EB-2024-0004
June 4, 2024

ONTARIO ENERGY BOARD

IN THE MATTER OF section 25(1) of the *Electricity Act, 1998*, S.O. 1998, c. 15S

AND IN THE MATTER OF an application by the Independent Electricity System Operator to modify its revenue requirements, expenditures, and usage fees for fiscal years 2024 and 2025

REPLY SUBMISSIONS OF THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR

June 4, 2024

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A. OVERVIEW

1. These are the reply submissions of the Independent Electricity System Operator ("**IESO**") in support of its request for Ontario Energy Board (the "**OEB**" or "**Board**") approval of the Revenue Requirement Submissions for incremental 2024 and 2025 expenditure and revenue requirements and fees that were filed on January 11, 2024 (the "**Submissions**") pursuant to subsection 25(4) of the *Electricity Act, 1998* (the "**Electricity Act**").

2. The IESO reiterates its requests that the Board approve the Submissions. As a general comment, the IESO observes that Board Staff and the intervenors continue to approach the Submissions as if the IESO were a for-profit utility subject to a multi-year incentive rate-setting mechanism. The IESO makes the following points in reply to the submissions filed by Board Staff and the intervenors:

(a) The approved Settlement Proposal in EB-2022-0318 (the "**Settlement Proposal**") does not prohibit the IESO from applying to adjust its usage fees in circumstances where, although the adjustment mechanism summarized in section 3.3 of the Settlement Proposal (the "**Adjustment Mechanism**") has not been triggered, the IESO is projecting deficits in the Forecast Variance Deferral Account ("**FVDA**") of $300,000 in 2024 and $22.4 million in 2025. The inclusion of a mechanism that required the IESO to undertake a review of its usage fees in no way precluded it from applying to adjust its usage fees in other circumstances if the need arose.

(b) Regardless of its interpretation of the Settlement Proposal, the Board has the authority in this proceeding to approve the Submissions under subsection 25(4) of the Electricity Act. The Board should reject the position of the intervenors that the Settlement Proposal is a contract and that the consent of all signatories to the Settlement Proposal is required to approve the Submissions. As a matter of law,

the parties could not limit the Board's jurisdiction to consider and approve the Submissions through the Settlement Proposal.

(c) The IESO complied with its obligation to disclose the Minister of Energy's letter to the IESO dated July 10, 2023 (the "**Minister's July 10 Letter**") pertaining to the provincial government's *Powering Ontario's Growth: Ontario's Plan for a Clean Energy Future* plan (the "**POG Plan**"). The concerns about fairness which underlie and inform the obligation to disclose in regulatory proceedings do not arise in this case. The intervenors have not articulated how the interests they represent have been prejudiced in any tangible way by the alleged non-disclosure.

(d) The evidence filed in support of the Submissions demonstrates why the IESO requires the requested incremental revenue requirements for 2024 and 2025. The IESO will continue to assess the incremental needs and work to find efficiencies, but it is unrealistic to expect the IESO will be able to find efficiencies to cover incremental revenue requirements totaling $9.9 million over two years. Any additional revenues will ultimately be applied against the IESO's projected deficits and reduced the associated financing costs that need to be collected from future ratepayers.

(e) The budgeting used by the IESO to estimate costs for the POG Plan tasks was consistent with the IESO's past budgeting practices. In the Settlement Proposal, the IESO committed to investigating alternative approaches and presenting forecast and historic spending on major activity and initiative basis in its 2026-2028 Revenue Requirement Submission. The parties will have an opportunity to explore the appropriate approach for the IESO's budgeting in the IESO's 2026-2028

Revenue Requirement Submission with the benefit of the results of the IESO's investigation.

(f) Board Staff submits the IESO should report on the final year-end balance in the FVDA for 2024 and 2025 and provide an explanation on the variances in revenues and expenses. The IESO provides this information in the IESO's Annual Report, a copy of which must be provided to the Board and delivered to the Minister under the IESO's licence.

3. The IESO acknowledges this is its first attempt at a multi-year approach and there is an opportunity for all parties to learn from this experience. The IESO is open to reviewing and refining its approach as part of its 2026-2028 Revenue Requirement Submission based on the experience gained by the parties in implementing a three-year cycle for IESO usage fees for the first time.

B. REPLY ARGUMENT

1. General (Issues 1.1, 1.2 and 1.3)

(a) The Settlement Proposal does not prohibit the IESO from applying to adjust its usage fees

4. In their closing submissions, Board Staff[1] and the intervenors[2] (except for the Society of United Professionals[3]) take the position that the terms of the Settlement Proposal prohibit the IESO from applying to adjust its usage fees in circumstances where the adjustment mechanism summarized in section 3.3 of the Settlement Proposal (the "**Adjustment Mechanism**") has not

[1] OEB Staff Submission dated May 21, 2024 ("**Staff Submissions**") at pages 2 to 3
[2] Final Submissions AMPCO dated May 21, 2024 ("**AMPCO Submissions**") at pages 4 to 5; Submissions of Canadian Manufacturers & Exporters dated May 21, 2024 ("**CME Submissions**") at paragraphs 9 to 17; Energy Probe Argument dated May 21, 2024 ("**EP Submissions**") at pages 3 to 5; Submissions of Environmental Defence dated May 21, 2024 ("**ED Submissions**") at pages 2 to 3; Final Argument of the School Energy Coalition dated May 21, 2024 ("**SEC Submissions**") at paragraphs 16 to 21; Submission of the Vulnerable Energy Consumers Coalition ("**VECC Submissions**") at paragraphs 8 to 11
[3] Society of United Professionals' Final Submissions dated May 21, 2024 ("**SUP Submissions**")

been triggered. Board Staff even posit that the IESO "intended to limit [its] ability to seek approval to adjust its fees solely to the circumstances set out in the Adjustment Mechanism."[4]

5. Board Staff and the intervenors continue to approach the Adjustment Mechanism as if it were a Z-factor adjustment in the context of a multi-year incentive rate-setting mechanism.[5] This fundamental misconception about the nature of the IESO's proposal lead Board Staff to erroneously conclude that, if the Board accepts the IESO's argument, there would be no need for an Adjustment Mechanism at all.[6] The IESO disagrees. As explained in the Argument-in-Chief, the IESO designed the Adjustment Mechanism to act as a guardrail to identify circumstances in which a review of the IESO's usage fees would be required.[7] In contrast to how it is now being portrayed by the other parties, the Adjustment Mechanism acts as an upper boundary that would have necessitated a review of the usage fees by the IESO if the FVDA was already in a deficit position at the end of 2023. This was done to address potential concerns about the IESO running annual operating deficits (with the attendant financing charges) in the absence of oversight during a multi-year term.[8]

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[4] Staff Submissions at page 3

[5] While the other parties acknowledge the IESO's status as a not-for-profit statutory corporation, the continued comparisons of the Adjustment Mechanism to a Z-factor indicates to the IESO that the parties do not fully appreciate the implications of this status. The Z-factor forms part of an incentive rate-setting mechanism that attempts to mimic the risk/reward structure of a competitive market and under which a utility's shareholders can earn a return above the approved return on equity. For such a regime to operate successfully, it is imperative to have a restrictive mechanism in place to prevent the reopening of the rate for ordinary business risks that a utility is expected to manage. The same considerations do not exist in the case of a not-for-profit statutory corporation such as the IESO. The IESO has no shareholder, earns no rate of return and is subject to the direction of government. Comparisons to a Z-factor that forms part of an incentive rate-setting mechanism are not instructive or helpful. From the IESO's perspective, the relevant question is whether the requested adjustment achieves the benefits of utilizing a multi-year mechanism – regulatory efficiency, certainty and timely approval. As the IESO explained in its Argument-in-Chief, those benefits have been and will continue to be realized if the Submissions are approved in a timely manner.

[6] Staff Submissions at page 3; see also ED Submissions at page 2

[7] Argument in Chief of the Independent Electricity System Operator dated May 6, 2024 (the "**Argument-in-Chief**") at paragraph 12

[8] In this regard, the relevant comparator to the IESO's proposal is not utilities' Z-factor but the mechanism utilized by the IESO in its capacity as Smart Metering Entity ("**SME**") that has been in place for more than a decade in connection with its multi-year Smart Metering Charge. The SME's mechanism requires annual reporting by the SME with the potential for adjustments where the SME's costs are over or under a set band. The origins and rationale for the SME mechanism were discussed in the Settlement Proposal approved by the Board in its Decision and Order dated March 28, 2013 in EB-2012-0100/EB-2012-0211.

6. Tellingly, neither Board Staff nor the intervenors can point to a provision in the Settlement Proposal, or any statement in the evidence cited in the Settlement Proposal, that prohibits the IESO from seeking to adjust its usage fees outside of the Adjustment Mechanism or demonstrates that it was the IESO's intent in making the proposal. Instead, Board Staff and the intervenors are asking the Board to read a prohibition into the Settlement Proposal by way of implication. To support this implied clause, Board Staff cited three examples from the record in EB-2022-0318 that, in their view, demonstrate the alleged intention to restrict the IESO's ability to apply for an adjustment outside of the Adjustment Mechanism.[9] However, none of the three examples can withstand scrutiny.

7. First, Board Staff present an incomplete quotation from Exhibit F-1-1 of the IESO's evidence in EB-2022-0318 to suggest that the circumstances in which IESO "may choose to re-apply to adjust its fees" are limited to those specified in the Adjustment Mechanism.[10] This is an inaccurate reading of the IESO's evidence in EB-2022-0318. The relevant quote is presented in its full context below:

> [I]f unforeseen expenses or change in revenues cause the IESO's proposed operating reserve, and the balance of the FVDA, to reduce below zero in Year 1 of the three-year cycle (i.e., in 2023), the IESO proposes that the IESO may choose to re-apply to adjust its fees. If the $15 million threshold is exceeded, the IESO would review whether it is appropriate and feasible to apply for revised usage fees with the OEB. The IESO's review would take into account the timing of the Minister's review of a revised Business Plan, the timing of an OEB proceeding, the impact on ratepayers, and the availability of the IESO's letter of credit with the Ontario Electricity Financial Corporation.[11]

[9] Staff Submissions at page 3
[10] Staff Submissions at page 3
[11] EB-2022-0318, Exhibit F-1-1 [emphasis added]

8. As can be seen in the paragraph above, and consistent with the position articulated by the IESO in its Argument-in-Chief,[12] the IESO's proposal in EB-2022-0318 was that it would be ***required*** to undertake a review of the appropriateness of its usage fees ***if*** the Adjustment Mechanism was triggered but that the decision on whether to apply for adjustment would be made ***only*** by the IESO (i.e. it would not be compelled to seek an adjustment). Board Staff and the intervenors have misconstrued the IESO's evidence by reversing the order of operations to suggest the IESO could ***only*** choose to adjust its usage fees ***if*** the Adjustment Mechanism was triggered (as would be the case with a Z-factor). This is obviously not what the IESO stated in Exhibit F-1-1.

9. The inclusion of a mechanism in the Settlement Proposal that required the IESO to undertake a review in no way precluded it from applying to adjust its usage fees in other circumstances if the need arose. To this effect, the same paragraph in Exhibit F-1-1 that Board Staff cited contains a discussion about the possibility of the IESO applying to adjust its fees in circumstances other than those that would trigger the Adjustment Mechanism:

> There may be a possibility to apply for revised usage fees if material unforeseen changes impact the IESO in Year 2, however the timing for approval of revised usage fees would be limited. Given that, the IESO proposes that any material unforeseen expenses in Year 2 or Year 3 would likely be reviewed in the next application. The proposal seeks to balance the need to preserve the benefits of the multi-year approach, with the possibility for material unforeseen changes that would materially impact the IESO's revenue requirement beyond a reasonable threshold.[13]

10. As stated in this excerpt, the IESO's proposal was premised on finding a "balance" between the benefits of a multi-approach and the possibility of material unforeseen changes. For this reason, the proposal did not include a rigid mechanism akin to a Z-factor. When Board Staff

[12] Argument-in-Chief at paragraph 13
[13] EB-2022-0318, Exhibit F-1-1 [emphasis added]

suggested in 3.0-OEB STAFF-23 that "the IESO's limited scope of the review focused on the unforeseen expense is similar to a Z-factor request", the IESO flatly rejected the comparison based on its status as a not-for-profit statutory corporation and the need to have its business plan approved by the Minister:

> The IESO is not proposing to satisfy the Z-factor requirements applicable to electricity distributors and does not view it as an appropriate tool for managing deficits that meet the material threshold. The IESO is a not-for-profit statutory corporation with objects that include important electricity system matters such as planning, reliability and security. As a non-profit corporation, the IESO has no ROE (or any comparable metric) and its investments and activities cannot necessarily be evaluated on the basis of financial and economic measures that might apply in respect of regulated utilities. The IESO's proposed revenue requirement and capital expenditure envelope are included in the Business Plan that is approved by the Minister before the IESO files its submission for review with the OEB, which is distinct from the process electricity distributors follow in their incentive regulation mechanisms.[14]

11. In the Settlement Proposal, the intervenors accepted the IESO's proposal "as set out in the Application and clarified through IRs"[15] and the Settlement Proposal included references to both Exhibit F-1-1 and 3.0-OEB STAFF-23.[16] The intervenors now contend they would not have agreed to the Settlement Proposal if they understood the IESO could seek to adjust its usage fees during the term and accuse the IESO of engaging in "revisionist history".[17] As detailed above, the documented history shows that the prospect of a mid-term adjustment was discussed in the IESO's evidence and the intervenors agreed to that proposal without substantive modification as part of the settlement. If the intervenors intended to include a prohibition on mid-term adjustments, then it was incumbent upon them to present such a proposal to the IESO in EB-2022-0318 for

[14] 3.0-OEB STAFF-23 [emphasis added]
[15] Settlement Proposal at section 3.3
[16] Settlement Proposal at section 3.3
[17] SEC Submissions at paragraph 18

consideration. It should not be assumed that the IESO would have agreed to such a proposal if it had been presented.

12. Second, Board Staff supports its argument by reference to the wording of Issue 3.3 in the Board-approved Issues List in EB-2022-0318.[18] The IESO fails to understand how the wording of an issue can support the implied clause that Board Staff and the intervenors are requesting be read into the Settlement Proposal. In any event, Issue 3.3 referenced the IESO's adjustment proposal, which was set out in Exhibit F-1-1 and formed part of the record when the Issues List was finalized. As discussed above, the IESO's proposal in Exhibit F-1-1 did not include a restriction on its ability to apply for adjustments to its usage fees.

13. Third, Board Staff cite the Board's Decision and Order in EB-2022-0318 which states, in the Board's reasons, that an adjustment to the approved expenditures, revenue requirement and fees would "only occur" if the Adjustment Mechanism was triggered.[19] The IESO interprets this passage as descriptive of the operation of the Adjustment Mechanism (*i.e.* the required review would only occur when the specified criteria were met as explained above) and not a determination that the Adjustment Mechanism was to be the sole means by which the IESO could adjust its usage fees during the three-year term. In any event, the "only occur" language did not appear in the terms of the Settlement Proposal (nor in the evidence referenced in the Settlement Proposal) that was accepted by the Board as discussed above. It is the terms of the Board's order, and not the supporting reasons, which binds and has legal effect.[20] The Board accepted the Settlement Proposal without amendment in paragraph 1 of its Order.

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[18] Staff Submissions at page 3
[19] Staff Submissions at page 3; see also CME Submissions at page 6
[20] *Grand River Enterprises v. Burnham*, 2005 CanLII 6368 (ON CA) [Tab 1 of IESO Book of Authorities ("**IESO BOA**")], citing *Canadian Express Ltd. v. Blair*, 1991 CanLII 7172 (ON SC) [Tab 2 of IESO BOA] that "it is the order of the court appealed from which binds, not the reasons assigned for making it: the reasons may be wrong but the order right."

