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Court File No. 221/11

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

POLLUTION PROBE FOUNDATION

Applicant

and

ONTARIO ENERGY BOARD

Respondent

APPLICATION UNDER Rule 68 and the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2, as amended

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APPLICANT'S FACTUM

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See also *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (Ont. C.A.) at para. 16.

48. The March 29th Budget Cap Decision and the June 30th *Guidelines* at issue here are more akin to rules or regulations as the *effect* of the decisions is to impose mandatory obligations on the natural gas utilities to limit certain portions of their budgets to the amounts pre-determined by the Board. As noted in *Ainsley*,

> The policy is not simply, as it purports to be, "a guide ...". ***Its effect is to impose a positive obligation*** upon securities dealers ***to follow those practices***, ... [emphasis added].
>
> ***Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, (O.C.J - Gen. Div.) (QL) at paras. 47 & 48. aff'd 21 O.R. (3d) 104 (Ont. C.A.).**

49. In this situation, the March 29th Budget Cap Decision and the June 30th *Guidelines* also create positive obligations and expectations because they have a coercive effect. In order to receive approval for DSM budgets and funding, the natural gas utilities are expected to comply with the Board's unlawful Decision and *Guidelines* (including regarding DSM budget caps). However, if the utilities do not comply (e.g. request a higher budget than allowed by the Decision and *Guidelines*), the Board will not approve their DSM plans, and the utilities will not receive the corresponding funding for their DSM programs. As stated by the Court of Appeal in *Ainsley,* "[t]he threat of sanction for non-compliance is the essence of a mandatory requirement."

> ***Ainsley Financial Corp. v. Ontario Securities Commission*, 21 O.R. (3d) 104 (Ont. C.A.) at para. 20.**

50. The Applicant submits that there is no provision in the *Ontario Energy Board Act, 1998* that authorizes the Board to make binding decisions or *Guidelines* in the manner it did (i.e. using a "consultation process" instead of holding a hearing and issuing an "order"). By making the binding decisions without following the required legislative framework, the Board circumvented the requirements of both the *Ontario Energy Board Act, 1998*

and the *Statutory Powers Procedure Act*. As a result, the Board's impugned decision and *Guidelines* are *ultra vires* the Board's jurisdiction and must be quashed and set aside. As noted by the Nova Scotia Supreme Court,

> Absent such express authority or delegation of powers as aforesaid, ***the Board cannot circumvent its enabling legislation by purporting to implement an administrative policy*** establishing a new entrant's fee. The introduction of such a fee ***could properly be made only through the enactment of an appropriate regulation under the enabling legislation. That wasn't done, with the result that the Board has acted ultra vires its jurisdiction*** in imposing the new entrant's fee ***in the manner in which it purported to do*** [emphasis added].
>
> ***Oulton v. Chicken Farmers of Nova Scotia*, 2002 NSSC 58 at para. 29, aff'd [2002] N.S.J. No. 513 (N.S. C.A.).**

51. In summary, the Applicant submits that the Board did not act in accordance with what is required by its legislative framework, and it had no authority to make the March 29th Budget Cap Decision or the subsequent June 30th *Guidelines*. Both of these are *ultra vires* the Board's jurisdiction, and they must be quashed and set aside.

The Decision Unlawfully Fetters the Discretion of the Board

52. In addition, the Board's March 29th Budget Cap Decision and June 30th *Guidelines* effectively and unlawfully fetter the discretion of the Board regarding future hearings related to DSM. For example, the Board is in the process of conducting hearings that will result in orders of the Board that will determine the DSM budgets of certain utilities, but both the Decision and the *Guidelines* fix an upper limit as to what those budgets may be. By making the Decision and *Guidelines* through a "consultation process" instead of a proper hearing in accordance with its legislative framework, the Board has unlawfully fettered its discretion with respect to exercising this discretion in hearings regarding DSM.

53. The Decision and the *Guidelines* effectively leave the Board with no room to exercise its discretion in the subsequent individual hearings regarding DSM. Rather than assist or guide the Board in exercising its discretion at hearings, the ***mandatory*** "guidelines" instead state that the budgets have already been decided. As noted by the Court of Appeal in *Hopedale*,

> ... In laying down as principles and stipulating that the defendant must come within them the Board has sought, one must conclude, to reduce the scope of the inquiry. To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise ***but to say that the appellant must comply with them before the Board will allow the application is clearly wrong and the Board, if it so fettered its jurisdiction, would be in error*** [emphasis added].
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> ***Re Hopedale Developments Ltd. and Town of Oakville*, [1965] 1 O.R. 259-266 (Ont. C.A.) (Carswell) at para. 13.**
>
> **See also *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para. 75.**

54. By making the binding March 29th Budget Cap Decision and June 30th *Guidelines* through non-statutory instruments that cannot be binding or mandatory, the Board has unlawfully fettered its discretion. The only way the Board could lawfully fetter its future discretion through a decision such as the March 29th Budget Cap Decision and the June 30th *Guidelines* would be to make the decision in accordance with the requirements of the Board's legislative framework. However, as discussed above, this did not occur. As noted by the Federal Court of Appeal in *Thamotharem*,

> Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered: [case omitted]. ***This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure*** [emphasis added].
>
> ...
>
> ***In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.*** [emphasis added]

***Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at paras. 62 & 66.**

55. In summary, the Applicant submits that the Board's March 29th Budget Cap Decision and June 30th *Guidelines* unlawfully fetter the discretion of the Board as they were not made in accordance with the Board's legislative framework and they effectively leave no room for the Board to exercise its discretion in subsequent individual hearings regarding DSM (e.g. DSM budgets beyond the prescribed limits).

PART IV: ORDER REQUESTED

56. In light of all of the above and the submissions of counsel, the Applicant respectfully seeks an Order:

a. quashing and setting aside the document issued by the Ontario Energy Board entitled "Demand Side Management ('DSM') Guidelines for Natural Gas Utilities (EB-2008-0346): Issues for Further Comment" and dated March 29, 2011;

b. quashing and setting aside the subsequent document issued by the Ontario Energy Board entitled "Demand Side Management Guidelines for Natural Gas Utilities: EB-2008-0346" and dated June 30, 2011;

c. the Applicant's costs of this application on a substantial indemnity basis, together with post-judgment interest thereon pursuant to s. 129 of the *Courts of Justice Act*; and