EB-2018-0270

ONTARIO ENERGY BOARD

IN THE MATTER OF an application made by Hydro One Inc. for leave to purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation, made pursuant to section 86(2)(b) of the Ontario Energy Board Act, 1998.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking to include a rate rider in the current1 Board- approved rate schedules of Orillia Power Distribution Corporation to give effect to a 1% reduction relative to their Base Distribution Delivery Rates (exclusive of rate riders), made pursuant to section 78 of the Ontario Energy Board Act, 1998.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its distribution system to Hydro One Networks Inc., made pursuant to section 86(1)(a) of the Ontario Energy Board Act, 1998.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation seeking cancellation of its distribution licence, made pursuant to section 77(5) of the Ontario Energy Board Act, 1998.

AND IN THE MATTER OF an application made by Hydro One Networks Inc. seeking an order to amend its distribution licence, made pursuant to section 74 of the Ontario Energy Board Act, 1998, to serve the customers of the former Orillia Power Distribution Corporation.

AND IN THE MATTER OF an application made by Orillia Power Distribution Corporation for leave to transfer its rate order to Hydro One Networks Inc., made pursuant to section 18 of the Ontario Energy Board Act, 1998.

AND IN THE MATTER OF an application made by Hydro One Networks Inc., seeking an order to amend the Specific Service Charges in Orillia Power Distribution Corporation's transferred rate order made pursuant to section 78 of the Ontario Energy Board Act.

MOTION RECORD AND BOOK OF AUTHORITIES OF THE VULNERABLE ENERGY CONSUMERS COALITION

January 11, 2019

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THE CORPORATION OF THE CITY OF ORILLIA

- and -

ORILLIA POWER CORPORATION

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HYDRO ONE INC.

SHARE PURCHASE AGREEMENT

Dated the 15th day of August, 2016

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EXECUTION VERSION

THE CORPORATION OF THE CITY OF ORILLIA

- and -

ORILLIA POWER CORPORATION

- and -

HYDRO ONE INC.

SHARE PURCHASE AGREEMENT

Dated the 15th day of August, 2016

EB-2018-0171, Decision and Order at 5-10.

4 THE THRESHOLD TEST

Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* requires anyone bringing a motion to review and vary an OEB order or decision to identify the grounds for the motion:

Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

1. (i) error in fact;
2. (ii) change in circumstances;
3. (iii) new facts that have arisen;
4. (iv) facts that were not previously placed in evidence in the

   proceeding and could not have been discovered by reasonable diligence at the time.

Rule 43.01 of the *Rules of Practice and Procedure* states:

In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Position of the Moving Parties

The moving parties submitted that their motions passed the threshold test described in Rule 43.01. Both applicants set out grounds that they allege raise a question of correctness of the MAADs decision and which therefore requires a review on the merits. The grounds advanced by the applicants are that the MAADs panel:

1. a) Changed OEB policy regarding the no-harm test and erred both in departing from its own guidance and in not providing notice of the change
2. b) Erred in relying on irrelevant evidence filed in the Hydro One distribution rate application[8]
3. c) Changed the standard to be met, applying a higher standard that the OEB must be *assured* rather than there must be a *reasonable expectation* that underlying cost structures would be no higher than they would be in the absence of the acquisition

[8] EB-2017-0049.

4. d) Erred in ruling that Hydro One failed to file further evidence requested by the OEB
5. e) Considered new criteria, i.e. Hydro One's general cost allocation methodology which fetters and pre-empts the discretion of a future panel responsible for setting rates for the consolidated entity

The moving parties allege that the first three grounds result in breaches of procedural fairness. The final ground provides what, in their view, is the type of information that they now understand the OEB to require to make a proper assessment of whether the proposed acquisition meets the no harm test.

Positions of OEB Staff, Mr. Kehoe, and SEC
OEB staff, Mr. Kehoe and SEC submitted that the threshold test had not been met.

OEB staff submitted that the process was fair. Procedural Order No. 6 had explained why the OEB placed the Orillia case in abeyance. OEB staff also submitted that the MAADs policy, specifically the no harm test, has not changed. Although the OEB does not set rates in a MAADs application, OEB staff submitted that it does not mean that rates are irrelevant. OEB staff submitted that the MAADs panel was clear in having the expectation that lower cost structures should eventually lead to lower rates. OEB staff argued that the OEB's first objective is to consider price, and the only price customers will pay is the rate they will pay.

