

EB-2011-0361
EB-2011-0376

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

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

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

SUBMISSIONS OF ELECTRICITY DISTRIBUTORS ASSOCIATION

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I. NATURE OF PROCEEDING

1. These are the submissions of the Electricity Distributors Association (“EDA”) relating to the following threshold questions¹:

- B1** Is there a statutory basis for the Langley Utilities Application (as defined in Order No. 1) under the *Ontario Energy Board Act, 1998* (the “Act”)?
- B2** If the Act does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4)?

II. OVERVIEW

2. With respect to the first threshold question, EDA submits that there is no statutory basis for the Board to hear the Langley Utilities Application:
- (a) The statutory scheme requires that matters concerning the compliance of electricity distributors (“LDCs”) and their affiliates with s. 73 of the Act, the subject of this Langley Utilities Application, be dealt with pursuant to a specific, comprehensive code which provides LDCs with important procedural protections, namely the code set out at Sections 112.2 to 112.8. Importantly, the Legislature at section 112.2 mandated that only the Board can commence enforcement proceedings.
 - (b) Subsection 19(1) of the Act is not properly interpreted as conferring jurisdiction on the Board to hear the Langley Utilities Application. The case law and arguments advanced by Langley do not support the claimed

¹ See Notice of Combined Hearing and Procedural Order No. 1 dated November 25, 2011 (“Order No. 1”).

unlimited mandate for the Board to hear matters within its subject-matter jurisdiction.

- (c) The Act does not provide for a private right of action or enforcement. To accede to Langley's request would result in the Board's loss of control over its own process and regulatory agenda. Requiring the Board to hear and determine every complaint about a regulated entity's compliance with the Act would waste the limited resources of both the Board and regulated entities and negatively affect the Board's ability to adequately address in a timely manner important matters of public concern properly within its mandate. The Board is able to choose what compliance issues to address and when to do so.
 - (d) With respect to the second threshold question, EDA submits that subsection 19(4) only authorizes the Board to hear, on its own motion, matters which could otherwise have been brought before it on an application by third parties. It does not permit the Board to determine any question it wishes to. In any event, in a case where the Board has already determined not to take enforcement action respecting a complaint of non-compliance, there is little if anything to be served by debating whether the Board could hear the matter of its own motion pursuant to a more general provision of the Act.
3. In summary, the fundamental issue to be decided by the Board at this preliminary stage is one of a private party's standing to bring an application respecting an LDC affiliate's compliance with the Act. The statutory scheme makes it clear that this question must be answered in the negative.

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

a. The Act Contains a Comprehensive Statutory Code relating to Compliance

4. The Langley Utilities Application raises an issue – an LDC’s compliance with the Act – that is subject to the Board’s exclusive enforcement discretion pursuant to a comprehensive statutory code relating to compliance.
5. The question sought to be raised by the Langley Utilities Application is whether Enersource Hydro Mississauga Services Inc. (“EHMSI”) in this case is in breach of Subsection 73(1) of the Act. This provision prescribes the business activities that may be undertaken by an affiliate of a municipally-owned electricity distributor.
6. Subsection 73(1) is an “enforceable provision” within the meaning of that term, pursuant to Section 3 of the Act. Accordingly, compliance with this provision is subject to a very detailed, specific and comprehensive statutory code relating to compliance proceedings that is expressly subject to the Board’s – and only the Board’s – exercise of its enforcement discretion.
7. This comprehensive code has a number of features. First, pursuant to Section 105 of the Act, the Board may receive complaints concerning conduct that may be in contravention of an enforceable provision and may investigate such complaints.
8. Second, if, as a result of such complaints and/or investigations, the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, then under Subsection 112.2, the Board may, on its own motion, make very specific mandatory orders, including:
 - (a) (112.3) requiring the person to comply with the enforceable provision and to take such action as the Board may specify to (a) remedy a contravention that has occurred; or (b) prevent a contravention or further contravention of the enforceable provision.

