compliance Bulletin (the "November 2010 Bulletin") stipulating that:

> Section 73(1) of the Ontario Energy Board Act, 1998 (the "OEB Act") restricts the activities that may be undertaken by an affiliate of a municipally-owned distributor. More specifically, the section establishes an exhaustive list of activities that such affiliates may undertake, including distributing and retailing gas and renting or selling hot water heaters, as well as business activities the principal purpose of which is to use more effectively the assets of the distributor or of an affiliate of the distributor...
>
> A number of distributors have affiliates that are engaged in the provision of street lighting services, such as street light installation

[2] Powerline Complaint filed September 10, 2009 with the Board, EHMSI's Book of Authorities, Tab C1.

> and maintenance. A question has been raised as to whether this is permissible under section 73 of the OEB Act...
>
> **Board Staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services.**[3] [Emphasis added.]

15. In response, Powerline wrote to Board staff on November 9, 2010 seeking clarification of the November Bulletin stating as follows:

> We have a copy of the board's compliance bulletin issued November 5, 2010 regarding application of section 73 of the Ontario Energy Board Act, 1998 in respect of street lighting services.
>
> Please clarify for us whether an affiliate can provide street lighting services outside of their area. For example, would Enersource Hydro Mississauga Services Inc., an affiliate of the public utility, Enersource Hydro Mississauga Inc. be allowed to bid on contracts to provide street lighting services in Thunder Bay or Brampton, or say, Edmonton for that matter? Potentially they would be bidding against other affiliates of power distribution companies and free enterprise operations, over which they would have an obvious and unfair advantage due to the fact that they are supported by public funds.[4]

16. On April 12, 2011, Board Staff issued a supplementary Compliance Bulletin (the "April 2011 Bulletin"), which provided as follows:

> Section 73(1) of the *Ontario Energy Board Act, 1998* (the "OEB Act") restricts the activities that may be undertaken by an affiliate of a municipally-owned distributor. On November 5, 2010, Board staff issued a Compliance Bulletin (the "November Bulletin") regarding the application of section 73(1) of the OEB Act in respect of street lighting services. The view expressed by staff in the November Bulletin is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services.
>
> A question has been raised as to whether that view extends to the circumstances where an affiliate of a distributor is providing street

[3] Ontario Energy Board Compliance Bulletin dated November 5, 2010, EHMSI's Book of Authorities, Tab C2.
[4] Letter from James Hunt, counsel to Powerline, to the Ontario Energy Board Market Operations Hotline dated November 9, 2010, EHMSI's Book of Authorities, Tab C3

> lighting services outside of the affiliated distributor's licensed service area.
>
> By its terms, the November Bulletin is not limited to its application to the provision of street lighting services within the affiliated distributor's licensed service area…
>
> **Board staff's view is that an affiliate of a distributor is not precluded by section 73(1) of the OEB Act from providing street lighting services outside of its affiliated distributor's licensed service area.**[5] [Emphasis added.]

17. The Board has followed its prescribed procedure for investigating and considering complaints, has received the opinion of compliance staff regarding the complaint, and has determined not to bring proceedings for non-compliance. Langley now files a second application on identical facts raising identical issues and asks the Board to convene a hearing notwithstanding the disposition of the Powerline Complaint.

IV. THRESHOLD QUESTION #1 - Is there a statutory basis for the Langley Utilities Application under the Act?

a. Section 112.2 Vests the Exclusive Right in the Board

18. Subsection 73(1) places certain restrictions around the activities that may be undertaken by an affiliate of a municipally-owned electricity distributor. Specifically, subsection 73(1) provides as follows:

> **Municipally-owned distributors**
> 73. (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:
>
> 1. Transmitting or distributing electricity.
>
> 2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82

[5] Ontario Energy Board Compliance Bulletin dated April 13, 2011, EHMSI's Book of Authorities, Tab C4

> or for which the Board did not issue a notice of review in accordance with section 80.
>
> 3. Retailing electricity.
>
> 4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
>
> 5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
>
> 6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
>
> 7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in section 1 of the *Public Utilities Act* or sewage services.
>
> 8. Renting or selling hot water heaters.
>
> 9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. 1998, c. 15, Sched. B, s. 73 (1); 2002, c. 23, s. 4 (9).[6]

19. Subsection 73(1) is included in the definition of "enforceable provision" in section 3 of the Act. If an LDC has contravened an enforceable provision, the Board may, but is not required to, take enforcement proceedings under subsections 112.3(1), 112.4(1) or 112.5(1) of the Act. These subsections provide:

> **Action required to comply, etc.**
>
> **112.3 (1)** If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,
>
> (a) remedy a contravention that has occurred; or

[6] Subsection 73(1) of the Act, EHMSI's Book of Authorities, Tab A1

(b) prevent a contravention or further contravention of the enforceable provision. 2003, c. 3, s. 76.