Mr. Kehoe, a residential customer of Orillia Power and former chair and board member of the former Orillia Water Light and Power, submitted that the merger would harm customers. Mr. Kehoe estimated that customers will receive $400 dollar in savings during the first 10 years, but will have to pay $2,000 in costs in years 10 to 20.

SEC submitted that the MAADs panel did not err. SEC argued that the applicants bear the burden of demonstrating that the transaction meets the no harm test. The OEB needs to ensure that customers are not harmed. If not, then the OEB is not meeting its statutory duty to protect customers with respect to price. Further, SEC submitted that because the applicants did not meet the onus of demonstrating that Orillia customers would not be harmed, the OEB was correct to deny the application on that basis.

Findings

Pursuant to Rule 43.01, a threshold determination must be made regarding whether the grounds raise a question as to the correctness of the order and whether the error is material and relevant to the outcome. The correctness of the decision may also be put in issue by new facts or facts that could not have been reasonably discovered at the time the decision was made.

In this case, there are a number of conclusions that the applicants urge the OEB to adopt to determine that there are grounds to doubt the correctness of the MAADs decision.

There is no challenge to the jurisdiction of the OEB in making the MAADs decision. Section 86 of the Act establishes that the OEB review a proposed share acquisition and approve the transaction if it is in the public interest. The MAADs decision applied the "no harm test" as set out in the Handbook in its assessment of the public interest.

The OEB has considered all of the grounds and has determined that both motions do not pass the threshold set out in Rule 43.01 to require a review on the merits. The OEB makes the following specific findings concerning the individual grounds relied upon by the moving parties.

a) Did the MAADs panel change OEB policy without notice and err in departing from its own guidance and not providing notice of the change?

Hydro One and Orillia Power maintain that the no harm test applied by the MAADs panel was inconsistent with the Handbook. They point to the sections of the Handbook that indicate that the no harm test is primarily directed to the impact on the underlying cost structures. For them, the MAADS panel changed policy by considering cost allocation and the effect on rates following the deferred rebasing period. They argued that cost allocation and rates are matters that must be dealt with by way of separate rate-setting applications following the deferred rebasing period,[9] not in the MAADs proceeding.

[9] The OEB provides "the opportunity for electricity distributors to defer rebasing for a period up to ten years following the closing of a consolidation transaction. This deferred rebasing period is intended to enable distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction." *Handbook to Electricity Distributor and Transmitter Consolidations*, pp. 8-9.

In their contention that a change of policy has taken place, Hydro One and Orillia Power have tried to differentiate regulatory terms that are inextricably linked. The OEB finds the applicants' attempt to distinguish prices from rates, and cost structures from cost allocation, to be insufficient grounds by which to conclude that the MAAD's decision changed policy or was in error.

The no harm test is a broad one. The Handbook's reference to cost structures was not intended to exclude considerations of cost allocation, diminish consideration of future rate impacts or constrain the application of the no harm test.

The Handbook states the expectation is that merged customers should enjoy lower costs per customer. The Handbook further emphasizes that the rate implications for customers of the acquired utility will be the primary consideration in applying the test.

While the rate implications to all customers will be considered for an acquisition, the primary consideration will be the expected impact on customers of the acquired utility.[10]

The Handbook also states that the OEB will consider whether the no harm test is satisfied "based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives".[11] These objectives, of course include the protection of the interests of consumers with respect to prices.

The OEB finds that the MAADs panel's determination that future rate impacts (i.e. prices) are relevant to the no harm test is not inconsistent with the Handbook.

The moving parties also argued that the MAADs decision represents a new approach from prior guidance provided in MAADs decisions to date. They argued that prior decisions did not focus on rates or rate-setting expectations following the deferred rebasing period.