14. As the IESO noted in the Argument-in-Chief, the Settlement Proposal also requires the IESO to report on any unplanned material operating capital budget increases and its overall trajectory in its Interim Year Business Outlook.[21] The position taken by Board Staff and the intervenors begs the question of what value there is in that reporting if the Settlement Proposal bars the IESO from seeking adjusted usage fees to address that trajectory in circumstances where it is projecting deficits in the FVDA of $300,000 in 2024 and $22.4 million in 2025.[22]

(b) The Settlement Proposal does not limit the Board's jurisdiction under the Electricity Act

15. A number of the intervenors argue that the Settlement Proposal is a contract that "restricts" the IESO's right under the Electricity Act to request revised usage fees for 2024 and 2025 unless the terms of the Settlement Proposal are amended with the consent of all the signatories from EB-2022-0318 (even those that are not participating this proceeding).[23] While presented as a restriction on the IESO, the position of the intervenors necessarily infringes on the jurisdiction of the Board and as such is both incorrect as a matter of law and highly impractical in practice.

16. These intervenors cite language in the Preamble of the Settlement Proposal that states it is "a legal agreement, creating mutual obligations, and binding and enforceable in accordance with its terms."[24] However, this preambular language needs to be read in context – it forms part of a proposal which was being presented to the Board for approval and that was, as the parties acknowledge in the Preamble, subject to the exclusive jurisdiction of the Board. By agreeing to the Settlement Proposal, each of the parties was binding itself to support the terms of the settlement when it was presented to the Board for approval and was acknowledging that its

[21] Settlement Proposal at section 1.0
[22] Exhibit G-2.0-1 – OEB STAFF 2-2, page 4 of 4
[23] CME Submissions at paragraphs 18 to 20; SEC Submissions at paragraphs 12 and 23; VECC Submissions at paragraphs 12 to 14
[24] Settlement Proposal, preamble

commitment could be enforced against it in the context of that settlement hearing. That commitment was fulfilled when all parties supported the Board's acceptance of the Settlement Proposal.

17. Contrary to what the intervenors argue,[25] the preambular language in the Settlement Proposal did not create an enduring contractual commitment between the parties that survived beyond the conclusion of EB-2022-0318. Once the Board accepted the Settlement Proposal, it became part of a Board order made under subsection 25(4) of the Electricity Act and it is subject to the Board's jurisdiction to revisit an order in a future application that is properly brought before it (as would be the case with any other Board order). Accepting the intervenors' interpretation of the preambular language would provide each of the parties to the Settlement Proposal with a direct contractual right to enforce the Settlement Proposal against another party and a veto over the exercise of the Board's authority. This would create jurisdictional confusion over enforcement of the Settlement Proposal[26] and impose a contractually created limit on the Board's statutory authority.[27]

18. The logical conclusion of the intervenors' position is plainly stated in SEC's submissions – in its view, the terms of the Settlement Proposal can ***only*** be adjusted with "the agreement of all signatories", including those that have not participated in this proceeding, and that without that

[25] VECC Submissions at paragraph 14
[26] If one of the parties truly sought to enforce the Settlement Agreement against another party as a "contract", it would need to do so by way of an action or application in the Ontario Superior Court of Justice (i.e. an application seeking an order prohibiting another party from submitting an application) as the Board does not have the general authority to adjudicate contractual disputes between parties. This would be at odds with the Board's exclusive jurisdiction over this matter under the Electricity Act and the language used in the Settlement Proposal.
[27] In the context of administrative proceedings settled by agreement requiring a tribunal order, the tribunal has the authority to exercise its discretion regardless of the agreement of the parties: *Osawe (Re)*, 2015 ONCA 280 at paragraphs 33-34 [Tab 3 of IESO BOA] and *Grafton Street Restaurant Ltd. v. Nova Scotia (Utility and Review Board)*, 2002 NSCA 120 at paragraph 5 [Tab 4 of IESO BOA]. This authority continues to exist after the tribunal accepts the settlement.

agreement "the IESO's fee adjustment cannot be approved."[28] What party is it that SEC is arguing ***cannot*** approve the Submission? The Board. Regardless of how the intervenors may frame it, their argument that the Settlement Proposal is an enduring contract necessarily constrains the authority of the Board. For this reason, it is imperative the Board reject the intervenors' proposition that the Settlement Proposal creates contractual commitments among the parties and that the Submissions can only be approved if all signatories to the Settlement Proposal agree.

19. The IESO specifically rejects SEC's allegation that it "recognized" the need to obtain the agreement of the intervenors in EB-2022-0318 to revise its usage fees.[29] The clarification question response cited by SEC was a description of what the IESO hoped to achieve as part of a Settlement Conference in this proceeding (which was conducted with the parties that intervened in this proceeding, not those from EB-2022-0318). The IESO never acknowledged a need to obtain the consent of all signatories to the Settlement Proposal and (in the same response cited by SEC) explicitly advised the intervenors that it would proceed with a hearing on the Submissions if a settlement could not be reached:

> The IESO's objective in the Settlement Conference is to reach an agreement with the intervenors to amend the Settlement Proposal from the previous application in EB-2022-0318 and present the amendment to the OEB panel for approval. If an agreement on an amendment cannot be reached in the Settlement Conference, the IESO will proceed with its application for OEB approval of its incremental expenditures and revenue requirement and the revised usage fees pursuant to subsection 25 (1) of the Electricity Act, 1998.[30]

[28] SEC Submissions at paragraph 23. In addition to its legal shortcomings, SEC's submission suffers from a practical problem – not all of the signatories to the Settlement Proposal are actively participating in this proceeding. HQ Energy Marketing Inc. and the Power Workers Union were parties to the Settlement Proposal but did not apply to intervene in this proceeding. The Association of Power Producers of Ontario, the Canadian Renewable Energy Association, Energy Storage Canada, and Ontario Waterpower Association, and the Electricity Distributors Association intervened in this proceeding but did not file closing arguments.
[29] SEC Submissions at paragraph 23
[30] EB-2024-0004 Clarification Questions OEB Staff Question 1(a) [emphasis added]

20. As the parties were unable to reach agreement on a settlement, the IESO proceeded with a hearing on the Submissions exactly as it advised the intervenors it would do. The IESO agrees with Board Staff that, regardless of the Board's conclusion on whether the terms of the Settlement Proposal permit adjustments outside of the Adjustment Mechanism, the Board has the authority in this proceeding to approve the IESO's request to adjust its usage fees under subsection 25(4) of the Electricity Act.[31] The Board's decision on whether to approve the IESO's request should turn on the evidence filed in this proceeding and not whether the IESO has obtained the agreement of all signatories to the Settlement Proposal in EB-2022-0318.[32]

(c) The IESO complied with its Obligation to Disclose

21. The IESO strenuously rejects the allegations made by several of the intervenors that it did not meet its obligation to disclose material information – the potential financial implications of the Minister's July 10 Letter – to the intervenors in the context of settlement discussions in EB-2022-0318.[33]

22. While the IESO accepts that, as a regulated entity, it has a general obligation to disclose relevant information in connection with an application under section 25 of the Electricity Act, that obligation must be interpreted and applied in a manner that accounts for the structure of the IESO's fee-setting regime and the circumstances of this situation. The IESO complied with its obligation to disclose and the concerns about fairness due to non-disclosure which underlie and inform that obligation do not arise in this case. Once again, the intervenors erroneously approach

[31] Staff Submissions at pages 3 and 4; see also ED Submissions at pages 2 and 3
[32] Some of the intervenors argue that the IESO's actions threaten the "sanctity" of approved settlement proposals and would invite other applicants to call into question the legitimacy of the settlement process (SEC Submissions at paragraph 25; VECC Submissions at paragraph 14). The Board should reject this specious floodgates argument. The IESO does not deny that the terms of the Settlement Proposal are binding upon it as they were accepted by the IESO and form part of a Board order that approved the IESO's fees. Further, as the IESO has explained throughout these submissions, its circumstances differ significantly from those of other applicants.
[33] CME Submissions at pages 8 to 9; EP Submissions at page 5; SEC Submissions at paragraphs 22 to 24; VEC Submissions at paragraph 10

the issue as if the IESO were a regulated utility that is subject to an incentive rate-setting mechanism with a Z-factor under which the utility's shareholder is permitted to earn a return that exceeds its regulated return on equity.

23. In this regard, the Board's decision in *Westcoast Energy Inc.*, relied upon by SEC in its submissions,[34] offers a useful contrast to the circumstances of this case.[35] In *Westcoast*, the Board approved a settlement agreement establishing Union Gas' first 5-year Incentive Rate Program ("**IRP**") on January 17, 2008. In September 2008, Union Gas submitted a new application for approval of a corporate reorganization that would result in annual tax savings of $1.3 million. Union Gas sought to delay the adjustment of its revenue requirement to account for the tax savings until the end of the IRP term because the reduction did not constitute a Z-factor. Intervenors countered that the adjustment had to take effect in 2009 because, had the reorganization been disclosed in the IRP proceeding, the cost reductions would have become part of the negotiations and settlement in establishing the IRP.

24. The Board found that the corporate reorganization and the associated tax implications were known to Union Gas at the time of the settlement negotiations on the IRP in 2007. In the Board's view, the tax savings should have been disclosed by Union Gas in the IRP application because they were "real and non-controversial", the amount of the savings had been determined, there was an impending deadline to realize on the savings, and Union Gas knew it would proceed with the reorganization during the first year of the IRP.[36] Citing "an element of fairness", the Board directed the adjustment to occur in 2009 on the basis that it would not "penalize intervenors and

[34] SEC Submissions at paragraph 22
[35] *Westcoast Energy Inc. and Union Gas Limited*, Decision and Order dated November 19, 2008 (EB-2008-0304) [*Westcoast*] [Tab 5 of IESO BOA]
[36] *Westcoast* at pages 9 and 10

the ratepayers they represent because they were late raising an issue where the Utility failed to advise them of essential information in a timely fashion."[37]

25. The circumstances of this case are in no way analogous to *Westcoast*. The IESO never sought to conceal the Minister's July 10 Letter or its implications from the intervenors. The Minister's July 10 Letter was posted on the IESO's public website on the same day it was received.[38] Unlike Union Gas in *Westcoast*, which was aware of the amount of tax savings at the time of its IRP settlement and hid them to its own benefit, the IESO required time to work through the implications of the tasks assigned by the Minister and to prepare the corresponding budget for those tasks.[39] Furthermore, the IESO was dependent on the Minister's approval of the amendment to its 2023-2025 Business Plan (the "**Amendment**") before it could bring an application to adjust its usage fees. The scope of EB-2022-0318, and the resulting Settlement Proposal in that proceeding, was limited to the Minister-approved 2023-2025 Business Plan and not potential future amendments to the business plan which might or might not be approved by the Minister.

26. Board Staff and some intervenors suggest that the IESO could have alerted the parties to its discussions with government about the potential financial implications of the POG Plan tasks assigned to the IESO by the Minister's July 10 Letter.[40] However, as the IESO stated in response to OEB STAFF 2-1, the IESO is unable to disclose or speak to government policy until government has made a decision to act – whether that was in relation to the Minister's decision to issue the July 10 Letter or to approve the Amendment:

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[37] *Westcoast* at page 12. It is noteworthy that the Board in *Westcoast* adjusted a rate set under an IRP established by way of an approved settlement proposal even though the Z-factor circumstances were not triggered and not all parties to the settlement proposal consented.
[38] All Intervenors Clarification Question 2
[39] All Intervenors Clarification Question 2
[40] Board Staff Submissions at page 5; VECC Submissions at paragraph 10

> The IESO has ongoing and continuous discussions with the Ministry of Energy on potential actions necessary to advance the decarbonization of Ontario's electricity system including following the release of the IESO's Pathways to Decarbonization Study in December 2022 and in the lead up to the release of the Government's Powering Ontario's Growth report in July 2023.
>
> The IESO is unable to speak to government policy that is still under development by the government until the government has made a decision to act, engage or communicate on that policy.[41]

27. Given this reality, the IESO disclosed pertinent information to the Board and intervenors in a timely manner once it was able to do so.[42]

28. Nor do the circumstances of this case raise the same concerns about fairness arising from non-disclosure that were present in *Westcoast.* The consequences of Union Gas' failure to disclose the corporate reorganization and associated tax savings were obviously unfair – its shareholders stood to receive an additional $1.3 million in revenue requirement annually under the IRP without subjecting that amount to intervenor review. In contrast, the intervenors in this proceeding have not articulated how the interests they represent have been prejudiced in any tangible way by the IESO's alleged non-disclosure. The IESO has no shareholder that gets to keep an excess return nor is it attempting to shield the costs associated with the Minister's July 10 Letter from intervenor review in any way.

29. CME posits that the IESO denied the other parties "the opportunity to evaluate their position regarding the Settlement Agreement [*sic*] in light of this new information."[43] In assessing this abstract statement, it is useful to consider the three options that would have been available

[41] Exhibit G-1.0-1 – OEB STAFF 2-1
[42] Exhibit G-1.1-3 – SEC-2
[43] CME Submissions at page 9

to the parties in EB-2022-0318 if the financial implications of the Minister's July 10 Letter were known at that time.

(a) The first option would have been to adjust the IESO usage fees in EB-2022-0318 to account for the additional POG Plan-related costs. However, without an approved amendment to its 2023-2025 Business Plan, the IESO would not have had the authority to include the additional costs arising from the Minister's July 10 Letter in its revenue requirement in EB-2022-0318. Therefore, to address those costs in the Settlement Proposal, it would have been necessary for the IESO to adjourn EB-2022-0318 until after the Minister approved the Amendment (which occurred on November 28, 2023). The likely outcome is that the resolution of EB-2022-0318 (by way of settlement or a hearing) would have stretched into 2024, defeating the objectives of the multi-year structure.

(b) The second option would have been to settle the matters at issue in EB-2022-0318 (as occurred) and pushed off the implications of the Minister's July 10 Letter to be dealt with by way of a mid-term adjustment. In that event, the IESO would have commenced a new application to adjust its usage fees to address the tasks identified in the Minister's July 10 Letter once the Minister approved the Amendment – precisely the process that is being followed here.

(c) The third option would have been to push off the implications of the Minister's July 10 Letter until the 2026-2028 Revenue Requirement Submission. By that time, the IESO would have incurred the additional costs (without being subject to intervenor review) and would be seeking to recover them (along with any additional financing costs) from future ratepayers.

30. When the circumstances of this case are fully considered, it is evident that, in contrast to what Union Gas attempted in *Westcoast,* the rights of intervenors in this situation have in no way been restricted or compromised by the IESO's conduct.

2. Incremental Revenue Requirements (Issues 2.1, 2.2 and 2.3)

(a) The IESO requires the Incremental Revenue Requirements

31. Board Staff support recovery of the 2024 and 2025 incremental revenue requirements for the POG Plan related work but did express certain concerns regarding the need for additional funding for the IESO to carry out the POG Plan initiatives in 2024.[44] The intervenors also question whether the IESO requires the incremental revenue requirements based on the updated financial information presented by the IESO in this proceeding.[45] It is the IESO's position that its request for incremental revenue requirements for 2024 and 2025 is justified when the evidence presented in this proceeding is viewed in its entirety.