- (b) (112.4) in the case of a licensee under Part IV or V of the Act, suspending or revoking the licence; and
 - (c) (112.5) if the Board is satisfied that a person has contravened an enforceable provision, requiring a person to pay an administrative penalty.
- 9. In all of these cases, the Act specifies an order may only be made on the Board's own motion. This represents a codification of the decision of the Ontario Divisional Court, in *Graywood Investments Ltd. v. Ontario (Energy Board)*.²
- 10. In essence, the Langley Utilities Application seeks to circumvent the comprehensive code for compliance pursuant to the Act, by raising an issue, in the guise of an application pursuant to Section 19(1), that Langley can only properly raise by way of complaint pursuant to Section 105 of the Act. There is no distinction between the declaration sought by Langley and the Board's powers under sections 112.3 through 112.5; the Applicant effectively seeks to prohibit EHMSI from carrying on certain activities alleged to be prohibited by section 73 and to remedy a past violation. These are the very powers given to the Board under section 112.3.
- 11. If permitted, this usurpation of the Board's powers could result in a situation of an LDC being found to be in violation of an enforceable provision, in the absence of the important procedural protections forming part of the comprehensive compliance code pursuant to Part VII.1 of the Act. This Part, which is entitled "Compliance", sets out specific procedures for the making of orders pursuant to Subsections 112.3 to 112.5 of the Act, including requirements for:
 - (a) Written notice;
 - (b) Specific contents of the notice;
 - (c) Personal or other service of the notice; and
 - (d) A hearing.

² (2005), 194 O.A.C. 241 (Div. Ct.) ("*Graywood*").

12. These procedural protections make sense in light of the range of orders which may flow from a finding of non-compliance with an enforceable provision. As outlined above, these include serious consequences such as the revocation of a licence and the imposition of administrative monetary penalties. Accordingly, these provisions make clear that if compliance matters are to be raised, they must be raised by the Board under the comprehensive code provided by the Act, and not through an exercise of the Board's general powers to hear matters within its jurisdiction pursuant to Section 19.

b. Subsection 19(1) of the Act does not grant Langley the Right to make this Application

13. The Board is a creature of statute; as such, it cannot exceed the powers granted to it by the Act, which must either be express or arise by necessary implication.³ The power of a third party to bring an enforcement application is absent from the explicit language of the Act. Nor can it be "implied" from the statutory regime as necessarily incidental to the explicit powers.
14. Langley argues that Subsection 19(1) of the Act grants the Board the authority to decide its application. When Subsection 19(1) of the Act is read in a manner consistent with the modern principles of statutory interpretation, it becomes clear that Subsection 19(1) cannot support the Board's jurisdiction to entertain the Langley Utilities Application.
15. It has long been established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".⁴ When the words of Subsection 19(1) are read in this manner, it is clear that they cannot be interpreted in the manner argued for by Langley, that is, as conferring jurisdiction on the Board to hear the Langley Utilities Application.

³ *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

⁴ *65302 British Columbia Ltd. v Canada*, [1999] 3 S.C.R. 804, cited in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para 10.

16. Subsection 19(1) states “[T]he Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.” It is submitted that in order to give effect to the ordinary meaning of these words, this provision must be interpreted as granting the Board the authority to hear and determine all questions of law and fact, provided a matter is within its jurisdiction. The Board’s jurisdiction over the subject matter must originate elsewhere.
17. A contextual reading of Section 19(1) supports this conclusion. As is outlined above, the Board’s jurisdiction over compliance matters is set out elsewhere in the Act, in a comprehensive code that makes clear the Board, and only the Board, may bring proceedings relating to compliance with an enforceable provision. To permit private litigants like Langley to bring an application pursuant to Subsection 19(1) of the Act for what is, in essence, a matter involving EMHSI’s compliance with an enforceable provision, would be inconsistent with that comprehensive code and a harmonious reading of the Act.
18. Subsection 1(1) of the Act specifies the Board’s objectives in relation to electricity. None of these objectives suggest that the Board should allow non-electricity interests, such as those raised in the Langley Utilities Application, to disrupt the Board’s regulatory agenda.⁵
19. The authorities cited by Langley do not assist it. In order to advance an overly large and liberal interpretation of Subsection 19(1) of the Act, and specifically to allege that this statutory provision confers the power on the Board to rule on the validity of a contract for street lighting services pursuant to the Langley Utilities Application, Langley cites the recent decision of the Court of Appeal in *Snopko v Union Gas*.⁶ At paragraph 19 of its submission, Langley quotes Sharpe J.A.:

The generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions

⁵ Similarly, see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (“ATCO”), [2006] 1 S.C.R. 140, at para. 7.

⁶ *Snopko v. Union Gas Ltd.*, (“Snopko”) 2010 ONCA 248.

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.

Langley's submission takes the above reference to the "validity of relevant contracts" entirely out of context. The dispute in *Snopko* was over an agreement for just and equitable compensation to owners of property overlaying a gas storage area, a matter falling within the Board's exclusive jurisdiction pursuant to Subsection 38(2) of the Act. The Ontario Court of Appeal there rejected a plaintiff's attempt to frame a civil action in a manner so as to bring it outside of the Board's clear jurisdiction, merely by claiming the validity of the contract itself was at issue.