The OEB finds the MAADs panel inquiry was a reasonable, legitimate response to concerns raised by SEC regarding the proposed rates of previously acquired utilities by Hydro One, once the deferred rebasing period ended. Time had passed since those utilities were acquired. It bears repeating that no two cases are identical. This inquiry may have been more intensive in the information on rate impacts that was sought than previous MAADs examinations, but it was a not a departure from the overarching

[10] *Handbook to Electricity Distributor and Transmitter Consolidations*, p. 7.
[11] *Handbook to Electricity Distributor and Transmitter Consolidations*, pp. 1, 4.

mandate to protect the public interest that is inherent in the making of MAADs decisions. The fact that the MAADs panel considered matters not raised in some previous cases does not amount to an error. Further, the OEB is entitled to seek information it considers relevant in carrying out its statutory duties and responsibilities.

The moving parties also argued that the MAADS panel erred in not providing notice given it changed policy and departed from prior guidance. The OEB addresses the submission regarding notice later in this Decision (see Question d).

b) Did the MAADs panel err in relying on irrelevant evidence filed in the Hydro One distribution rate application?

The moving parties argue that the MAADs panel based the potential for rate increases to Orillia Power customers on the Hydro One distribution rates application. The distribution rates application proposed rates for customers of three utilities acquired following the end of the deferred rebasing periods. And while section 21(6.1) of the Act permits consideration of this evidence, it was submitted that notice of an intention to rely on such evidence must precede its consideration.

The OEB finds that the MAADs panel did not improperly rely on evidence taken from the Hydro One distribution rates application. The MAADs panel was certainly aware of some of the record from that proceeding: it was discussed in SEC's argument and Hydro One's reply argument, and charts using data from the distribution case were filed in the MAADs proceeding as well. It can also be said that information from the distribution application was of concern to the MAADs panel, and provoked the inquiry from the MAADs panel regarding the implications for Orillia Power's customers following its deferred rebasing period. The MAADs panel's concern was based on the apparent disconnect between the cost savings that were promised to the customers of the three acquired utilities and the evidence provided in the application. The OEB finds it reasonable that the MAADs panel inquired whether future results would be potentially unfavourable to Orillia Power customers in applying the requisite no harm test. It does not imply the MAADs panel relied on the evidence, relevant or irrelevant, in another proceeding.

The MAADs panel indicated that it "was not satisfied" that no harm test had been met. There is no mention of the Hydro One distribution rates application in the MAADs decision's conclusion. The OEB concludes that although the MAADs panel was informed by the Hydro One distribution rates proceeding, its decision was based on the record that was before it in the MAADs case. Based on that record, the MAADs panel was not satisfied that the no harm test had been met.

The OEB finds that the MAADs panel did not err as it did not rely on irrelevant evidence.

c) Did the MAADs panel err by changing the standard to be met, applying a higher standard that the OEB must be assured rather than there must be a reasonable expectation that underlying cost structures would be no higher than would be in the absence of the acquisition?

Orillia Power submitted in its Notice of Motion that the MAADs panel applied a novel and higher standard by requiring that the OEB must be "assured" that underlying cost structures would be no greater than they would be in the absence of the acquisition rather than the Handbook's requirement that there must only be a "reasonable expectation" that the post-acquisition cost structures would be no greater.

This ground was not argued at the oral hearing of submissions. In any event, there is no suggestion that the word "assured" in the same paragraph as "satisfied" had a material effect upon the MAADs decision result, or was intended to introduce a higher standard. To the contrary, the MAADs panel indicated that its "primary concern is that there is a reasonable expectation that underlying cost structures for the acquired utility are no higher than they would have been had the consolidation not occurred."[12] [emphasis added]

d) Did the MAADs panel err in ruling that Hydro One failed to file further evidence as requested?

The moving parties submit that insufficient notice was given concerning the case they had to make to show no harm, prior to the MAADs decision. They note that the ability to file new evidence was only one of the options in the Order section of Procedural Order No. 7 as it indicated:

Hydro One Inc. shall file evidence or submissions on its expectations of the overall cost structures following the deferred rebasing period and the effect on Orillia Power customers...

Hydro One responded to Procedural Order No. 7 by filing a submission. The moving parties also allege that Procedural Order No. 7 only referenced cost structures following the deferral period and not issues associated with cost allocation and possible rate increases.

