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April 23, 2015

VIA COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Essex Powerlines Corporation ("EPL")
Submissions of EPL
Board File No. EB-2014-0072 & EB-2014-0301**

We are co-counsel to the Applicant, Essex Powerlines Corporation ("EPL"), in the above noted proceeding.

Pursuant to the schedule set at the oral hearing that took place on April 14, 2015, please find attached the submissions of EPL.

If there are any questions, please contact the undersigned.

Yours very truly,

AIRD & BERLIS LLP



Scott Stoll

SAS/bm

cc: Case Manager, Georgette Vlahos (*via email*)
Board Counsel, Richard Lanni (*via email*)
All Intervenors (*via email*)
Co-Counsel, George Vegh (*via email*)

Encl.

22470770.1

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 Essex Powerlines Corporation for an order approving a Smart Meter Disposition Rate Rider ("SMDR") and a Smart Meter Incremental Revenue Requirement Rate Rider ("SMIRR"), each effective January 1, 2015;

AND IN THE MATTER OF an application by Essex Powerlines Corporation for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2015.

SUBMISSIONS IN CHIEF OF ESSEX POWERLINES CORPORATION

Part I. Introduction

1. These are the Submissions in Chief of the Applicant Essex Powerlines Corporation ("**Essex Powerlines**") in this application, including matters arising out of the oral hearing held in this matter on April 14, 2015 (the "**Oral Hearing**"). This hearing is a result of the Board combining two applications, an incentive rate making application ("**IRM**") and an application in respect of smart meters. During the consideration of the applications, Essex Powerlines identified an error in certain deferral and variance accounts. The discovery of this error has been the subject of additional interrogatories and the Oral Hearing.

2. Essex Powerlines is not aware of any disagreement regarding the requests for relief aside from the resolution of the error. As such, Essex Powerlines hereby requests the Board grant order(s) effective May 1, 2015 granting relief for the base IRR and smart meter as follows:

	SMDR	SMIRR
Recovery Period	May 1, 2015 to April 30, 2016	May 1, 2015 to April 30, 2016.
Residential	(\$0.04)	\$1.07
GS < 50 kW	\$8.20	\$3.46

3. Essex Powerlines hereby requests a Board order(s) for rates effective May 1, 2015 for rate riders incorporating the:

- (a) Disposition of DVA balances incorporating residual amounts for the 2011/2012 and 2013 balances for accounts other than 1588 and 1589 over a one year period which are summarized below:¹

#	Account	2013 Claim	2011/2012 Residual	Total
1550	LV	643,592	209,377	852,969
1551	Smart Meter Entity	47,653	-	47,653
1580	WMS	234,955	(1,070,334)	(835,379)
1584	Network	(1,405,299)	108,967	(1,296,332)
1586	Connection	(1,023,940)	(377,563)	(1,401,503)
1590	Recovery of Reg	(1,510,347)	-	(1,510,347)
1595	2012 Disposition	(258,007)	-	(258,007)
	Total	(3,271,393)	(1,129,553)	(4,400,946)

¹ The column "2013 Claim" is in the evidence at Essex_2015_IRM_Rate_Generator_Appendix A_Master_Exhibit 1_20150407 Column BE. The column "2011/2012 Residual" are the uncollected amounts from February 1, 2015 to April 2015 and are in the evidence at Essex Powerlines IRR Continuity Schedules 20150407 Table 6.

- (b) Disposition of Account 1588 in the amount of (\$4,567,591) over a period of two years, being comprised of the amounts below; and

Description	Amount
May 1, 2014 to January 31, 2015- settled	(\$3,614,779)
February 1, to April 30, 2015 residual	\$2,762,600
Correction to misallocation of GA	(\$1,563,971)
2013 Balance	<u>(\$2,151,441)</u>
Total:	<u>(\$4,567,591)</u>

- (c) Disposition of Account 1589 in the amount of \$6,908,196 over a period of four years being comprised of the amounts below:

Description	Amount
May 1, 2014 to January 31, 2015 - settled	\$3,614,779
February 1, to April 30, 2015 residual	(\$2,653,477)
Correction to misallocation of GA	\$1,563,971
2013 Balance	<u>\$4,382,923</u>
Total:	<u>\$6,908,196</u>

4. Fundamentally, Essex Powerlines still remains of the view that the intent of the accounts in question is to ensure customers pay the appropriate cost of power and the utility is held harmless. Therefore over and underbilled amounts should be corrected. By proceeding with the disposition of variance accounts as proposed in paragraph 3 above, customer impacts have been mitigated and the cumulative result is a credit for both RPP and non-RPP customers when taking into account other adjustments such as the removal of the completed riders and changes to other rates such as transmission charges.