32. The intervenors argue the IESO could cover the costs of the POG Plan by finding efficiencies and point to alleged underspending by the IESO in 2023 of $12.9 million.[46] This argument is premised on an incomplete reading of the IESO's evidence. Contrary to the position advanced by the intervenors, the IESO's 2023 actual expenses of $218.2 million were higher than the 2023 budgeted amount of $208.4 million.[47] A more meaningful measure of the IESO's ability to manage costs and find efficiencies is its actual 2023 OM&A expenses (which exclude the uncontrollable items of Interest, Amortization, and Registration Fees). The IESO's actual OM&A expenses were $219.4 million compared to an approved OM&A budget of $197.3 million.[48] While

[44] Staff Submissions at pages 7 to 12
[45] CME Submissions at paragraphs 28 to 30; EP Submissions at page 6; SEC Submissions at paragraphs 33 to 37
[46] EP Submissions at page 6; SEC Submissions at paragraph 34
[47] Exhibit G-2.0-1 – OEB STAFF 2-2(a)
[48] All Intervenors Clarification Questions 10

the IESO's higher expenses were partially offset by higher revenues and higher interest income in 2023, the bottom line was an operating deficit of $4.8 million for 2023.[49]

33. The intervenors attempt to cast doubt on whether the IESO will be able to achieve its Full Time Equivalents ("**FTE**") forecast for 2024 and 2025.[50] On that point, Board Staff queries whether the actions the IESO took in 2023 in support of talent acquisition were effective because the IESO only achieved 54% of the planned increase of FTEs in 2023.[51] The IESO believes its talent acquisition efforts in 2023 were effective and will continue to be in 2024 and 2025. In the IESO's view, the table constructed by OEB Staff showing the achieved FTEs increases for past years[52] is not necessarily indicative of the current or future state of talent acquisition. The IESO views its year-end headcount as a better measure of the success of its talent acquisition efforts.[53] The IESO's total headcount of 897 at the end of 2023 was in accordance with budget, excluding Market Renewal Project headcount that was 30 below the budget. The IESO progressively onboarded resources throughout 2023, but because the starting average FTEs for 2023 was lower than budgeted, it pulls down the FTE average for the year. The IESO intends to continue with the successful talent acquisition actions taken in 2023 and is working on implementing additional actions in 2024.[54] The IESO is not expecting to have challenges in filling FTEs by the end of 2024.[55]

34. As it stated in its Argument-in-Chief, the IESO will continue to assess the incremental needs and work to find efficiencies to moderate, as much as possible, the projected expenses in

[49] Exhibit G-2.0-1 – OEB STAFF 2-2(a)
[50] VECC Submissions at paragraphs 16 to 22
[51] Staff Submissions at page 10
[52] Staff Submissions at page 10
[53] AMPCO Clarification Question 3(c)
[54] Exhibit G-2.0-1 – OEB STAFF 2-3
[55] Exhibit G-2.0-1 – OEB STAFF 2-3

future years.[56] However, it is unrealistic to expect the IESO will be able to find efficiencies to cover incremental revenue requirements totaling $9.9 million over two years. Moreover, as the IESO is projecting year-end deficit balances in the FVDA of $300,000 in 2024 and $22.4 million in 2025,[57] any additional revenues will ultimately be applied against the IESO's projected operating deficits and will reduce the associated financing costs that need to be collected from future ratepayers.

35. The Board should also be cognizant that the projected FVDA balance for 2024 was provided in response to an interrogatory request and based only on updated revenues (using an updated energy forecast and existing usage fees) without accounting for an update to expenses.[58] In the IESO's view, this is not a balanced approach for determining whether the IESO can work within the approved revenue requirement in 2024.[59] As Board Staff highlight in its submissions,[60] the IESO has identified three risk items – the outcome of the Power Worker Union collective agreement negotiations, accounting guidelines for recognizing cloud computing solutions as operating expenses, and potential incremental volume of work associated with POG Plan initiatives not included in the Amendment – that could result in higher expenses in 2024.[61]

(b) The IESO has committed to Investigate Revisions to its Budgeting

36. Some of the intervenors take issue with the way in which the IESO budgeted for the required tasks under the POG Plan and expressed dissatisfaction that the IESO was unable to present incremental requirements for each of the initiatives.[62]

[56] Exhibit G-2.0-4 – VECC-1, Attachment, page 2 of 3
[57] Exhibit G-2.0-1 – OEB STAFF 2-2, page 4 of 4
[58] Exhibit G-2.0-1 – OEB STAFF 2-1
[59] Exhibit G-2.0-1 – OEB STAFF 2-1
[60] Staff Submissions at page 9
[61] Exhibit G-2.0-1 – OEB STAFF 2-1
[62] SEC Submissions at paragraphs 28 to 32; VECC Submissions at paragraph 23 to 28

37. The budgeting used by the IESO to estimate costs for the POG Plan tasks was consistent with the IESO's past budgeting practices. The IESO's budgeting is not done on an activity basis, which the IESO acknowledges is an ongoing point of contention with the intervenors.[63] In EB-2022-0318, the IESO expressed a willingness to re-examine its budgeting practices and committed in the Settlement Proposal to investigating alternative approaches and presenting forecast and historic spending on major activity and initiative basis in its 2026-2028 Revenue Requirement Submission:

> The IESO will investigate the potential to report on historical and forecast spending on a project, initiative or program basis similar in nature to Appendix 2-JC of the OEB's Filing Requirements for Electricity Distribution Rate Applications and report on its findings in the 2026-2028 Revenue Requirement Submission. In addition, in the 2026-2028 Revenue Requirement Submission, the IESO will present forecast and historic spending on major activity and initiative basis, with the understanding that the reporting may involve assumptions, including with respect to time allocation.[64]

38. A revised approach to budgeting will take time to develop and, as such, the Submissions were not prepared on this basis.[65] Nonetheless, and even though the IESO does not consider the activities set out in the Minister's July 10 Letter as major activities or initiatives on an individual basis, in an effort to be responsive to intervenor inquiries, the IESO provided a simplified breakdown of the budget by activity set out in the Minister's July 10 Letter as part of its interrogatory responses.[66]

[63] All Intervenors Clarification Question 1; Exhibit G-2.1-3 – SEC-6
[64] Settlement Proposal at section 1.0
[65] Exhibit G-2.1-3 – SEC-6
[66] Exhibit G-2.1-3 – SEC-6

39. The parties will have an opportunity to explore the appropriate approach for the IESO's budgeting in the IESO's 2026-2028 Revenue Requirement Submission with the benefit of the results of the investigation the IESO has committed to undertake.

(c) The IESO reports on variances in the Year-end Balance of the FVDA

40. Board Staff submit the IESO should report its final year-end balance in the FVDA for each of 2024 and 2025 regardless of the value of the balance and provide an explanation if the balance exceeds $5 million.[67] The purpose of the revised reporting requirement is to allow the IESO, parties and Board Staff the opportunity to scrutinize the details related to the FVDA.

41. The IESO notes that the final year-end balance in the FVDA, as well as an explanation on the variances in revenues and expenses, is already reported in the IESO's Annual Report, a copy of which is provided to the Board under section 6.2(c) of the IESO's licence.[68] A copy of the Annual Report is also delivered to the Minister within 90 days after the end of each fiscal year pursuant to the reporting and specific requirements in the Memorandum of Understanding between the IESO and the Ministry of Energy and section 6.2(d) of the IESO's licence.

3. Usage Fees (Issues 3.1 and 3.2)

42. The IESO reiterates the submissions it made in relation to Issues 3.1 and 3.2 in its Argument-in-Chief.

[67] Staff Submission at page 6
[68] Independent Electricity System Operator Licence EI-2013-0066, issued September 26, 2013 as amended July 31, 2014

C. RELIEF REQUESTED

43. The IESO reiterates its requests that the OEB approve the requested incremental 2024 and 2025 expenditure and revenue requirements and fees pursuant to subsection 25(4) of the Electricity Act.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June 2024.

Patrick Duffy
Stikeman Elliott LLP

TAB 1

DATE: 20050316
DOCKETS: M32025 (M31880),
M32026 (C42624)

COURT OF APPEAL FOR ONTARIO

CATZMAN, LASKIN and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
GRAND RIVER ENTERPRISES A PARTNERSHIP CARRYING ON BUSINESS IN THE PROVINCE OF ONTARIO THE PARTNERS OF WHICH ARE MEMBERS OF THE FIRST NATIONS OF CANADA and GRAND RIVER ENTERPRISES SIX NATIONS LTD.	)	Brian Duxbury and Stephen Chisholm for the plaintiffs (appellants), defendants by counterclaim
Plaintiffs (Appellants)	)	
- and -	)	
SYDNEY BURNHAM	)	Peter C. Wardle and Marlo L. Kravetsky for the defendant respondent, plaintiff by counterclaim
Defendant (Respondent)	)	
- and -	)	
SIDNEY BURNHAM	)	
Defendant Plaintiff by Counterclaim (Respondent)	)	
GRAND RIVER ENTERPRISES A PARTNERSHIP CARRYING ON BUSINESS IN THE PROVINCE OF ONTARIO THE PARTNERS OF WHICH ARE MEMBERS OF THE FIRST	)	

NATIONS OF CANADA, GRAND RIVER ENTERPRISES SIX NATIONS LTD. and WAYNE (VICTOR) BOMBERRY, KENNY HILL, JERRY MONTOUR, PETER MONTOUR, DON SKYE, SCOTT SMITH and CURTIS STYRES	)	
Plaintiffs Defendants by Counterclaim (Appellants)	)	
	)	Heard: February 9, 2005

Motion to quash an appeal and a motion for leave to appeal from the order of Justice C. Raymond Harris of the Superior Court of Justice dated November 11, 2004.

CATZMAN J.A.:

The appeal

[1] Grand River Enterprises Six Nations Ltd. ("Grand River") is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("the *CBCA*" or "the *Act*"). It carries on the business of manufacturing cigarettes under a licence by the federal government. Sidney Burnham ("Burnham") is one of eight shareholders of record of Grand River.

[2] Grand River Enterprises, a partnership of Grand River and members of the First Nations of Canada, commenced an action against Burnham, alleging that he had wrongfully terminated a lease under which the partnership had built, occupied and maintained a building on property Burnham owned. Burnham defended the action and brought a counterclaim, alleging oppression under the *CBCA*, in that he had been denied participation in the management of the partnership, denied information about its financial affairs and denied dividends and other distribution of profits.

[3] Burnham brought a motion, under s. 241 of the *CBCA*, for what his notice of motion described as interim relief. His motion was granted by Harris J., who made the order that is the subject-matter of the current motions ("the order").

[4] In general terms, the order directed Grand River to pay Burnham an interim payment of $988,688 on account of shareholder benefits, to disclose to Burnham specified items of financial information, and to produce a number of Grand River's representatives for examination for discovery regarding its financial affairs.

[5] Grand River took exception not only to the terms of the order but also to certain language appearing in the endorsement of Harris J. In it, he found that Burnham had not received any shareholder bonuses since January 2000, whereas all of the other shareholders had received bonuses in proportion to their shares. He further found that, in December 2002, bonuses totalling $15,000,000 were distributed to the remaining seven shareholders, but not to Burnham. The language to which Grand River took particular exception was the following:

- "The conduct of Grand River is *prima facie* oppressive" (para.15);
- "I am satisfied that the business affairs of [Grand River] have been conducted in a manner that is oppressive and has unfairly disregarded the interests of [Burnham] as a security holder" (para. 16); and
- (in rejecting a cross-motion by Grand River to split the trial between liability and damages), "I have already made a finding of oppression against [Grand River]" (para. 21).

The appeal, the motion for leave to appeal, and the motion to quash

[6] Grand River responded to the order in two ways. First, it served a notice of appeal to the Court of Appeal, asking that the finding of oppression against it in favour of Burnham be set aside and that the order requiring it to pay to Burnham the sum of $988,668 be set aside. Second, to cover the contingency that the order might be found to be interlocutory rather than final, Grand River moved for leave to appeal to the Court of Appeal from the finding of oppression and the order for payment of $988,688 and from other provisions of the order.

[7] In response, Burnham moved before this court to quash Grand River's appeal and motion for leave to appeal. He founded the motion to quash on two grounds: first, that no aspect of the order was final, and the order was therefore not appealable without leave; and second, that the proper court to which the order can be appealed was the Divisional Court, not the Court of Appeal.

The issues

[8] Burnham's motion to quash raises two issues:

(1) is the order final or interlocutory?

(2) in either case, to what court does the appeal from the order lie?

Final or interlocutory

[9] On the face of the order, several of its provisions clearly indicate that it was intended to be interlocutory. The preamble speaks of a motion "for the *interim* payment" of moneys and "for an *interim* order" regarding discoveries and disclosure of information. Paragraph 1 orders Grand River to pay to Burnham "an *interim* payment" of $988,688. Paragraph 6 orders Grand River to deliver a number of documents "*until the trial or other resolution of this action*" [italics added].

[10] In any event, the law is clear that an appeal lies from an order, not from the reasons given by the judge making the order: Williston and Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), Vol. 2 at p. 1025; *Lake v. Lake*, [1955] 2 All E.R. 538 (C.A.); *Canadian Express Ltd. v. Blair* (1991), 6 O.R. (3d) 212 (Div. Ct.).

[11] In his factum in support of the motion to quash, Mr. Wardle took the position that the endorsement of Harris J. should be interpreted as determining only whether there was a strong *prima facie* case of oppression for the purposes of the motion before him. At the invitation of the court, he filed Burnham's written undertaking not to raise the "finding of oppression" made by Harris J. as a substantive defence, whether as issue estoppel, *res judicata* or otherwise, to any position Grand River might take on the trial of the issues in this proceeding. He further acknowledged and undertook that the interim payment of $988,588 was subject to whatever disposition the trial judge might make at trial, which disposition might include, if appropriate, repayment of some or all of that sum.

[12] Burnham's undertaking should alleviate any concern by Grand River about the comments made by the motion judge in the course of his reasons.

[13] Focusing, then, upon the terms of the order and not the motion judge's reasons, it is my view that the order was interlocutory and that no appeal lies from the order without leave.

The appeal forum

[14] Before 2001, s. 249 – the provision of the *CBCA* governing appeals – read:

> 249. An appeal lies to the court of appeal from any order made by a court under this Act.

[15] In 2001, the provision was amended to read:

> 249. (1) An appeal lies to the court of appeal of a province from any final order made by a court of that province under this Act.

> 249. (2) An appeal lies to the court of appeal of a province from any order other than a final order made by a court of that province, only with leave of the court of appeal in accordance with the rules applicable to that court.

[16] The effect of the 2001 amendment was to distinguish between final orders and other orders and to require the granting of leave to appeal from orders in the latter category. But there was no amendment to the terms "court of appeal" or "court". Both terms were, and currently continue to be, defined in s. 2(1) as follows:

> "court of appeal" means the court to which an appeal lies from an order of a court.

and

> "court" means
>
> (a.1) in the Province of Ontario, the Superior Court of Justice.

[17] The question of the appropriate appeal forum was first raised in this province in *Ferguson v. Imax Systems Corp*. (1982), 38 O.R. (2d) 59 (Div. Ct.). *Ferguson* involved an appeal from an order appointing an appraiser to assist the court to fix a fair value for the shares of dissenting shareholders. It was conceded that the order was interlocutory. After referring to what was then s. 242 (in the language of s. 249 prior to the 2001 amendment) and to the definition of "court of appeal" set out above, Galligan J. said at p. 60:

> It was contended by the respondent that this Court has no jurisdiction to entertain this appeal because leave to appeal has not been granted by a judge of the High Court. It is, of course, common ground, that if this were an appeal from an interlocutory order made in proceedings authorized by an Ontario statute, this Court would have jurisdiction only if leave were granted. However, these are proceedings under a federal statute and are governed by the appeal provisions contained in that statute. Section 242 of the *Canada Business Corporations Act* provides that an appeal lies to the Court of Appeal from any order made by a court under that Act. Section 2(1) [am. 1978-79, c. 11, s. 10(1)] of the Act defines Court of Appeal as follows:
>
> > "court of appeal" means the court to which an appeal lies from an order of a court;

> *It is common ground that the Divisional Court is the Court of Appeal for the purpose of that definition.*
>
> The problem arises because of the provisions of the *Judicature Act*, R.S.O. 1980, c. 223, which provide that an appeal from an interlocutory order may only be taken with leave of a judge of the High Court. However, s. 242 of the *Canada Business Corporations Act* does not restrict the right of appeal in any such way, it grants an absolute right of appeal, from any order. It is therefore, my opinion that this Court does have jurisdiction to hear this appeal. I do not think that an Act of the Legislature of Ontario can derogate from rights of appeal specifically created by a federal statute [italics added].

[18] In fairness, the focus of the decision in *Ferguson* was whether an appeal from an interlocutory order under the *CBCA* lay as of right or only with leave. Galligan J. held that the *Act* (in its pre-amendment form) conferred an absolute right of appeal and that leave was not required. But he also noted that it was "common ground" that the Divisional Court was the court of appeal intended by the definition of that term under the *Act*.

[19] The question whether an appeal under s. 249 lay to the Divisional Court or to the Court of Appeal was addressed again by the Divisional Court in *Budd v. Gentra Inc.* (2001), 56 O.R. (3d) 414. Again, the appeal was brought from an interlocutory order, in this case, an order dismissing motions under the *Act* for an interim award of costs and a motion for the appointment of an inspector. The amendment to s. 249 was not yet in force, and so the issue before the court was not whether leave was required (*Ferguson* had decided that it was not) but rather whether the appeal lay to the Divisional Court or to the Court of Appeal. Blair R.S.J., speaking for the court, held that the appeal lay to the Court of Appeal. After setting out the extract quoted in para. 16, above, Blair R.S.J. said, at p. 416:

> [5] We note the comment that "[it was] common ground that the Divisional Court is the Court of Appeal for purposes of [the definition in s. 249 of the *CBCA*]". It appears, therefore, that the issue which is presently before us was presumed and not addressed specifically in *Ferguson v. Imax*.
>
> [6] With deference to this earlier decision, we are all of the view that the language of s. 249 of the *CBCA* is clear and that the appeal lies to the Court of Appeal for Ontario and not the Divisional Court under that section.

