ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, c. 15, Sched. B;

AND IN THE MATTER OF an application by Hydro One Networks Inc. for authority to expropriate land for the purpose of an electricity transmission line in the City of Port Colborne;

WRITTEN ARGUMENT-IN-CHIEF OF HYDRO ONE NETWORKS INC.

July 25, 2025

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PART I - OVERVIEW

1. Hydro One Networks Inc. ("**Hydro One**")[1] owns and operates the 115 kilovolt C2P and A6C transmission lines (the "**Existing Transmission Lines**") on certain lands owned by the intervenors, Nyon Oil Inc. and 1170367 (together, "**Nyon**") (the "**Lands**"). These lines are a key part of the IESO-controlled grid and run adjacent to the Welland Canal near the City of Port Colborne. The full route of the Existing Transmission Lines starts at the Allanburg and/or Crowland Transformer Stations and runs south to the Port Colborne Transformer Station.[2] Along this route, the Existing Transmission Lines supply power to industrial customers and local distribution companies serving residential and commercial customers in the area.

2. Pursuant to section 99 of the *Ontario Energy Board Act, 1998* ("***OEB Act***"),[3] Hydro One seeks the authority to expropriate certain interests in the Lands where the Existing Transmission Lines are located.[4] Alternatively, Hydro One asks the OEB to grant any other relief it considers necessary and in the public interest to ensure the continued safe and reliable operation of the IESO-controlled transmission grid, including the Existing Transmission Lines.

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[1] Given the extended period covered by the issues in this proceeding, several predecessors of Hydro One were involved in the relevant events. In these submissions, the term 'Hydro One' encompasses Hydro One and its predecessors.

[2] Appendix 1 to Exhibit A-1-1 (map); Appendices 2A and 2B (detailed areal maps).

[3] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 99.

[4] The Lands are more particularly described and shown in the plans attached to Exhibit A-1-1, and are listed in Appendix 6 thereto. Please note that due to recent consolidation of certain PINs, Hydro One will prepare an updated Appendix 6 for the Board's ease of reference.

PART II - BACKGROUND

A. Original Transmission Lines

3. In the 1920s and 1930s, pursuant to the *Power Commission Act*, Hydro One entered into a series of easements allowing it to erect and maintain lines to transmit power in the Port Colborne area. Hydro One then constructed transmission lines pursuant to the land rights it had secured. Of particular importance in this application, Hydro One constructed what are now known as the C2P and A6C transmission lines. The original lines remained in operation without disturbance until the 1960s.

B. Relocation of the Transmission Lines for Welland Canal Expansion

4. In the 1960s, the St. Lawrence Seaway Authority (the "**Seaway Authority**"), a federal agency, expropriated certain land to realign the Welland Canal. The Seaway Authority did so pursuant to an Order in Council dated December 2, 1965, which authorized it to undertake immediate expropriation "for the purposes of the diversion of the southerly section of the Welland Canal".[5]

5. The land expropriated by the Seaway Authority included the land that contained the original transmission lines. Because the original transmission lines were in the path of the new canal route, Hydro One would be required to move them when the canal realignment was undertaken.

[5] Exhibit I-1-1-1 (P.C. 1965-2174 dated December 2, 1965).

a. The Master Agreement

6. Hydro One and the Seaway Authority entered into an October 1969 agreement (the "**Master Agreement**")[6] to authorize the continued operation of the original transmission lines, and to facilitate their relocation when necessary to accommodate the construction of the realigned canal.

7. The preamble to the Master Agreement provides, in part:

> WHEREAS the Authority, as part of the deep waterway between Montreal and Lake Erie, operates and maintains the Welland Canal;
>
> AND WHEREAS the Commission [i.e., the Hydro-Electric Power Commission of Ontario] operates and maintains power lines and electricity supply facilities in the Counties of Lincoln and Welland;
>
> AND WHEREAS the Authority is relocating its channel between Port Robinson and Port Colborne and has expropriated lands on which ***the Commission's power lines and electricity supply facilities*** are presently operated and maintained; […][7]

8. The Master Agreement confirms that "the power lines and electrical supply facilities" continued to be owned by Hydro One. For example, section 1.1 of the Master Agreement provides that Hydro One would be required to prepare an estimate of the cost of relocating "***its*** power lines and electrical supply facilities" (emphasis added).[8] Section 2.4 provides that in the event that Hydro One's power lines and electrical supply facilities were relocated, Hydro One was only responsible for paying the cost of betterments or improvements to "***its***" power lines or electrical supply facilities.[9]

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[6] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969).

[7] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, preamble) (emphasis added).

[8] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, section 1.1) (emphasis added).

[9] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, section 2.4) (emphasis added).

9. Section 5 of the Master Agreement confirms that Hydro One has the right to operate "***its***" power lines and electricity facilities rent free and in perpetuity:

> In lieu of all rights and privileges hitherto enjoyed by the Commission within the expropriated area ***the Authority shall grant free of rental to the Commission the right and privilege to maintain and operate its power lines and electricity supply facilities*** across the relocated channel and equivalent lands as more particularly set out in an agreement supplemental hereto.[10]

10. Finally, section 7 provided that the Master Agreement may be supplemented by subsequent agreements "as exigencies may hereinafter require".[11]

b. The Relocation of the Original Transmission Lines

11. Between approximately 1967 and 1973, the original transmission and distribution lines were fully or partially rebuilt pursuant to the Master Agreement. In particular:

(a) The C2P was entirely rebuilt within a wholly new alignment extending north from Concession Road 3, paralleling the A6C and consolidated north of Concession 4 at C2P17 Jct with the A6C ("B" to "C").

