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*.

ENERSOURCE HYDRO MISSISSAUGA SERVICES INC.'S BOOK OF AUTHORITIES

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TAB A-1

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

...

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 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).

...

Board receives complaints and makes inquiries

105. The Board may,

(a) receive complaints concerning conduct that may be in contravention of an enforceable provision whether the conduct constitutes an offence or not; and

(b) make inquiries, gather information and attempt to mediate or resolve complaints, as appropriate, concerning any matter that comes to its attention that may be in contravention of an enforceable provision whether the matter constitutes an offence or not. 2010, c. 8, s. 38 (22).

...

PART VII.1
COMPLIANCE

112.1 Repealed: 2010, c. 8, s. 38 (29).

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.

Notice

(2) The Board shall give written notice to a person that it intends to make an order under section 112.3, 112.4 or 112.5. 2003, c. 3, s. 76.

Contents of notice

(3) Notice under subsection (2) shall set out the reasons for the proposed order and shall advise the person that, within 15 days after receiving the notice, the person may give notice requiring the Board to hold a hearing. 2003, c. 3, s. 76.

Service of notice or order

(3.1) Any notice or order required to be given or served by the Board under this Part or Part VII.2 is sufficiently given or served if,

(a) delivered personally;

(b) sent by registered mail; or

(c) sent by another manner, if the Board can prove receipt of the notice or order. 2010, c. 8, s. 38 (30).

Deemed service

(3.2) Where service is made by registered mail, the service is deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice or order until a later date. 2010, c. 8, s. 38 (30).

Exception

(3.3) Despite subsection (3.1), the Board may order any other method of service. 2010, c. 8, s. 38 (30).

Hearing

(4) A person to whom notice is given under subsection (2) may, within 15 days after receiving the notice, give notice to the Board requiring the Board to hold a hearing. 2003, c. 3, s. 76.

If hearing not required

(5) If no notice requiring a hearing is given within the time permitted by subsection (4), the Board may make an order. 2003, c. 3, s. 76.

TAB B-1

Graywood Inv. Ltd. v. Energy Bd. (2005), 194 O.A.C. 241 (DC)

MLB headnote and full text

Temp. Cite: [2005] O.A.C. TBEd. FE.029

Graywood Investments Limited (applicant) v.
Ontario Energy Board and Toronto Hydro-Electric
System Limited (respondents)
(724/02)

**Indexed As: Graywood Investments Ltd. v.
Ontario Energy Board et al.**

Court of Ontario
Superior Court of Justice
Divisional Court
Lane, Pitt and Molloy, JJ.
February 3, 2005.

Summary:
The Ontario Energy Board dismissed Graywood Investments Ltd.'s complaint that Toronto Hydro-Electric System Ltd. had failed to comply with certain provisions of its licence and the Ontario Energy Board Act, 1999. Graywood sought judicial review, or, alternatively, appealed from that decision.

The Ontario Divisional Court allowed the application for judicial review, quashed the Board's decision and remitted the matter to the Board for further consideration.

Editor's Note: for related cases see [2003] O.T.C. 434 and 181 O.A.C. 265.

Administrative Law - Topic 262
The hearing and decision - Right to a hearing - When right exists - The Ontario Energy Board dismissed Graywood Investments Ltd.'s complaint that Toronto Hydro-Electric System Ltd. had failed to comply with certain provisions of its licence and the Ontario Energy Board Act, 1999 - Graywood sought judicial review - It argued that the Board breached its duty of fairness in failing to conduct a hearing before making its findings - The Ontario Divisional Court rejected the argument - There was no requirement that the Board hold a hearing every time a complaint was referred to it - The right to a hearing arose only where, after its initial investigation, the Board was inclined to issue a notice of non-compliance - Even then, it was the licensee rather than the complainant who was entitled to request a hearing (Act, s. 75) - Apart from that, it was entirely within the discretion of the Board whether to hold a formal hearing in this type of situation - The mere decision not to hold a formal hearing was not in itself a denial of procedural fairness - See paragraphs 19 to 22.

Administrative Law - Topic 266

The hearing and decision - Right to a hearing - Persons not entitled to a hearing - [See **Administrative Law - Topic 262**].

Administrative Law - Topic 2266
Natural justice - The duty of fairness - What constitutes procedural fairness - The Ontario Energy Board dismissed Graywood Investments Ltd.'s complaint that Toronto Hydro-Electric System Ltd. had failed to comply with certain provisions of its licence and the Ontario Energy Board Act, 1999 - Graywood sought judicial review - It objected to the Board taking into account evidence of past industry practice without giving Graywood notice of its intent to do so and an opportunity to respond to it - The Ontario Divisional Court found no procedural unfairness in the Board taking into account industry practice - The Board was a highly specialized tribunal - It had considerable knowledge and experience as to the nature of this particular industry and how it operated - The Board was entitled to draw on its expertise and was not required to give any notice of such to the complainant before making a decision - See paragraphs 19 and 23.

Administrative Law - Topic 2442
Natural justice - Procedure - Notice - When required - [See **Administrative Law - Topic 2266**].

Administrative Law - Topic 2609
Natural justice - Evidence and proof - Reliance on evidence not adduced by parties - [See **Administrative Law - Topic 2266**].

Administrative Law - Topic 9102
Boards and tribunals - Judicial review - Standard of review - [See **Public Utilities - Topic 4741**].

Public Utilities - Topic 4664
Public utility commissions - Regulation - Rates - Contracts subject to regulation - The Ontario Energy Board published a Distribution System Code which set out minimum conditions with which distributors of electricity had to comply - The Code's object was to end Toronto Hydro-Electric System Ltd.'s former monopoly and open the field to competition - Article 1.7 provided that the Code's provisions would "not apply to projects that are the subject of an agreement entered into before November 1, 2000" - The Board found that an implied connection agreement had been entered into between Graywood Investments Ltd. and Toronto Hydro prior to November 1, 2000 respecting Graywood's subdivision project - On judicial review, the Ontario Divisional Court quashed the Board's decision - The Board's finding of an implied connection agreement prior to November 1, 2000 was unreasonable given the existence of an actual written connection agreement dated November 8, 2000 - The parties here chose to date their contract November 8, 2000 - This was not inadvertent - Toronto Hydro drafted the contract in December 2000 - It was deliberately back-dated to November 8, 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood respecting the installation - See paragraphs 37 to 47.

Public Utilities - Topic 4741

Public utility commissions - Judicial review - General - Standard or scope of review - The Ontario Energy Board dismissed Graywood Investments Ltd.'s complaint that Toronto Hydro-Electric System Ltd. had failed to comply with certain provisions of its licence and the Ontario Energy Board Act, 1999 - The Board found that Graywood's subdivision project was "subject to an agreement" with Toronto Hydro prior to November 1, 2000 and therefore fell outside the new competitive regime in Ontario respecting electrical services - Graywood sought judicial review - The Ontario Divisional Court considered the four factors set out in Pushpanathan v. Canada (SCC) for determining the level of deference to be given an administrative tribunal and held that the appropriate standard of review was one of reasonableness - Therefore, the Board was not required to be correct in its decision - See paragraphs 30 to 36.

Public Utilities - Topic 4742

Public utility commissions - Judicial review - Appeals or judicial review - Jurisdiction - The Ontario Energy Board dismissed Graywood Investments Ltd.'s complaint that Toronto Hydro-Electric System Ltd. had failed to comply with certain provisions of its licence and the Ontario Energy Board Act, 1999 - Section 33(1) of the Act permitted an appeal to the Divisional Court from an "order of the Board" - The Ontario Divisional Court held that the Board's decision was not an "order" within the meaning of s. 33(1) and therefore was not subject to an automatic right of appeal - A decision by the Board that it was not appropriate to initiate the process leading up to a hearing under s. 75 was more administrative than judicial - The decision not to proceed further under s. 75 was simply a decision not to make an order - Although the Board's decision not to proceed against Toronto Hydro was not an "order" subject to appeal, it clearly affected the legal rights, powers and liabilities of Graywood - As such, it was a statutory power of decision and subject to judicial review - See paragraphs 25 to 29.