> [7] Resort to the definition of Court of Appeal in s. 2(1) of the *CBCA* is not helpful. It says: "'court of appeal' means *the* court to which an appeal lies from an order of a court" [emphasis added]. The definition simply begs the question at issue, namely, what is the court to which an appeal lies from the order in question?
>
> [8] The Divisional Court is a statutory court and has no jurisdiction other than what is given to it by statute. While it may prove anomalous that appeals under the *CBCA* go to the Court of Appeal whereas appeals from essentially similar orders under the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 go to [the] Divisional Court, the language of s. 249 is clear, in our opinion, and therefore must govern. [italics in original].[1]

[20] Mr. Wardle submitted that the reference to provincial procedure signalled Parliament's intention that appeals from interlocutory orders were to go to the Divisional Court. The submission was that, since the Divisional Court is an appellate court for some purposes (see s. 19(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and rules 1.03(1) and 61 of the *Rules of Civil Procedure*), and since interlocutory orders are appealable, with leave, to the Divisional Court, the closing words of s. 249(2) of the *CBCA* incorporate by reference the powers of appeal conferred on the Divisional Court. In the result, Mr. Wardle argued, an appeal from an interlocutory order under the *CBCA* lies, with leave, to the Divisional Court.

[21] I do not agree. The amendment to s. 249 in 2001 drew a statutory distinction, where one had not appeared before, between appeals from final orders and appeals from other orders, such as interlocutory orders. The amendment was probably prompted by the decision of the Supreme Court of Canada in *Kelvin Energy Ltd. v. Lee* (1992), 97 D.L.R. (4th) 616 (S.C.C.), in which L'Heureux-Dubé noted (at p. 627), with apparent approval, that courts (including *Ferguson*) in different provinces had confirmed that the scope of s. 249, as it then read, was not limited to a final judgment rendered under a power conferred by the *Act*.

[22] Before 2001, all appeals – whether from final or from interlocutory orders made under the powers conferred by the *CBCA* – were appealable as of right. The 2001 amendment distinguished between final orders and interlocutory orders. Final orders were still appealable as of right, but interlocutory orders were appealable only with leave.

---

[1] The anomaly to which Blair R.S.J. refers in this paragraph is mitigated by the fact that appeals from orders made under other federal commercial statutes go not to the Divisional Court but to the Court of Appeal: see s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and ss. 13 and 14 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

The process for applying for leave – but not the forum for the appeal – was directed by s. 249(2) to follow the rules applicable to the court.

[23] That, in my view, was all that the final phrase in s. 249(2) was intended to accomplish: to bring provincial rules of procedure to apply to the manner in which leave was to be sought. The final phrase did not, and was not intended to, confer a substantive right of appeal on any court other than the "court of appeal" as defined in s. 2(1). Although *Budd v. Gentra Inc.* was decided before the 2001 amendment, it remains good law today. In this province, the court to which an appeal can be taken, as of right if the order is final, and with leave if it is not, remains the Court of Appeal.

Disposition

[24] For these reasons, I have concluded that the order under appeal is interlocutory and that an appeal lies, with leave, to this court. The motion to quash the appeal is granted, but the motion to quash the motion for leave to appeal is dismissed. I am advised that the motion for leave to appeal has been perfected in accordance with rule 61.03.1 of the *Rules of Civil Procedure*, and I direct that it be submitted in the usual manner to a panel of this court for consideration.

[25] The parties, appropriately, agreed that, if success on these motions was divided, no costs should be awarded, and I therefore make no order as to costs.

Released:

"MAC"
"MAR 16 2005"

"M. A. Catzman J.A."
"I agree John Laskin J.A."
"I agree Robert P. Armstrong J.A."

TAB 2

Canadian Express Ltd. v. Blair, Enfield Corp. and Montreal Trust Co. of Canada

[Indexed as: Canadian Express Ltd. v. Blair]

6 O.R. (3d) 212
[1991] O.J. No. 2176
Action No. 548/91

ONTARIO
Ontario Court (General Division), Divisional Court,
Steele J.
December 6, 1991

Appeal -- Motion to quash -- Appellant not appealing from order but from part of reasons for judgment -- Appeal quashed.

After the annual general meeting of E Ltd., there was a dispute about who had actually been elected as a director of E Ltd. On an action for a declaration, the court declared that P, and not B, had been duly elected as a director. B appealed and asked that the judgment be set aside and that judgment be granted "declaring that B discharged his duty as chairman of the annual meeting, properly and in good faith". The respondent in the appeal made a motion to quash B's appeal on the grounds that B was not appealing the order, but only part of the reasons for judgment.

Held, the appeal should be quashed.

The trial judge gave two separate grounds that each stood on their own for finding that the order as issued should be granted. The appeal related only to one of those grounds. The appeal could therefore not succeed because the trial judge's other reason for judgment was enough to support the order as issued.

Lake v. Lake, [1955] 2 All E.R. 538, [1955] P. 336, [1955] 3 W.L.R. 145, 99 Sol. Jo. 432 (C.A.), apld

Re May's Appeal (1963), 45 W.W.R. 328 (Sask. Dist. Ct.); R. v. Hutchinson (1939), 71 C.C.C. 199, [1939] 3 D.L.R. 189, [1939] 1 W.W.R. 545 (Sask. C.A.), distd

Statutes referred to

Business Corporations Act, 1982, S.O. 1982, c. 4, ss. 107, 254
Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 144(5)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 59.05, 61.09

Authorities referred to

Bar Admission Course, 1984-85 Civil Procedure 1, Lecture Notes
Halsbury's Laws of England, 4th ed. (London: Butterworths, 1979), vol. 26, p. 237

MOTION to quash an appeal from the judgment of the High Court of Justice (1989), 46 B.L.R. 92.

Barry A. Leon and James C. Tory, for Canadian Express Ltd., applicant.

Thomas J. Lockwood, Q.C., and R. Eric Fournie, for Michael F. Blair, respondent.

Darryl T. Mann, for Montreal Trust Co. of Canada.

STEELE J.:--This is a motion by Canadian Express Limited, the applicant, to quash the appeal of the appellant, Michael F. Blair (Blair), from the judgment of John Holland J. dated September 25, 1989 [now reported 42 B.L.R. 92 (Ont. H.C.J.)] on the grounds that the appellant is not appealing the order, but only part of the reasons for judgment.

The notice of appeal asks that the judgment be set aside and that judgment be granted "declaring that Blair discharged his duty as chairman of the annual meeting, properly and in good faith". The grounds of appeal are that the judge erred in finding that Blair failed to meet the quasi-judicial standard of conduct demanded of a chairman of a shareholders' meeting, and other itemized grounds relating to Blair's conduct.

The order of the court, as issued, provides in part as follows:

> THIS COURT DECLARES that Timothy R. Price ("Price"), and not the Respondent Michael F. Blair ("Blair"), was duly elected as a director of the Respondent The Enfield Corporation Limited ("Enfield") at the annual meeting of Enfield held on July 20, 1989.

There is no reference in the order referring to Blair's conduct.

The relevant parts of the application to Holland J. were made under s. 107 of the Business Corporations Act, 1982, S.O. 1982, c. 4 (the Act), and asked for the following relief:

L04,08,001. a declaration that the Respondent Michael F. Blair ("Blair") was not elected as a director of the Respondent The Enfield Corporation Limited ("Enfield") at the Annual and Special Meeting of Enfield held on Thursday, July 20, 1989 (the "Meeting");

> 2. a declaration that the Board of Directors of Enfield from and after Thursday, July 20, 1989, includes

Timothy A. Price ("Price") and not Blair . . .

In his reasons, Holland J. stated that the only points which he needed to consider were: (1) the true construction to be given to certain proxies filed at the shareholders' meeting; and (2) the conduct of Blair immediately before and at the meeting.

In his reasons he stated [p. 95 B.L.R.]:

> There is no doubt on the evidence that the proxyholders intended to, and did, cast their votes for Price and not for Blair. It was conceded that, in the event that the ballots cast for Price were to be counted as validly cast, Price, not Blair, was the winner.

(Emphasis original)

He then went on to state [p. 95 B.L.R.]:

> In any event, I find that Blair failed to meet the quasi-judicial standard of conduct demanded of a chairman: Re Bomac Batten Ltd. and Pozhke (1983), 43 O.R. (2d) 344 . . . (H.C.)

He then set out various reasons relating to Blair's conduct, and concluded as follows [p. 96 B.L.R.]:

> In view of Blair's conduct alone and quite apart from the true construction of the proxies, his ruling cannot stand.

In my opinion, Holland J. gave two separate grounds that each stand on their own for finding that the order as issued should be granted. The grounds of appeal relate only to one of those grounds.

Blair originally filed a notice of appeal attacking both grounds, but subsequently amended it to confine it to the one ground that is presently before the court. Counsel for Blair contends that the finding of breach of fiduciary duty is detrimental to Blair, and it is that issue that he wants to have reversed on appeal. Assuming, but without so finding, that Holland J. was wrong in his findings and conclusion of law that Blair had breached a fiduciary duty, the appeal cannot succeed and should be quashed. The finding relating to the proxies amply supports the order as issued.

Counsel for Blair argued that the word "order" in the Act includes the decision, and that such decision can be appealed. He relied on the following statement in Halsbury's Laws of England, 4th ed. (London: Butterworths, 1979), at vol. 26, p. 237:

> The terms "judgment" and "order" in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties, to a proceeding properly before the court.

I agree with that general proposition, but I do not agree that it applies to each individual set of findings by a judge in his reasons. The only issue before the court was whether Blair or Price was elected a director. He also referred to the cases of R. v. Hutchinson (1939), 71 C.C.C. 199, [1939] 1 W.W.R. 545 (Sask. C.A.), and Re May's Appeal (1963), 45 W.W.R. 328 (Sask. Dist. Ct.). In my opinion, those cases are inapplicable because they deal with only one issue resulting in a decision, not a number of issues.

I agree with the following statement made in the Bar Admission Course, 1984-85 Civil Procedure 1, Lecture Notes:

> Reasons for judgment do not constitute the judgment of the court. An appeal is taken not from the reasons for judgment but from the judgment itself, and it is the order of the

court appealed from which binds, not the reasons assigned for making it: the reasons may be wrong but the order right.

The English Court of Appeal decision in Lake v. Lake, [1955] 2 All E.R. 538, [1955] P. 336, is applicable and supports the above proposition, even where some of the reasoning may prejudice a party in other proceedings. Such prejudice should be left to be dealt with in the other proceedings.

Rule 59.05 of the Rules of Civil Procedure, O. Reg. 560/84, provides for the entry of an order. Rule 61.09 relating to an appeal book provides that an order or decision, as signed and entered, must be included, as well as the reasons of the court. This supports my view that it is the order that is appealed from, not the reasons.

Counsel for Blair also argued that s. 144(5) of the Courts of Justice Act, 1984, S.O. 1984, c. 11, authorized an appeal from part of an order or decision and therefore permitted this limited appeal to be taken. This is an incorrect interpretation of the Courts of Justice Act, 1984. Section 254 of the Act provides for an appeal to the Divisional Court from any "order" made under the Act. Section 144(5) of the Courts of Justice Act, 1984 relates to part of an order or decision. If the order in question had numerous parts, an appeal could be taken from some parts of the order, but this does not mean that an appeal can be taken from part only of the reasons behind a specific order.

For these reasons, the appeal is quashed. However, I do so without prejudice to Blair applying on or before December 20, 1991, for leave to amend his notice of appeal and to reinstate it, and/or for leave to appeal the order as to costs.

Costs to the applicant fixed at $2,500, payable by Blair forthwith.

Appeal quashed.

TAB 3

In the Matter of Osawe
[Indexed as: Osawe (Re)]

Ontario Reports

Court of Appeal for Ontario,

Laskin, van Rensburg and Benotto JJ.A.

April 22, 2015

125 O.R. (3d) 428 | 2015 ONCA 280

Case Summary

Criminal law — Mental disorder — Dispositions — Procedural fairness — Parties putting forward joint submission for appropriate disposition at annual disposition review hearing — Review board rejecting joint submission and imposing more restrictive disposition — Board depriving appellant of fair hearing by failing to give him notice that it was inclined to reject joint submission and opportunity to lead more evidence or make additional submissions — Notice requirement could have been met by questions asked at hearing but not made out here — New disposition hearing ordered.

The appellant was found not criminally responsible on account of mental disorder. At his annual disposition review hearing, the parties put forward a joint submission for the continuance of the appellant's previous disposition. In light of the joint submission, the hearing was brief and only one witness, the hospital's psychiatrist, testified. The review board rejected the joint submission and imposed a more restrictive disposition. The appellant appealed.

Held, the appeal should be allowed.

The board had the authority to reject a joint submission if it was of the view that the joint submission did not meet the requirements of s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46. However, the board had a duty to give the appellant notice that it was considering rejecting the joint submission and imposing a more restrictive disposition and to give the parties an opportunity to lead more evidence and make additional submissions. Although the board can fulfill its duty to give notice in different ways, including by questions at the hearing, it did not give adequate notice in this case, and therefore breached the duty of procedural fairness it owed to the appellant. The disposition is set aside and a new hearing ordered.

College of Physicians & Surgeons of Ontario v. Petrie (1989), 68 O.R. (2d) 100, [1989] O.J. No. 187, 32 O.A.C. 248, 37 Admin. L.R. 119, 14 A.C.W.S. (3d) 34 (Div. Ct.); *Ontario (Attorney General) v. Grady*, [1988] O.J. No. 21, 34 C.R.R. 289, 3 W.C.B. (2d) 389 (H.C.J.), **consd**

Other cases referred to

Ahmed-Hirse (Re), [2014] O.R.B.D. No. 1876; *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, REJB 1999-13279, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777; *Hassan (Re)*, [2011] O.J. No. 3800, 283 O.A.C. 154, 2011 ONCA 561; *Kachkar (Re)* (2014), 119 O.R. (3d) 641, [2014] O.J. No. 1500, 2014 ONCA 250, 309 C.C.C. (3d) 1, 318 O.A.C. 247, 112 W.C.B. (2d) 466; *Kelly (Re)*, [2015] O.J. No. 634, 2015 ONCA 95; *Osawe (Re)*, [2014] O.R.B.D. No. 794; *R. v. Elster*, [2011] O.J. No. 4947, 2011 ONCA 701, 98 W.C.B. (2d) 714; *R. v. Harley*, [2005] O.J. No. 1346, 64 W.C.B. (2d) 582 (C.A.); [page429] *R. v. Lepage*, [1999] 2 S.C.R. 744, [1999] S.C.J. No. 34, 175 D.L.R. (4th) 269, 241 N.R. 142, J.E. 99-1276, 122 O.A.C. 184, 135 C.C.C. (3d) 205, 25 C.R. (5th) 84, 63 C.R.R. (2d) 252, 42 W.C.B. (2d) 392, affg (1997), 36 O.R. (3d) 3, [1997] O.J. No. 4016, 152 D.L.R. (4th) 318, 103 O.A.C. 241, 119 C.C.C. (3d) 193, 11 C.R. (5th) 1, 47 C.R.R. (2d) 66, 36 W.C.B. (2d) 90 (C.A.); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, 175 D.L.R. (4th) 193, 241 N.R. 1, J.E. 99-1277, 124 B.C.A.C. 1, 135 C.C.C. (3d) 129, 25 C.R. (5th) 1, 63 C.R.R. (2d) 189, 42 W.C.B. (2d) 381

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, ss. 672.5(13.1), 672.54 [as am.]

Authorities referred to

Barrett, Joan, and Riun Shandler, *Mental Disorder in Canadian Criminal Law*, looseleaf (Toronto: Carswell, 2006)

APPEAL from the disposition of the Ontario Review Board, [2014] O.R.B.D. No. 793.