(b) The A6C was rebuilt north of Concession 4 commencing at Structure 17 (C2P17 Jct) ("C" to "A"). The section of line south of Structure 17 to Concession Road 3 remained unaffected ("D" to "C").

(c) The distribution lines were rebuilt between Concession 3 and Concession 4, before crossing the Welland Canal in a new duct bank ("H" to "G").[12]

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[10] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, section 5) (emphasis added). The "Authority" referred to is St. Lawrence Seaway. The "Commission" is the predecessor to Hydro One.

[11] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, section 7).

[12] Exhibit I-1-1, p 2, response a).

c. Subsequent Agreements

12. As contemplated by the Master Agreement, the Seaway Authority and Hydro One entered into a "Supplemental Agreement" on June 1, 1976 to permit Hydro One to "maintain, operate and/or renew" the transmission infrastructure.[13] The preamble to the Supplemental Agreement provides, in part:

> AND WHEREAS the Authority has relocated its channel between Port Robinson and Port Colborne and has expropriated ***lands on which the Company's power transmission lines and electricity supply facilities are operated and maintained***;
>
> …
>
> AND WHEREAS by virtue of Agreement G-73-1 Clause 5 [i.e., Master Agreement, section 5] in lieu of all rights and privileges heretofore enjoyed by the Company within the expropriated area ***the Authority did agree to grant free of rental to the Company the right and privilege to maintain and operate its existing transmission lines and electricity supply facilities as replaced and relocated*** across the Authority's relocated channel…;[14]

13. In section 1 of the Supplemental Agreement, the Seaway Authority granted to Hydro One "free of rental and in perpetuity, the right and privilege to maintain, operate and/or renew" certain power transmission lines.[15] The Seaway Authority also agreed that prior to selling, transferring or disposing of the lands on which Hydro One's rights and privileges are located, it shall give notice of the transaction to Hydro One and give notice of Hydro One's rights and privileges to the transferee.[16]

14. On April 4, 1977, the Seaway Authority and Hydro One entered into a license agreement to permit Hydro One to "erect, maintain, operate and/or renew" a 115 kV electrical transmission

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[13] Appendix 2D to Exhibit A-1-1 (Supplemental Agreement dated June 1, 1976).

[14] Appendix 2D to Exhibit A-1-1 (Supplemental Agreement dated June 1, 1976, preamble) (emphasis added).

[15] Appendix 2D to Exhibit A-1-1 (Supplemental Agreement dated June 1, 1976, section 1).

[16] Appendix 2D to Exhibit A-1-1 (Supplemental Agreement dated June 1, 1976, section 3).

line across the Welland Canal in Lots 17 and 18, Concession 5, for rent of $75 per year.[17] The license agreement clearly contemplates that the electrical transmission line would remain the property of Hydro One. Section 10 of this license agreement permitted either party to terminate the agreement with notice (the Master Agreement and Supplemental Agreement do not contain any termination provisions).[18] Upon termination, section 11 required the Licensee (i.e., Hydro One) to "remove ***his*** property" from the Licensor's land, or else the Licensor may remove it at the Licensee's expense "or, at the option of the Licensor, said property shall become the property of and shall vest in the Licensor…".[19] This is clear evidence of the parties' intention that the electricity transmission infrastructure would be Hydro One's property, which only "vests" in the Licensor, the Seaway Authority, if certain conditions precedent are met.

C. The Existing Transmission Lines

15. Since being relocated between 1967 and 1973, the Existing Transmission Lines have remained in place and have been owned, inspected, operated, and maintained by Hydro One.[20]

16. Today, the Existing Transmission Lines are an integral part of Hydro One's transmission system, transmitting electricity from the Sir Adam Beck No. 1 and No. 2 Generating Stations in Niagara Falls, Ontario, to large industrial load and local electricity distribution connected residential and commercial customers in the Port Colborne and Welland area. Hydro One estimates that 37,000 residents of Port Colborne rely on the Existing Transmission Lines to provide electricity.[21]

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[17] Appendix 2E to Exhibit A-1-1 (License Agreement dated April 4, 1977).

[18] Appendix 2E to Exhibit A-1-1 (License Agreement dated April 4, 1977, section 10).

[19] Appendix 2E to Exhibit A-1-1 (License Agreement dated April 4, 1977, section 11).

[20] See Hydro One response to interrogatory OEB – 04, and attachments thereto. See also paragraph 45, below.

[21] Exhibit I-2-11, response a).

D. Subsequent Transfers of the Lands

a. Transfer to the City of Port Colborne

17. On May 10, 2005 and December 13, 2005, the Canada Lands Company CLC Limited ("**Canada Lands Company"**), a federal body that was then titleholder of the Lands, sold the Lands to the Corporation of the City of Port Colborne (the "**May 2005 APS**" and the "**December 2005 APS**", respectively).[22]

18. Section 4 in each of the May 2005 APS and the December 2005 APS confirmed that the City of Port Colborne agreed to accept title subject to:

> (i) all registered or unregistered agreements with municipalities and publicly or privately regulated utilities; (ii) all registered or unregistered easements, rights, covenants and/or restrictions in favour of municipalities, publicly or privately regulated utilities or adjoining owners, or that otherwise run with the land; (iii) any encroachments as may be revealed by Schedule A-2 or by an up-to-date survey; and (iv) the Permitted Encumbrances set out in Schedule "C".[23]

19. Therefore, while the lands were subject to certain "Permitted Encumbrances" listed in Schedule "C", they were also subject to interests that were ***not*** enumerated in Schedule "C" (i.e., points (i), (ii), and (iii) in section 4 of the APS, quoted above). In any event, Schedule "C" to the May 2005 APS, which listed the Permitted Encumbrances, included the April 1977 License Agreement between the Seaway Authority and Hydro One.[24] Schedule "C" to the December 2005

[22] Appendix 13 to Nyon's Evidence (Agreement of Purchase and Sale dated May 10, 2005); Appendix 12 to Nyon's Evidence (Agreement of Purchase and Sale dated December 13, 2005).

