

April 11, 2019

W. Shawn Davitt  
1 Leaside Park Drive, Suite 520  
Toronto, ON  
M4H 1R1  
W\_Shawn\_Davitt@hotmail.com

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

**Via Courier and E-mail**

Dear Ms. Walli,

**Re: Appeal of April 1, 2019 Decision – Procedural Order No. 1  
Denial of Intervenor Status to W. Shawn Davitt (“Appellant”)  
EB-2018-0205**

Dear Ms. Walli,

1. Pursuant to subsection 7(1) of the *Ontario Energy Board Act, 1998*, the Appellant hereby appeals the April 1, 2019 decision of Ms. Christine E. Long.
2. In her decision, Ms. Long denied the Appellant intervenor status in proceeding EB-2018-0205. The decision was issued in Procedural Order No. 1. Ms. Long is an employee of the Board.

**Remedy**

3. The Appellant requests the Board:
  - a. quash the April 1, 2019 decision of Ms. Long and
  - b. grant the Appellant intervenor status

## Grounds of Appeal

4. The grounds of appeal are as follows:

- a. The Board violated the principle of natural justice and duty of procedural fairness as the Appellant was not given the right to be heard before the decision was made.

For example, in reaching her decision, Ms. Long stated that section 36 of the *Ontario Energy Board Act, 1998* grants the Board the power to establish deferral accounts. The Appellant was not given the opportunity to make submissions on this issue. As discussed below, Ms. Long's statement and legal conclusion is false and incorrect.

- b. The Board violated the principle of natural justice as the decision makers, the Board and Ms. Long, are not impartial. The Board and its employees are not impartial because:
  - i. The Board's practice is to terminate employees and take other acts of reprisal against employees who comply with the legislation or disclose wrongdoing. Ms. Long is an employee of the Board.
  - ii. The reason the Appellant is seeking intervenor status is to challenge illegal conduct by the Board. Granting intervenor status would facilitate exposure of the Board's illegal conduct.
  - iii. Many Board members and employees are former employees of utilities and many of these utilities have illegally established deferral and variance accounts. Consequently, Board members and employee have an incentive to block challenges to their conduct while they were employed by utilities.

Among other things, the unlawful orders by the Board are resulting in misstatements in the financial statements of utility companies. Utilities are reporting assets on their financial statements that do not lawfully exist.

- c. The decision is unreasonable. As discussed below, Ms. Long erred in law in stating the Board has the general power to establish deferral accounts pursuant to section 36.
- d. The decision is unreasonable as Ms. Long disregarded the Appellant's rights under the section 3 of the *Canadian Charter of Rights and Freedoms*. The Appellant is seeking intervenor status to:
  - uphold his democratic rights

- ensure the Ontario Energy Board is complying with its governing legislation

The Appellant's letter requesting intervenor status stated:

I am an anti-corruption and pro-democracy advocate. I am working to ensure governments and government bodies, such as the Ontario Energy Board, comply with the law including the constitution.

I am intervening to ensure that the Ontario Energy Board complies with its governing statute and acts in a transparent manner. Compliance and transparency are fundamental elements of a democracy.

- e. The April 1, 2019 decision was made in bad faith. The Appellant's reasons for intervening is to ensure the Ontario Energy Board and utilities comply with the law. In denying the Appellant status, the Board is merely blocking challenges to its illegal conduct for the unlawful purpose of continuing the unlawful conduct.
- f. The Appellant should be granted intervenor status as it is in the public interest. Ms. Long erred in failing to address the three areas of consideration when deciding whether to grant public interest standing.<sup>1</sup> The three areas are:
  - i. There is a serious issue raised as to the lawfulness of the Board's orders and other conduct;
  - ii. The Appellant's section 3 *Charter* rights are directly affected by the Board's unlawful orders, its false and misleading statements and other illegal conduct; and
  - iii. There is not other reasonable and effective way to bring the issue before the Board. The other parties and intervenors have failed to challenge the Board's longstanding wrongdoing.

The Board is not responding to the Appellant's requests for information and explanations on these issues.

### **Appellant Meets Board's Test for Intervenor Status**

5. Appellant has a substantial interest in the proceeding as the Board is violating the *Ontario Energy Board Act, 1998* and his rights under section 3 of the *Canadian Charter of Rights and Freedoms*.

---

<sup>1</sup> *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at p.253

6. Per Rule 22.02 of the Board's Rules of Procedure, the test for granting intervenor status is:

The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by cross-examining a witness.

7. The Board decision is contrary to purpose of administrative law. Administrative law functions as a shield protecting citizens, and acts to constrain governmental powers within their legal bounds.

### **Violations of Appellant's Section 3 Charter Rights**

8. The Board and Board employees are violating section 3 of the *Charter*, the *Ontario Energy Board Act, 1998* and the *Public Service of Ontario Act, 2006*. Specifically:
  - a. The Board is issuing unlawful orders. The Board's power to establish deferral and variance accounts is limited. The December 14, 2019 order to establish the Federal Carbon Charge – Facility Deferral Account is unlawful.