Kelley J. Bryan, for appellant.

Maura Jetté, for respondent Attorney General for Ontario.

Michele Warner, for respondent person in charge of the Centre for Addiction and Mental Health.

The judgment of the court was delivered by
LASKIN J.A.: —

A. *Introduction*

[1] The Ontario Review Board owes a duty of procedural fairness to accused persons under its jurisdiction. This appeal raises an important question about the extent of that duty at a board hearing. The parties put forward a joint submission for an appropriate disposition. The board contemplates rejecting the joint submission, and imposing a disposition more restrictive of the accused's liberty. Should the board give the accused notice of its inclination to reject the joint submission and an opportunity to lead more evidence or make additional submissions?

[2] The appellant, Edward Osawe, has been detained under the board's jurisdiction at the Centre for Addiction and Mental Health ("CAMH") since November 2010. At his annual review in February 2014, all parties -- the hospital, the Crown and Osawe -- put before the board a joint submission for the continuation of Osawe's previous disposition. Under this disposition, Osawe, subject to the hospital's permission, had unaccompanied[1] hospital and grounds privileges; unaccompanied entry into the [page430] community; and even the possibility of living in the community in supervised accommodation.

[3] The board released its decision the following month. It rejected the joint submission: for unaccompanied hospital and grounds privileges, the board substituted hospital and grounds privileges only if accompanied by staff; for unaccompanied entry to the community, it substituted entry to the community accompanied by staff or by a person approved by the person in charge; and it eliminated the possibility of community living altogether.

[4] Osawe submits that the board denied him a fair hearing by not giving him notice of its inclination to reject the joint submission and an opportunity to lead further evidence and make further submissions. Alternatively, Osawe submits that the board's disposition was unreasonable.

[5] The Crown submits that the board's duty of procedural fairness did not require it to give Osawe explicit notice it might reject the joint submission, and that the accused is not entitled to make further submissions after the board begins deliberating. In addition, the Crown submits that the questioning by some board members during the hearing gave Osawe sufficient notice they were concerned about the joint submission. The Crown also submits that the board's disposition was reasonably supported by the record.[2]

B. *Background*

[6] To put my discussion of the issue in context, I will say a few words about Osawe; the index offence that brought him under the board's jurisdiction; his detention at CAMH; the board's 2013 disposition; and the outstanding charge of sexual assault that he was facing at the time of his 2014 hearing, which seems to have prompted the board to reject the joint submission. I will then summarize the hearing before the board and the board's reasons for rejecting the joint submission.

(a) *Edward Osawe*

[7] Edward Osawe is now 36 years old. He was born in Nigeria, but immigrated to Canada with his family when he was a teenager. He had difficulty at school, and only completed grade nine. He worked for brief periods in 2005 and 2007, [page431] but otherwise has been supported by the Ontario Disability Support Program. He went through periods of homelessness and frequently used drugs and alcohol.

(b) *The index offence*

[8] The index offence took place in March 2009 at the Museum subway station in Toronto. Osawe committed an unprovoked attack on a 57-year-old woman who was standing on the platform waiting for a train. He approached her and struck the right side of her head with a steak

knife. She suffered a six-centimetre cut, which required staples. Osawe fled, but was later caught and charged with assault causing bodily harm. He had no previous criminal record, although he had received diversions in the past.

[9] At a hearing in October 2010, Osawe was found not criminally responsible on account of mental disorder. At the time of the hearing, he was diagnosed with schizophrenia, anti-social personality traits and borderline-mild mental retardation. He had a documented history of using marijuana, crack cocaine and inhalants, and of drinking alcohol. He was also diagnosed as being capable of consenting to sexual activity and "marginally capable" of consenting to treatment.

(c) *Osawe's detention at CAMH*

[10] Osawe has been under the board's jurisdiction continuously since November 2010, and during that time has been detained at CAMH. At successive hearings, the board has found that Osawe continues to pose a significant threat to the safety of the public. Osawe does not challenge that finding.

[11] While at CAMH, Osawe has consistently complied with his medication regime, and has participated in a wide range of programs, both on the hospital grounds and in the community.

[12] Beginning in October 2011, Osawe began to receive passes for "indirectly supervised" or unaccompanied privileges. He used them appropriately save for one incident in February 2013, when he tested positive on a urine screen for the use of "spice", a synthetic form of cannabis. After this incident, his privileges were suspended for a time before being reinstated.

[13] In March 2012, Osawe applied for admission to a 24-hour supported residence. At the time of his 2014 annual disposition review hearing, he was still waiting for appropriate housing to become available.

[14] Osawe does have a history of aggressive and inappropriate sexual behaviour while residing at CAMH. On one occasion, he engaged in a shouting match with another patient; on another occasion, he held and pulled the hand of a female patient; [page432] and on yet another occasion, he was seen kissing a female patient. He has participated in a sexual behaviour group at the hospital. While in the group, he admitted he thinks about having sex with a woman, and even sexually assaulting a woman.

(d) *The board's 2013 disposition*

[15] In its 2013 disposition, the board ordered that Osawe be detained on the general forensic unit of CAMH, and, with the permission of the hospital, be allowed unaccompanied hospital, grounds and community privileges.

[16] The terms of the board's formal order, which the parties jointly submitted should be continued in 2014, are as follows [at para. 3]:

2. IT IS FURTHER ORDERED that the person in charge of the Centre for Addiction and Mental Health, Toronto create a program for the detention in custody and rehabilitation of the accused within the General Forensic Unit of the Centre for Addiction and Mental

Health, Toronto in which the person in charge, in his or her discretion, may permit the accused:

(a) to attend within or outside of the hospital for necessary medical, dental, legal or compassionate purposes;

(b) hospital and grounds privileges, indirectly supervised;

(c) to enter the community of Toronto, accompanied by staff or [a] person approved by the person in charge;

(d) to enter the community of Toronto, indirectly supervised; and

(e) to live in the community in supervised accommodation approved by the person in charge;

[17] In its reasons for its 2013 disposition, the board noted that Osawe was "ready for the transition to community living".

(e) *The outstanding sexual assault charge*

[18] The incident giving rise to this charge occurred in September 2013. Osawe and a female patient at CAMH had agreed to meet at a nearby hotel to have sexual intercourse. Both used unaccompanied passes into the community to visit the hotel.

[19] The female patient and Osawe gave conflicting accounts about what actually occurred. The female patient said that she changed her mind after arriving at the hotel, but that Osawe had sexual intercourse with her anyway and then left the hotel. Osawe denied that he had sexual intercourse with her. He said that when he arrived at the hotel, he went back to the hospital to get a longer pass. And when he returned to the hotel, the female patient had left. [page433]

[20] Osawe was charged with sexual assault causing bodily harm. At the time of his Ontario Review Board hearing, the charge was outstanding and a preliminary inquiry was scheduled for June 2014. Because of the charge, Osawe's unaccompanied privileges both on and off the hospital grounds were temporarily scaled back. They were gradually being restored when the board hearing took place in February 2014.

[21] On his appeal, Osawe tendered fresh evidence, which showed that in June 2014, the sexual assault charge was stayed because the complainant was unwilling to testify. Osawe entered into a peace bond.

(f) *The 2014 board hearing*

[22] In the light of the joint submission, the hearing was brief. It lasted only 30 minutes. The only witness to testify was Dr. Padraig Darby, the hospital's psychiatrist. And at the beginning of his evidence, Dr. Darby said he would be brief because of the joint submission.

[23] Dr. Darby testified that Osawe had had "a relatively good year on the general unit". His mental status was stable; he complied with his medication; he co-operated in attending therapeutic group sessions; and he had no suspected drug use. Despite the outstanding charge, Dr. Darby testified "we certainly don't feel that any more restrictive disposition is required".

[24] Dr. Darby also testified about the importance of maintaining the community living privilege in the board's disposition. He thought supervised community living was a realistic possibility for Osawe in the coming year, though he acknowledged that even if housing in the community became available, Osawe would not be placed there until the outstanding charge of sexual assault had been resolved. Another reason Dr. Darby wanted the community living privilege to remain in the disposition was so Osawe would not lose his spot on the long waiting list.

[25] After board members questioned Dr. Darby -- a matter I will return to later in these reasons -- the chairperson invited further submissions, but added:

> THE CHAIRPERSON: Thank you. Then we have a joint submission and we have ample evidence in oral evidence. If there is anything you want to add by way of submission, we'll hear that, but I don't want everybody to just repeat what we just heard so . . .

(g) *The board's 2014 disposition*

[26] The five-member board released its disposition on March 11, 2014, with unanimous reasons following on April 3 [*Osawe (Re)*, [2014] O.R.B.D. No. 794]. As I have said, the board rejected [page434] the joint submission by substituting hospital, grounds and community privileges only if accompanied by staff, instead of unaccompanied privileges, and by removing Osawe's community living privileges altogether. The relevant terms of the board's formal disposition are [at para. 3]:

> 2. IT IS FURTHER ORDERED that the person in charge of the Centre for Addiction and Mental Health, Toronto create a program for the detention in custody and rehabilitation of the accused within the General Forensic Unit of the Centre for Addiction and Mental Health, Toronto in which the person in charge, in his or her discretion, may permit the accused:
>
> (a) to attend within or outside of the hospital for necessary medical, dental, legal or compassionate purposes;
>
> (b) hospital and grounds privileges, accompanied by staff; and
>
> (c) to enter the community of Toronto, accompanied by staff or person approved by the person in charge.

[27] Section 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46 required the board to impose "the least onerous and least restrictive" disposition for the accused. In the board's opinion, these terms constituted the least onerous and least restrictive disposition.

[28] The board addressed why it rejected the joint submission for unaccompanied privileges and passes into the community: it was concerned about public safety in the light of the outstanding charge [at para. 27]:

> In coming to [this] conclusion the Board notes the joint recommendation of the parties but rejects this recommendation of [the] parties. The Board does not accept that the safety of the public can be adequately managed under the terms of the present disposition. The allegations against Mr. Osawe are very serious and pending determination of these charges

> steps must be taken to ensure the protection of the public. The Board is not confident that Mr. Osawe can be given indirectly supervised time in the community or even on the hospital grounds. Mr. Osawe's thinking about sexual behaviour, quite separate and apart from the new allegation, is very concerning to the Board.

[29] But the board also said it would have concerns about giving Osawe unaccompanied privileges even if the charge was resolved favourably [at para. 28]:

> Should the outstanding charges against Mr. Osawe be resolved in his favour with no findings of guilt the Board would still have very serious concerns about Mr. Osawe having indirectly supervised community access, and also hospital and grounds. Mr. Osawe seems to have very little understanding [of] the impropriety of acting on his sexual thoughts.

[30] Indeed, the board said it could not understand how the hospital could even contemplate community living for Osawe [at para. 29]: [page435]

> The Board is confounded to understand how the clinical team could still be questioning the possibility of placing Mr. Osawe in the community at all given his present thinking, let alone still considering the possibility of a placement that included female residents, vulnerable or not.
> [31] With this background, I turn to the issue on appeal.

C. *Was Osawe Denied a Fair Hearing?*

[32] Two principles are at play on this appeal. The first is the board's right to reject a joint submission. The second is the board's duty to give an accused a fair hearing. Both sides agree on these principles.

[33] The board has the undoubted authority, indeed the duty, to reject a joint submission if it is of the view that the joint submission does not meet the requirements of s. 672.54 of the *Criminal Code*. This principle has been affirmed by this court several times. For example, in *Hassan (Re)*, [2011] O.J. No. 3800, 2011 ONCA 561, 283 O.A.C. 154, at para. 25, we said:

> However, the Board does not necessarily err because it declines to follow a hospital's or Crown's recommendation. Automatically adhering to the position of a hospital or Crown would mean abdicating its own role. A review board is composed of medical and legal experts with specialized knowledge and experience in mental health and in risk assessment and management. Parliament has vested these boards with authority to make their own independent and often difficult determinations after weighing the package of factors in s. 672.54 of the *Code*.

[34] In *R. v. Lepage* (1997), 36 O.R. (3d) 3, [1997] O.J. No. 4016, 152 D.L.R. (4th) 318 (C.A.), at para. 73, affd [1999] 2 S.C.R. 744, [1999] S.C.J. No. 34, Doherty J.A. stated the principle succinctly: "[t]he court or Review Board is not required simply to choose among the various dispositions put forward by the parties but must make the appropriate disposition regardless of the positions taken by the parties to the inquiry".

[35] At the same time, the board has an obligation, both under the *Criminal Code* and at common law, to give an accused person before it a fair hearing. It has that obligation because

its decisions affect an accused's rights, privileges and indeed liberty. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, at para. 20; and *Kachkar (Re)* (2014), 119 O.R. (3d) 641, [2014] O.J. No. 1500, 2014 ONCA 250, 309 C.C.C. (3d) 1, at paras. 42-44.

[36] The dispute in this appeal is over the content of this duty -- what procedural rights does the duty of fairness require at a hearing of the Ontario Review Board? Osawe contends that before the board rejects a joint submission, it must give the accused notice that it may do so, and a corresponding opportunity [page436] to lead more evidence or make additional submissions. The Crown contends that this kind of notice is not required, and indeed requiring it would undermine the board's collective process of deliberation. But the Crown also says that Osawe did receive notice through the questioning of Dr. Darby that at least some members of the board were concerned about the joint submission.

[37] I have concluded that the board did have a duty to give Osawe notice it was considering rejecting the joint submission and imposing a more restrictive disposition. The board also had a corollary duty to give Osawe and the other parties an opportunity to lead further evidence or make further submissions to address the board's concerns. Although the board can fulfill its duty to give notice in different ways, including by questions at the hearing, in this case it did not give adequate notice and therefore breached the duty of procedural fairness it owed to Osawe.

(a) *The board's duty of fairness: basic principles*

[38] The content of the duty of procedural fairness -- what procedures the duty of fairness requires in a given case -- varies depending on the rights affected and the statutory context. But as L'Heureux-Dubé J. explained in *Baker*, at para. 22, the overriding goal of procedural fairness is

> to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, *with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker*.

(Emphasis added)

[39] With that goal in mind, the court considers a list of criteria to determine the procedures required to ensure a fair hearing before a particular tribunal. Although not exhaustive, the list typically includes the following:

-- the importance of the decision to the individual affected;

- the statutory scheme, the nature of the decision and the process followed in reaching a decision;
-

-- the tribunal's own procedures;

- the legitimate expectations of the person challenging the decision.
-

See *Baker*, at paras. 23-28.

[40] These criteria support Osawe's position that the board was obliged to give him notice of its inclination to reject the joint [page437] submission and impose a more restrictive disposition. Without notice, the goal of procedural fairness -- giving Osawe an opportunity to put forward his views and evidence fully and have them considered by the board -- could not be met.

(i) *The importance of the decision to Osawe*

[41] This criterion is critical to assessing what procedures are required for a fair hearing: "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated". See *Baker*, at para. 25.

[42] The population of those under the jurisdiction of the board is a vulnerable population. Each accused has a mental disorder, and each is detained or at least has limited freedom. Thus, the terms of a disposition are profoundly important to an individual accused.

[43] For Osawe, the board's disposition was not a minor departure from the terms proposed in the joint submission. It was an important variation, and a significant restriction of his liberty, which no doubt has had an appreciable impact on his day-to-day living and on his future plans and aspirations. He can no longer go into the community or even on the hospital grounds unaccompanied. With the removal of his community living privileges, his ultimate wish to be reintegrated into the community has evaporated, at least in the short term. The importance of the board's decision to Osawe alone argues for notice, so that he could have had an opportunity to address through evidence or submissions the board's concern about accepting the joint submission.

(ii) *The statutory scheme, the nature of the decision and the process followed in reaching a decision*

[44] Three important considerations underlie these criteria: the board's role, the nature of the hearing when a joint submission is put forward and the institutional constraints on requiring notice.

The board's role

[45] As is now well established in the case law, the board's role is inquisitorial, not adversarial. The board has the evidentiary and legal burden of establishing that a not criminally responsible accused person poses a significant threat to public safety, and, if so, the least onerous and least restrictive disposition consistent with public safety. See [page438] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, at paras. 54-55.[3]

[46] The board's role requires it to search out all information relevant to its disposition. That role favours the notice Osawe contends for. In the context of a joint submission, if the board does not give the accused sufficient notice that it may depart from that submission, it may not have all the information relevant to its decision about the appropriate disposition.