Public Utilities - Topic 4743

Public utility commissions - Judicial review - Appeals - [See **Public Utilities - Topic 4742**].

Cases Noticed:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; 243 N.R. 22, refd to. [para. 22].

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, addendum [1998] 1 S.C.R. 1222; 226 N.R. 201, refd to. [para. 30].

Consumers' Gas Co. v. Ontario Energy Board et al., [2001] O.A.C. Uned. 287 (Div. Ct.), refd to. [para. 31].

Arding v. Buckton (1956), 20 W.W.R. (N.S.) 487; 6 D.L.R.(2d) 586 (B.C.C.A.), refd to. [para. 42].

Ryan v. Law Society of New Brunswick, [2003] 1 S.C.R. 247; 302 N.R. 1; 257 N.B.R.(2d) 207; 674 A.P.R. 207; 2003 SCC 20, refd to. [para. 62].

Dr. Q., Re, [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170; 2003 SCC 19, refd to. [para. 62].

Casurina Limited Partnership et al. v. Rio Algom Ltd. et al.(2004), 181 O.A.C. 19 (C.A.), refd to. [para. 67].

Petty v. Telus Corp. (2002), 164 B.C.A.C. 152; 268 W.A.C. 152 (C.A.), refd to. [para. 67].

Authors and Works Noticed:
Chitty on Contracts (28th Ed. 1999), paras. 12-043, 12-046 [para. 67].

Counsel:
Robert J. Howe and David S. Cherepacha, for the applicant;
F.J.C. Newbould, for the respondent, Toronto Hydro-Electric System Limited;
M. Philip Tunley, for the respondent, Ontario Energy Board.

This application was heard on November 15, 2004, before Lane, Pitt and Molloy, JJ., of the Ontario Divisional Court. The judgment of the court was delivered on February 3, 2005, when the following opinions were filed:

Malloy, J. (Lane, J., concurring) - see paragraphs 1 to 50;
Pitt, J., dissenting - see paragraphs 51 to 69.

[End headnote]

A. INTRODUCTION

[1] Molloy, J.: Graywood Investments Limited ("Graywood") seeks to judicially review, or alternatively, appeal from a decision of the Ontario Energy Board (the "OEB" or "the Board") dated July 25, 2001, in which the OEB dismissed Graywood's complaint that the Toronto Hydro-Electric System Limited ("Toronto Hydro") had failed to comply with certain provisions of its licence and the **Ontario Energy Board Act, 1999** ("the **Act**"). In particular, Graywood argued before the OEB that the subdivision project it was developing was governed by new rules which came into force on September 29, 2000 and that it was entitled to hire a contractor at competitive rates to install the electrical distribution system for the subdivision. Toronto Hydro took the position that the old monopolistic regime applied and that Graywood was obliged to retain Toronto Hydro at the rates applicable under the old system. The OEB dismissed Graywood's complaint based on its finding that Graywood and Toronto Hydro had entered into an agreement before November 1, 2000 such that an exception applied and the subdivision project did not fall within the new regime.

B. BACKGROUND FACTS

[2] Graywood is a real estate developer. In 1999, Graywood commenced development of a residential subdivision in north Scarborough. At that time, Toronto Hydro enjoyed a monopoly on the provision of new electrical supply facilities to developers in that geographic area. Accordingly, on November 1, 1999 Graywood consulted Toronto Hydro about the underground electrical distribution system for the subdivision.

[3] Toronto Hydro replied by letter dated November 9, 1999 that it would proceed with the "design" of the electrical distribution system upon payment of a "deposit fee" of $110.00 per

lot, which fee would later be "credited against the overall electrical charges which will be detailed in the project invoice". Graywood paid the requested design fee of $63,140.00 on December 23, 1999. Both parties obviously anticipated that Toronto Hydro would eventually be doing the installation work as at that time Toronto Hydro enjoyed a monopoly position in the market.

[4] Toronto Hydro completed the design work and sent its design drawings to Graywood's engineers on June 27, 2000. At this point, Graywood was under no contractual obligation with Toronto Hydro to proceed any further.

[5] It is clear that by the fall of 2000 Graywood was committed to proceeding with the development of this subdivision. In September, October and November 2000 sewers, water mains and roads were being constructed. In November 2000 Graywood contacted Toronto Hydro with respect to the installation of the electrical distribution system it had designed. Toronto Hydro refused to install the electrical system without a written contract.

[6] By November 2000 a new regime had come into force with respect to the provision of certain electrical services, which regime was designed to end the monopoly electrical providers had previously enjoyed. Graywood took the position that the new regime applied to its subdivision and that Toronto Hydro should comply with the new scheme by making an offer to connect which Graywood could then consider and possibly exercise its option to obtain alternative bids from other electrical suppliers. Toronto Hydro disagreed, taking the position that the new regime did not apply to this subdivision and refusing to provide an offer to connect under the new scheme. Toronto Hydro insisted that it would only provide installation services pursuant to its pricing structure and policies in place prior to the new regime.

[7] Ultimately, Graywood agreed to proceed with Toronto Hydro, but under protest with respect to the pricing structure. Toronto Hydro drafted a contract entitled "Agreement for the Installation of an Underground Electrical Distribution System in a Residential Subdivision" and forwarded it to Graywood in mid December 2000. Although executed by the parties in December 2000, the agreement stipulates that it is "made this 8th day of November, 2000". Schedule B to the agreement was a preliminary invoice for a full contract amount of $1,772,867.34. Against this, Toronto Hydro applied a credit of $63,140.00 being the "deposit" paid for the design work, such that the price to be paid by Graywood was $1,709,727.34. Toronto Hydro stipulated that the full contract price would have to be paid before it proceeded with any installation work. Graywood paid the invoice in full but stated this was without prejudice to its rights to challenge Toronto Hydro's position before the OEB and/or the courts.

C. ENDING THE MONOPOLY: CHANGES TO THE LEGISLATIVE SCHEME

[8] On July 14, 2000, the OEB published a Distribution System Code ("the Code") which sets out minimum conditions with which distributors of electricity must comply. A "distributor" is defined as a person who owns or operates a system for distributing electricity, which includes Toronto Hydro. The Code's object was to end Toronto Hydro's monopoly and open the field to competition. Different aspects of the Code came into force at different times. Chapter 3 of the

Code, dealing with "Connections and Expansions" came into force on September 29, 2000 with one key exception. The Code provided in Article 1.7 that its provisions would "not apply to projects that are the subject of an agreement entered into before November 1, 2000". That exception provision is central to the determination of the proceeding now before this Court.

[9] Article 1.7 does not specifically define what type of "agreement" would trigger the exception to the application of Chapter 3 of the Code, nor is the term "agreement" included in the general definition section of the Code. However, Chapter 3 relates to Connections and Expansions of electrical distribution systems. The general definition section of the Code refers to only one type of agreement, that being a "Connection Agreement", which is defined as follows:

"'Connection Agreement' means an agreement entered into between a distributor and a person connected to its distribution system that delineates the conditions of the connection and delivery of electricity to that connection;"

[10] Under the Conditions of Service attached to its licence, Toronto Hydro is required to enter into a contract of service with any customer before it connects a building for a new or modified supply of electricity (Conditions of Service, s. 2.1.7.1). Further, in the absence of a written agreement, the Conditions of Service provide that an agreement will be implied "with any Customer who is connected to Toronto Hydro's distribution system and receives distribution services from Toronto Hydro". The terms of such an implied agreement are stipulated to be embedded in various sources, including the Conditions of Service and the Distribution System Code (s. 2.1.7.2). These provisions are mirrored in the Code. Article 2 of the Code (dealing with standards of business practice and conduct) provides;

"A distributor shall ensure that it has an appropriate Connection Agreement in place with any customer prior to commencement of service. If a Connection Agreement is not entered into once service has commenced, the provision of service by the distributor shall imply acceptance of the distributor's Conditions of Service and the terms of any applicable Connection Agreement."