2015 RPP BILL IMPACTS compared to 2015 Stayed Rates

Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(9.18)	-29.95%	(10.97)	-9.13%
GS<50	2,000	0	(14.85)	-21.04%	(18.55)	-6.37%
GS 50 - 2,999	1,198,113	2,968	(15,539.28)	-112.00%	(20,384.42)	-12.38%
UMSL	2,000	0	(25.07)	-32.18%	(32.16)	-9.68%
Sentinel Lights	36	0.1	(0.43)	-9.66%	(0.55)	-5.56%
Street Lights	36	0.1	(0.36)	-8.99%	(0.47)	-4.84%

2015 Non-RPP BILL IMPACTS compared to 2015 Stayed Rates

Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(3.26)	-10.64%	(4.95)	-4.06%
GS<50	2,000	0	0.34	0.53%	(3.10)	-1.07%
GS 50 - 2,999	1,198,113	2,968	(6,889.34)	-69.33%	(10,609.99)	-6.49%
UMSL	2,000	0	(9.87)	-13.84%	(14.99)	-4.54%
Sentinel Lights	36	0.1	(0.15)	-3.59%	(0.24)	-2.47%
Street Lights	36	0.1	(0.11)	-2.57%	(0.18)	-1.93%

Part II. Background

5. Essex Powerlines submitted two applications, the IRM application (EB-2014-0072) and the smart meter application (EB-2014-0301) which were subsequently joined by the Board into a single proceeding. Essex Powerlines is a Group II distributor, a better than average performer, and the 14th lowest cost utility in the province. As such, the IRM increase in rates is 1.45% as determined by the formula and variables specified by the Board.

6. Essex Powerlines in EB-2014-0301 has also sought disposition of the smart meters using the Board approved process. The Board's report, "Sector Smart Meter Audit Review Report", dated March 31, 2010, indicates a sector Average Capital Cost of \$186.76 per meter and an Average Total Cost per Meter (including both Capital and OM&A) of \$207.37.

7. Essex Powerlines' average capital cost per meter of \$116.85 and its average total cost per meter of \$120.10 (including costs exceeding minimum functionality) demonstrate that Essex Powerlines' Smart Meter costs have been prudently incurred and reflect efficient deployment of resources.

8. Commencing May 1, 2014, Essex Powerlines began charging rates that included rate riders that incorporated the balances in accounts 1588 and 1589 as of December 2012. The 2012 balances included amounts related to 2011 as the account balances had not been disposed of in the prior years' rate application because the aggregate balance of all the Group 1 Deferral and Variance Accounts did not warrant disposal.

9. Since its inception up to and including 2011, Essex Powerlines had settled amounts in accounts 1588 and 1589 without incident. As part of its settlement routine, Essex Powerlines staff completed a form, ("**Form 1**")² which, among other things, allocated electricity costs between RPP and non-RPP customers. Form 1 derives this information by accessing information from the customer billing information system. Essex Powerlines regularly reviewed the balances in the accounts and was subject to annual audits. This review focused more on the aggregate balance in the two accounts.

10. In 2011, with the introduction of time of use ("**TOU**") pricing, the previous form used by Essex Powerlines was switched to a new form ("**Form 2**")³ to incorporate the necessary changes for implementing TOU pricing. However,

² Exhibit K1, Board Staff Compendium, page 21.

³ Exhibit K1, Board Staff Compendium, page 22.

Form 2 did not include the allocation between RPP and Non-RPP customers. Further, given the years of settlement without incident, the switch in forms did not trigger a review of the oversight procedures.

11. At the Oral Hearing, Mr. Dimmel explained that Essex Powerlines' miscalculation of the allocation of costs between RPP and Non-RPP customers was the result of an error in a formula in the new form. Specifically, the error occurred when the change in the forms used to bill customers was implemented and an incorrect formula was coded into the new form to perform the allocation.⁴ This error existed despite a review by the Essex Powerlines staff.

12. Upon implementing the change in forms, Mr. Dimmel testified that Essex Powerlines noticed a change in the allocation but attributed the change to switch to TOU pricing.⁵ The change was rationalized based upon customer count rather than consideration of customer count and volumes. It was acknowledged that in hindsight the attribution of the change to TOU was incorrect.