The nature of the hearing when a joint submission is put forward

[47] Joint submissions can play an important role in proceedings before the board. They can narrow the issues in dispute, or, as in this case, even eliminate the issues in dispute. And by doing so, they can reduce the time and costs of board hearings. Thus, it seems to me that the board's procedures should encourage, not undermine, the use of joint submissions.

[48] When the parties put forward a joint submission, the hearing will likely be shortened. It was so in this case. It lasted only 30 minutes. Dr. Darby was the sole witness and even he prefaced his evidence by stating that in the light of the joint submission he was going to be brief. Had the parties known the board was inclined to reject the joint submission, likely Dr. Darby would have testified at greater length about why the hospital recommended continuing the terms of Osawe's previous disposition. And Osawe's attending psychiatrist, Dr. Prendergast, could have testified and, for example, addressed the board's concerns about Osawe's sexual thoughts.

[49] Some might suggest that the board's inquisitorial role requires it to have a full evidentiary record in every case, even in a case where the parties have put forward a joint submission. But I would reject that suggestion. In many cases where the parties put forward a joint submission and only a brief evidentiary record to support it, the board will have all the information it needs to discharge its inquisitorial function and make the appropriate disposition. See, for example, *Kelly (Re)*, [2015] O.J. No. 634, 2015 ONCA 95. [page439]

[50] In those cases where the board feels it does not have enough information, presumably it can say so, or call for more evidence. To require the parties who have made a joint submission to put forward the kind of evidentiary record they would put forward in a contested hearing would undermine the benefits of a joint submission.

Institutional constraints

[51] The board sits in panels of five. It deliberates collectively. And Parliament has undoubtedly placed its faith in the "collective wisdom" of this expert tribunal. The Crown submits that to give effect to Osawe's position would threaten the integrity of the board's collective deliberations. I do not agree with the Crown's submission.

[52] The statutory scheme the board operates under expressly contemplates that the board may be required to adjourn its proceedings to obtain further evidence. Section 672.5(13.1) of the *Criminal Code* states:

> 672.5(13.1) The Review Board may adjourn the hearing for a period not exceeding thirty days if necessary for the purpose of ensuring that relevant information is available to permit it to make or review a disposition or for any other sufficient reason.

[53] And as Doherty J.A. said in *Lepage*, at para. 73:

> If, in the course of its inquiry, the court or Review Board determines that additional information is needed before it can decide whether it is of the opinion that an absolute discharge is appropriate, then the court or Board can take the necessary steps to obtain that information. It, of course, may also adjourn the inquiry for that purpose.

[54] If the parties put forward a joint submission at a hearing, and then in the course of its deliberations the board becomes inclined to reject the joint submission, it can notify the parties and invite them to lead further evidence or to address its concerns. Doing so would be consistent with the board's obligation to seek out all information relevant to its disposition. And it would be a procedure authorized by the *Criminal Code*. Seeking out this further evidence would not interfere with the board's collective deliberations; on the contrary, the additional evidence may promote the wisdom of those deliberations.

(iii) *The board's procedures*

[55] Counsel advised us that the board does not presently have a procedural rule addressing joint submissions. Nor does it have a rule that would preclude giving notice of its inclination to [page440] reject a joint submission and giving the parties an opportunity to put more evidence before it.

[56] Rather, the board's own rules supplement the *Criminal Code* provisions. I would interpret these rules as giving the board the authority to reconvene a hearing if, during its deliberations, it begins to feel uncomfortable with a joint submission or inclined to reject it. Rule 1 of the Ontario Review Board's *Rules of Procedure* provides that all of its rules are to be liberally construed "to secure the just, most expeditious and least expensive determination of every matter". Rule 3 states that "[w]here any matter of procedure is not provided for by these Rules, the Chairperson of the Review board or the presiding Alternate Chairperson shall determine the procedure to be followed". The board's own rules thus are sufficiently broad and flexible to accommodate the giving of notice where the board is inclined to reject the joint submission, even where the inclination to do so arises during the board's deliberations.

(iv) *Osawe's legitimate expectations*

[57] In this case, this criterion is neutral. Osawe could not legitimately expect that the board would automatically accept the joint submission. In Canada, the notion of legitimate expectations does not create substantive rights: see *Baker*, at para. 26. And, although the board frequently adopts joint submissions, it does not always do so. As I have already said, automatic acceptance of a joint submission is inconsistent with the board's statutory mandate.

[58] Moreover, no evidence was put before us about the general practice or procedure of the board when faced with a joint submission it does not wish to adopt, nor about what procedure Osawe might have expected. Osawe's legitimate expectations in this case do not assist in determining the content of the board's duty of fairness.

(b) *Case law*

[59] This court has not squarely addressed the issue raised on this appeal: whether the board must give an accused notice of its inclination to reject a joint submission and impose a more restrictive disposition. The issue has been raised in at least two cases, but not decided. See *R.*

v. Harley, [2005] O.J. No. 1346, 64 W.C.B. (2d) 582 (C.A.) and *Kachkar (Re)*. Nonetheless, decisions in two other cases -- *R. v. Elster*, [2011] O.J. No. 4947, 2011 ONCA 701 and *Ontario (Attorney General) v. Grady*, [1988] O.J. No. 21, 34 C.R.R. 289 (H.C.J.) -- support Osawe's position that notice is required. [page441]

[60] In *Elster*, the board imposed a condition in a detention order that the accused could live in the community only in "supervised accommodation". None of the parties had made submissions on the meaning of, or the need for, "supervised accommodation". In a brief endorsement, this court held that the board erred in law by imposing the term without hearing submissions from the parties [at paras. 4 and 8]:

> The Board should not have imposed the term . . . without allowing the parties an opportunity to make submissions as to the need for, meaning of, and availability of "supervised accommodation" in Mr. Elster's particular circumstances. In effect, the Board imposed a further limitation of Mr. Elster's liberty without any submissions as to the need for that limitation and without a clear understanding of the effect of that limitation on Mr. Elster.
>
> . . . . .
>
> The Board's failure to entertain submissions from the parties before imposing a "supervised accommodation" limitation on Mr. Elster's liberty, combined with the uncertainty as to the meaning of that phrase, compels the conclusion that the Board erred in law in unilaterally imposing that term.

[61] In other words, absent notice that the board was considering imposing a requirement of supervised accommodation, the parties had no opportunity to address its necessity. The lack of an opportunity to do so made the further restriction on Elster's liberty unfair. This unfairness is equally pronounced when the board departs from a joint submission and, without notice, imposes terms more restrictive of an accused's liberty.

[62] *Grady* was decided under the Lieutenant Governor warrant system in place before 1992.[4] Still, *Grady* is relevant.

[63] In that case, the board had recommended Grady be transferred from a medium security facility to the maximum security facility at Penetanguishene, and the Lieutenant Governor accepted the recommendation. No evidence was led before the board to justify this heightened restriction on Grady's liberty, and the board did not give notice it was considering such a recommendation.

[64] On judicial review, Callaghan A.C.J.H.C. quashed the board's recommendation, holding that Grady had been denied procedural fairness. At p. 308 C.R.R., he wrote: [page442]

> The issue of Penetanguishene was not raised in the materials before the board or in the course of the hearing. Although there was an opportunity for Mr. Grady's counsel to make submissions, it would have been foolish for him to make reference to all potential outcomes; as a practical reality, the materials before the board and the response of the board thereto set the agenda for status hearings. It is clear that the Penetanguishene recommendation

> could not reasonably have been anticipated and to the extent that there was, therefore, no opportunity to make submissions in respect of this option, the rules of fairness were denied.

[65] At p. 320 C.R.R., Associate Chief Justice Callaghan expanded on why fairness required the parties to have been given an opportunity to make submissions on the possible transfer to Penetanguishene before the board made its recommendation:

> When the decision-maker disposes of a matter on the basis of facts in respect of which the parties have not had an opportunity to make submissions, fairness requires that the decision-maker must give the parties such an opportunity before making a final disposition.
>
> . . . . .
>
> [T]he board decided the matter on the basis of an interpretation of the facts that could not have been reasonably anticipated and was not raised at the hearing and there was no opportunity to make submissions in respect thereof. Counsel to Mr. Grady quite properly restricted his submissions to issues that arose from the materials and the testimony before the board. The board should have given him an opportunity to make submissions in respect of matters about which it was concerned that were not raised at the hearing or in the materials.
>
> In my view, the board should have indicated that, on its view of the facts, it was considering a transfer to Penetanguishene and asked for submissions in respect of that opinion. If, in spite of submissions to the contrary, the board had decided such a transfer was in order, the review of the decision would be a more difficult matter. It should be noted, however, that it is equally possible with direct evidence on the issues of treatment and security needs associated with Mr. Grady, that the board might have realized there was no evidence to support a transfer and accepted the hospital's recommendation.

[66] Callaghan A.C.J.H.C.'s comments in *Grady* on procedural fairness have particular relevance to the case before us. Where all parties have put forward a specific set of terms, absent notice, one cannot reasonably expect any of the parties to predict the board's objections to the terms and to lead evidence or make arguments that might answer these objections. In the present case, the brevity of the hearing strongly suggests that none of the parties anticipated the board would be sufficiently concerned about the joint submission to reject it.

[67] Of course, trial judges in criminal proceedings deal with joint submissions all the time, as do many professional bodies when they deal with disciplinary penalties for their members. [page443] I accept the Crown's submission that the dictates of procedural fairness in these other proceedings will differ from what fairness requires in Ontario Review Board proceedings.

[68] Still, I regard the reasoning of the Divisional Court in *College of Physicians & Surgeons of Ontario v. Petrie* (1989), 68 O.R. (2d) 100, [1989] O.J. No. 187, 32 O.A.C. 248 (Div. Ct.) as being relevant to the present case. In *Petrie*, the Discipline Committee departed from a joint submission requesting an unpublished reprimand, and instead imposed a published reprimand and a licence suspension. The Divisional Court held that the Discipline Committee had denied Petrie procedural fairness, writing, at para. 5:

> While it is within the jurisdiction of the committee to reject a joint submission, we are of the view that when a committee with disciplinary power rejects such a submission and proposes to impose a sentence of a more severe character, then the rule of *audi alteram partem* should be invoked, and the committee should afford counsel the opportunity to make representations addressing the issue of the more severe penalty.

[69] And then in words that in my opinion apply to Ontario Review Board proceedings, the Divisional Court said, at para. 8:

> It is our view that a tribunal imposing a more substantial penalty than that which has been recommended on a joint submission should follow carefully that fundamental principle and indicate to those appearing before it that it is considering imposing such a penalty and request submissions thereon.

[70] On my review, the case law fully supports Osawe's contention that he was entitled to notice the board was considering rejecting the joint submission and imposing a more restrictive disposition.

(c) *The board's duty of fairness requires it to give notice it may reject the joint submission and impose a more restrictive disposition*

[71] I have concluded that when the board contemplates rejecting a joint submission and imposing a more restrictive disposition, it must give the accused notice that it may do so and the opportunity to make further submissions and, if necessary, lead additional evidence

[72] This procedure upholds the overriding objectives of procedural fairness, which are to ensure that administrative decisions are made using a fair and open procedure and that affected individuals can put forward their views and evidence fully and have them considered by the decision maker. This conclusion is also supported by the case law for hearings before both the board and other administrative tribunals. [page444]

[73] Notice may be given in different ways. The presiding board chairperson may express the board's concerns about accepting a joint submission at the hearing itself and ask the parties whether they wish to lead additional evidence. If necessary, the board can adjourn its hearing so the parties can obtain the further evidence they require. Or, the board's concerns about accepting a joint submission may be evident to the parties from the questions posed during the hearing by various board members. If the parties have adequate notice from the board's questions, then the parties may ask for an opportunity to lead additional evidence or make additional arguments to address these concerns. Or, in some cases, concerns about the joint submission may arise after the board begins its deliberations, in which case the board may need to notify the parties and request further submissions or evidence.

[74] The form of notice the board gives may vary, and the board has a broad power to determine its own procedures. But, though notice may be given in different ways, it must satisfy the objective of allowing the accused a meaningful opportunity to present the evidence and argument relevant to the board's disposition.

(d) *The board did not give Osawe notice*

[75] As I have said, one way the board may give notice is by the questions board members pose during the hearing. Because the board's role is inquisitorial, after a witness testifies, typically each of the board members will ask the witness questions. In *Harley*, in a brief endorsement, this court concluded that the many questions the board asked the hospital psychiatrist showed that it had concerns about the joint submission. If notice were required -- a point the court did not decide -- the board's questions provided adequate notice. The Crown says that is true in this case as well. She points especially to the following exchange near the end of the hearing between Dr. Darby and the psychiatrist member of the board, Dr. Johnstone:[5]

> Q. I apologize, but having heard the Crown's brief précis of the synopsis, does it remain your opinion that it's -- the Hospital is able to safely manage these limited passes that Mr. Osawe has?
>
> A. Yes, we believe we can. [page445]
>
> Q. How do you do that?
>
> A. He has been quite amenable to direction. The team waited a considerable period of time before re-instituting passes after the allegations and the -- he's basically allowed very brief periods of time on the hospital grounds. There hasn't been concern about AWOL's in the past.
>
> B. Well, obviously there is a process leading up to these privileges that allowed him to make this arrangement to the hotel room?
>
> A. Yes.
>
> Q. And so, there was some confidence, apparently misplaced at that point. So, how do you know that that -- because it doesn't sound like there is a lot of change so, can you tell us what's different now than at that time?
>
> R. I don't think things are substantially different than they were at that time.
>
> S. So, how does the Hospital come to that conclusion that they can be confident?
>
> T. I think that's a clinical judgment that Mr. Osawe was spoke to clearly, very firmly, about what the limits of the passes are. At that time he had far more extensive passes.
>
> Q. Thank you.
>
> A. His passes at that point had included passes for up to two hours.

[76] I do not regard this exchange, or indeed any of the questions from the board members, as amounting to adequate notice -- for four reasons.

[77] First, though Dr. Johnstone's questions might suggest some concern about unaccompanied passes, he does not suggest he is considering rejecting the joint submission. Certainly, the questions do not suggest the alarm reflected in the board's reasons when it said it was "confounded" by the hospital's recommendation to keep open the possibility Osawe could live in the community.

[78] Second, the parties at the hearing were in the best position to assess whether the board had a heightened concern about the joint submission. As none of the parties asked to lead further evidence or make further submissions, or even ask the board members whether they had any concerns about the joint submission, I doubt the parties believed the joint submission was in jeopardy.

[79] Third, other questions by board members suggested the board was quite content to accept the joint submission, and was simply seeking additional information. One example is another exchange between Dr. Darby and Dr. Johnstone, where Dr. Johnstone asked about the waiting list for accommodation in the community: [page446]

> Q. Do you have any information for us as to just how long the waiting list . . .
>
> A. No.
>
> Q. . . . might be?
>
> A. Those things, I end up finding, are often quite unpredictable and certainly people will say it could be a matter of years, but then things can suddenly appear . . .
>
> Q. M'hmm.
>
> A. . . . unpredictably.
>
> Q. So, it's reasonable to have that in his Disposition . . .
>
> A. I think it is, yes.
>
> Q. . . . despite all the barriers, the issues around the outstanding court date?
>
> A. Yes, we believe it is, yes.
>
> Q. Thank you, Doctor.

[80] Finally, if any doubt may have existed about the board's willingness to accept the joint submission, that doubt was seemingly put to rest by the board chairperson's brief closing comments, which I quoted earlier:

> THE CHAIRPERSON: Thank you. Then we have a joint submission and we have ample evidence in oral evidence. If there is anything you want to add by way of submission, we'll hear that, but I don't want everybody to just repeat what we just heard so . . .

[81] For these reasons, I would not give effect to the Crown's submission that the board's questions amounted to adequate notice.

D. *Conclusion*

[82] The board's failure to give Osawe notice it was inclined to reject the joint submission, and an opportunity to lead more evidence or make further submissions, deprived Osawe of a fair hearing. On this basis alone, I would allow the appeal. It is therefore not necessary to deal with Osawe's submission that the board's disposition was unreasonable.