[11] Article 3.2.2 of the Code provides that if an expansion of a distributor's main distribution system is needed in order to connect a customer, the distributor is required to make an offer to the customer that must include a description of the material and labour required to build the expansion required to connect the customer, an estimate of the amount that would be charged for construction of the system by the distributor and an estimate of what the distributor will charge for the connection of the new system to its main system. The distributor is also required to inform the customer of the option of obtaining alternative bids from qualified contractors. This is the provision relied upon by Graywood, but which Toronto Hydro took the position did not apply to Graywood's subdivision because of the exception in Article 1.7 for projects subject to an agreement entered into before November 1, 2000.

[12] Article 3.2.3 provides that, "A distributor shall be responsible for the preliminary planning, design and engineering specifications of the work required for the distribution system expansion and connection." However, under the new regime, it does not necessarily

follow that the distributor will obtain the contract to construct the distribution system expansion and connection. The consumer may elect to proceed with an approved private contractor for that portion of the work.

D. PROCEEDINGS BEFORE THE ONTARIO ENERGY BOARD

[13] Graywood wrote to the Ontario Energy Board on March 9, 2001 alleging that Toronto Hydro was in breach of its licenee by failing to comply with the provisions of the Code. Toronto Hydro outlined its position in a letter dated April 4, 2001, indicating that the Code did not apply to the Graywood subdivision because of the design work undertaken by Toronto Hydro prior to November 1, 2000. Graywood requested the OEB to schedule a hearing to consider whether Toronto Hydro was in breach of its obligations.

[14] The OEB advised Graywood in May 2001 that it would be treating Graywood's letter as a complaint and would conduct an investigation. The OEB's letter in that regard states, in part:

"While in your letter you requested a hearing to determine whether Toronto Hydro is in compliance with the Code, the Board will treat the matters raised in your letter as a complaint. Under the licensing provisions of the **Ontario Energy Board Act, 1998**, parties do not have a right to obtain a hearing on matters of non-compliance. Rather, where the Board believes a licensee is in non-compliance, it may issue a notice setting out its intention to issue a non-compliance order or suspend or revoke the licence. Where parties raise issues of non-compliance, the Board has adopted the practice of referring such complaints to the Director of Licensing to investigate and make recommendations regarding further action by the Board."

[15] Graywood did not at the time object to the manner in which the OEB proposed to deal with its complaint, other than to take the position that a hearing should be held.

[16] Section 75 of the **Ontario Energy Board Act, 1988**, provides:

"75(1) If the Board is satisfied that a licensee is contravening or is likely to contravene any licence, the Board may order the licensee to comply with its licence.

"(2) The Board shall give written notice to the licensee that it intends to make an order under subsection (1).

"(3) Notice under subsection (2) shall set out the reasons for the proposed order and advise the licensee that, within 15 days after the day that notice was given, the licensee may request the Board to hold a hearing.

"(4) If no request for hearing is made within the time permitted by subsection (3), the Board may make an order." (Emphasis added)

[17] The OEB conducted an investigation and obtained extensive written submissions and documentation from Graywood. The investigation included a consideration of all of the dealings between Graywood and Toronto Hydro from the inception of the subdivision project

as well as Graywood's own work within the project. Toronto Hydro was given the opportunity to provide further documentation or submissions, but did not do so.

[18] Following its investigation, the OEB concluded that Toronto Hydro was not in breach of its licence and was not required to comply with the requirements of Chapter 3 of the Code for the Graywood subdivision project. Essentially, the OEB concluded that there was an agreement between Graywood and Toronto Hydro prior to November 1, 2000 such that the exception provision in Article 1.7 applied. The OEB's reasons for this determination are set out in a letter from the Board Secretary, the operative portion of which states:

"Based on the information provided, the Board finds that an implied agreement had been reached prior to November 1, 2000.

"The Board finds that in past industry practice, there was often no formal offer to connect and associated written connection agreement between parties on a specific project. The evidence indicates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November 1, 2000 and that Graywood was committed to the Project proceeding as municipal servicing had commenced prior to October of 2000.

"Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed based on past industry practice."

E. PROCEDURAL FAIRNESS

[19] Graywood raises two issues of procedural fairness. First, it argues that the OEB breached its duty of fairness in failing to conduct a hearing before making its findings. Second, Graywood objects to the Board taking into account evidence of past industry practice without giving Graywood notice of its intent to do so and an opportunity to respond to it.

[20] With respect to the first point, Graywood requested the OEB to hold a hearing and the OEB refused, based on its conclusion that there had been no breach by Toronto Hydro. I do not agree with the applicant's contention that the Board was required to hold a hearing before concluding there had been no breach.

[21] The language used in s. 75 of the Act is instructive. Subsections (2) and (3) provide that the Board "shall" give written notice to the licensee if it intends to make a compliance order and "shall" provide reasons for the proposed order. However, mandatory language is not used in other parts of this provision. Thus, even if the Board finds there has been non-compliance, it "may" order the licensee to comply, but is not required to do so: ss. 75(2) and (4). Given the structure of these provisions, 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.

[22] There is no requirement that the Board hold a hearing every time a complaint is referred to it. Rather, 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 in this type of situation. Unless that discretion is exercised improperly (which is not alleged here), this court will not interfere. The mere decision not to hold a formal hearing is not in itself a denial of procedural fairness: **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817; 243 N.R. 22.

[23] Likewise, I find no procedural unfairness in the OEB taking into account industry practice. The Board is a highly specialized tribunal. It has considerable knowledge and experience as to the nature of this particular industry and how it operates. The Board noted that it is not uncommon in the industry for there to be no formal written connection agreement. The Board was fully entitled to draw on its expertise in this regard. That is one of the distinct advantages of having these types of matters decided by a specialized tribunal. I also note that both the Toronto Hydro operating licence and the legislation contemplate this very situation and provide that an agreement consistent with the distributor's conditions of licence and the legislation will be implied in the absence of a written agreement. The Board also noted that the subdivision project had been costed based on past industry practice. Again, the Board is uniquely positioned to draw such a conclusion based on its expertise. While evidence of past industry practice might be necessary before a court or in areas outside the expertise of the tribunal, no such evidence was necessary before the Board here. The matters taken into account were within the special expertise of the Board. The Board was entitled to draw on that expertise and was not required to give any notice of such to the complainant before making a decision.

[24] Accordingly, I find no breach of procedural fairness by the OEB in its handling of this matter.

F. STANDARD OF REVIEW

Is the OEB Decision an Order?

[25] Section 33(1) of the **Act** provides that an appeal lies to the Divisional Court from an "order of the Board", the making of a rule under s. 44 or the issuance of a code under s. 70.1. Section 33(2) stipulates that the appeal may be made solely upon a question of law or jurisdiction. The first issue to be determined is whether the decision of the Board in this case is an "order" within the meaning of s. 33(1) and therefore subject to an automatic right of appeal.

[26] Sections 19(1) and (2) provide:

"19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.

"(2) The Board shall make any determination in a proceeding by order."

[27] The applicant also relies upon s. 21(2) of the **Act**, which prohibits the Board from making an "order" unless it has conducted a hearing on notice to the appropriate parties. However, this provision is stated to be "subject to any provision to the contrary in this or any other Act".