20. In the case of the Langley Utilities Application, there is no similar jurisdiction pursuant to the Act for the Board to address the contract for street lighting services. In the words of Sharpe J.A. there are no "claims or other matters that are properly before it." Accordingly, this authority does not assist Langley's claim that the Board may consider the validity of the contract for street lighting services pursuant to Subsection 19(1) of the Act. To the contrary, the excerpt from *Snopko* relied upon by Langley in fact confirms the ordinary meaning of Subsection 19(1) of the Act outlined above, that is, there must first be a matter within the Board's jurisdiction in order for the Board to exercise its authority to hear and determine all questions of law and fact.
21. In summary, therefore, when Subsection 19(1) of the Act is read in the manner required by jurisprudence of the Supreme Court of Canada, it is clear that Subsection 19(1) cannot provide a basis for the Board to entertain the Langley Utilities Application.
22. Nor can it be argued that the ability of the Board to entertain the Langley Utilities Application arises by necessary implication. It is clear from the comprehensive statutory code relating to compliance that the Board has the powers necessary to address an allegation of non-compliance of an LDC with an enforceable provision such as Section 73 of the Act. Indeed, the Act, in Section 105, provides for the Board to receive complaints from private parties regarding such an allegation. There simply can be no

argument that the Board will be unable to exercise its statutory duties without granting Langley standing to initiate the Langley Utilities Application.

c. The Act does not Provide for a Private Right of Action or Enforcement

23. The Act does not provide for a private right of action or enforcement, which would be the effect of the Langley Utilities Application being accepted.

24. There is no requirement that the Board hold a hearing every time a complaint is referred to it. As the Divisional Court in *Graywood* held:

...the right to a hearing arises only where, after its initial investigation, the Board is inclined to issue a notice of non-compliance. Even then, it is the licensee rather than the complainant who is entitled to request a hearing. Apart from that, it is entirely within the discretion of the Board whether to hold a formal hearing...unless that discretion is exercised improperly...this court will not interfere. The mere decision not to hold a formal hearing is not in itself a denial of procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).⁷

25. If Langley were entitled to require a hearing, the Board would lose control over its own process. As a result, the Board would risk being inundated with requests, similar to the Langley Utilities Application, seeking to pursue a private, commercial motive or advantage. This would waste limited resources of both the Board and regulated entities and negatively affect the Board's ability to adequately address important matters of public concern properly within its mandate.

26. Moreover, in situations where the Legislature intended the Board to deal with an application by a third party it expressly provided for such an application. For example, Section 50 of the Act provides that "a person may apply to the Board" for a licence. Langley Utilities relies on no similar statutory provision.

27. Similarly, where the legislature or Parliament has intended to grant private parties direct access to the Courts or to an administrative tribunal in order to address an allegation of

⁷ *Graywood*, at para. 22.

non-compliance with a statutory regime, it has done so in very specific language. A good example of this is presented by the private right of access to the Competition Tribunal pursuant to Section 75 of the *Competition Act*, R.S.C. 1985, c. 19, which specifically states: “Where, on application by the Commissioner or a person granted leave ...” In this case, there is no right of private action contemplated in the Act. No similar right exists under the Act.

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

28. Subsection 19(4) of the Act only permits the Board to hear, on its own motion, matters which could have otherwise been properly brought before it on an application by third parties. It does not expand the Board’s jurisdiction, nor does it create any additional substantive rights for third parties to request a hearing.
29. Nor does subsection 19(4) confer unlimited discretion to the Board. The Board’s discretion must be exercised within the confines of the statutory regime, including the compliance regime discussed above.⁸

⁸ *ATCO*, at paras. 50 and 86.

30. The bottom line is that compliance with the Act in respect of street lighting services may *only* be addressed by the Board under Sections 105 and 112.2. Board staff having opined on this subject matter, and the Board not having acted in variance to this view allowing municipally-owned LDC affiliates from engaging in street lighting services, there is no reason to now re-open this issue. The Board can devote its resources elsewhere.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of December 2011.

Originally signed by

Michael Koch

SCHEDULE “A”
List of Authorities

65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, cited in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, at para. 7

Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722

Graywood Investments Ltd. v. Ontario (Energy Board), [2005] 194 O.A.C. 241 (Div. Ct.)

Snopko v. Union Gas Ltd., 2010 ONCA 248

SCHEDULE “B”

Statutory Provisions and Rules

Board objectives, electricity

1.(1)The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer’s economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c.23, Sched. B, s.1; 2009, c.12, Sched. D, s.1.

Board’s powers, general

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. 1998, c.15, Sched.B, s.19 (1).