13. As the formula was coded into Form 2, subsequent settlement occurred without revisiting the coding of the formula.

14. As such, that singular error perpetuated despite four layers of review within the utility and it was also not caught through external review, including the reviews by Essex Powerlines' auditor.

⁴ Transcript Vol. 1, April 14, 2015, page 19, lines 10 to 13.

⁵ Transcript Vol. 1, April 14, 2015, page 52, lines 2 to 11.

15. Unbeknownst to Essex Powerlines at the time, it proceeded to present this information in error to the Board as part of EB-2013-0128 who relied upon it in clearing the 2011/2012 audited DVA balances in the amounts set out in Table 1 below commencing May 1, 2014.

Table 1 - 2011/2012 Board Approved Balances

Year	Account 1588	Account 1589
Total	\$9,603,667	(\$8,786,415)

16. In 2013 Essex Powerlines had continued to settle using the same process. In monitoring the DVA account balances, the individual account balances continued to increase, but the aggregate balance was not. Further, because 2011/2012 balances had not yet been dispositioned, there were no offsetting entries and the continued growth in the individual account balances was not initially highlighted as a significant issue, especially in light of the growth and volatility of the Global Adjustment charges in Ontario over the same time period.

17. In the most recent IRM Application (EB-2014-0072), Essex Powerlines applied for disposition of the DVA account balances for 2013 with the miscalculation still embedded in its DVA account balances.

18. In December 2014, on its own initiative, Essex Powerlines began to investigate the correctness of the balances in accounts 1588 and 1589 and reported the issue to the Board and the other parties as part of the response to interrogatories in January 19, 2015. At that time, Essex Powerlines felt the appropriate response was to refund amounts overbilled, collect underbilled

amounts and correct the balances going forward, which would be consistent with a response to a billing error. This suggestion would ensure that all parties would be treated fairly. This theme was incorporated into Essex Powerlines' previous submissions in this regard.

19. As noted, Essex Powerlines applied to the Board for authorization to cease the application of the erroneous rate rider effective February 1, 2015. The Board ordered Essex Powerlines to stop charging the rate rider effective February 1, 2015.

20. Table 2 below⁶ provides a summary of the settled and residual amounts for February 1, 2015 to April 30, 2015 remaining in the DVA accounts.

Table 2 - Residual Period DVA Balances

Account Number	Total Approved Disposition	Actual Recovery - May 1 2014 to Jan 31 2015	Residual Amounts
1550	727,886	518,509	209,377
1580	(3,720,954)	(2,650,620)	(1,070,334)
1584	378,816	269,849	108,967
1586	(1,312,577)	(935,014)	(377,563)
1588	9,603,767	6,841,167	2,762,600
1589	(8,786,415)	(6,132,938)	(2,653,477)
Total 1595 Balances	(3,109,477)	(2,089,045)	(1,020,432)
1590	(1,483,365)	-	(1,483,365)
Total Approved Balances	(4,592,842)	(2,089,045)	(2,503,797)

21. As the IRM application also included the disposition of balances for 2013 in respect of these accounts, and given the cumulative balance, Essex Powerlines is of the view disposition over a 1 year period is appropriate of the accounts and the amounts provided in Table 3 below.

⁶ Board Staff IR#5, April 7, 2015.

Table 3 - DVA Accounts Balances for Disposition (Excl. 1588 and 1589)

#	Account	2013 Claim	2011/2012 Residual	Total
1550	LV	643,592	209,377	852,969
1551	Smart Meter Entity	47,653	-	47,653
1580	WMS	234,955	(1,070,334)	(835,379)
1584	Network	(1,405,299)	108,967	(1,296,332)
1586	Connection	(1,023,940)	(377,563)	(1,401,503)
1590	Recovery of Reg	(1,510,347)	-	(1,510,347)
1595	2012 Disposition	(258,007)	-	(258,007)
	Total	(3,271,393)	(1,129,553)	(4,400,946)

22. These 2011/2012 DVA residual balances and 2013 balances can be corrected on a prospective basis. The result of these accounts is a significant credit for customers over the next year.

23. With respect to Accounts 1588 and 1589, Essex Powerlines has settled with customers for the period of May 1, 2014 to January 31, 2015 on the incorrect amounts. The amounts settled in error for accounts 1588 and 1589 during this period are:

Table 4 - Settled Amounts 1588 and 1589

Account 1588	\$6,841,167
Account 1589	(\$6,132,938)

24. The amounts recovered, the residual amounts and the correction necessary for accounts 1588 and 1589 were explained in the response to Board Staff IR#7 and can be summarized as follows in Figure 1.⁷

⁷ Board Staff IR#7, April 7, 2015, Tables 7, 8, 9.