[28] Section 75(4) of the **Act** is an example of a situation in which an "order" may be made without a hearing. It provides that where the Board is of the view that a licensee has failed to comply with the conditions of its licence, has given notice to the licensee of its intention to make a compliance order and has not received a request for a hearing from the licensee within the 15 day time limit, the Board "may make an order". However, the fact that some determinations made by the Board under s. 75 are "orders" subject to the appeal right, does not mean that every decision made by the Board in the administration of that section will necessarily be an "order". The Board performs many functions under the **Act**. Some are judicial, or quasi-judicial, in nature; others are more administrative. In my view, a decision by the Board that it is not appropriate to initiate the process leading up to a hearing under s. 75 is more administrative than judicial. That is not to say that important interests of other parties are not affected. Often they will be. However, in my opinion, a decision not to proceed further under s. 75 is simply a decision not to make an order. It is not itself an order, and is not subject to the appeal right set out in s. 33 of the **Act**.

Judicial Review

[29] The OEB supervises the terms upon which electrical power is supplied to Ontario residents. Graywood was not able to simply retain somebody other than Toronto Hydro to connect electricity to its subdivision. Graywood attempted to obtain relief from the civil courts in respect of its contract with Toronto Hydro, but its case was dismissed on the grounds that the OEB had exclusive jurisdiction to deal with the matter: **Graywood Investments v. Toronto Hydro-Electric System Ltd.**, [2003] O.T.C. 431; [2003] O.J. No. 2091 (S.C.J.), affd. [2004] O.J. No. 193; 181 O.A.C. 265 (C.A.). Whether or not Graywood was required to proceed with Toronto Hydro on its terms under the old monopoly regime, as opposed to the new regime, is a matter of considerable financial consequence for Graywood. Therefore, although the Board's decision not to proceed against Toronto Hydro was not an "order" subject to appeal, it clearly affected the legal rights, powers and liabilities of Graywood. As such, it is a statutory power of decision and subject to judicial review by this Court.

Standard of Review

[30] The Supreme Court of Canada ruled in **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982, addendum [1998] 1 S.C.R. 1222; 226 N.R. 201, that a "pragmatic and functional approach" should be taken in determining the level

of deference to be accorded an administrative tribunal. The reviewing court is required to evaluate each situation taking into account four factors: (1) whether there is a privative cause; (2) the expertise of the tribunal; (3) the purpose of the legislation as a whole and the particular provision in issue; and (4) the nature of the question before the tribunal: **Pushpanathan**, supra, at paras. 28-38.

[31] There is no privative clause in the **Act**. There is a right of appeal, but limited to questions of law and jurisdiction. As noted by the Divisional Court in **Consumers' Gas Co. v. Ontario Energy Board et al.**, [2001] O.A.C. Uned. 287; [2001] O.J. No. 5024 (Div. Ct.), at para 3, that is a factor which places the Board "on a continuum short of patent unreasonableness".

[32] The OEB is a highly specialized tribunal with considerable expertise. **Consumer's Gas Co. v. Ontario (Energy Board)**, supra, was a judicial review of an OEB decision permitting Consumers Gas to use the value of past ratepayer benefits to pay deferred taxes amounting to $50 million. The Divisional Court applied a "reasonableness" standard of review, emphasizing the importance of deference due to the Board's high level of expertise. Carnwath, J., noted, at para. 2:

"The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate - the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment. The following are but some of the activities of the Board requiring expertise:

- economic forecasting

- familiarity with accounting and income tax principles

- special features and requirements of a monopolistic utility"

[33] While the expertise brought to bear by the OEB in the case at bar is somewhat different from the situation before the Court in the **Consumer's Gas** case, it is no less complex or specialized. The Board was required to balance the interests of the consumer with those of electricity distributors, suppliers and contractors, all within the context of a market that was moving from a monopolistic structure to one with some aspects of competition, but still with supervision and controls. The OEB's expertise includes not just the provision of electricity but many other aspects of construction, engineering and subdivision planning and control. The specialized nature of the OEB's expertise demands a relatively high degree of deference to its decisions.

[34] The nature of the legislation involved also supports a deferential standard of review. The subject matter is specialized and complex, involving the balancing of many different levels of public and private interests. Further, the particular provision before the Board in this case dealt with the phasing in of a new competitive regime and was squarely within the public interest mandate and expertise of the Board.

[35] The matter decided by the OEB was whether the Graywood subdivision project fell within the new competitive regime. This required the Board to decide whether the project was "subject to an agreement" with Toronto Hydro prior to November 1, 2000. This involves questions of law as to contract formation and statutory interpretation. However, it is not a pure question of law. To answer the question before it, the Board was also required to consider the dealings between the parties and make findings of fact. Accordingly, the question decided by the Board was one of mixed fact and law. As such, it is less likely to be held to the standard of correctness often applied to pure questions of law. On the other hand, although there are factual aspects to the question, they did not involve determinations of disputed questions of fact or findings of credibility.

[36] Taking all of these factors into account, I am of the view that the appropriate standard to be applied is one of reasonableness. The OEB is not required to be "correct" in its decision. It is not the court's role, therefore, to substitute its own determination for that of the Board. Rather, the court must only interfere with the OEB's decision if it is an unreasonable construction of the law when considered in light of the established facts.

G. ANALYSIS

[37] The OEB found there was no unfairness to Graywood in requiring it to proceed under the old monopolistic regime, such that it was obliged to have Toronto Hydro construct and install its electrical system at prices fixed by Toronto Hydro. This finding was based on the Board's review of the construction plans and industry practice and its conclusion that Graywood had costed the subdivision based on the projected electrical prices under the old regime. This was a reasonable conclusion on the Board's part and I would not interfere with it.

[38] However, the OEB's decision cannot be based solely on its view of what is fair in the circumstances. There was a system in place with established rules for the transition. The OEB was required to apply those rules. If Graywood's project was not subject to "an agreement" with Toronto Hydro prior to November 1, 2000, then Graywood was entitled to the benefit of the new regime even if that resulted in an unforeseen economic benefit to Graywood.

[39] The central and dispositive finding made by the OEB was that an "implied agreement had been entered into prior to November 1, 2000". The Board does not set out the terms of that implied agreement, nor the operative date of the agreement. However, in the very next sentence following the finding of an implied agreement, the Board notes that in past industry practice there is often "no formal offer to connect and associated written connection agreement". The logical inference is that the Board was of the view that even though there was no written connection agreement prior to November 1, 2000, it is often the case that projects would not have such a written agreement and the Board therefore found there was an "implied" connection agreement prior to that date.

[40] The basis for the OEB coming to that conclusion was the fact that Toronto Hydro had been involved with the project from 1999, having undertaken the preliminary design work for the electrical distribution system. Further, Graywood had committed to proceeding with the project prior to October 2000 as evidenced by the installation of municipal services. Once

again, there is no issue with respect to these findings. The fact that Toronto Hydro did the design work in 1999/2000 is uncontroverted. Likewise, the OEB's conclusion on the evidence before it that Graywood had committed to going ahead with the project prior to October 2000 was a reasonable one.

[41] If that had been the entire evidence and Toronto Hydro had proceeded with the construction and installation of the electrical distribution system in the absence of a written connection agreement, I would take no issue with the OEB's conclusion of an "implied" connection agreement, nor with the reasonableness of the Board's conclusion as to the timing of that implied agreement. However, that was not the entire evidence. The OEB was aware of, but did not refer to, the fact that Graywood and Toronto Hydro had an actual written connection agreement with respect to this project. The evidence is clear that Toronto Hydro was not contacted with respect to doing the installation until after November 1, 2000. Toronto Hydro then insisted on a formal written connection agreement before proceeding. The contract was drafted by Toronto Hydro and Toronto Hydro dated the contract November 8, 2000, even though it was actually drafted and signed a month or so later. The question therefore is whether the OEB's finding of an implied connection agreement prior to November 1, 2000 is reasonable in light of the existence of an actual written connection agreement dated November 8, 2000. In my view, it is not.

