
# ONTARIO ENERGY BOARD

## BOARD STAFF SUBMISSION

### APPLICATION BY ELECTRICITY DISTRIBUTORS ASSOCIATION

**Board File No.: EB-2012-0414**

January 4, 2013

## Introduction

On October 16, 2012, the Electricity Distributors Association ("EDA") filed an application (the "Stay Application") for an order staying the operation of the Board's September 13, 2012 Decision and Order in EB-2011-0120 (the "CANDAS Decision and Order"), pending the outcome of the EDA's appeal of the Decision and Order to the Ontario Superior Court of Justice (Divisional Court). In making its application, the EDA states that it relies on section 33(6) of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c.15 (Schedule B).

In the CANDAS Decision and Order, the Board found that it's Decision and Order in RP-2003-0249, dated March 7, 2005 (the "CCTA Decision") applies to the attachment of wireless equipment to distribution poles. The proceeding which culminated in the CCTA Decision concerned an application by the Canadian Cable Television Association which sought an amendment to the licences of all regulated electricity distribution utilities in Ontario requiring a standard pole attachment agreement, including a standard pole rental charge as part of the standard terms and conditions. The CCTA Decision provided all Canadian carriers as defined in the *Telecommunications Act, S.C.* 1993, c. 38, and all cable companies that operate in the Province of Ontario with access to the power poles of electricity distributors at the rate of $22.35 per pole per year.

The Decision and Order which is the subject of the current Stay Application addressed whether the CCTA Decision covers the attachment of wireless equipment, including DAS attachments which the applicant, the Canadian Distributed Antenna Systems Coalition ("CANDAS") proposed to make.

The Board found that the CCTA Decision is clear on its face and that it applies on a technology-neutral basis. The Board concluded that:

> …the CCTA Order confers a broad right of access to all Canadian carriers and cable companies to the poles of the LDCs and the right of access extends to all attachments that are related to the service which the telecommunications or cable company is providing. The CCTA Order applies to the attachment of wireless equipment, including DAS components to distribution poles.

In the Stay Application the EDA has indicated that electricity distributors will be

subject to enforcement proceedings and penalties if, pending the disposition of the EDA's appeal, they do not permit access for all telecommunications carriers to attach any attachments related to the service which the carrier is providing to the distributors poles.

**Board Staff Submission**

(1) Legislative Authority

The following legislative provisions provide the construct pursuant to which this Board has the jurisdiction to grant a stay. These sections make clear that while an appeal of a Board order to a court does not operate as an automatic stay of the order, the Board may order a stay.

Section 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, C. S. 22, addresses the question of stays as follows:

> An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,
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> (a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or
> (b) the tribunal or the court or other appellate body orders otherwise.

Section 33(6) of the *Ontario Energy Board Act, 1998*, however, expressly provides that an appeal does not automatically operate as a stay. That section reads as follows:

> Subject to subsection (7), every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise.

Subsection (7) reads as follows:

> The Divisional Court may, on an appeal of an order made by the Board,
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> (a) stay the operation of the order; or
> (b) set aside a stay of the operation of the order that was ordered by the Board under subsection (6).

(2) Test for Stay

The appropriate test to be applied by the Board in determining whether to grant the stay requested by the EDA is the three part test articulated in *RJR-MacDonald Inc.* v. *Canada (Attorney General),* ("*RJR-MacDonald*") , namely:

(a) is there a serious issue to be tried;

(b) will the moving party suffer irreparable harm prior to the determination of the matter if the stay is refused; and

(c) does the balance of convenience, taking into account the public interest, favour the granting of a stay?[1]

All three branches of the test must be satisfied if a stay is to be granted. The Board has previously determined that this is the appropriate test to be applied in determining whether to grant a stay.[2]

At each stage, the onus is on the party applying for the stay, in this case the EDA. First, the EDA must demonstrate a serious issue to be tried. Second, the EDA must convince the Board that its members will suffer irreparable harm if the stay is not granted. Third, the EDA must establish that on the balance of convenience, the stay should be granted.

In this case, it is respectfully submitted that the EDA has not established that a stay is appropriate in the circumstances of this case, and on a consideration of the relevant law.

**(a) Serious Issue to be Tried**

The test articulated in *RJR-MacDonald* requires that in determining whether to grant the stay, the Board must make a preliminary assessment of the merits of the case, and must be satisfied that there is a serious issue to be determined.[3] While the threshold for establishing a serious issue is not high, Board staff submits that the EDA should not succeed on this branch of the test.

