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BY EMAIL and RESS

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June 3, 2021
Our File: EB20210154

Attn: Christine Long, Registrar

Dear Ms. Long:

Re: EB-2021-0154 – Rules of Practice and Procedure Amendments – SEC Comments

We are counsel to the School Energy Coalition ("SEC"). We thank the Board for the opportunity to comment on the proposed changes to the *Rules of Practice and Procedure* ("Rules") regarding motions to review.

SEC has reviewed the proposed changes and is generally supportive. We do wish to raise some specific issues for the Board to consider.

1. Rule 42.01

The Board's proposed amended Rule 42.01 sets out an exhaustive list of available grounds for a motion to review. Section (a) requires that the moving party set out the grounds for the motion, including that the OEB made a material and clearly identifiable error of fact, law, or jurisdiction. The section also includes clarifying wording that notes "[f]or this purpose…(ii) "disagreement as to how the OEB excised its discretion does not amount to an error of law or jurisdiction."

SEC raises two issues with the proposed wording of section (a) and sub-section (ii).

Error of Law. First, as currently worded, subsection (ii) could be interpreted as eliminating all motions to review based on errors of law or jurisdiction. The confusion arises because most of the Board's decisions involve the exercise of discretion, be it procedural (e.g., determining specific steps in a proceeding) or substantive (e.g., setting "just and reasonable" rates or granting leave to construct an asset as it is in "the public interest"). There are some exercises of discretion that should be treated as errors of law because they are so characterized in the jurisprudence.

While the Board's discretion is broad, it is not absolute.[1] For example, while the Board has broad discretion in rate-setting, it is constrained by the legal requirements against retroactive ratemaking. It

[1] See for example, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para. 16

must also ensure that, over the long run, a utility has an opportunity to earn a fair return.[2] General administrative law principles also constrain the Board's discretion. Among other requirements, the Board has a duty of procedural fairness[3], and cannot impermissibly fetter its discretion.[4] All of these examples are ways in which an exercise of discretion becomes an error of law.

SEC submits that the Board should revise the wording of subsection (ii) as follows:

> (ii) disagreement as to how the OEB excised its discretion does not amount to an error of law or jurisdiction, unless the exercise of discretion involves an extricable error of law

This language is consistent with the jurisprudence, which classifies an exercise of discretion as a question of mixed fact and law[5], which only rises to an error of law when an extricable question of law or legal principle is present.[6]

This revised wording would ensure that the moving party must raise more than just a simple disagreement as to the exercise of a discretion. The moving party must point to a specific *legal* error made by the Board when exercising its discretion, for it to be a reviewable error of law or jurisdiction.

Error of Regulatory Principle. Second, the proposed change to Rule 42.01, even including the required clarification discussed above, would appear to eliminate *any* review of the Board's exercise of its discretion that does not rise to an error of law. SEC believes there may be limited circumstances, where a Board Panel unreasonably departs from core regulatory principles, which should remain a ground for a motion to review.

SEC understands the concern the Board is trying to address with this proposed rule change. The Board is seeking to eliminate motions to review regarding the normal application of the Board's broad discretion. This makes sense, as most Board decisions do not lend themselves to a 'right' or 'wrong' answer. They require consideration of the facts in the context of balancing various factors and objectives. Almost inherently, different panels of commissioners may reach different conclusions on the same facts.

SEC agrees that motions to review that are simply an opportunity for the moving party to have "another kick at the can" are inappropriate, and do not promote regulatory efficiency or fairness. At the same time, there are certain regulatory principles that, while not legal requirements, are fundamental, and the Board should not deviate from them lightly.

For example, this includes concepts such as benefits follow costs, the standalone principle, cost causation, and the no-harm test. SEC Is not suggesting the Board cannot depart from these principles. It certainly can and, in some cases, the evidence may require it to do so. At the same time, consistency

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[2] See *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44, para. 16; Report of the Board on the Cost of Capital for Ontario's Regulated Utilities (EB-2009-0084), December 11, 2019, p.18

[3] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Decision and Order* (EB-2017-0320 - Motion to Review - Hydro One Inc/OPDC), January 4, 2018, p.9

[4] *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para. 66; *Decision and Order on Notice of Motion to Review and Vary* (EB-2014-0155 - SEC Motion to Review - KWHI), July 31, 2014, p.7

[5] *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, para. 72;

[6] *Housen v. Nikolaisen*, 2002 SCC 33, para. 37; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, para. 45

in the application of discretion is important, and each Board Panel bears the burden of justifying any departure from longstanding fundamental regulatory principles.[7]

The problem is that, occasionally, individual Board panels depart from fundamental principles, and there is little, if any, discussion by the parties on the issue during the hearing, nor analysis in the written reasons. It is in these limited situations that a party should be able to bring a motion to review, to ensure the Board had thoughtfully and rationally justified the deviation.