[42] There are many situations in which it may be appropriate to find an implied agreement in the absence of a formal written contract. The Conditions of Service attached to Toronto Hydro's license and the Distribution Code provide for such an agreement being implied. However, both contemplate that the agreement will be implied only once services have been connected and if there is no written agreement in place (see paragraph 10 above). This is consistent with basic contract law. A contract comes into existence only when its essential terms have been agreed upon by the parties. While such an agreement may be implied from the conduct of the parties, there must nevertheless be some indication of a meeting of the minds and an intention to be legally bound. The principle is succinctly stated by the British Columbia Court of Appeal in **Arding v. Buckton** (1956), 20 W.W.R. 487; 6 D.L.R.(2d) 586 (B.C.C.A), as follows (at para. 12):

"From the authorities it would follow that a contract may be implied only when the conduct of the parties indicates that they are proceeding on the basis of some legal relation so that the function of the court is merely to find as a fact that relation with its attendant obligations and rights which the parties have so indicated by implication but have failed to express: **Falcke v. Scottish Imperial Insur. Co.**, supra, [(1886) 34 Ch.D. 234]; **McKissick, Alcorn, Magnus & Co. v. Hall**, [1928] 3 W.W.R. 509; **Leigh v. Dickeson** (1884) 15 Q.B.D. 60; 54 LJQB 18." (Emphasis added)

[43] The parties here chose to date their contract November 8, 2000. This was not inadvertent. Toronto Hydro drafted the contract in December 2000. It was deliberately back- dated to November 8, 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood with respect to the installation of the distribution system. In the face of that evidence, it is simply not reasonable to find that the agreement arose by implication earlier than November 1, 2000.

[44] Chapter 3 of the Code came into force on September 29, 2000. At that time, there was no existing contract between Toronto Hydro and Graywood. Toronto Hydro had completed its contract for the design of the distribution system in June 2000. Graywood had paid for the design work in advance in December 1999. In 1999 when Toronto Hydro was retained to do the design work, it may well have been the expectation of the parties that Toronto Hydro would also be doing the installation. At the time, Toronto Hydro had a monopoly and, absent a change in the legislation, Graywood would have had no choice but to retain Toronto Hydro for the installation. However, an intention to enter into a contract, or even the shared expectation that a contract would eventually be formed, does not mean there is an agreement until those intentions coalesce into a meeting of the minds and the formation of a contract. Absent such a meeting of the minds, the contract does not arise, whether by implication or otherwise. As of September 29, 2000, the new regime was in force and it applied to all ongoing projects unless they were "subject to an agreement entered into prior to November 1, 2000". The exception provision is not framed to exclude all projects in which preliminary design work has already been done or where the parties have had discussions about entering into a contract. The exemption is clearly stated to apply to situation in which an agreement as been "entered into". The Board's finding that Graywood and Toronto Hydro had by implication entered into agreement prior to November 1, 2000 is unsustainable on the evidence and is an unreasonable construction of the scope of the exemption provision.

[45] I have considered whether the OEB's finding of an implied agreement is a reference to the agreement for the design of the distribution system, rather than the connection agreement. I do not believe the Board's decision can reasonably be construed as referring to an implied design agreement. The design agreement had been entered into the year before, had been fully performed by Toronto Hydro and had been paid for by Graywood. If the OEB meant that the existence of the design agreement prior to November 1, 2000 triggered the exemption provision, it surely would have simply said so. There would be no need to "imply" such an agreement prior to November 1, 2000. The design agreement clearly existed prior to that time. Indeed, it had been fully performed by then. In my view, it is clear from the Board's reasons that the agreement it implied was a connection agreement. It may well be the case that the exemption provision is capable of a broader construction than that, such that other types of agreements might also result in exempting a particular project from the new regime. However, it is not surprising that in the context of this case the Board interpreted Article 1.7 as referring to a connection agreement. It is the contract for the connection of services which Graywood sought to have to have governed by the new regime. Chapter 3 of the Code deals with connection agreements. The agreement at issue between Graywood and Toronto Hydro is a connection agreement. The central issue is whether that connection agreement is governed by the new regime. It makes perfect sense, therefore, that it is the timing of that connection agreement that governs which regime will apply.

H. CONCLUSION AND ORDER

[46] As I have already noted, the OEB is a tribunal with specialized expertise. The interpretation and application of the transition provisions in the Distribution Code falls squarely within that expertise and is entitled to deference. I have no difficulty accepting all of

the factual and policy considerations noted by the Board. However, the question of when this particular contract was entered into is not really dependant upon findings of fact, or policy, or statute interpretation. The question is whether an agreement can be implied prior to the date upon which the parties actually entered into it, based on the fact that the parties had a prior contract in relation to the same project. That is more a straightforward question of law and less within the special expertise of the Board. All that existed prior to November 1, 2000 was an already fully performed design agreement and the expectation prior to September 29, 2000, based on the then existing monopolistic regime, that Toronto Hydro would eventually be retained to install the system as well. In my view, the Board's finding of an implied agreement prior to November 1, 2000 was an error of law and unreasonable. It cannot stand.

[47] The Board's decision is quashed.

[48] The applicant also sought a declaration that its subdivision project is governed by the new Code, the issuance of a notice of intention to suspend or revoke Toronto Hydro's licence and ancillary relief by way of an accounting. These are matters within the sole jurisdiction of the OEB. It is not appropriate for this Court to usurp the function of the tribunal by making such orders.

[49] This matter is remitted to the OEB for its further consideration, based on this Court's finding that the connection agreement between Toronto Hydro and Graywood was entered into on November 8, 2000.

[50] If the parties cannot agree upon costs, written submissions may be forwarded to the court within 30 days.

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[51] Pitt, J. [dissenting]: This is an application for judicial review of a decision of the respondent, Ontario Energy Board (OEB) holding that the subject subdivision was "a project that was the subject of an agreement" entered into by Graywood Investments Limited (Graywood) and Toronto Hydro-Electric System Limited (Toronto Hydro) before November 1, 2000.

[52] I have read the reasons for judgment of my colleagues. I have no disagreement with their analysis of procedural fairness, judicial review or standard of review. However, I disagree with their conclusion that the decision of the respondent was either incorrect or unreasonable for the reasons that follow.

[53] The undisputed evidence before the OEB was that Toronto Hydro (up to November 1, 2000) the sole supplier of electricity, and Graywood in its capacity as the developer of real property known as Warden Avenue Hydro Corridor Residential Subdivision, had discussions about the supply of electricity for the project, commencing in November 1999.

[54] On July 14, 2000, the OEB approved and published the Distribution System Code (the "Code"), the object of which was to end Toronto Hydro's electrical monopoly.

[55] On September 29, 2000, s. 1.7 of the Code was amended as follows:

"This Code comes into force on the day subsection 26(1) of the Electricity Act comes into force with the following exception.

"All of Chapter 3, Connections and Expansions and Subsection 6.2.3. of Section 6.2, Responsibilities to Generators come into force on September 29, 2000. These provisions do not apply to projects that are the subject of an agreement entered into before November 1, 2000."

[56] By June 27, 2000, Toronto Hydro had already completed and forwarded to Graywood a design for the underground electrical system for the project, which was duly paid for by Graywood.

[57] It is not disputed that as of November 1, 2000, there was no legally enforceable agreement between the parties for the installation of the underground electrical distribution system for the project.

THE PROCESS

[58] The dispute is rendered more complicated than it needs be because when Toronto Hydro advised Graywood in July 2000 that the Warden Avenue project was considered to be subject to an agreement prior to November 1, 2000 and, therefore, was required to have its installation done by Hydro, Graywood filed a complaint to the OEB alleging that Toronto Hydro was in breach of its licence by virtue of the position it had taken with respect to its installation rights.