[83] I would allow the appeal, set aside the board's disposition dated March 11, 2014 and order a new hearing.

Appeal allowed.

Notes

1 The term used by the board is "indirectly supervised". It means unaccompanied. I use the term "unaccompanied" throughout these reasons.

2 Since the argument of this appeal, Osawe has had another hearing. Although that hearing might have rendered our decision moot, we have decided to give these reasons because of the importance of the issue to board proceedings.

3 In July 2014, after this case was heard, Parliament amended s. 672.54 of the *Criminal Code* to require that the board make the "necessary and appropriate" disposition. Since the amendment, the board has held that "the necessary and appropriate disposition" is also the least onerous and least restrictive disposition. See *Ahmed-Hirse (Re)*, [2014] O.R.B.D. No. 1876, at para. 35.

4 Before 1992, the review board served only as an advisory body to the Lieutenant Governor. Although the board had recognized expertise in the field of mental health, it had no authority to make or review a disposition. It could only make recommendations to the Lieutenant Governor, who had discretion to accept or reject them. See Joan Barrett and Riun Shandler, *Mental Disorder in Canadian Criminal Law*, looseleaf (Toronto: Carswell, 2006), c. 7 at p. 7-1, consulted on March 31, 2015.

5 The exchange took place after the board had marked as an exhibit a synopsis of the outstanding sexual assault charge.

TAB 4

Date: 2002107
Docket: CA 178682

NOVA SCOTIA COURT OF APPEAL

[Cite as: *Utility and Review Board (Nova Scotia) v. Grafton Street Restaurant Limited,* 2002 NSCA 120]

Glube, C.J.N.S.; Bateman and Cromwell, JJ.A.

BETWEEN:

GRAFTON STREET RESTAURANT LIMITED

Appellant

- and -

NOVA SCOTIA UTILITY AND REVIEW BOARD and
NOVA SCOTIA ALCOHOL AND GAMING AUTHORITY

Respondents

REASONS FOR JUDGMENT

Counsel: David P.S. Farrar for the appellant
Dale Darling and Genevieve Harvey for the Respondent Gaming Authority
Richard Melanson for the respondent Utility Board

Appeal Heard: October 7th, 2002

Judgment Delivered: October 7th, 2002

THE COURT: Appeal dismissed per oral reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Bateman, J.A. concurring.

CROMWELL, J.A.: (Orally)

[1] This is an appeal from a decision of the Nova Scotia Utility and Review Board. On the basis of agreed facts, the Board found that the appellant had committed an offence under the Liquor License Board Regulations by permitting an underage person to be present on its premises. The appellant and the Investigation and Enforcement Division of the Alcohol and Gaming Authority jointly recommended the penalty of a three day suspension of the appellant's license to be served on a Monday, Tuesday and Wednesday.

[2] After a hearing, the Board declined to adopt the jointly recommended penalty. During the hearing, the Chair reminded counsel that the determination of penalty was in the Board's discretion. Through his questions to counsel, the Chair made clear his concern that the recommended penalty was a departure from the Board's previous practice of imposing a suspension on the same day of the week as the offence had been committed. Counsel were given an opportunity to address the Board's concerns. The Board then reserved its decision and ultimately filed a written decision imposing a one day suspension to be served on a Friday. The appellant appeals.

[3] Our jurisdiction on appeal is limited to questions of law and jurisdiction.

[4] The appellant argues that the Board erred in various ways by failing to accept the joint recommendation. It is argued that there were not substantial enough reasons to depart from the recommendation, that it was unfair to do so without giving notice to counsel and an opportunity to be heard, that the Board impermissibly fettered its discretion by adhering to previous penalty decisions and that it failed to take into account the appellant's excellent cooperation and willingness to take remedial measures.

[5] In our view, these arguments have no merit. The determination of the penalty was within the discretion of the Board as was the weight it should give to a joint recommendation. The Board made it clear it was troubled by the joint recommendation and counsel had every opportunity to address the Board's concerns. The Board did not impermissibly fetter its discretion by giving weight to its prior practices which, it would seem, were consistent with the normal practices of the Authority. The Board gave reasons for not departing in this case from its prior practices. There is nothing in the record to suggest that relevant considerations were ignored.

[6] The appeal is, therefore, dismissed. We think this is a case for costs including costs of the stay application which were ordered to be costs in the cause. The appellant will pay to the respondent, Nova Scotia Alcohol and Gaming Authority, costs in the total amount of $2000.00 inclusive of

disbursements. Consistent with its request, there will be no costs payable to the respondent Board.

Cromwell, J.A.

Concurred in:
Glube, C.J.N.S.
Bateman, J.A.

TAB 5

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2008-0304

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 Westcoast Energy Inc. and Union Gas Limited for leave pursuant to section 43(2) of the *Ontario Energy Board Act, 1998* (the "Act") for the transfer of a controlling interest in Union Gas Limited to a limited partnership;

AND IN THE MATTER OF an Application by Westcoast Energy Inc. and Union Gas Limited pursuant to section 21(4) of the Act for the Board to dispose of this application without a hearing.

DECISION AND ORDER

On September 15, 2008 Westcoast Energy Inc. ("Westcoast") and Union Gas Limited ("Union") filed an application pursuant to section 43(2) of the *Ontario Energy Board Act, 1998* requesting leave of the Board to transfer a controlling interest in Union from Westcoast to a limited partnership to be organized under the laws of Ontario.

On October 15, 2008, the Board granted intervenor status to four parties, the School Energy Coalition ("SEC"), the City of Kitchener, the Consumers Council of Canada ("CCC") and the Canadian Manufacturers and Exporters Association ("CME"). On November 6th, the Board was advised that the CCC would be taking no position on the matter. On the same day, the Board received a letter from the Industrial Gas Users Association ("IGUA") providing comments pursuant to Rule 24. IGUA is not an intervenor.

For the reasons set out below, the Board approves this application subject to certain conditions.

The Transaction

This application is brought pursuant to Section 43(2) of the *Ontario Energy Board Act*, which provides as follows:

> 43. (2) No person, without first obtaining an order from the Board granting leave, shall,
>
> (a) acquire such number of voting securities of a gas transmitter, gas distributor or storage company that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company; or
>
> (b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company if such voting securities constitute a significant asset of that corporation. 1998, c. 15, Sched. B, Section 43 (2).

Three steps in the proposed transaction are relevant to this Decision. The first concerns the direct ownership of Union. Union is currently 100% owned by Westcoast. Westcoast in turn is owned by a U.S. corporation, Spectra Energy Corporation, a U.S. corporation based in Houston. The existing structure is set out in Appendix “A”.

The applicants propose to transfer all of the voting shares of Union to a limited partnership to be organized under the laws of Ontario. All of the voting shares of the general partner of the limited partnership would be owned by Westcoast. Westcoast will own 99.999% of the limited partnership units and the wholly owned general partner will own the remaining 00.001% of the limited partnership units as indicated in Appendix “B”.

The second element of the transaction involves Union Gas Limited (UGL), the Ontario corporation, becoming Union Gas Company (UGC), a Nova Scotia unlimited liability company incorporated under the *Nova Scotia Companies Act.* A corporation continued in Nova Scotia and converted to a ULC retains all of the rights and obligations it had prior to the continuance. For Canadian tax purposes, the ULC is the same as any other business corporation and is subject to tax on all of its taxable income. In other words, the Canadian tax status of Union will not change. However, there are significant implications for U.S. tax purposes. The tax liability of the U.S. parent is discussed further in these reasons.

The third element of the transaction is the redemption of the existing preferred shares in Union. Union currently has approximately 4,200,000 preferred shares valued at $110 million held by unrelated parties. Once Union becomes an unlimited liability company, the shareholders on a windup become liable for all the obligations of the company. The existing preferred shareholders, of course, did not contemplate unlimited liability. Accordingly, the existing preferred shares must be redeemed and replaced by an equivalent amount of unrelated third party debt.

Under the terms of one of the series of preferred shares, Union has a redemption option only once every five years. The next redemption option date is January 1, 2009. Notice of the proposed redemption must be given 30 days prior to the redemption date. This is the reason that Union asks that this application be dealt with on an expedited basis.

Rationale for the Transaction

The driving force behind this transaction is the significant tax savings to Spectra, the U.S. parent. When a U.S. corporation receives dividends from a foreign subsidiary, that corporation is subject to U.S. tax laws and the repatriated earnings are considered to be earnings and profit for U.S. tax purposes. Under the current ownership structure, Union’s earnings and profit as determined under

the U.S. tax rules are deemed to move to Westcoast at the time that Union pays the dividend to Westcoast. Inserting a limited partnership between Westcoast and Union provides Spectra with more control over when Union's earnings and profit are moved to Westcoast and up the chain to the U.S. parent, Spectra.

Under the new ownership structure, Union's earnings and profit will be accounted for first by the limited partnership and only taken into account by Westcoast when the limited partnership makes the distribution to Westcoast. Control over the timing of the limited partnership's distribution allows Spectra to utilize tax losses which offset the tax liability. These tax savings are estimated to amount to $50 million[1]. They relate to a loss carried forward resulting from the premium over book value Duke (now Spectra) paid for goodwill when Duke acquired Westcoast in March, 2002.

Impact of the Transaction

Union maintains that the transaction will have no adverse impact on Union, Union's customers, or Union's costs, revenues, rights, obligations, liabilities, management, operations or governance. The evidence supports that conclusion.

It is clear that Union's Canadian tax status will not change. It is also evident that Union's management, Board of Directors and ultimate ownership will not change. Union's head office will remain in Chatham and the company will continue to be operated from there.

There was some discussion in these proceedings whether the obligations of Union Gas Company ("UGC") as a Nova Scotia ULC would be less than those of Union Gas Limited ("UGL") the Ontario Corporation. As counsel for Union points out, Union is being continued as a ULC under Nova Scotia laws and the Nova Scotia Statutes regarding corporate obligations mirror those in Ontario[2].

---

[1] Exhibit C.2, pg. 2

[2] See Section 181 of the *Business Corporation Act* (Ontario) and Section 133 of the *Companies Act*

Nor does the continuation have any impact on the Board's jurisdiction. That jurisdiction flows from Section 36 of the *Ontario Energy Board Act*, which grants the Board jurisdiction over gas transmitters and distributors in Ontario. The fact that Union becomes a Nova Scotia unlimited liability company does not reduce the jurisdiction of this Board regarding any of Union's Ontario activities.

There are however, three concerns voiced by the intervenors. The first is whether the undertakings by Union Gas Limited and Westcoast Energy Inc. given to the Lieutenant Governor in Council on December 9, 1998 remain in force. The second is whether the cost of this reorganization and this proceeding should be borne by the ratepayers. The third is whether the cost reductions resulting from this reorganization should be passed on to ratepayers and if so, when. Each of these issues is considered below.

The Undertakings and the Order in Council dated December 9, 1998

On December 9, 1998 Union Gas Limited and West Coast Energy Inc. entered into undertakings with the Lieutenant Governor in Counsel attached as Appendix "C" [3]. The most important of the undertakings is paragraph 3.0 which concerns the maintenance of common equity. That undertaking provides that Union will maintain a level of equity at a level established by the Board. If the equity falls below that level, it must be restored to meet the required level within 90 days. At present, under the Board's most recent Decision, Union is required to maintain its common equity ratio at 36%.

(Nova Scotia)

3 (Exhibit K:1.2). These undertakings date back to undertakings of May 13, 1988 which followed the acquisition of Union by Unicorp Canada Corporation and a Report of the Board on that matter required by an Order in Council issued in 1985. In the Matter of a Reference Respecting Unicorp Canada Corporation, [See EBRLG 28, August 2, 1985]. These undertakings were replaced by undertakings dated November 27, 1992 (approved and accepted by the Lieutenant Governor in Council on December 16, 1992) when Westcoast Energy Inc. acquired control of Union Gas from Unicorp Canada Corporation. The 1992 undertakings were essentially reaffirmed by the December 9, 1998 undertakings which became necessary with passage of the *Energy Competition Act, 1998* on October 10, 1998.

The current signatories include Union and Westcoast. As indicated, Union Gas Limited, the Ontario corporation, will cease to exist and will become Union Gas Company, a ULC under Nova Scotia law. These undertakings, as S.3.1 indicates, apply to Union and Westcoast and its "affiliates". SEC argues that the limited partnership Union intends to create would not be an affiliate because it is not a corporation. The undertakings in S.1.2 define an affiliate as having the same meaning as it does in the *Business Corporations Act,* R.S.O. 1990, Chapter B.16. SEC argues that the *Business Corporations Act* defines an affiliate as a corporation. Accordingly, in their view, it would not (and cannot) include the proposed limited partnership.

In response to an SEC interrogatory[4], Union confirmed that Union and Westcoast intend to abide by the terms of the undertakings, the Affiliate Relations Code and all regulations by which the Board regulates affiliates of regulated utilities. Union states that "the Limited Partnership and the General Partner are wholly owned subsidiaries of Westcoast and thus would be affiliates of Union Gas and would therefore be subject to any requirement of the Board".

SEC asks the Board to make it a condition of approving this transaction that the proposed limited partnership and the Nova Scotia ULC, Union Gas Company, sign the undertakings. Union responds that the Board has no authority because the undertakings are an agreement between Union and the Lieutenant Governor in Council. The Board is not a party. Moreover, Union says that regardless of any condition the Board might direct, the Board has no way of knowing whether the Lieutenant Governor in Council will agree to that condition.

While it is unlikely that the Lieutenant Governor in Council would not agree, Union is technically correct. Moreover, even if steps were taken by the Lieutenant

[4] Exhibit D.1

Governor in Council to add UGC or the partnership to the undertakings, that might take time and the deadline for this transaction might pass.

In the circumstances, the Board asked Westcoast and Union to confirm that they regard the Ontario limited partnership and the general partner as affiliates of Westcoast that will comply with undertakings in the same fashion as Union Gas Limited. It is significant in this regard that Westcoast will control UGC, just as it controlled UGL in the past. The Board accepts that the undertakings provided by Union and Westcoast (attached to this Decision as Appendix “D”) are sufficient evidence that the general partner and the limited partnership will be bound by the undertakings.

The Costs of the Transaction

The second issue relates to whether any of the costs of this transaction will be borne by the ratepayers. Union has agreed that all costs of the transaction will be paid by Westcoast not Union and will not be borne by ratepayers.

The Reduction in Revenue Requirement

An essential element of this transaction is that the preferred shares will be replaced by debt. Because the cost of the debt is less than the cost of preferred shares, there is an annual reduction in the revenue requirement of approximately $1.3 million.

The parties agree that this amount should be reflected in the reduction of rates. However, they question the timing. Union takes the position that this should occur on the rebasing at 2012. The intervenors state that it should take place on January 1, 2009.

Union’s rationale for the 2012 date is that the company entered into a five year Incentive Rate Plan beginning January 1, 2008. This is a five year plan which provides that no adjustments are to be made unless there are unusual

circumstances. Union says the $1.3 million reduction does not constitute an unusual factor or Z factor.

The intervenors respond that if Union had disclosed this transaction in a timely fashion, the cost reductions would have become part of the negotiations and settlement that led to the Board's Decision approving the five year Incentive Rate Plan.

It is important to put the timing of the two events in context.

On May 11, 2007, Union applied under section 36 of the *Ontario Energy Board Act* for an Order approving a multi-year Incentive Rate Plan to determine their rates effective January 1, 2008. This was a unique and important proceeding. Prior to this application, the rates for a period of almost 40 years, were generally set on an annual basis. Rates under this new application will apply for a five year period set by a formula largely determined by the cost of inflation minus a productivity improvement factor.

On August 31, 2007 the Board scheduled a settlement conference which subsequently took place between December 6th and December 17th. On January 2, 2008 Union filed a Settlement Agreement which was approved by the Board on January 17, 2008. [5]

On August 30, 2007, the day before the Board issued the Order scheduling the Settlement Conference in the incentive rate proceeding, Mr. Hebert, a tax planning specialist with Union, delivered to Spectra a five page memorandum entitled "UGL Conversion Step Plans"[6]. The Memorandum identified the transaction at issue here, including the steps by which Union would redeem the

[5] EB-2007-0606, January 17, 2008
[6] Exhibit D.7

existing preference shares held by Third Parties for approximately $110 million, plus a redemption premium[7].