[23] Appendix 13 to Nyon's Evidence (Agreement of Purchase and Sale dated May 10, 2005, section 4); Appendix 12 to Nyon's Evidence (Agreement of Purchase and Sale dated December 13, 2005, section 4).

[24] Appendix 13 to Nyon's Evidence (Agreement of Purchase and Sale dated May 10, 2005, Schedule C).

APS included Instrument No. 12470 registered January 5, 1931, which is the grant of easement from Charles C. Phillips to Hydro One's predecessor.[25]

20. In section 6 of the May 2005 APS and the December 2005 APS, the parties agreed that "no fixtures, building or chattels are included in the Purchase Price."[26] As discussed below, this provision makes clear that, even if Nyon's legal arguments regarding the expropriation of assets by the Seaway Authority were correct and the Existing Transmission Lines were treated as fixtures that were expropriated, the City of Port Colborne did not acquire title to any of the Existing Transmission Lines pursuant to the May 2005 APS or the December 2005 APS and never could have transferred title of those assets to Nyon.

21. Hydro One became aware of the transfers to the City of Port Colborne on or about February 26, 2013.[27] The issue arose at a scheduled Ontario Municipal Board hearing to finalize Official Plan and Zoning By-Law amendments. Although the Supplemental Agreement required notice to be given to Hydro One of any transfers of the lands, no such notice was given by the Canada Lands Corporation when it transferred the lands to the City of Port Colborne.

b. Transfer to Nyon

22. The City of Port Colborne subsequently sold the Lands to Nyon Energy Corp., a predecessor of Nyon, in January 2006 (the "**January 2006 APS**").[28] The January 2006 APS provided a Purchase Price of $1.00 for the Lands, with additional annual payments to follow.[29]

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[25] Appendix 12 to Nyon's Evidence (Agreement of Purchase and Sale dated December 13, 2005, Schedule C).

[26] Appendix 12 to Nyon's Evidence (Agreement of Purchase and Sale dated December 13, 2005, section 6).

[27] Exhibit I-1-2(a) and (b) (Hydro One response to interrogatory OEB – 02).

[28] Appendix 14 to Nyon's Evidence (Agreement of Purchase and Sale dated January 30, 2006).

[29] Appendix 14 to Nyon's Evidence (Agreement of Purchase and Sale dated January 30, 2006, sections 1 and 10; see Schedule A-1 thereto for the legal description of the Lands).

23. The January 2006 APS was conditional on a number of matters, including Zoning and Official Plan amendments to accommodate Nyon's proposed "Energy Park" development. The January 2006 APS finally closed on May 1, 2015.[30]

24. As noted above, on February 26, 2013, Hydro One learned of the transfer between the City of Port Colborne and Nyon. Despite the notice requirements in the Supplemental Agreement, the City of Port Colborne did not give notice to Hydro One at the time that it entered the January 2006 APS with Nyon.[31] Hydro One understands that the City of Port Colborne's usual practice and expectation is that the purchaser (in this case, Nyon) would complete the draft Notice and Direction provided by the City and then provide the completed document to Hydro One. This had not occurred in this case. Hydro One contacted the City of Port Colborne shortly after learning of the transaction, but a resolution could not be reached because the conditional January 2006 APS had already been executed.

25. Hydro One then contacted Nyon and sought, initially through the Ontario Municipal Board process and subsequently through discussions, to resolve the matter.[32] Nyon and Hydro One engaged in an extensive negotiation, contemplating that Nyon would grant Hydro One easements for its Existing Transmission Lines and that Nyon would construct a proposed petroleum and biofuel storage tank farm set back from the Existing Transmission Lines.[33] These negotiations were ultimately unsuccessful.

[30] See Appendices 9-14 of Nyon's responses to interrogatories, showing the transfer from the City of Port Colborne to Nyon for $1 on May 1, 2015. See also Nyon response to interrogatory HONI – 08(a).

[31] Exhibit I-1-2(a) and (b) (Hydro One response to interrogatory OEB – 02).

[32] Exhibit I-1-2(c) (Hydro One response to interrogatory OEB – 02).

[33] Exhibit I-1-2(c) (Hydro One response to interrogatory OEB – 02).

26. On September 22, 2015, Nyon wrote to Hydro One and asserted its position that Hydro One does not have the right to occupy the Lands in question.[34] Nyon served Hydro One with a Notice to Pay or Quit and a Notice to Remove, and purported to terminate the agreements and licenses pursuant to which Hydro One had operated, maintained and renewed the Existing Transmission Lines since their relocation decades earlier.

27. Through counsel, Hydro One and Nyon agreed to hold Nyon's September 22, 2015, letter and notices "in abeyance" pending the resolution of the dispute between them. Over the subsequent months, correspondence was exchanged between counsel, culminating in Hydro One's final letter to Nyon on December 9, 2015, to which Nyon did not respond.[35]

c. Transfers to Third Parties

28. Nyon no longer owns much of the land it originally acquired from the City of Port Colborne.[36] Nyon has only retained ownership of the Lands on which the Existing Transmission Lines are located.