[59] The OEB refused to accede to the request of Graywood, taking the view that the Warden project was, in fact, "subject to an agreement". The OEB's decision was issued in the form of a letter to Graywood's counsel. The relevant portions of which are as follows:

"Based on the information provided, the Board finds that an implied agreement had been entered into prior to November 1, 2000.

"The Board finds that in past industry practice, there is often no formal offer to connect and associated written connection agreement between parties on a specific. The evidence demonstrates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November 1, 2000 and that Graywood was committed to the Project as municipal servicing had commenced prior to October of 2000.

"Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed on past industry practice.

"The Board finds that Toronto Hydro is not required to comply with the requirements of Chapter 3 of the Code for this Project. Therefore the Board finds that Toronto Hydro is not in breach of its licence and the Board will not issue a notice of its intention to issue a compliance order under subsection 75(2) of the Act."

I have produced these portions of the letter because the applicant has treated it as evidence of the unreasonableness of the OEB's position.

[60] I respectfully disagree with the applicant for the following reasons:

STANDARD OF REVIEW

[61] An application of the pragmatic and functional approach mandated by **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982, addendum [1998] 1 S.C.R. 1222; 226 N.R. 201, reveals:

Privative Clause: The Act does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.

Expertise: As per this court in **Consumers' Gas Co. v. Ontario Energy Board et al.**, [2001] O.A.C. Uned. 287; [2001] O.J. No. 5024 (Div. Ct.), the OEB has a 'high level of expertise'. The **OEBA** provides the OEB with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.

Purpose of the **OEBA**: The purpose of the **OEBA** is to maintain just and reasonable rates with respect to electricity.

Nature of the Problem: The nature of the problem in this case is whether the Project was subject to an agreement entered into before November 1, 2000, within the meaning of s. 1.7 of the Code.

In my view, the standard of review ought to be reasonableness.

ANALYSIS

[62] I agree with the respondent's view that the question whether the project was subject to an agreement entered into before November 1, 2000 within the meaning of s. 1.7 of the Code is more appropriately viewed as a question of mixed fact and law, and that the OEB's decision on that issue must be afforded a high degree of deference. The "law" component of that issue is the interpretation of the provisions of the Code, as they relate to the proper management of a major transition from monopoly to competition under the **OEB Act**, rather than general contractual principles. The determination is "fact-intensive", and involves an assessment of specialized facts and relationships, which are at the core of the OEB's exclusive jurisdiction. See **Ryan v. Law Society of New Brunswick**, [2003] 1 S.C.R. 247; 302 N.R. 1; 257 N.B.R. (2d) 207; 674 A.P.R. 207; 2003 SCC 20, at para. 41; **Dr. Q., Re**, [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170; 2003 SCC 19, at p. 240.

Frankly, if the question were as the appellant has formulated it, there would really be no issue. Contractual rights are protected unless the legislative language purporting to infringe them is explicit and unambiguous.

[63] There was evidence to support the OEB's view that the project was subject to an agreement, not the least of which was the existence of an agreement for the design work. Nothing in the Code suggests that an agreement must mean an "agreement for installation".

[64] It is useful, in my view, to recognize that s. 1.7 of the Code was amended to establish a "cut-off date" for ending the monopoly and introducing competition. The use of the expression "projects that were subject to an agreement" gave the OEB the flexibility to divide projects into different categories based on the stage of development in terms of the relationship with Toronto Hydro.

[65] The object of the exercise in which the OEB was engaged was not to make legal determinations on whether a certain "implied agreement" (to use the imprecise term used by the OEB) had become a full blown enforceable agreement. It was rather to determine whether the Warden Avenue project was one of those projects that was already subject to an agreement i.e. whether it was to be governed by the old regime or the new regime. Toronto Hydro had been involved with the project for at least nine months prior to the announcement; the project would have been budgeted on the basis that Toronto Hydro, the only supplier of electricity, would have been the installer and supplier. There was an executed agreement with respect to design, and much discussion about the installation had already taken place. It would have been the expectation of the parties and in their contemplation, at least up to the date of the announcement of the new regime in July 2000, that the installation would have been done by Toronto Hydro.

[66] In making a determination on the reasonableness of such a decision, it seems to me imperative to consider the practical implications of the decision urged upon the court by the appellants. No developer, who had not signed a contract by November 1, 2000 would consider itself bound by the requirements of the old regime once the announcement of the new regime was made. Accordingly, whatever ruse or subterfuge that would postpone the final execution to a date beyond November 1, 2000 would likely be attempted if a postponement were perceived to produce an advantage to the developer. Effectively, the whole concept of a transitional period (from July to November) would be rendered academic. The new regime would have effectively begun on the date of the announcement. As I adumbrated earlier, developers with enforceable agreements would not, in any event, have been affected by changes in the policies of the OEB. It would have been unnecessary to refer to them in the new Code. Clearly the stipulation of a transition period was designed to deal in a fair manner with developers in the grey area.

[67] The construction of written instruments:

"12-046 Law and Fact. The construction of written instruments is a question of mixed law and fact. The expression 'construction' as applied to a document includes two things, first, the

meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. Construction becomes a question of law a soon as the true meaning of the words in which an instrument as been expressed and the surrounding circumstances, if any, have been ascertained as facts. However, the meaning of an ordinary English word, of technical or commercial terms and of latent ambiguities, and the discovery of the surrounding circumstances (when they are relevant) are questions of fact."

Casurina Limited Partnership et al. v. Rio Algom Ltd. et al., [2004] O.J. No. 177; 181 O.A.C. 19 (C.A.), at para. 34, citing **Perry v. Telus Corp.** (2002), 164 B.C.A.C. 152; 268 W.A.C. 152 (C.A.), at para. 14 referring to H.G. Beal, ed. **Chitty on Contracts** 28 Ed. (London: Sweet & Maxwell, 1999), at paras. 12-043 and 12-046.

[68] It was at a minimum, eminently reasonable for the OAB to interpret "projects subject to an agreement" in the manner that it did.

DISPOSITION

[69] I would dismiss the application.

Application allowed.

Editor: Rodney A. Jordan/gs

[End of document]

TAB B-2

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Chapter 8

SCOPE OF JUDICIAL REVIEW

8.1 INTRODUCTION

A court's powers of review are narrow. It does not retry the matter that was decided by the tribunal. A reviewing court is not concerned with the merits of the case before the tribunal nor with the wisdom of the tribunal's decision. Its sole concern is whether the tribunal properly exercised powers conferred on it by statute.[1]

Only the decision of the tribunal is reviewable. The tribunal's reasons for decision may be considered to ascertain whether the decision was arrived at by reviewable error. However, the reasons alone cannot be quashed leaving the decision intact.[2] A person who is content with a tribunal's decision cannot complain about comments made by the tribunal in its reasons. Furthermore, if content with the final decision, a party may not apply for judicial review of an interim ruling.[3]

8.2 THE POWERS OF THE TRIBUNAL

Since a tribunal has only those powers conferred on it by statute, a court may review its constating statute to determine whether it had the power to do what it did. Regardless whether the tribunal's action was desirable or reasonable in the circumstances, if the tribunal lacked power, the act is subject to judicial review and the court will determine whether the tribunal had the power to do the act.[4] No deference is given to the tribunal. A tribunal's decision that it had the statutory power to make the order or

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1 *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 at 446-448 (Ont C.A.), leave to appeal to S.C.C. refused October 19, 2000.

2 *Libby, McNeill & Libby of Canada Ltd. v. U.A.W.* (1978), 21 O.R. (2d) 362 (C.A.).

3 *United Brotherhood of Carpenters and Joiners of America, Local 1023 v. Laviolette* (1998), 199 N.B.R. (2d) 270 (C.A.).