The Board of Directors of Union Gas did not approve the plan formally until a year later on September 5, 2008. Union filed this Application 10 days later.

Union and Spectra first began considering the tax plan in early 2007[8]. That consideration resulted in the memorandum of August 30, 2007. During the period in which Union and Spectra were considering this tax plan, there were extensive negotiations with intervenors regarding the Incentive Rate Plan.

The intervenors say that Union had a duty to disclose the likelihood that Union would reorganize its corporate structure to reduce taxes paid by the parent which in turn would reduce Union's cost of operations.

Union's response is two-fold. First, Union says the amount was not material. Second, Union says that as of August, 2007 no decision had been made to proceed. And even if a decision had been made to proceed it wasn't clear as to what the consequences would be in terms of Union's operating costs.

In my view, these arguments are not persuasive. Nor do I find that the evidence supports them. The first point is that $1.3 million per year is material, particularly when you consider that over the length of a five-year IRM Plan, it amounts to over $5 million.

Secondly, as of August of 2007, Union had identified a tax plan and determined that the restructuring could save the parent company at least $50 million in taxes. The evidence of Union witnesses is that the amount was determined[9]. It wasn't

[7] Exhibit D.7, p. 4
[8] Transcript , p. 8, line 18
[9] Transcript p.7, line 11

hypothetical. It was real because that was the amount of loss carry forward available for this purpose.

Nor was this a complicated or controversial tax planning step. It was well known and understood. In an SEC interrogatory, Union was asked to "produce a copy of each tax or corporate planning letter, opinion, tax ruling or reorganization memorandum that in whole or part formed the basis for the internal reorganization proposed in the application". Union responded as follows:

> "There are no opinions or tax rulings available. The reorganization being proposed for Union is common tax planning that has been employed in respect of many of Westcoast's Canadian affiliates." [10]

The tax implications were well understood and the amount of the loss carried forward was clear, as was the minimum amount of tax savings.

Union responds that even if a decision had been made to proceed, there was no decision as to the timing. But why would Union delay? The tax benefits were real and non-controversial. Moreover, tax carry forwards have a limited life. They can be lost in whole or in part if there was delay.

Most importantly, the reorganization was dependant on the redemption of the preference shares. There was a deadline for that redemption. That deadline was January 1, 2009 and notification 30 days before was required. Failing to meet that deadline would mean that Union could not implement this reorganization until 2014 and Spectra would be denied the tax reduction until then.

In the circumstances, it is reasonable to conclude that in the August, 2007 timeframe there was a real prospect that Union would be reorganized to secure these tax savings on behalf of the U.S. parent. The evidence also suggests that

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[10] Exhibit D.7

Union would proceed with the restructuring in the first year of the Incentive Rate Program which is, in fact, exactly what happened.

A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis. As stated recently by Mr. Justice Lederman in the case of *Toronto Hydro-Electric System Limited v. Ontario Energy Board* [2008] OJ No 3904(QL), para 78.

> "At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large."

Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.

A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In so doing, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here.

It should be understood that this obligation is a corporate responsibility. Mr. Penny and Mr. Packer were both involved with the incentive rate

proceeding. Both are involved in this case. They say that they had no knowledge of the proposed re-organization. I accept that. Both gentlemen have been involved extensively in proceedings before this Board in the past decade and are highly regarded. But I do not accept that the Union organization lacked the relevant knowledge. And they had an obligation to instruct counsel.

Nor can there be any question that the relevant information was within the control of Union. The memorandum of August 30, 2007 was prepared by Dennis Hebert, the General Manager of Canadian taxes with Union Gas. He held positions relating to taxation services with Union Gas since August of 2002 and was involved in investigating the tax consequences of this reorganization since early 2007.

There is also an element of fairness involved here. How can the Board penalize intervenors and the ratepayers they represent because they were late raising an issue where the Utility failed to advise them of essential information in a timely fashion.

Nor can it be said, as Mr. Penny suggests, that this tax plan was “just a gleam in somebody’s eye”. It was much more than that. It is not believable that a sophisticated organization such as Spectra/Union/Westcoast would leave $50 million on the table. In all likelihood once they completed the tax analysis in August of 2007 (which in their own words was “common tax planning for many of Westcoast Canadian affiliates”) the organization would move forward in a timely fashion given the deadline for redemption of the preference shares.

In the result, the Board approves the application subject to three conditions:

1. The costs of the entire transaction, including the hearing costs, will be for the account of Union shareholders and not passed on to the ratepayers;

2. Union and Westcoast will file with the Board a letter confirming that the general partner and the limited partner will be considered affiliates for the purpose of undertakings contained in the Order of Council dated December 9, 1998;

3. Union's rates will be reduced effective January 1, 2009 to reflect the cost reduction of $1.3 million per year resulting from this reorganization.

Mr. Ryder on behalf of the City of Kitchener argued that Union's failure to disclose should be sanctioned by the Board, by way of a cost penalty. He suggested that the costs should be borne by the shareholder, not the ratepayer. I agree. The three intervenors participating in this hearing will be entitled to reasonably incurred costs with costs to be paid by the shareholders of Union.

DATED at Toronto, November 19, 2008.

Ontario Energy Board

_____
Gordon Kaiser
Vice-Chair and Presiding Member

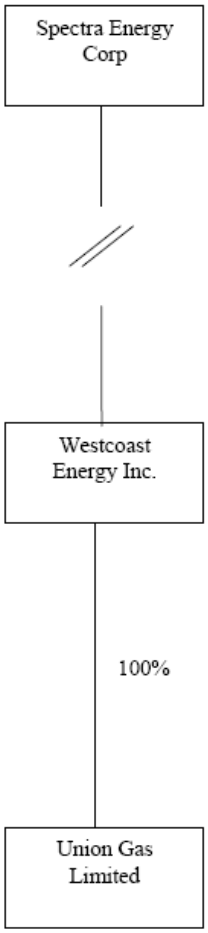
Appendix "A"

To Decision and Order

Dated: November 19, 2008

Current Organization Structure Chart

Attachment 2 **Current Structure**



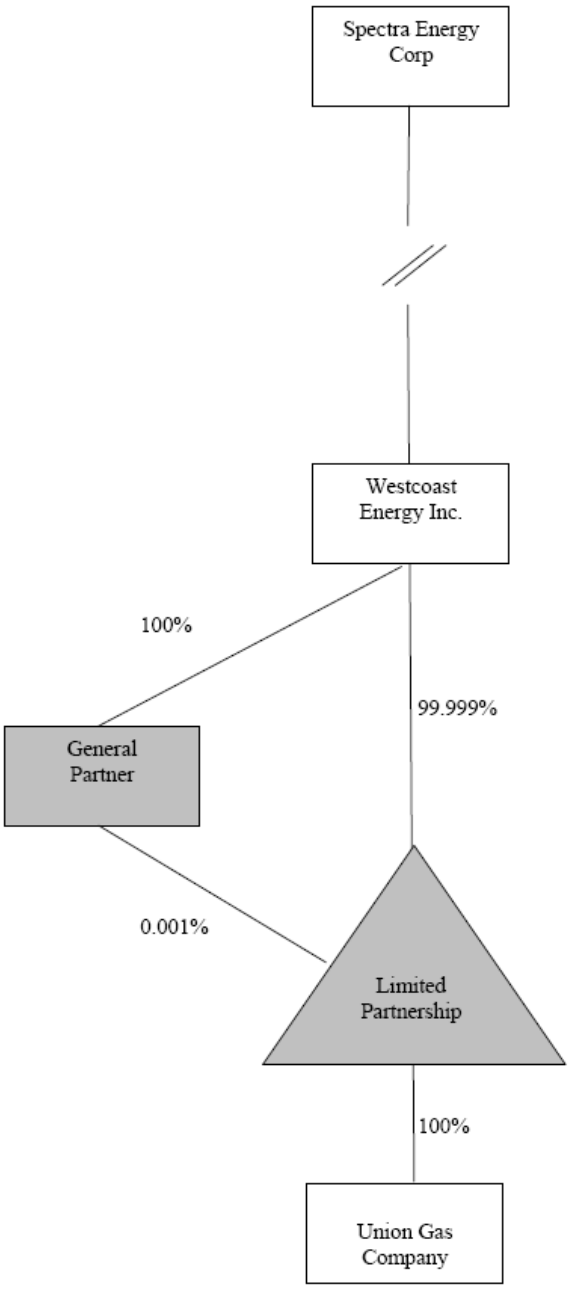
Appendix “B”

To Decision and Order

Dated: November 19, 2008

Proposed Organization Structure Chart

Attachment 3 **Final Structure**



Appendix “C”

To Decision and Order

Dated: November 19, 2008

Order in Council dated December 9, 1998, CC 2865/98

Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit :

WHEREAS Westcoast Energy Inc., 1001142 Ontario Inc., Union Energy Inc., Union Gas Limited, and Union Shield Resources Ltd. provided Undertakings dated the 27th day of November, 1992 to the Lieutenant Governor in Council and these Undertakings were referred to in Order in Council No. 3639/92;

AND WHEREAS Enbridge Inc. (previously IPL Energy Inc.) and The Consumers' Gas Company Ltd. provided Undertakings dated the 21st day of June, 1994 to the Lieutenant Governor in Council and these Undertakings were referred to in Order in Council No. 1606/94;

AND WHEREAS, with the receipt of Royal Assent for the *Energy Competition Act, 1998* on the 30th day of October, 1998, it is considered expedient to approve new Undertakings provided by Union Gas Limited, Centra Gas Utilities Inc., Centra Gas Holdings Inc., Westcoast Gas Inc., Westcoast Gas Holdings Inc. and Westcoast Energy Inc. and by The Consumers' Gas Company Ltd., Enbridge Consumers Energy Inc., 311594 Alberta Ltd., Enbridge Pipelines (NW) Inc. and Enbridge Inc.(the "New Undertakings");

NOW THEREFORE the New Undertakings, attached hereto, are accepted and approved.

Recommended _____
Minister of Energy, Science & Technology

Concurred _____
Chair of Cabinet

Approved & Ordered DEC 9 - 1998
Date

_____
Lieutenant Governor

O.C./Décret 2865/98

Ontario Energy Board
FILE No. EB-2008-0304
EXHIBIT No. K. 1. 2
DATE NOV 7/2008

/99

UNDERTAKINGS OF UNION GAS LIMITED,

CENTRA GAS UTILITIES INC., CENTRA GAS HOLDINGS INC.,

WESTCOAST GAS INC., WESTCOAST GAS HOLDINGS INC.,

WESTCOAST ENERGY INC.

TO: Her Honour The Lieutenant Governor in Council for the Province of Ontario

WHEREAS Centra Gas Utilities Inc. holds all the issued and outstanding common shares of Union Gas Limited ("Union");

AND WHEREAS Centra Gas Holdings Inc. holds all the issued and outstanding common shares of Centra Gas Utilities Inc.;

AND WHEREAS Westcoast Gas Inc. holds all the issued and outstanding common shares of Centra Gas Holdings Inc.;

AND WHEREAS Westcoast Gas Holdings Inc. holds all the issued and outstanding common shares of Westcoast Gas Inc.;

AND WHEREAS Westcoast Energy Inc. holds all the issued and outstanding common shares of Westcoast Gas Holdings Inc. ("Westcoast");

the above named corporations do hereby agree to the following undertakings:

1.0 Definitions

In these undertakings,

1.1 "Act" means the *Ontario Energy Board Act, 1998*;

1.2 **"affiliate"** has the same meaning as it does in the *Business Corporations Act*;

1.3 **"Board"** means the Ontario Energy Board;

1.4 **"business activity"** has the same meaning as it does under the Act or a regulation made under the Act; and

1.5 **"electronic hearing"**, **"oral hearing"** and **"written hearing"** have the same meaning as they do under the *Statutory Powers Procedure Act*.

2.0 Restriction on Business Activities

2.1 Union shall not, except through an affiliate or affiliates, carry on any business activity other than the transmission, distribution or storage of gas, without the prior approval of the Board.

3.0 Maintenance of common equity

3.1 Where the level of equity in Union falls below the level which the Board has determined to be appropriate in a proceeding under the Act or a predecessor Act, Union shall raise or Westcoast and its affiliates shall provide within 90 days, or such longer period as the Board may specify, sufficient additional equity capital to restore the level of equity in Union to the appropriate level.

3.2 Any additional equity capital provided to Union by Westcoast or its affiliates sh provided on terms no less favourable to Union than Union could obtain directly capital markets.

4.0 **Head Office**

4.1 The head office of Union shall remain in the Municipality of Chatham-Kent.

5.0 **Prior Undertakings**

5.1 These undertakings supersede, replace and are in substitution for all prior underta Union, Westcoast and their affiliates.

6.0 **Dispensation**

6.1 The Board may dispense, in whole or in part, with future compliance by any of th signatories hereto with any obligation contained in an undertaking.

7.0 **Hearing**

7.1 In determining whether to grant an approval under these undertakings or a dispens under Article 6.1, the Board may proceed without a hearing or by way of an oral, or electronic hearing.

8.0 **Monitoring**

8.1 At the request of the Board, Union, Westcoast and their affiliates will provide to th Board any information the Board may require related to compliance with these undertakings.

9.0 **Enforcement**

9.1 The parties hereto acknowledge that there has been consideration exchanged for the receipt and giving of the undertakings and agree to be bound by these undertakings.

9.2 Any proceeding or proceedings to enforce these undertakings may be brought and enforced in the courts of the Province of Ontario and Westcoast, Union and their affiliates hereby submit to the jurisdiction of the courts of the Province of Ontario in respect of any such proceeding.

9.3 For the purpose of service of any document commencing a proceeding in accordance with Article 9.2, it is agreed that Union is the agent of Westcoast and its affiliates and that personal service of documents on Union will be sufficient to constitute personal service on Westcoast and its affiliates.

10.0 **Release from undertakings**

10.1 Westcoast, Union and their affiliates are released from these undertakings on the day that Westcoast no longer holds, either directly or through its affiliates, more than 50 per cent of the voting securities of Union or on the day that Union sells its gas transmission and gas distribution systems.

11.0 **Effective Date**

11.1 These undertakings become effective on March 31, 1999.

5

DATED this 7th day of December, 1998.

UNION GAS LIMITED

by _____

CENTRA GAS UTILITIES INC.

by _____

CENTRA GAS HOLDINGS INC.

by _____

WESTCOAST GAS INC.

by _____

WESTCOAST GAS HOLDINGS INC.

by _____

WESTCOAST ENERGY INC.

by _____

Appendix “D”

To Decision and Order

Dated: November 19, 2008

Letters by Union Gas Limited and Westcoast Energy Inc. acknowledging Limited Partnership as an Affiliate

uniongas

A Spectra Energy Company

November 12, 2008

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

Dear Ms. Walli:

Re: EB-2008-0304

The Ontario Energy Board has asked Union Gas Limited ("Union") to provide certain assurances in connection with the Application in EB-2008-0304 (Transcript, November 7, 2008, p.108, lines 21-25).

Union confirms by this letter that the general partner and limited partnership to be formed to hold Union's voting shares, as described in the Application, will be considered "affiliates" for the purpose of Undertakings given by Union to the Lieutenant Governor in Counsel dated December 7, 1998 and accepted by Order In Council December 9, 1998.

Yours truly,

M. Richard Birmingham
Vice President, Finance and Regulatory Affairs

Spectra Energy Transmission
P.O. Box 11162
Suite 1100, 1055 West Georgia Street
Vancouver, BC V6E 3R5

November 11, 2008

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

Dear Ms. Walli:

Re: EB-2008-0304

The Ontario Energy Board has asked Westcoast Energy Inc. ("WEI") to provide certain assurances in connection with the Application in EB-2008-0304 (Transcript, November 7, 2008, p.108, lines 21-25).

WEI confirms by this letter that the general partner and limited partnership to be formed to hold Union's voting shares, as described in the Application, will be considered "affiliates" for the purpose of Undertakings given by WEI to the Lieutenant Governor in Counsel dated December 7, 1998 and accepted by Order In Council December 9, 1998.

Yours truly,

WESTCOAST ENERGY INC.,
a Spectra Energy Company

Bruce E. Pydee,
Vice President, Regulatory Affairs
and General Counsel