Figure 1 – Residual Balances Correction Accounts 1588 and 1589

Account	Approved Disposition incl Principal & Interest	Actual Recovery - May 1 2014 to Jan 31 2015	Residual Amounts
Cost of Power - 1588	9,603,767	6,841,167	2,762,600
Global Adjustment - 1589	(8,786,415)	(6,132,938)	(2,653,477)

Account	Misallocation incl in Approved Amt	Misallocation Recovered in Rates - May 1 2014 to Jan 31 2015	Estimated Remaining Misallocation
Cost of Power - 1588	5,178,750	3,689,041	1,489,709
Global Adjustment - 1589	(5,178,750)	(3,614,779)	(1,563,971)

Account	Corrected Principal & Interest	Corrected Recovered in Rates - May 1 2014 to January 31 2015	Corrected Residual Amounts
Cost of Power - 1588	4,425,017	3,152,126	1,272,891
Global Adjustment - 1589	(3,607,665)	(2,518,159)	(1,089,506)

25. Board Staff proposed a slightly modified analysis, based upon dollar for dollar recovery, as compared to the Essex Powerlines' summary above. Board Staff's proposal and Essex Powerlines' proposal come to the similar results.⁸

26. In addition to the prior residual balances for Accounts 1588 and 1589; the 2013 balances which were never settled need to be corrected in rates going forward to ensure customers pay the correct amounts. The disposition of the residual and 2013 balances results in an aggregate disposition of Accounts 1588 and 1589.

27. In respect of Account 1588, Essex Powerlines has summarized the figures for disposition in Table 5 below and is requesting 2 years to return the amounts to customers. It includes correction for the amounts incorrectly settled,

⁸ Transcript Vol. 1, April 14, 2015, page 70, line 24 to page 71, line 7.

amounts in respect of the residual period from February 1, 2015 to April 30, 2015; correction for the misallocation and amounts in respect of 2013.

Table 5 - Account 1588 Disposition Summary

Rider #2		2013 Claim *	2011/2012 Residual **	Misallocation Residual ***	Total
1588	Cost of Power	(2,151,441)	2,762,600	(1,563,971)	(952,812)
			2011/2012 Recovery ****	Misallocation Recovered Already *****	Adjustment required
1588	Cost of Power		6,841,167	3,614,779	(3,614,779)
	Total				(4,567,591)

* Essex_2015_IRM Rate_Generator_Appendix A_Master_Exhibit 1_20150407 Column BE

** K1_BdStaff Compendium_20150414 Tab 1 Table 6

*** K1_BdStaff Compendium_20150414 Tab 2 Table 3

**** K1_BdStaff Compendium_20150414 Tab 2 Table 1

***** K1_BdStaff Compendium_20150414 Tab 2 Table 2

28. Essex Powerlines has proposed that in respect of Accounts 1589 be recovered from customers over a four year period. It includes correction for the amounts incorrectly settled during May 1, 2014 to January 31, 2015, amounts in respect of the residual period from February 1, 2015 to April 30, 2015; correction of the misallocation and amounts in respect of 2013.

Table 6 - Account 1589 Disposition Summary

Rider #3		2013 Claim *	2011/2012 Residual **	Misallocation Residual ***	Total
1589	Global Adjustment	4,382,923	(2,653,477)	1,563,971	3,293,417
			2011/2012 Recovery ****	Misallocation Recovered Already *****	Adjustment required
1589	Global Adjustment		(6,132,938)	(3,614,779)	3,614,779
	Total				6,908,196

* Essex_2015_IRM Rate_Generator_Appendix A_Master_Exhibit 1_20150407 Column BE

** K1_BdStaff Compendium_20150414 Tab 1 Table 6

*** K1_BdStaff Compendium_20150414 Tab 2 Table 3

**** K1_BdStaff Compendium_20150414 Tab 2 Table 1

***** K1_BdStaff Compendium_20150414 Tab 2 Table 2

29. This proposal provides a fair resolution to all customers as bill impacts remain acceptable and Essex Powerlines has sufficient cashflow to operate its business and meet its needs.