In its Notice of Appeal dated October 12, 2012, the EDA seeks from the Divisional Court, *inter alia*:

[1] *RJR-MacDonald (Attorney General)* [1994] 1 S.C.R. 311, at para 43, Board Staff Book of Authorities Tab 1,
[2] *Re Consumers Council of Canada*, EB-2010-0184, at para 32, Board Staff Book of Authorities Tab 2
[3] *RJR-MacDonald*, at paras 49, 78, Board Staff Book of Authorities Tab 1

- A declaration that the Board erred in law and exceeded its jurisdiction by completing the CANDAS matter and purporting to exercise its regulatory authority without addressing the application of section 29 of the OEB Act;
- A declaration that the Board erred in law by failing to consider, and acting contrary to, its statutory objectives as set out in section 1(1) of the OEB Act; and
- An order setting aside the CANDAS Decision and Order and directing the Board to consider the evidence given in the Proceeding relating to the marketplace for siting of wireless attachments and directing the Board to (a) determine whether the Board should, pursuant to section 29(1) of the OEB Act, forbear from the exercise of its authority, or (b) reconsider the Decision and in doing so apply the Board's statutory objectives as set out in section 1(1) of the OEB Act.

Although Board staff acknowledges that there is a low threshold for an applicant to meet this first prong of the *RJR-MacDonald* test, given the facts in this case and a preliminary review of the merits of the appeal, Board staff is of the view that there is no serious issue to be tried.

In the CANDAS Decision and Order the Board expressly addressed issues that had been raised by Toronto Hydro-Electric Systems Ltd. ("THESL") by way of motion earlier in the case.[4] In particular, THESL had sought, *inter alia*, for the Board to refrain, pursuant to section 29(1) of the *Ontario Energy Board Act, 1998*, from exercising any of its powers, including imposing any distribution license conditions governing the access of wireless attachments to the electricity distribution system, on the basis that there is or will be competition in the market for siting of Wireless Attachments sufficient to protect the public interest.

In the CANDAS Decision and Order, the Board concluded that this issue would not be heard within the CANDAS application and denied the motion, but left open the possibility that the forbearance issue could be raised.

Board staff is of the view that the appeal by the EDA to the Divisional Court fails to recognize that the Board has not precluded the possibility of hearing the merits of the question of whether there is a competitive market for the siting of wireless attachments. By launching the appeal to the Divisional Court and requesting a stay of the CANDAS Decision and Order pending the outcome of that appeal, the EDA has ignored the implicit direction provided by the Board.

Board staff is therefore of the view that there is no serious issue to be tried in the court.

[4] The motion was held in abeyance by the Board pending a consideration of the issues as articulated by the applicant.

### (b) Irreparable Harm

The meaning of "irreparable" was discussed in the *RJR-MacDonald* case, as follows*:*

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[5]

The only issue to be decided at this second stage of the *RJR-MacDonald* analysis, therefore, is whether a refusal to grant the relief sought by the EDA could so adversely affect the EDA's members' interests that the harm could not be remedied. As provided above, on this branch of the test, the Board is required to look to the nature, and not the magnitude of the harm. Examples of "irreparable" harm from decided cases include instances where a party will be put out of business or will suffer permanent market loss.

In Board staff's submission, no harm should be suffered by the EDA or its members as a result of the operation of the Board's Decision and Order in the CANDAS matter. While the EDA states in its Application that if telecommunications carriers[6] are permitted to attach pending the appeal, the *status quo* will not be maintained,[7] Board staff is of the view that exactly the opposite is true.

The effect of the CANDAS Decision and Order was to confirm the *status quo*. There was no change made as a result of the Board's interpretation of the CCTA Decision. Rather, the Decision and Order confirmed for all parties, including all electricity distributors, that are EDA members, that electricity distributors continue to be required to allow all Canadian carriers (as defined in the *Telecommunications Act*) and all cable companies that operate in the Province of Ontario with access to their power poles at the rate of $22.35 per pole per year.

In the absence of guidance from the Board on this point, there was no basis upon which electricity distributors could in the past or can in the present, discriminate between Canadian carriers that wish to attach wireline and wireless equipment to distribution poles.

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[5] *RJR-MacDonald* at para 59, Board Staff Book of Authorities Tab 1,

[6] Board staff presumes that the EDA intended to qualify the term "telecommunications carriers" in this statement to those wanting to attach wireless equipment since there was no dispute that the CCTA Decision applies to wireline attachments.

[7] At par. 8 of the EDA's Application.

It follows then that no harm could have been or in the future be suffered by the EDA or its members since the Board has confirmed the *status quo*. There are no new or changed expectations of the distributors as a result of the Board's Decision and Order.

It is worth noting that even if the EDA or its members were able to show some harm as a result of the Board's Decision and Order, which is explicitly not the case in Board's staff's submission, such harm would not be "irreparable" as that term has been defined and used by the courts. To the contrary, there is evidence on the record of the CANDAS case that makes clear that some distributors have attached wireless equipment to their distribution poles. There is no question that such attachments can be accommodated. If there is a material difference in the costs associated with attaching wireless equipment as compared to wireline equipment, then the Board was explicit in both its CCTA Decision and in the more current CANDAS Decision and Order that if the rate of $22.35 per pole per year is not reflective of the actual costs borne by the distributor then it is open for such distributor to apply to the Board for a different rate.