Order

(2)The Board shall make any determination in a proceeding by order. 1998, c.15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2(1).

Reference

(3)If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c.15, Sched. B, s.19 (3).

Additional powers and duties

(4)The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c.15, Sched. B, s.19 (4).

Exception

(5)Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c.15, Sched. B, s.19 (5).

Jurisdiction exclusive

(6)The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c.15, Sched. B, s.19 (6).

Application for licence

50.(1)A person may apply to the Board for the issuance or renewal of a gas marketing licence. 2003, c.3, s.37.

Regulations

(2)The Lieutenant Governor in Council may make regulations prescribing requirements for a gas marketing licence which, if not met, will result in the refusal to issue or renew a licence. 2003, c.3, s.37.

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).

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.

Interim orders under s. 112.3

(6) An interim order of the Board may be made under section 112.3, with or without a hearing, and may take effect before the time for giving notice under subsection (4) has expired. 2003, c.3, s.76.

Action required to comply, etc.

112.3(1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

- (a) remedy a contravention that has occurred; or
 - (b) prevent a contravention or further contravention of the enforceable provision.
- 2003, c.3, s.76.

Application

(2) This section applies to contraventions that occur before or after this section comes into force. 2003, c.3, s.76.

Suspension or revocation of licences

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

Application

(2) This section applies to contraventions that occur before or after this section comes into force. 2003, c.3, s.76.

Administrative penalties

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

Purpose

(1.1) The purpose of an administrative penalty is to promote compliance with the requirements established by this Act and the regulations. 2010, c.8, s.38 (31).

Limitation

(2) The Board shall not make an order under subsection (1) in respect of a contravention later than two years after the later of,

- (a) the day the contravention occurred; and
- (b) the day on which the evidence of the contravention first came to the attention of the Board. 2003, c.3, s.76.

Amount of penalty, limited

(3) An administrative penalty in respect of a contravention shall not exceed \$20,000 for each day or part of a day on which the contravention occurs or continues. 2003, c.3, s.76.

No offence to be charged if penalty is paid

(4) If a person who is required by an order under subsection (1) to pay an administrative penalty in respect of a contravention pays the amount of the penalty in accordance with the order, the person shall not be charged with an offence in respect of the contravention. 2003, c.3, s.76.

Regulations

(5) The Lieutenant Governor in Council may make regulations,

- (a) specifying types of contraventions in respect of which an order may not be made under this section and circumstances when the Board shall not make an order under this section;
- (b) governing the determination of the amounts of administrative penalties, including the criteria to be considered and including providing for different amounts depending on when an administrative penalty is paid;
- (c) respecting any other matter necessary for the administration of the system of administrative penalties provided for by this section. 2003, c.3, s. 76.

General or particular

(6)A regulation under subsection (5) may be general or particular in its application. 2003, c.3, s.76.

Application

(7)Subject to subsection (8), this section applies to contraventions that occur before or after this section comes into force. 2003, c.3, s.76.

Same

(8)This section does not apply to a contravention that occurred before this section came into force unless, at the time it occurred, section 125.2 was in force and a notice could have been issued in respect of the contravention under that section. 2003, c.3, s.76.

Restraining orders

112.6The Board may apply to the Superior Court of Justice for an order directing a person not to contravene an enforceable provision, and the court may make that order or such other order as the court considers just. 2003, c.3, s.76.

Voluntary compliance

112.7(1)A person may give the Board a written assurance of voluntary compliance,

- (a) to refrain from contravening an enforceable provision specified in the assurance;
- (b) to take such action as is specified in the assurance to remedy a contravention of an enforceable provision; or
- (c) to take such action as is specified in the assurance to prevent a contravention of an enforceable provision. 2003, c. 3, s. 76.

Force and effect

(2)An assurance of voluntary compliance has the same force and effect as an order of the Board. 2003, c.3, s.76.

(3)Repealed: 2010, c.8, s.38 (32).

Public record

112.8(1)The Board shall maintain a public record of,

- (a) assurances of voluntary compliance given under this Act;
- (b) compliance orders issued under this Act;
- (c) orders made under section 112.10;
- (d) any other prescribed document or information. 2010, c.8, s.38 (33).

Orders

(2)The Board may by order require the payment of fees for the inspection of public records maintained under subsection (1) and may approve the amount of those fees. 2010, c.8, s.38 (33).

Same

(3)Part III (Regulations) of the *Legislation Act, 2006* does not apply to an order made under subsection (2). 2010, c.8, s.38 (33).

Form and manner of public record

(4)The public record maintained under subsection (1) shall be maintained by the Board in such form or manner as may be prescribed by regulation. 2010, c.8, s.38 (33).