[12] EB-2016-0276, Decision and Order, April 12, 2018, p. 12.

Procedural Order No. 6, where the MAADs panel put the entire proceeding on hold, was the subject of a motion by the same moving parties. The motion review decision overturned Procedural Order No. 6 on the grounds that the MAADs panel would be able to obtain information about impacts on Orillia Power's customers in the MAADs proceeding itself, and it did not need to await the outcome of the Hydro One distribution rate case. The motion review decision specifically contemplated re-opening the record to obtain additional information.

Procedural Order No. 7, while not copying verbatim the language of Procedural Order No. 6, specifically noted that, in response to the motion review decision:

... the OEB has determined that it will re-open the record of the MAAD application as it wishes to receive further material in the form of evidence or submissions from Hydro One on what it expects the overall cost structures to be following the deferral period and the impact on Orillia Power customers. [emphasis added]

There was no new evidence provided in the MAADs proceeding, despite the opportunity to do so, to address the issue specifically referenced in Procedural Order No. 7, and the concern set out in Procedural Order No. 6. While Hydro One made submissions following the issuance of Procedural Order No. 7, they were largely to the effect that it intended to follow the OEB's Filing Requirements and Cost Allocation Model. It should have been clear to the applicants what was at issue. The OEB finds that adequate notice was provided to Hydro One in Procedural Order No. 6 and 7, prior to the issuance of the MAADs decision.

The OEB finds that the MAADs panel did not err as it provided the applicants with adequate notice of the type of information required.

EB-2018-0270, Application, Exhibit A, Tab 4, Schedule 1, Page 7.

3.0 HYDRO ONE SHARED COSTS

If the transaction is approved, the underlying cost structures for serving the former OPDC customers will be reduced by an estimated $7.1M to a revenue requirement of $7.3M under the Residual scenario. The $7.3M Residual revenue requirement does not reflect OPDC customers paying their full share of the costs for services that Hydro One would be providing to OPDC customers. Hydro One considers the costs of the functions, resources and assets used to provide such services to be its "Shared Costs". More particularly, Hydro One's Shared Costs reflect (i) shared facilities used to provide operations and maintenance services (i.e. service centres and maintenance yards), billing and IT system costs, and other miscellaneous general plant; (ii) OM&A costs associated with shared services, such as planning, finance, regulatory, human resources, information technology, customer services and corporate communications; and (iii) asset and related OM&A costs associated with upstream distribution facilities used by former OPDC customers (i.e. costs formerly captured under LV charges).

In Year 11, upon harmonizing rates for customers in the OPDC service territory with Hydro One's rates for its existing customer base, the underlying cost structures would continue, as illustrated in Table 1 of Exhibit A, Tab 2, Schedule 1. The synergies and efficiencies realized during the 10-year deferral period would continue to have a mitigating effect on rates for customers in the former OPDC service territory. However, through rate harmonization (post 10-year deferral period), Hydro One would have an opportunity to begin collecting a portion of its Shared Costs from customers in the former OPDC service territory. At that time, the prior Status Quo cost structures will have been reduced through synergies and efficiencies of the proposed

consolidation. Given that those customers will receive benefits from the functions, resources and assets that are carried out or held centrally by Hydro One, it will be appropriate for those customers to bear responsibility for some of the Shared Costs. The manner in which Shared Costs will be allocated, and the amount that will ultimately be borne by former OPDC customers following the deferral period, will be matters for the OEB to consider and determine at such time that Hydro One proposes a rate structure and rate harmonization plan as part of its rebasing application following the 10-year deferral period.

At that time, Hydro One would determine the quantum of its Shared Costs and the appropriate methodology for allocating those Shared Costs among all of its customer groups, including its distribution customers in the former OPDC service territory, resulting in what it then believes to be an appropriate amount of Shared Costs to be collected from the former OPDC customers.

There are a number of factors that are likely to be taken into consideration at that time, both by Hydro One in developing its proposed methodology and by the panel of the OEB in considering that proposal and making a final determination on that methodology and the amount of Shared Costs to be included in rates for former OPDC customers. In particular, consideration would likely be given to factors such as the impact on rates for former OPDC customers, the impact on rates for Hydro One's other customers, the OEB's cost allocation policies and preferred cost allocation practices at the time, the outcome from the pending EB-2017-0049 Decision as it relates to Hydro One's previous Acquired Customers, as well as general principles of rate

making.