E. Nyon Commences Legal Proceedings and Threatens the Operation of the Existing Transmission Lines in the Public Interest

29. On February 21, 2024, Nyon initiated legal proceedings against Hydro One.[37] In its litigation, Nyon seeks, among other things, a permanent injunction preventing Hydro One from accessing Nyon's Lands for the purpose of "constructing, operating, maintaining or renewing" the Existing Transmission Lines, and a declaration that Hydro One's "use, maintenance and

[34] Appendix 2F to Exhibit A-1-1 (Letter from Nyon dated September 22, 2015).
[35] Appendix 2G to Exhibit A-1-1 (Letter from Hydro One dated December 9, 2015).
[36] Appendix 3 to Exhibit A-1-1 (map of divested lands).
[37] Appendix 28 to Nyon's Evidence (Notice of Action dated February 21, 2024).

operation" of the Existing Lines is a trespass. Nyon also seeks a declaration that the Master Agreement, Supplemental Agreement and "Feeder Line Licence" are terminated.

30. On November 29, 2024, Nyon served Hydro One with a "Notice of Trespass" and advised that Hydro One is "not to access our clients' property for any purpose, whatsoever. Any breach of this will be relied on as evidence of [Hydro One's] ongoing intentional disregard of [Nyon's] property rights."[38] Hydro One confirmed its position that access through Nyon's property is permitted under section 40 of the *Electricity Act, 1998*.[39] Nevertheless, Hydro One employees have not attempted to access Nyon's property since receipt of the Notice of Trespass.[40]

31. Negotiations with Nyon remain at an impasse, as the differences between the parties are irreconcilable.[41]

PART III - ISSUES

32. In Procedural Order No. 2 dated July 16, 2025, the Board identified the following main issues to be decided on this application:

(a) Who owns the subject transmission facilities?

(b) If Hydro One does, did it lose its original easements when the federal government expropriated land for a canal?

(c) If Hydro one did lose the original easements, were they replaced by other rights that continue to exist?

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[38] Exhibit I-1-5(b) (Hydro One response to interrogatory OEB – 05).
[39] *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, s. 40 [*Electricity Act, 1998*].
[40] Exhibit I-1-5(b) (Hydro One response to interrogatory OEB – 05).
[41] Exhibit I-1-6 (Hydro One response to interrogatory OEB – 06).

(d) If not, is it in the public interest for the Board to grant them authority to expropriate new easements?

33. The Board advised that in setting out the main issues to be decided, it does not intend to "limit the right of the parties to make submissions on all relevant issues". In addition to the main issues identified by the Board, Hydro One addresses the following further issues:

(a) The Board's jurisdiction to grant the relief sought; and

(b) Nyon's allegations of misrepresentation and bad faith.

PART IV - SUBMISSIONS ON ISSUES

A. Issue 1: Hydro One owns the Existing Transmission Lines

34. Hydro One owns the Existing Transmission Lines. Nyon's arguments to the contrary lack a legal or factual basis.

a. Hydro One constructed the original transmission lines

35. In the 1920s and 1930s, Hydro One secured land rights necessary to construct the original transmission lines, and then constructed the original transmission lines pursuant to authorization under the *Power Commission Act*.[42] There is no dispute that Hydro One continued to own the original transmission lines until 1965.

b. The Seaway Authority agreed that Hydro One continued to own the original transmission lines after expropriation

36. In 1965, the Seaway Authority expropriated certain land in order to expand the Welland Canal. After expropriation, the Seaway Authority entered into multiple agreements with Hydro

[42] See I-01-01. Page 3, Answer d).

One that confirmed the Seaway Authority's understanding that Hydro One continued to own the transmission infrastructure located on the expropriated land.

37. In particular, the Master Agreement and Supplementary Agreement repeatedly refer to Hydro One's predecessor's rights vis-à-vis ***its*** transmission infrastructure. This confirms that the parties to the Master Agreement and the Supplementary Agreement were *ad idem* and understood the electricity infrastructure to belong to Hydro One's predecessor.

38. In its responses to interrogatories, Nyon makes technical arguments about the meaning of the possessive pronoun "its" by parsing through the agreements and reading provisions out of context. For example, Nyon fixates on section 4.1 of the Master Agreement, which provides:

> The Authority shall grant to the Commission permission to enter upon ***its lands*** for the purposes of relocation and restoration of ***its said power lines and electricity supply facilities***.[43]

39. Nyon says that the first "its" (that is, "its lands") refers to the lands owned by the Authority and, therefore, the second "its" (that is, "its said power lines and electricity supply facilities") must also mean those of the Authority. Nyon's interpretation ignores the context in which section 4.1 appears in the Master Agreement, and the grammatical structure of the surrounding provisions. The language of "***its said*** power lines" is a reference to the ***aforementioned*** power lines, for example:

(a) Section 1.1 ("The Commission shall … estimate the cost of relocating ***its*** power lines…");

[43] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, section 4.1) (emphasis added). See Nyon's response to interrogatory HONI – 01.