4 *Syndicat des Employés de Production du Qué. v. Canada (Labour Relations Board)* (1984), 14 D.L.R. (4th) 457 at 478-80 (S.C.C.).

decision must be correct.[5] Likewise, the tribunal's interpretation of the *Constitution Act*[6] to determine the scope of the powers conferred by statute must be correct.[7]

Although a court will not defer to an incorrect, though reasonable, interpretation by the tribunal of its powers, well articulated reasons written by a tribunal expert in its field may persuade a court that the tribunal's interpretation is the correct one, and may also give the court a factual context in which to interpret the statute so as to avoid an impractical interpretation in the abstract.

A statutory provision prohibiting review by a court of a tribunal's acts cannot prevent a court from reviewing whether the tribunal had power to act as it did.[8] Such a provision is typically called a "privative clause" (these clauses are discussed below).

Where two tribunals make orders that impose conflicting obligations on a party, so that compliance with one order results in a violation of the other order, and where each order is within the powers of the tribunal and is not unreasonable, a court may decide which order takes precedence.[9]

Not all interpretations of a tribunal's constating statute relate to its powers to act. Often a tribunal must interpret a provision of its statute so as to apply it to facts and decide the merits of a case. Courts are wary of applicants who, in an attempt to reduce the deference given by the court to the tribunal's decision, label statutory provisions as restricting a tribunal's powers. The tribunal's interpretation of statutory provisions for the purpose of deciding whether an order should be made in the circumstances of the case receives curial deference from the courts. Likewise, the tribunal's choice of orders from a variety of orders permitted by the statute is entitled to deference.[10] Some statutory provisions are difficult to classify as being clearly of one type or the other. It is difficult to decide whether they confer powers upon the tribunal, or whether they are simply the type of provision that must be interpreted to administer the statute. For example, some provisions empower a tribunal to issue an order

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5 *Syndicat des Employés de Production du Qué. v. Canada (Labour Relations Board), ibid; Syndicat National des Employés de la Commission Scolaire Regionale de l'Outaouais v. Union des Employés de Service* (1988), 95 N.R. 161 at 204, 207 (S.C.C.).

6 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

7 *Westcoast Energy Inc. v. Canada (National Energy Bd.)* (1998), 156 D.L.R. (4th) 456 at 478 (S.C.C.).

8 *Crevier v. Qué. (A.G.)* (1981), 38 N.R. 541 (S.C.C.); *Qué. (A.G.) v. Farrah*, [1978] 2 S.C.R. 638 at 655. But see: *Dayco v. C.A.W.* (1993), 102 D.L.R. (4th) 609 (S.C.C.).

9 *B.C. Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* (1995), 125 D.L.R. (4th) 443 (S.C.C.).

10 *C.U.P.E., Local 301 v. Montreal (City)* (1997), 144 D.L.R. (4th) 577 at 588-601 (S.C.C.); *Royal Oak Mines Inc. v. Canada (Labour Relations Board)* (1996), 133 D.L.R. (4th) 129 (S.C.C.); *Syndicat National des Employés de la Commission Scolaire Regionale de l'Outaouais v. Union des Employés de Service, supra*, note 5; *C.U.P.E., Local 963 v. N.B. (Liquor Corp.)*, [1979] 2 S.C.R. 227 at 233; *Volvo Canada Ltd. v. U.A.W., Local 720* (1979), 99 D.L.R. (3d) 193 at 202-04 (S.C.C.).

TAB B-3

CITATION: Snopko v. Union Gas Ltd., 2010 ONCA 248
DATE: 20100407
DOCKET: C49977

COURT OF APPEAL FOR ONTARIO

Sharpe, MacFarland and Watt JJ.A.

BETWEEN

Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight

Plaintiffs (Appellants)

and

Union Gas Ltd. and Ram Petroleums Ltd.

Defendants (Respondents)

Donald R. Good., for the appellants

Crawford Smith, for the respondents

Heard: January 22, 2010

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated January 6, 2009.

Sharpe J.A.:

[1] This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

[2] The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

[3] In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

[4] In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty

payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

[5] In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement, Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

[6] On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

[7] Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

[8] The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

[9] Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

[10] Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

[11] Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the

appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

[12] On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

[13] The appellants advance the following claims against Union:

- *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
- *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));
- *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
- *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
- *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

[14] The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the

agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

[15] In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

[16] Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

[17] The Act provides as follows with respect to the regulation of gas storage areas:

> **Gas storage areas**
>
> 36.1 (1) The Board may by order,
>
> (a) designate an area as a gas storage area for the purposes of this Act; or
>
> (b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2 (2).
>
> **Transition**
>
> (2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1) (a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2 (2).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2 (3).

Authority to store

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional

> Court, in which case that section applies and section 33 of this Act does not apply.

[18] In addition, s. 19 of the Act provides as follows:

> **Power to determine law and fact**
>
> 19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

[19] The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

[20] The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

[21] While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

[22] Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

[23] The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

[24] I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of

the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

[25] The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

[26] In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

[27] Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

[28] In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

[29] By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

[30] In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

[31] As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

[32] For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

"Robert J. Sharpe J.A."
"I agree J. MacFarland J.A."
"I agree David Watt J.A."

RELEASED: April 07, 2010

TAB C-1

JAMES T. HUNT
BARRISTER & SOLICITOR

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Counsel: W.R. Sherwood, *QC, JD*

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BY FAX: (416) 216-3930

September 14, 2009

Jennifer Teskey
Ogilvy Renault LLP
Suite 3800
Royal Bank Plaza, South Tower
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4

Dear Ms. Teskey:

Re: Powerlineplus Ltd v. Mississauga Enersource & City of Brampton

---

I have been advised by staff of the OEB to use the consumer on-line enquiry 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 OEB.

I have accordingly utilized the website and the on-line response form. I provide a copy of the summary of my submission.

I expect that the staff of the OEB will request further information at which time I can provide to them copies of the appropriate pleadings and other materials.

I will also provide to them contact information for you and your office.

If you have any further information with respect to the process, I would very much appreciate receiving it. This material was e-mailed on September 10, 2009.

It is our position that this process is the process contemplated within the order.

I had provided further notice to OEB by telephone on several occasions but was told to present it in this fashion.

If you have any questions or comments, please let me know.

Yours very truly,

James T. Hunt

JTH:jl
encl.

Ontario Energy Board

www.crrr.oeb.gov.on.ca/FeedBack/OEB

Permission to store/share info with OEB staff? Yes

Permission to store/share info with regulated utilities? Yes

Permission to store/share info with Government reps/OEB business partners? Yes

First name: James
Last name: Hunt
Job title: Solicitor
Company name: James T. Hunt Law Office
Representing: Powerline

How can we reach you?
Contact: Fax
What is the best time to reach you: No preference
Preferred language: English
Email: sherwoodhunt@bellnet.ca
Phone: 905-372-4500
Fax: 905-372-0091
Address: 279 Spring Street
Cobourg, ON
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Canada

Who do you get your bill from: N/A
Is this regarding a gas or electricity contract? Yes (Electricity)
If yes, who is the contract with? This complaint relates to a contract between Hydro Mississauga Services Inc. and the Corporation of the City of Brampton,
Contract number: 2008-087

Your comments: 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 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 to 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.

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. 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 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 provision of maintenance services 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 decision by the Ontario Energy Board including any appeal there from, on whether the services contemplated under the corporation of the city of Brampton contract number 2008/087 are permitted business activities which in affiliate of a municipally owned electricity distributor can lawfully carry on under section 73 of the Ontario Energy Board Act, 1998 so1998c. 15 schedule B.

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.

Please advise if further information is required.

Sincerely,

James T. Hunt

TAB C-2

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Ontario

COMPLIANCE BULLETIN

DATE ISSUED: November 5, 2010

TO: All Licensed Electricity Distributors
All Other Interested Parties

RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

---

This Bulletin provides guidance in relation to the application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors.