Board staff therefore submits that any potential harm identified in support of the stay application would, if it existed, be of a monetary nature and be quantifiable. The monetary harm argued by the EDA to be suffered as a result of complying with the Board's order can be addressed through the regulatory process which was explicitly provided for in both the 2005 and the 2012 cases establishing the requirement for distributors to attach such equipment.

The EDA also raises in its Stay Application the possibility of enforcement proceedings and penalties if electricity distributors do not permit Canadian carriers to have access to their distribution poles for the purpose of attaching wireless equipment. Board staff finds this argument to be completely without merit as it is entirely within the power of such distributors to avoid any such enforcement proceedings by complying with the Board's order which was established in The CCTA Decision and was confirmed in its most recent CANDAS Decision and Order. Board staff cannot foresee a situation where a distributor is unable to either facilitate the attachment at the prescribed rate or apply to the Board for a different rate.

In summary, Board staff submits that because the CANDAS Decision and Order confirmed the *status quo*, there is no harm, either actual or potential associated with not granting a stay in this case. In fact, distributors are in no better or worse position as a result of the Board's Decision and Order in the CANDAS matter and no prejudice will therefore befall them if the Board does not grant the stay. Quite the opposite in fact, the granting of a stay by this Board would, in Board staff's submission, change the landscape and the expectations of distributors dramatically and create uncertainty and potential prejudice for distributors and telecommunications carriers alike.

In the alternative, any alleged harm that may be suffered if no stay is granted and the appeal is ultimately successful is not irreparable, can be quantified in monetary terms and remedied.

### (c) Balance of Convenience and Public Interest Considerations

In the third branch of the test, the interest of the public must be taken into account.

The important considerations for the application of this branch of the test were articulated by the Supreme Court of Canada in the *Manitoba (Attorney General) v. Metropolitan Stores Ltd* Decision:

> In looking at the balance of convenience, they (the courts) have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.[8]

In its submissions filed December 14, 2012, the EDA quoted the Ontario Court of Appeal in *International Corona Resources Ltd. V. Lac Minerals Ltd.* as follows:

> …as a general rule it is in the interest of justice that the 'status quo' be maintained pending an appeal where such can be done without prejudicing the interest of the successful party. [9]

In Board's staff's submission, and as has been articulated above, the *status quo* is the requirement for electricity distributors to attach the equipment of all Canadian carriers and all cable companies that operate in the Province of Ontario with access to the power poles of electricity distributors at the rate of $22.35 per pole per year. This was confirmed in the CANDAS Decision and Order.

Board staff submits that the EDA's members should not be prejudiced by maintaining the *status quo*. Maintaining the certainty associated with continuing to uphold the regulatory requirement set out in the CCTA Decision and the CANDAS Decision and Order is in the public interest.

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[8] *Manitoba (Attorney General) v. Metropolitan Stores Ltd* [1987] 1 S.C.R. 110 at para. 56, Board Staff Book of Authorities, Tab 3.

[9] *International Corona Resources Ltd. V. Lac Minerals Ltd* [1986] O.J. No. 2128 at page 3, Board Staff Book of Authorities, Tab 4.

The EDA has cited only the private interests of its members in not complying with the Board's original Order in order to avoid the costs associated with such compliance as its rationale for the Board granting the stay. Board staff would submit that the Board's original Order, as confirmed by the CANDAS Decision and Order is in the public interest and is consistent with the Board's objectives.

It is noteworthy that the Supreme Court addressed similar arguments in *RJR-MacDonald* relating to the increased price of tobacco products. The Supreme Court stated that "such an increase is not likely to be excessive and is purely economic in nature. Therefore any public interest in maintaining the current price of tobacco products cannot carry much weight."[10] Board staff submits that the interests of the EDA's members do not outweigh the public interest in upholding the Board's Decisions in both the CCTA and CANDAS matters.

(3) Conclusion

Board staff submits that the EDA has failed to meet the test articulated in the *RJR-MacDonald* case. In particular, Board staff's submission is that the EDA has not established that:

(a) there is a serious issue to be tried in the court,
(b) the EDA's members will suffer irreparable harm if the stay is not granted, or
(c) the balance of convenience and the public interest favour granting the stay.

As such, Board staff submits that the Board should deny the request for a stay of the Board's Order in the CANDAS Decision and Order.

All of which is respectfully submitted.

[10] *RJR-MacDonald* at para 93, Board Staff Book of Authorities Tab 1,