...

Suspension or revocation of licences

112.4 (1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence. 2003, c. 3, s. 76.

...

Administrative penalties

112.5 (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues. 2003, c. 3, s. 76.[7]

20. Subsection 112.2(1) of the Act is clear – proceedings under subsections 112.3(1), 112.4(1) or 112.5(1) can only be made on the Board's own motion.

Procedure for orders under ss. 112.3 to 112.5

112.2 (1) An order under section 112.3, 112.4 or 112.5 **may only be made on the Board's own motion**. 2003, c. 3, s. 76.[8] [Emphasis added.]

21. Even prior to the enactment of section 112.2, the Ontario Divisional Court, in *Graywood Investments Ltd. v. Ontario (Energy Board)*,[9] had held that only the Board itself could initiate a hearing on a compliance matter. It is clear that the legislature, in enacting subsection 112.2(1), has effectively codified the *Graywood* decision and made it clear beyond any discussion that no person other than the Board can engage the Board's exclusive jurisdiction to bring compliance proceedings. The Board is entitled to have – indeed it must have – control of its regulatory agenda and docket.

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[7] Sections 112.4, 112.4 and 112.5 of the Act, EHMSI's Book of Authorities, Tab A1
[8] Subsection 112.2(1) of the Act, EHMSI's Book of Authorities, Tab A1.
[9] *Graywood Investments Ltd. v. Ontario (Energy Board)* (2005), 194 O.A.C. 241 (Div. Ct.) ("*Graywood*"), EHMSI's Book of Authorities, Tab B1.

b. Langley has no implied right to make this Application under the Act

22. As noted, there is no provision in the Act that permits third parties, such as Langley or Powerline, to move for an enforcement order before the Board.

23. The Board has no plenary power to hear *ad hoc* applications under the Act. The ability of a third party to bring such an application must be founded in the statute. The Board is a statutory creature, and as such, it cannot exceed the powers that were granted to it by its enabling statute. The Board must "adhere to the confines of [its] statutory authority or 'jurisdiction'; and [it] cannot trespass in areas where the legislature has not assigned [it] authority".[10]

24. The power of a third party to bring an enforcement application is absent from the explicit language of the Act. Nor can it be "implied" from the statutory regime as necessarily incidental to the explicit powers.

25. Specifically, the power of the Board to bring enforcement proceedings on its own motion for contraventions of the licensing provisions set out in Parts V and VII.1 of the Act are conferred without more. Section 112.2 clearly provides that the only party that is conferred a right to convene a hearing in the case of an alleged infraction is the Board itself. There is no mention in the Act of the power of a third party to bring such a proceeding, or to demand a hearing.

26. On the contrary, the Act sets out a comprehensive code to address compliance issues under the Act. Specifically, section 105 of the Act permits the Board to receive complaints and make inquiries concerning conduct that may be in contravention of the Act. If the Board is satisfied that an LDC that holds a licence under Part IV or V of the Act has contravened the Act, the Board may make an order suspending or revoking the licence. However, prior to so doing the LDC, and only the LDC, may request a hearing before the Board. The legislature expressly declined to give the complainant the right to request a hearing under Part VII.1 of the Act.

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[10] S. Blake, *Administrative Law in Canada*, (3rd ed. 2001), at pp. 183-184, EHMSI's Book of Authorities, Tab B2.

27. In the face of the legislature saying that only the Board can commence enforcement proceedings, it cannot credibly be contended that a similar authority was intended to be given to third parties and that this power should be considered to arise by "necessary implication".

28. There is no distinction between the declaration sought by Langley and the Board's powers under sections 112.3 through 112.5; the Applicant effectively seeks to prohibit EHMSI from carrying on certain activities alleged to be prohibited by section 73 and to remedy a past violation. These are the very powers given to the Board under section 112.3. But Langley seeks to disguise that by saying they seek only a "declaration". A similar situation was dealt with in *Snopko v. Union Gas*,[11] wherein the Court ruled that the exclusive jurisdiction of the Board could not be avoided by reframing the cause of action or the nature of the relief sought. If the matter which the applicant seeks to advance is in substance something the legislature has tasked the Board to deal with, the applicant will not be permitted to pursue it.