(b) Section 2.2 ("If the Commission is required to effect a temporary relocation of any of ***its*** power lines…");

(c) Section 2.4 ("…The Commission shall pay only for those betterments or improvements to ***its*** power lines…"); and

(d) Section 3.1(a) ("the costs incurred by the Commission in removing and relocating ***its*** power lines").[44]

40. Nyon also argues that the Master Agreement and Supplemental Agreement are silent on the question of ownership, and this must mean that ownership of the Existing Transmission Lines is vested in the Seaway Authority.[45] There is no basis for this assertion. Nyon is correct that the parties to these agreements were sophisticated.[46] Such sophisticated parties are aware of applicable laws, and would have been aware of section 45 of the *Power Commission Act*, R.S.O. 1960, c. 300, the predecessor to section 44 of the *Electricity Act, 1998* that was then in effect. As discussed further below, section 44 of the *Electricity Act, 1998* and its substantially similar predecessor statutes are a complete answer to Nyon's claims of ownership, and fully explain why the parties did not need to expressly state that the Existing Transmission Lines were owned by Hydro One. This was an obvious point.

41. In its responses to interrogatories, Nyon also asserts that the agreements and licenses listed in Schedule "C" to the May 2005 APS (by which the Canada Lands Corporation sold lands to the City of Port Colborne) were "extinguished" by the January 2006 APS (by which the City of

[44] Appendix 2D to Exhibit A-1-1 (Master Agreement dated October 6, 1969, sections 1.1, 2.2, 2.4, and 3.1(a)) (emphasis added).

[45] Nyon response to interrogatory HONI – 01.

[46] Nyon response to interrogatory HONI – 01.

Port Colborne sold the Lands to Nyon).[47] Nyon's assertion appears to be based on a conflation of the "as is, where is" provision and the entire agreement clause in the January 2006 APS. The "as is, where is" clause contains the seller's disclaimer of any representations and warranties about the Lands, and fully allocates the risk of the Lands' title, encumbrances, description, and so on to Nyon:

> **"AS IS, WHERE IS"**: The Purchaser acknowledges and agrees that it is acquiring the Property on an "as is, where is" basis without any representations or warranties, expressed or implied, as to title, encumbrances, description, condition (physical, environmental or otherwise), cost, size, merchantability or fitness for purpose, quantity or quality thereof, the existence or non-existence of any hazardous materials, compliance with any or all environmental laws or in respect of any matter or thing whatsoever concerning the Property and the Project. The Purchaser acknowledges and agrees that it is responsible to satisfy itself and is relying solely upon its own inspections and investigations with respect to the Property and the Project.[48]

42. The phrase "no representation, warranty or collateral agreement which affects this Agreement", on which Nyon relies,[49] appears in the entire agreement clause:

> **AGREEMENT IN WRITING:** This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between the Purchaser and the Vendor. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein. This Agreement shall be read with all changes of gender or number required by the context.[50]

43. This clause does not "extinguish" the operation of the Master Agreement or the Supplemental Agreement. Instead, the language of this clause simply limits the terms of the agreement of purchase and sale between the City of Port Colborne and Nyon to those reduced

[47] Nyon response to interrogatory HONI – 02.

[48] Appendix 14 to Nyon's Evidence (Agreement of Purchase and Sale dated January 30, 2006, section 9).

[49] Nyon response to interrogatory HONI – 02. Nyon response to interrogatory OEB – 3(c).

[50] Appendix 14 to Nyon's Evidence (Agreement of Purchase and Sale dated January 30, 2006, section 25).

to writing in the January 2006 APS, and excludes any pre-contractual representations made between the parties prior to the execution of the January 2006 APS.

c. The original transmission lines were moved by Hydro One between 1967 and 1973

44. After the expropriation by the Seaway Authority was complete, the original transmission lines were fully or partially rebuilt by Hydro One pursuant to the Master Agreement. Contemporaneous documentation confirms that Hydro One was responsible for the relocation of the transmission lines. In accordance with the terms of the Master Agreement, the Seaway Authority paid for the relocation, but Hydro One paid 25% of the cost of C2P because there was a "betterment" and, in accordance with the terms of the Master Agreement, the cost of any betterment was the responsibility of Hydro One.[51]

d. Hydro One has since taken all actions consistent with ownership including inspection, repair, and maintenance of the Existing Transmission Lines

45. The documentary evidence demonstrates that Hydro One has taken various actions attendant with ownership, such as inspecting,[52] maintaining,[53] and replacing[54] the Existing Transmission Lines. Hydro One has replaced components of the Existing Transmission Lines

[51] Exhibit I-1-4(a) (Hydro One response to interrogatory OEB – 04). See also Exhibit I-1-4-1 (the attachments to Hydro One response to interrogatory OEB – 04): HON000167 (Work Order dated June 10, 1971) and HON000168 (Field Report dated May 14, 1971).

[52] Exhibit I-1-4-1 (attachments to Hydro One response to interrogatory OEB – 04): HON000084 (Conductor Examination and Test Results dated July 24, 2014), HON000094 (Pole Test and Treat Data dated May 21, 1992), and HON000186 (list of work orders dated August 2015 to October 2022).

[53] Exhibit I-1-4-1 (attachments to Hydro One response to interrogatory OEB – 04: HON000095 (Field Instruction dated May 10, 2000), HON000187 (forestry maintenance record dated 2012), and HON000188 (forestry maintenance record dated 2016).

[54] Exhibit I-1-4-1 (attachments to Hydro One response to interrogatory OEB – 04): HON000093 (C2P replacement details dated August 2015), HON000096 (Instruction Order and Work Report dated February 2, 1995), HON000098 (Detailed Work Specification dated June 24, 1992), and HON000101 (Image titled 2017 Pole Replacement). See also Exhibit I-2-4-1 (Community Notice re Wood Pole Replacement dated September 25, 2010), attachment to Hydro One response to interrogatory Nyon – 06).

through its system renewal efforts with respect to towers, foundations, shield-wire and/or insulators along the circuits, and as driven by emergency restorations if necessary.[55] The Existing Transmission Lines have, since the time of their initial construction, continued to be operated and maintained by Hydro One as part of its overall transmission system. In a very real sense, most of the Existing Transmission Lines, which Nyon claims it owns, have been replaced since they were originally affixed to the Lands.