1. Background

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 electricity, distributing or 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. For convenience of reference, section 73 of the OEB Act is

reproduced in its entirety in Appendix A.

A number of distributors have affiliates that are engaged in the provision of street lighting services, such as street light installation and maintenance. A question has been raised as to whether this is permissible under section 73 of the OEB Act. This Bulletin sets out Board staff's views pertaining to the application of section 73 of the OEB Act to the provision of street lighting services by affiliates of distributors.

Section 73(3) of the OEB Act states that section 73(1) does not restrict the activities of a municipal corporation. As such, this Bulletin only addresses the issue of the provision of street lighting services by distributor affiliates that are not municipalities.

2. Application of 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. In arriving at this view, Board staff has noted the following Board proceedings:

i. As part of the revisions to the Affiliate Relationships Code for Electricity Distributors and Transmitters (the "ARC") (EB-2007-0662) that were adopted by the Board in 2008 (EB-2007-0662), the Board amended the definition of "energy service provider" to include a person that is involved in, among other things, street lighting services and sentinel lighting services. It follows that the Board was satisfied that energy service provider affiliates of a distributor can provide those services.

ii. In a proceeding regarding applications by Toronto Hydro-Electric System Limited ("Toronto Hydro") and its affiliates relating to the sale of street lighting assets (EB-2009-0180/0181/0182/0183), it was clear that an affiliate of the distributor owned street lighting assets and provided programs in relation to

street lighting. The Board determined in that case that some of the street lighting assets were distribution assets and could be transferred to the distributor. Although not discussed by the Board, the street lighting assets that could not be transferred to the distributor presumably would or could remain with the affiliate.

iii. In a proceeding regarding an application by Lakeland Power Distribution Ltd. for an exemption from the ARC (EB-2006-0029), the issue was whether the distributor should be permitted to share employees with its affiliate for the purposes of the provision by the latter of street lighting services. The application was denied, but not on the basis of there being an issue in relation to the provision of street lighting services by Lakeland Power's affiliate.

Board staff is aware that the list of permissible activities in section 73(1) does not refer specifically to street lighting, and that none of the proceedings referred to above specifically identified the particular item in section 73(1) of the OEB Act that would authorize the provision of street lighting services by an affiliate. In Board staff's view, street lighting services can be permitted under item 6 [as listed under section 73(1)]; namely, business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor. In this regard, Board staff notes the following:

i. In many, if not most, instances, the municipality owns the street lights. Street lights are thus assets of an affiliate of a distributor. In this context, the maintenance of street lighting assets by an affiliate makes more effective use of the street lighting assets.

ii. Distributors own the poles on which street lights are installed. The installation and maintenance of street lighting assets by an affiliate allows for the more effective use of the distribution poles.

iii. In some instances, the affiliate uses specialized equipment owned by the distributor for the purposes of providing street lighting services. A good example is bucket trucks. Use of such specialized assets, which have only a limited number of practical applications, by an affiliate for the provision of street lighting services makes more effective use of those assets. Similarly, where an affiliate acquires a specialized asset such as a bucket truck for use in a permitted activity under section 73(1), the subsequent use of that asset for the purposes of providing street lighting services makes more effective use of the asset.

In Board staff's view, the provision of street lighting services by an affiliate can also be permitted under item 9 [under section 73(1)]; namely, the provision of services related to the promotion of energy conservation, energy efficiency or load management. This would be the case to the extent that the street lighting services involve, for example, the installation and maintenance of more energy efficient lights. This would, among other things, also assist a distributor in meeting the conservation and demand management targets set out in its licence.

The views expressed in this Bulletin are those of Board staff and are not binding on the Board.

Any enquiries regarding this Bulletin should be directed to the Board's Market Operations hotline, at 416-440-7604 or market.operations@oeb.gov.on.ca.

Yours Truly,

Original Signed By

Aleck Dadson
Chief Operating Officer
Ontario Energy Board

APPENDIX A

Section 73 of the *Ontario Energy Board Act, 1998*

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 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.

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services.

(3) Subsection (1) does not restrict the activities of a municipal corporation.

TAB C-3

JAMES T. HUNT
BARRISTER & SOLICITOR

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November 9, 2010

Ontario Energy Board
Market Operations Hotline
P.O. Box 2319
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Toronto, Ontario M4P 1E4

Dear Sir or Madam:

Re: Powerline Plus Ltd. v Enersource Corporation, Enersource Hydro Mississauga Inc. and the Corporation of the City of Brampton

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.

Yours very truly,

James T. Hunt

JTH:rh
copy: client
Jennifer Teskey f: (416) 216-3930

TAB C-4

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Ontario

COMPLIANCE BULLETIN

DATE ISSUED: April 12, 2011

TO: All Licensed Electricity Distributors
All Other Interested Parties

RE: Application of Section 73 of the *Ontario Energy Board Act, 1998* in respect of Street Lighting Services

---

This Bulletin provides further guidance in relation to the application of section 73 of the *Ontario Energy Board Act, 1998* regarding the provision of street lighting services by affiliates of distributors, specifically in relation to the provision of those services outside of the affiliated distributor's licensed service area.

1. Background

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 circumstance where an affiliate of a distributor is providing street lighting services outside of the affiliated distributor's licensed service area.

By its terms, the November Bulletin is not limited in its application to the provision of street lighting services within the affiliated distributor's licensed service area. However, Board staff considers it appropriate to address this particular issue, and, accordingly, this Bulletin sets out Board staff's views in that regard.

2. Application of 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 outside of its affiliated distributor's licensed service area.

As noted in the November Bulletin, section 73(1) of the OEB Act establishes an exhaustive list of activities that affiliates of municipally-owned distributors may undertake. Board staff notes that section 73(1) of the OEB Act is silent as to the geographic area in which these permitted activities may be undertaken. Board staff also notes that, unlike licensed electricity distributors, their affiliates do not have licensed service areas that constrain the geographic scope of their activities.

As such, it is Board staff's view that, if and to the extent that an activity is permitted under section 73(1), an affiliate is permitted to undertake that activity both inside and outside of its affiliated distributor's licensed service area.

As stated in the November Bulletin, the provision of street lighting services by an

affiliate can be permitted under items 6 and 9 of section 73(1) of the OEB Act. For convenience of reference, relevant portions of the November Bulletin are reproduced here:

> ...In Board staff's view, street lighting services can be permitted under item 6; namely, business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor. In this regard, Board staff notes the following: ...
>
> iii. In some instances, the affiliate uses specialized equipment owned by the distributor for the purposes of providing street lighting services. A good example is bucket trucks. Use of such specialized assets, which have only a limited number of practical applications, by an affiliate for the provision of street lighting services makes more effective use of those assets. Similarly, where an affiliate acquires a specialized asset such as a bucket truck for use in a permitted activity under section 73(1), the subsequent use of that asset for the purposes of providing street lighting services makes more effective use of the asset.
>
> In Board staff's view, the provision of street lighting services by an affiliate can also be permitted under item 9; namely, the provision of services related to the promotion of energy conservation, energy efficiency or load management. This would be the case to the extent that the street lighting services involve, for example, the installation and maintenance of more energy efficient lights. This would, among other things, also assist a distributor in meeting the conservation and demand management targets set out in its licence.

Board staff's views as set out in this Bulletin are based solely on a consideration of the provisions of the OEB Act. Board staff expresses no view as to the implications, if any, of municipal or other law on the scope of an affiliate's activities.

The views expressed in this Bulletin are those of Board staff and are not binding on the Board.

Any enquiries regarding this Bulletin should be directed to the Board's Market Operations hotline, at 416-440-7604 or market.operations@ontarioenergyboard.ca.

Aleck Dadson
Chief Operating Officer
Ontario Energy Board