3.1 PROPOSED METHODOLOGY FOR ALLOCATING COSTS AFTER DEFERRAL PERIOD

After the deferral period, Hydro One will allocate costs to serve the former OPDC customers using the OEB's cost allocation model, adjusted to reflect the cost to serve the acquired OPDC

customers. Hydro One proposes within the harmonization and rebasing application following the deferral period, that it would ensure that the total cost, including a portion of Hydro One's Shared costs, to be collected from the former OPDC customers would be between, (a) the Residual Cost to Serve Scenario plus LV charges (totaling $8.3M), and (b) the Year 11 revenue requirement under the OPDC Status Quo scenario plus Year 11 LV charges (totaling $14.4M).

Table 4 below provides the calculation of these two costs.

Table 4 Calculation of Residual and Status Quo Costs ($000s)	
Revenue Requirement – OPDC Status Quo	13,443
Estimated LV Charges[6] – OPDC Status Quo	1,005
Total Cost to Serve – OPDC Status Quo	14,448
Revenue Requirement – Residual Cost to Serve Former OPDC	7,319
Estimated Revenue Requirement associated with providing LV services to Former OPDC	1,005
Total Residual Cost to Serve	8,324

As illustrated above, Hydro One could collect from the former OPDC customers a revenue requirement as low as $8.3M. This would mean that all savings from the transaction would accrue to the former customers of OPDC. Hydro One's legacy customers would not be harmed, as the former OPDC customers would be paying for their residual cost to serve. On the other hand, Hydro One could collect from the former OPDC customers a revenue requirement of up to $14.4M, and still be at or below their Status Quo cost to serve. This would mean that all savings from the transaction would accrue to Hydro One legacy customers. Any revenue requirement collected from the former OPDC customers between these two amounts (i.e. between $8.3M and $14.4M), would result in a sharing of the benefits between the two customer groups.

[6] Year 11 LV charges would reflect Hydro One's costs of providing host distributor services.

At this time, Hydro One is not in a position to determine the specific amount of costs that would be collected from OPDC's customers, as that will depend on the cost allocation and rate design proposed for the harmonized rate classes in Year 11. However, any adjustments to the OEB's cost allocation model to reflect the cost to serve the acquired OPDC customers in Year 11 would remain in place for subsequent years.

In Year 11, to calculate the status quo forecast, Hydro One would use the forecast as provided in this Application. However, that base amount would need to be adjusted to reflect any unknown or unforeseen costs at that time that would be applicable to serving the former OPDC customers if the transaction did not occur. For instance, if new legislative or OEB requirements or environmental regulations give rise to unanticipated costs, or unanticipated events such as political change (e.g. trade tariffs impacting costs) or storm damage results in the need for additional capital expenditures in the former OPDC service territory during the deferral period, those costs would have been incurred regardless of the transaction and would therefore need to be added to the OPDC status quo forecast. The base amount would also need to be adjusted to reflect the weighted average cost of capital applicable at that time.

For the ten year deferral period, Hydro One will track the incremental costs (OM&A and Capital) to serve customers in the former OPDC service territory, and have their asset plans distinguished in Hydro One's Distribution System Plan until rate integration in Year 11.

***British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para 34.**

[31] And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

[32] Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to relitigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process" (para. 56).

[33] Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue,

> the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

(See also *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 106, *per* Charron J.)

[34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[35] These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

***Toronto (City)* v. *C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 at para 37.**

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse

of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R.

(3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West*

Midlands, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter*(H.C.), *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts.

Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

Powers re control of proceedings

Abuse of processes

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. R.S.O. 1990, c. S.22, s. 23 (1).

OEB's *Rules of Practice and Procedure*

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

[…]

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the

requirements under **Rule 8.02**, shall:
(a) set out the grounds for the motion that raise a question as to the

correctness of the order or decision, which grounds may include:

1. (i) error in fact;
2. (ii) change in circumstances;
3. (iii) new facts that have arisen;
4. (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

January 11, 2019