46. In its responses to interrogatories, Nyon concedes that Hydro One has operated the Existing Transmission Lines "safely and effectively for decades".[56] Hydro One's ongoing operation and maintenance of the Existing Transmission Lines is consistent with its obligation under section 5.2.1 of the Transmission System Code to:

> operate and maintain its transmission facilities in compliance with this Code, its licence, its operating agreement with the IESO, the Market Rules, all connection agreements, good utility practice, the standards of all applicable reliability organizations and any applicable law.[57]

47. No agreement was ever in place to provide these services for any other owner but Hydro One or its predecessors.[58] The Existing Transmission Lines have never been operated or maintained by anyone other than Hydro One or its predecessors.[59]

48. The Existing Transmission Lines are covered by Hydro One's Transmission License from the Board, ET-2003-0035, and are explicitly identified in Schedule 1 to the License, which defines

[55] Exhibit I-1-2-4 (Hydro One response to interrogatory Nyon – 04).
[56] Nyon response to interrogatory HONI – 05(d).
[57] Transmission System Code, section 5.2.1 (online).
[58] Exhibit I-1-4(a)(1) (Hydro One response to interrogatory OEB – 04).
[59] Exhibit I-1-5(a) (Hydro One response to interrogatory OEB – 05).

Hydro One's transmission system network.[60] Hydro One is the only transmitter licensed to own, operate and maintain the Existing Transmission Lines.

49. In addition, the Existing Transmission Lines form part of Hydro One's rate base and corresponding revenue requirement. Hydro One's revenue requirement seeks recovery of costs associated with facilities it owns, operates, and/or maintains that are necessary to serve the public.[61] Hydro One's most recent revenue requirement application explicitly identifies the Existing Transmission Lines (A2C and C2P).[62]

e. There is no legal basis for Nyon's claim of ownership because the original transmission lines were not part of the land that was expropriated

50. Nyon's claim that it owns the Existing Transmission Lines relies entirely on a faulty legal assumption – that the original transmission lines were part of the "realty" that was expropriated by the Seaway Authority in 1965. They were not, and Nyon therefore does not have a tenable ownership claim.

51. Section 44 of the *Electricity Act, 1998* provides:

> Despite any other Act, if property of a transmitter or distributor has been affixed to realty, the property remains subject to the rights of the transmitter or distributor as fully as it was before being so affixed and does not become part of the realty unless otherwise agreed by the transmitter or distributor in writing.[63]

52. Nyon accepts that as a consequence of this section of the *Electricity Act*, "[a]ny newly constructed transmission lines that were paid for and constructed by Hydro One … after October

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[60] Exhibit I-1-4(a) and Exhibit I-1-4-3 (Hydro One response to interrogatory OEB – 04 and Attachment 3 thereto).

[61] Exhibit I-1-5(c) (Hydro One response to interrogatory OEB – 05).

[62] Exhibit I-1-4-2 (Capital Program Performance Report – 2020).

[63] *Electricity Act, 1998*, s. 44.

30, 1998, are owned by Hydro One."[64] Nyon fixates on the October 1998 date because this is when the *Electricity Act* came into force, but substantively identical language has been in force since long before 1998 – and long before the expropriation of the land by the Seaway Authority in 1965.

53. The same statutory language existed in predecessor legislation that predates the enactment of the *Electricity Act, 1998*.[65] For example, *The Power Commission Act* (predecessor to the *Electricity Act, 1998*) in force in 1960 included the following language at section 45:

> Notwithstanding this Act or any other general or special Act, where works of the Commission have been affixed to realty they remain subject to the rights of the Commission as fully as they were before being so affixed and do not become part of the realty unless otherwise agreed by the Commission in writing.[66]

54. However, according to Nyon, "there is a presumption that fixtures are included in real property once they are affixed to it". This appears to be based on the general proposition that "[a]appurtenances and hereditaments affixed to the land are presumed to be fixtures and transfer with the land."[67] Even if such a presumption exists at law as a general matter, in this case, the presumption is rebutted entirely by section 44 of the *Electricity Act, 1998* and substantially similar predecessor legislation that was in force during the entire relevant time period.[68] Nyon admits as

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[64] Nyon response to interrogatory OEB – 04(a).

[65] Exhibit I-2-7 (Hydro One IRR to Nyon IR 7).

[66] *The Power Commission Act*, R.S.O. 1960, c. 300, at s. 45 (online) (enclosed as **Appendix 7**).

[67] Nyon response to interrogatory OEB – 01(a). The case Nyon cites in support of this proposition, *Soboczynski v. Beauchamp*, 2015 ONCA 282, does not speak to this issue at all. The sole issue in that case was whether a homebuyer's claim for negligent misrepresentation could be advanced against the seller despite the presence of an entire agreement clause in the agreement of purchase and sale. The Court of Appeal held that the representations were actionable notwithstanding the entire agreement clause in the circumstances of that case. However, because there was no evidence that the buyers relied on the representation, their claim failed.