The Board is required to comply with the laws enacted by the democratically elected legislature. The right to vote is meaningless if public servants disregard the law with impunity.

As noted in *Figueroa*,<sup>2</sup> one of the purposes of the section 3 and democratic rights is ensuring the proper functioning of public institutions.

- b. In her decision, Ms. Long falsely stated that section 36 of the *Ontario Energy Board Act, 1998* authorizes the Board to make the December 14, 2018 order and create new deferral accounts. In fact, section 36 does not authorize the Board to make the order.

The publication of false information by the Board is a violation of section 3 of the *Charter*. Section 3 grants of each citizen the right to make an informed choice from among the various candidates. – see *Figueroa* [2003] 1 S.C.R. 912 at para 51. Citizens cannot vote in an informed manner when public bodies, such as the Ontario Energy Board, publish false and misleading information.

- c. Section 3 of the *Canadian Charter of Rights and Freedoms* requires the Board to state the subsection that authorizes its orders. The Board failed to do so in both its December 14, 2018 order and again in its April 1, 2019 decision.

---

<sup>2</sup> *Figueroa v. Canada (Attorney General)* [2003] 1 S.C.R. 912

- d. The Board and Board employees are violating their oath of office by issuing unlawful orders contrary to section 6 of the *Public Service of Ontario Act, 2006*.
- e. The Board and Board employees are threatening and taking reprisals against employees who disclose wrongdoing contrary to section 139 of the *Public Service of Ontario Act, 2006*.

### **Board's Power to Establish Deferral and Variance Accounts is Limited**

- 9. Ms. Long erred in stating section 36 authorizes the Board to make orders to establish deferral and variance accounts.
- 10. The Board's power to establish deferral and variance accounts is limited to only a few expenditure types, namely:
  - a. smart meters (pursuant subsection 78(3.02))
  - b. electricity conservation and demand management (pursuant to subsection 78(3.0.4))
- 11. In all cases, the legislature used the following phrase to grant the Board the power to establish the accounts:

“The Board may make orders permitting [name of entity] to establish one or more deferral or variance accounts related to ...”<sup>3</sup>
- 12. Section 36 does not contain this phrase and therefore does not grant the Board the power to establish the deferral or variance accounts.

---

<sup>3</sup> Subsection 78(3.0.2) states:

78(3.0.2) The Board may make orders permitting the Smart Metering Entity or distributors to establish one or more deferral or variance accounts related to costs associated with the smart metering initiative, in the circumstances prescribed in the regulations. [emphasis added]

Subsection 78(3.0.4) states:

78(3.0.4) The Board may make orders permitting the IESO, distributors or other licensees to establish one or more deferral or variance accounts related to costs associated with complying with a directive issued under section 27.2. [emphasis added]

13. In its April 1, 2019 decision, the Board conceded that the December 14, 2018 order to establish the Federal Carbon Charge – Facility Deferral Account was not made pursuant to either subsections 78(6.1) or (6.2).

**Ms. Long’s Interpretation of Section 36 is Contrary to the Rules of Statutory Interpretation**

14. Ms. Long erred in stating section 36 of the *Ontario Energy Board Act, 1998* authorizes the Board to order the establishment of deferral accounts. Ms. Long’s interpretation is inconsistent with numerous rules of statutory interpretation; namely:

- a. *Plain Meaning Rule* – The text of section 36 does not support Ms. Long’s interpretation. The text is precise and unambiguous. It does not state the Board has the power to order the establishment of deferral or variance accounts.
- b. Internal Coherence and Interpretation of General Provisions is Limited to Give Effect to Specific Provisions

The *Ontario Energy Board Act, 1998* is presumed to be coherent and systematic. Ms. Long’s interpretation is that the Board has general powers to establish deferral accounts under section 36 (and section 78)<sup>4</sup> in addition to the specific powers under subsection 78(3.0.2) and (3.0.4). Under this interpretation, the statute lack internal coherence as subsections 78(3.0.2) and (3.0.4) are superfluous. These subsections already grant the Board powers which, according to Ms. Long, it already has under 36 (and 78).

- c. Uniformity of Expression – Subsection 78(3.0.2) and (3.0.4) expressly grant the Board to establish deferral and variance accounts. Pursuant to Ms. Long’s interpretation, the *Ontario Energy Board Act, 1998* employs different terms and phrases to grant the Board the power to order the establishment of deferral and variance accounts. This interpretation violates the rule of statutory interpretation of uniformity of expression that states that each term or phrase in a statute should have one and only one meaning.

---

<sup>4</sup> The Board has also claimed a general power to establish deferral and variance accounts under section 78 in other correspondence.

### **Suggested Course of Action**

15. Enbridge should merely request an increase in rates if it wants to recover expenses related to greenhouse gas or carbon taxes.

Regards,

W. Shawn Davitt CA CPA LLB