29. The identical question was considered by the Ontario Divisional Court in *Graywood*.[12] This case concerned the Act prior to the repeal of section 75 and the enactment of section 112.2 – i.e. it considered the right of a third party to requisition a hearing on a compliance complaint at a time when the express prohibition against such an application had not been enacted. The Court held that even in the absence of a provision precluding enforcement proceedings by a third party, the Board, and only the Board, could have the power to convene a hearing in respect to a compliance complaint. In particular, the Divisional Court held as follows:

> ...the right to a hearing arises only where, after its initial investigation, the Board is inclined to issue a notice of non-compliance. Even then, it is the licensee rather than the complainant who is entitled to request a hearing. Apart from that, it is entirely within the discretion of the Board whether to hold a formal hearing...unless that discretion is exercised improperly...this court will not interfere. The mere decision *not* to hold a formal hearing is not in itself a denial of procedural fairness:

[11] *Snopko v. Union Gas Ltd.*, 2010 ONCA 248, EHMSI's Book of Authorities, Tab B3.
[12] *Graywood Investments Ltd. v. Ontario (Energy Board)* (2005), 194 O.A.C. 241 (Div. Ct.), EHMSI's Book of Authorities, Tab B1.

> *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).[13] [Emphasis in original.]

30. In sum, there is no statutory basis on which Langley may bring its application. Furthermore, as outlined above, such a power is not necessary for the accomplishment of the objects of the Act, or the proper discharge of the Board's statutory mandate as the Board has been conferred the power to initiate proceedings, on its own motion, in appropriate cases. No implied right of application by third parties can exist in light of section 112.2.

31. The issue of whether the Board has the power to grant declaratory relief is not the issue to be decided here. The Board may or may not have the power to grant declaratory relief, but the true question is whether the proceeding itself is properly before the Board. Even the cases which the Applicant relies upon in support for an expansive view of the Board's powers expressly acknowledge that the predicate for the exercise of these powers is that the matter be properly before the Board to start with.[14] Langley has failed to even address that issue.

V. THRESHOLD QUESTION #2 - If the Act does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4) of the Act?

32. Subsection 19(4) does not expand the Board's jurisdiction, nor does it create any additional substantive rights for third parties to request a hearing. It merely says the that in respect of any matter which the Act has said may be brought before the Board by application, the Board may itself initiate a determination of that question. It does not confer on the Board a broad power to determine any question it wishes whether on its own motion or on the motion of a third party. Specifically, subsection 19(4) provides:

> **Additional powers and duties**
>
> (4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, **determine any**

[13] *Grayrood Investments Ltd. v. Ontario (Energy Board)* (2005), 194 O.A.C. 241 (Div. Ct.), at para. 22, EHMSI's Book of Authorities, Tab B1.
[14] *Shopko v. Union Gas Ltd.*, 2010 ONCA 248, EHMSI's Book of Authorities, Tab B3.

> **matter that under this Act or the regulations it may upon an application determine** and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

33. The Board could determine, pursuant to subsection 19(4), any matter which the Board could determine upon a hearing convened pursuant to section 112.2. However, the Board has already exercised its discretion not to do so. Specifically, the Powerline Complaint was received and reviewed by the Board's Compliance Department. In response, two Compliance Bulletins were issued indicating that, it was the view of Board staff that an affiliate of an LDC is not precluded by subsection 73(1) of the Act from providing street lighting services. The Board, having the benefit of the Compliance Bulletins, decided not to bring enforcement proceedings against EMHSI. It has exercised its discretion already.

34. Procedural fairness does not require that the Board convene a hearing to address Langley's application. As the Divisional Court noted in *Graywood:*

> ...it cannot be the case that the legislature contemplated the Board would be required to hold a hearing before deciding the licensee had complied with its licence. If the Board was required to hold a hearing with respect to every complaint of non-compliance, clearly the licensee whose rights are directly affected would have to be given notice. However, ss.75(2) and (3) contemplate notice to the licensee only if the Board intends to make an order and at that point, the licensee is entitled to "request" a hearing. This provision would be meaningless if the Board had already been required to hold a hearing simply by virtue of the fact that a complaint had been filed.[15]

35. As indicated in *Graywood*, Langley may have recourse via judicial review if the Board's exercise of its discretion is unreasonable, but it cannot insist on the right to requisition the hearing itself.

36. If the Board were to put the Langley Utilities Application to a hearing, such a decision would be a reversal of its previous exercise of discretion not to do so. Panels of the Board should not be convened to second guess decisions already taken by the Board not to take enforcement proceedings against LDCs. Not only is there no good reason to do

[15] *Graywood Investments Ltd. v. Ontario (Energy Board)* (2005), 194 O.A.C. 241 (Div. Ct.), at para. 21, EHMSI's Book of Authorities, Tab B1.

so, but to do so risks ceding the Board's jurisdiction and regulatory agenda to third parties – which would be an improper delegation of the powers exclusively conferred on the Board. Furthermore, such a precedent could compromise the Board's ability to effectively and efficiently discharge its statutory mandate as the Board's docket could quickly be filled by third party interests.