[68] *An Act to Amend the Power Commission Act*, 1939, c. 35, s. 2 (enclosed as **Appendix 4**); *An Act to Amend the Power Commission Act*, 1944, c. 46, s. 4 (enclosed as **Appendix 5**); *Power Commission Act*, R.S.O. 1950, c. 281, s. 44(1) (enclosed as **Appendix 6**); *Power Commission Act*, R.S.O. 1960, c. 300, s. 45 (enclosed as **Appendix 7**); *Power Commission Act*, R.S.O. 1970, c. 354, s. 44 (enclosed as **Appendix 8**); *An Act to Amend the Power Commission Act*, 1973, c. 57, ss. 1-2 (enclosed as

much in respect of the *Electricity Act, 1998*, and there is no reason to interpret the substantively identical language in predecessor legislation differently. What Nyon has not explained is how its general presumption argument survives in the face of statutory language to the contrary.

55. The Legislature has spoken to ensure that even where "works of the Commission" or "property of a transmitter or distributor" has been affixed to realty, they do not become part of the realty or otherwise alter the Commission's (or transmitter's, or distributor's) right unless so agreed in writing. There are predictable reasons for the Legislature to make this policy decision and to ensure that property affixed to reality remains the property of the transmitter or distributor – this case highlights many of them. Nyon has sold all remaining property interests other than the Lands over which the Existing Transmission Lines are situated. It now seeks a windfall from its acquisition of the Lands on which transmission lines have been emplaced and operated for many decades. Nyon did not pay for the infrastructure — rate payers did — but Nyon now claims ownership, and seeks to force Hydro One (and ratepayers) to pay for the same infrastructure twice. Fortunately, the Legislature has foreclosed the possibility of this occurring by statute. The Board should give effect to the words of the *Power Commission Act* and find that Hydro One owns the Existing Transmission Lines.

56. In its responses to written interrogatories, Nyon states that it is "not aware whether Hydro One or its predecessors ever agreed in writing that the transmission infrastructure would not become part of the realty."[69] Hydro One or its predecessors never so agreed. Nyon bears the onus to show otherwise, if it intends to evade the consequences of section 45 of *The Power Commission Act*. Nyon has failed to discharge that onus.

Appendix 9); *Power Corporation Act*, R.S.O. 1980, c. 384, s. 43 (enclosed as **Appendix 10**); and *Electricity Act, 1998*, R.S.O. 1998, c. 15, Sched. A., s. 44.

[69] Nyon IRR to HONI – 06(b).

57. In its responses to written interrogatories, Nyon also argues that section 44 of the *Electricity Act* does not operate retroactively.[70] This is irrelevant and need not be decided by the Board. As discussed above, at the time that the Existing Transmission Lines were relocated to their current location in the 1960s, a legislative provision equivalent to section 44 of the *Electricity Act* was in effect.[71] Section 44 of the *Electricity Act* and its predecessors are a full answer to Nyon's claim that it owns the Existing Transmission Lines.

f. The doctrine of federal paramountcy does not apply

58. To evade the effects of section 45 of *The Power Commission Act* and similar legislation, including section 44 of the *Electricity Act*, Nyon makes a novel constitutional argument about the operability of this legislative provision. Nyon asserts that the constitutional doctrine of federal paramountcy prevents the operation of *The Power Commission Act* or the *Electricity Act* when land is expropriated by a federal body.[72] However, the doctrine of federal paramountcy does not apply because section 45 of *The Power Commission Act* is not inconsistent — as that term has been defined in constitutional jurisprudence — with the relevant provisions of the *Expropriation Act*, R.S.C. 1952, c. 106 or the *Seaway Authority Act*, R.S.C. 1952, c. 242.[73]

(i) The governing principles

59. The test for the application of federal paramountcy can be summarized as follows:

(a) ***First***, are the federal law and provincial law each validly enacted?

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[70] Nyon IRR to HONI – 02(d).

[71] *Power Commission Act*, R.S.O. 1960, c. 300, s. 45 (online) (enclosed as **Appendix 7**).

[72] Notice of Constitutional Question filed June 4, 2025.

[73] See Exhibits A-C of Nyon's Notice of Constitutional Question filed June 4, 2025, for the legislation.

(b) ***Second***, if so, is there an inconsistency between the two laws on the basis of either **(i)** an impossibility of dual compliance (sometimes referred to as an "operational conflict"); or **(ii)** a frustration of the federal law's purpose?[74]

60. If the laws are valid and inconsistent, then the provincial law is rendered inoperative to the extent of the inconsistency.[75] The burden of proof is on the party seeking to render the provincial law inoperative, and it is a high one:[76]

> Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws.[77]

61. The *Electricity Act*, the *Expropriation Act* and the *St. Lawrence Seaway Authority Act* are all validly enacted legislation. Nyon does not argue otherwise. The Board should presume that the first step of the paramountcy test is therefore satisfied. The key question, therefore, is whether there exists any "inconsistency" between the two laws because it is impossible to comply with both or there is a frustration of the federal law's purpose.

62. The paramountcy doctrine in Canadian law is based on the "presumption of constitutional validity" and the vision of cooperative federalism.[78] Courts will try to interpret provincial laws in a way that makes them valid and operable. If a law can be interpreted in two ways, one

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[74] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2017) at s. 16.1,16.3, 16.4, and 16.10 [Hogg], enclosed as **Appendix 12**, quoted in part in *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC) at 168.

[75] Hogg at s. 16.1,16.3, 16.4, and 16.10 (enclosed as **Appendix 12**)

[76] *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, at para. 85.

[77] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para 27.