Without such an option, there is no mechanism to review what could be very consequential decisions. In such a situation, a party cannot file an appeal under section 33 of the *Ontario Energy Board Act* as it would not generally be an error of law.[8] Previously, it may have been open for a party to bring a judicial review, but that may now not be possible. Recent jurisprudence from the Divisional Court suggests that courts should exercise their discretion to decline to hear such applications for judicial review on grounds other than errors of law, when there is a statutory right of appeal restricted to questions of law.[9]

SEC submits the Board should allow some room for parties to bring motions to review on this limited additional ground. The Board would still have the power under Rule 43.01, including dismissing the motion without a hearing, where the alleged error does appear to be a deviation from a core regulatory principle, but simply involves a party seeking to re-argue a matter.[10]

2. Rule 43.01(f)

The proposed new Rule 43.01 sets out a list of factors the Board may consider when determining the threshold question. The first part of section (f) states, "where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act…".

As currently worded, the language is confusing. There are two possible interpretations:

> a) if a moving party raises as its grounds for review a question of law or jurisdiction ***and*** has also brought an appeal under section 33 of the OEB Act on the same question, it may fail the threshold question, or
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> b) if a moving party raises as its grounds for review a question of law or jurisdiction ***that could be*** brought under section 33 of the *OEB Act* on the same question, it may fail the threshold question.

SEC assumes the Board's intention is the first interpretation, i.e. a choice of forum rule. That would be a sensible factor for the Board to consider in deciding the threshold question as the moving party should be required to pick its method of having the decision reviewed. The moving party should not

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[7] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, p.129-132

[8] The Divisional Court on multiple occasions noted in the context of OEB appeals, that "an arguably unreasonable exercise of a discretion is not an error of law or jurisdiction." See *Halton Hills Hydro Inc. v. Ontario Energy Board,* 2020 ONSC 6085, para. 6; *Natural Resource Gas Limited v. Ontario Energy Board,* 2012 ONSC 3520, para. 8

[9] See *Yatar v. TD Insurance Meloche Monnex,* 2021 ONSC 2507, para. 41

[10] This is consistent with the Board's previous statements first set out in the *NGEIR* decision that a "motion review is not an opportunity for a party to reargue the case" (*Decision with Reasons* (EB-2006-0322/338/340 - NGEIR Motion to Review), May 22, 2007, p.18)

normally be allowed simultaneously to bring a motion to review, and to appeal, on the same legal question arising from the same decision.

If the second interpretation is what the Board intended, the new rule would, by definition, apply to every error of law or jurisdiction, as all questions of law are appealable under section 33 of the *Ontario Energy Board Act*. Such an interpretation would, in our view, be unwise.

The Board should encourage reviews by motions to review, as opposed to by way of appeal to the Divisional Court, for errors of law. Motions to review are a comparatively expeditious and cost-effective method of review, and they allow the Board to apply its expertise to any alleged legal errors. In contrast, the Divisional Court process is lengthy and, for many, cost prohibitive. Additionally, consistent with the Supreme Court of Canada's decision in *Vavilov*[11], the courts no longer grant deference to administrative decision-makers on appeals of questions of law or jurisdiction.[12]

This second interpretation would run entirely contrary to the Board's explicit recognition that an error of law is a permissible ground for review under the proposed Rule 42.01.

SEC submits that the Board should clarify the proposed wording in Rule 43.01(f) to eliminate any confusion.

Conclusion

SEC is generally supportive of the proposed updating of the rules with respect to motions to review. However, that some technical adjustments, detailed above, would better accomplish the Board's goals and make the new rules clearer.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein 2021.06.03 15:00:29-04'00'

Mark Rubenstein

cc: Ted Doherty, SEC (by email)

[11] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
[12] *Enbridge Gas Inc v. Ontario Energy Board*, 2020 ONSC 3616, para. 14