30. The impact to the RPP and non-RPP customers is a credit as shown in Table 7 below. These amounts are well under the amounts permitted by the Board without implementing further mitigation and should therefore be acceptable to the Board and customers. Essex Powerlines noted that only two customers, Hydro One being one, contacted Essex Powerlines about the February 1, 2015 billing change or the subject of this hearing.⁹

2015 RPP BILL IMPACTS compared to 2015 Stayed Rates

Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(9.18)	-29.95%	(10.97)	-9.13%
GS<50	2,000	0	(14.85)	-21.04%	(18.55)	-6.37%
GS 50 - 2,999	1,198,113	2,968	(15,539.28)	-112.00%	(20,384.42)	-12.38%
UMSL	2,000	0	(25.07)	-32.18%	(32.16)	-9.68%
Sentinel Lights	36	0.1	(0.43)	-9.66%	(0.55)	-5.56%
Street Lights	36	0.1	(0.36)	-8.99%	(0.47)	-4.84%

2015 Non-RPP BILL IMPACTS compared to 2015 Stayed Rates

Rate Class	kWh	kW	Distribution Bill Impact		Total Bill Impact	
			\$	%	\$	%
Residential	800	0	(3.26)	-10.64%	(4.95)	-4.06%
GS<50	2,000	0	0.34	0.53%	(3.10)	-1.07%
GS 50 - 2,999	1,198,113	2,968	(6,889.34)	-69.33%	(10,609.99)	-6.49%
UMSL	2,000	0	(9.87)	-13.84%	(14.99)	-4.54%
Sentinel Lights	36	0.1	(0.15)	-3.59%	(0.24)	-2.47%
Street Lights	36	0.1	(0.11)	-2.57%	(0.18)	-1.93%

Part III. Factors Masking the Error

31. The change in forms was driven by the introduction of time of use rates, which was accompanied by other factors, namely, the introduction of significant

⁹ Transcript, Vol. 1, April 14, 2015, page 65, lines 1 to 9.

embedded generation within the Essex Powerlines' service territory and within the abutting service territory of Hydro One Networks Inc.¹⁰

32. Also, the result of the error was that equal and off-setting amounts were being recorded in the accounts. Therefore, the aggregate balance of the combination of accounts was properly tracking and Essex Powerlines was collecting the correct total amount which was then paid to the IESO. As the aggregate amount collected from customers was correct, the correct amount was always settled with the IESO.

33. In addition, the increasing and fluctuating quantities of Global Adjustment served to further hinder detection of a problem.¹¹

34. All of these factors combined to mask the error with respect to the calculation as there was no obvious change to the accounts.¹² In other words, the cumulative impact of all of the changes in the various components of costs made it difficult to isolate the impact of this error.

35. Essex Powerlines' evidence is that it has implemented the following in order to prevent these types of errors from happening again:¹³

"So what we have done, first and foremost, is ensuring that that process is again automated, which brings us to form 3 on page 23.

So we have tried to eliminate the human element of it

¹⁰ Transcript, Vol. 1, April 14, 2015, page 19, lines 14 to 20. Part of the Hydro One system is considered is embedded within Essex Powerlines' system.

¹¹ Transcript, Vol. 1, April 14, 2015, page 19, line 18 and page 20, line 5.

¹² Transcript, Vol. 1, April 14, 2015, page. 44, lines 2 to 19.

¹³ Transcript, Vol. 1, April 14, 2015, pages. 33-34.

which was present at the time of the error, and now we have an automated process. So that is the first thing we did.

The second thing we did is -- I am sure in our responses you have seen that we have looked at the picture at an aggregate level. You know, we looked at the OEB threshold and whether we were above that threshold or below that threshold. Obviously, in hindsight again, looking at it a global or an aggregate level wasn't the most accurate way to go about that. So we are looking at -- what we should have done and what we are doing is looking at the subaccounts now and looking specifically not at the global number, but at the specific micro level and subaccount level.

The other thing is more eyes. Obviously, the more eyes that look at it, the more levels that look at it, more in-depth they look at it, the more chance that there is catching the error.

And the fourth thing, I guess, is, when we engage external parties to audit, we specifically ask them to look at these potential high-risk accounts and look at those more specifically and more in-depth so we can have some level of comfort in terms of our third-party auditors."

36. Management is expected to act in a prudent manner and did so; it was monitoring the account balances and had internal oversight. Essex Powerlines acted quickly to investigate the issue, stop the issue from perpetuating and has sought a remedy that it believed was fair to all parties. Further, it has implemented corrective measures to its review and oversight process to ensure the error does not occur again.

Part IV. Proposed Solution

37. At the outset of the Oral Hearing, the Presiding Member stated that the Board took an "unprecedented step of ordering an oral hearing in what otherwise

would be a mechanistic adjustment to rates through the incentive rate mechanism process.”¹⁴

38. Essex Powerlines continues to be of the view that the best outcome – the one most in accordance with setting just and reasonable rates - would be for the result of the error to be fixed so that all parties would be put in the position that they would have been if the error had not been made.

39. In Procedural Order No. 3, the Board rejected Essex Powerlines’ proposal to implement this outcome by correcting it as a “billing error” as that term is used in the Retail Settlements Code. The Board also held that changing rates that were collected in 2014 would amount to retroactive rate making. Essex Powerlines has applied for a review of the Board’s determination in Procedural Order No. 3 and does not propose to reargue it here.¹⁵

40. In Essex Powerlines’ submission, the Board also has the authority to bring this result about pursuant to its power under Rule 41.02 of its Rules of Practice and Procedure, which provides as that, “The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions” (emphasis added).

41. The power to correct an error is an exception to the general rule that an administrative decision-maker has no ongoing power – or is *functus officio* – after

¹⁴ Transcript, Vol. 1, April 14, 2015, page 2, lines 7 to 10.

¹⁵ It should be noted that evidence was presented in the Oral Hearing that was not available at the time of Procedural Order No. 3. As currently advised, Essex Powerlines intends to amend its Motion for a Rehearing to address that evidence and to also add the request that the Board reconsider its finding with respect to a billing error under the Retail Settlements Code.

it releases a final decision. In other words, as the Supreme Court of Canada put it, "As a general rule, once...a decision maker has reached a final decision in respect of a matter before it in accordance with its enabling statute, that decision cannot be revised."¹⁶ In this case, the *functus* rule is why the Board does not have the authority to set retroactive rates.

42. However, an exception to this rule is that the decision-maker always maintains the power to correct an order to ensure that its original intention is reflected in that order. This power, called the "accidental slip rule" applies both where the error is in the Board's decision itself or, where, such as here, the error is in evidence that was incorporated into a Board decision.

43. Macauley's *Practice and Procedure in Administrative Tribunals* describes the accidental slip rule as applying to "cases where the applicant has accidentally mislead or failed to provide a decision-maker with the correct facts."

"It is important to note that in these cases the substance of the decision-maker's decision was not being changed. In each case it could be argued that the decision-maker had intended to, or had, awarded the thing in question which had been omitted from the implementation of the court's intention by error."¹⁷

44. As this quotation demonstrates, the purpose of the rule is to implement what the decision would have been if the decision-maker was not mistaken as to an underlying fact.

¹⁶ See: Macauley's *Practice and Procedure in Administrative Tribunals*, at p. 27A-5, citing *Chandler v. Association of Architects (Alta)*, [1989] 62 D.L.R. (4th) 577 at 596.

¹⁷ Macauley's *Practice and Procedure in Administrative Tribunals*, at p. 27A-33

45. The accidental slip rule has been applied by the Divisional Court with respect to tribunals that have the same power as that granted to the OEB in Rule 41.02. Thus, for example, in *Grier v. Metro International Trucks Ltd.*, an employment standards officer (the “ESO”) had to determine a former employee’s vacation pay entitlement. Having determined that the employee was entitled to vacation pay, the ESO erroneously determined a payment amount based on an employment period of two days instead of the actual employment period of one year and two days. The error in the decision arose from an error in an agreed statement of facts. After the decision was released, a party brought a motion to fix the error. The Divisional Court held that it was appropriate to do so:¹⁸

“Under the ESA the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision.”

46. Similarly, in *Kingston v. Ontario (Mining & Lands Commissioner)* (1977), 18 O.R. (2d) 166 (Div. Ct.), the Divisional Court stated:

“Where an officer or tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out that the order, through inadvertence or negligence of one of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view is for the interested party to apply to the tribunal to have its order amended.”

¹⁸ [1996] O.J. No. 538, p. 7.

47. The Board thus has the power to amend its order to incorporate the correct information.

48. Applying that here, the Board's order clearing the 2011 and 2012 deferral accounts was based on erroneous information respecting those accounts. If the correct amounts had been provided to the Board, the Board would have cleared the accounts on that basis.

49. In other words, the Board's order incorporated the erroneous information, not because it was persuaded to, but because the information was provided in error. In this case, perpetuating the error is not in the public interest and the Board can and, in the Applicant's respectful submission, should correct the error.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Dated: April 23, 2015

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