[78] Hogg at s. 16.3 and s. 15.13 (enclosed as **Appendix 12**), citing *Nova Scotia Board of Censors v. McNeil*, 1978 CanLII 6 (SCC).

constitutional and one not, the court will choose the interpretation that upholds the law's constitutionality.[79] As a result, courts will only find a conflict between federal and provincial laws in limited situations, and even then, they will try to keep as much of the provincial law in effect as possible.

63. Laws may be inconsistent by virtue of an impossibility of dual compliance (i.e., operational conflict). This occurs when a person complying with one law would necessarily violate the other law. In other words, it is impossible to comply with both laws at the same time. The Supreme Court explained this clearly in *Multiple Access*:

> In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation, as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.[80]

64. Even in cases where there might seem to be a direct conflict, the court has narrowly interpreted the legislative schemes to try to find both schemes operable. For example, in *Murray-Hall v. Quebec*, the federal *Cannabis Act* granted permissive authority for individuals to own no more than four cannabis plants, while the provincial *Cannabis Regulation Act* prohibited the possession of any cannabis plants.[81] While this superficially seems to create the "yes/no" scenario contemplated in *Multiple Access*, the Supreme Court held that the laws were not in operational conflict because a person could comply with both laws by not possessing any cannabis plants.[82]

65. Courts have very rarely found true impossibility of compliance between federal and provincial laws. The few examples include conflicting orders of paying debts, conflicting laws on denying versus allowing Japanese citizens to work, conflicting court orders granting custody to

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[79] Hogg at s. 16.3 (enclosed as **Appendix 12**).

[80] *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC) at 191.

[81] *Murray-Hall* at paras 4-8.

[82] *Murray-Hall* at para. 87.

opposite parents, different requirements for the unit of measurement for a gas tax, and conflicting authority for who gets to determine the location of mailboxes.[83]

66. Here, there is no impossibility of dual compliance. The federal government can still expropriate real property without expropriating transmission lines affixed to that property. Indeed, that is exactly what actually happened here. The land was expropriated in 1965, the canal was realigned, the transmission lines were relocated, and at no point was there ever any impossible situation that prevented compliance with both statutes. To the contrary, the evidence shows that they were both complied with at all times. There was no trouble at all until 50 years later when Nyon acquired the Lands and demanded millions of dollars in payment for electricity infrastructure that it had no hand in constructing, relocating, operating, maintaining, or replacing.

67. Under the doctrine of federal paramountcy, even if compliance with a federal and a provincial law is technically possible, an inconsistency will be found if the provincial law frustrates the federal law's purpose. One of the key considerations under this branch of the paramountcy test is whether the legislation gives permissive authority for an act to occur, or prohibitory authority. Where an act is simply permitted by Parliament, and then regulated by provincial legislature, the courts have been unlikely to find a frustration of federal purpose.

68. For example, in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, the federal *Tobacco Act* allowed retailers to display tobacco brand elements and post signs indicating the availability of tobacco products, while the provincial *Tobacco Control Act* banned all advertising, display or promotion of tobacco products in any premises which allowed minors.[84] The Supreme Court held that the provincial law did not frustrate the federal law's purpose as both legislative schemes

[83] Hogg at s. 16.3 (enclosed as **Appendix 12**).

[84] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 at paras 2-6 [*Rothmans*].

sought to protect young people's health and prevent them from being induced to use tobacco products.[85]

69. As another example, in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, the federal *Bankruptcy and Insolvency Act* required a 10-day notice period before appointing a receiver, but the *Saskatchewan Farm Security Act* required 150-day notice and other processes to be followed before a receiver could be appointed. The Supreme Court held that Parliament's purpose of providing bankruptcy courts with the power to appoint a receiver was not frustrated by the procedural and substantive conditions set out in the provincial law. The Court explained:

> To prove that provincial legislation frustrates the purpose of a federal enactment, the party relying on the doctrine "must first establish the purpose of the relevant federal statute and then prove that the provincial legislation is incompatible with this purpose" Clear proof of purpose is required. ***The burden a party faces in successfully invoking paramountcy is accordingly a high one***; provincial legislation restricting the scope of permissive federal legislation is insufficient on its own … paramountcy must be applied with restraint. ***In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject***.[86]

(ii) *Nyon cannot establish any conflict between The Power Commission Act and the Expropriation Act or St. Lawrence Seaway Authority Act*

70. As noted above, the burden of proof is on Nyon to establish that the *Electricity Act* is inoperative by virtue of an inconsistency with the federal *Expropriation Act* or the *St. Lawrence Seaway Authority Act*. There is no burden of proof on Hydro One to prove the opposite. Nevertheless, it is clear that this case does not meet the high bar for the application of the federal paramountcy doctrine, and Nyon's argument to the contrary is without merit.

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[85] *Rothmans* at para 25.

[86] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 at paras 25-27 (emphasis added) [*Lemare Logging*].

71. The provincial law at issue is section 45 of *The Power Commission Act* and similar legislation, including the currently operative section 44 of the *Electricity Act*. For ease of reference, section 44 of the *Electricity Act* is, again, reproduced below:

> Despite any other Act, if property of a transmitter or distributor has been affixed to realty, the property remains subject to the rights of the transmitter or distributor as fully as it was before being so affixed and does not become part of the realty unless otherwise agreed by the transmitter or distributor in writing.[87]

72. Nyon asserts that this provincial law is inconsistent with two federal laws, and therefore inoperative. First, section 18(1) of the federal *St. Lawrence Seaway Authority Act* provides:

> 18. (1) With the prior approval of the Governor in Council, the Authority may, without consent of the owner, take or acquire lands for the purposes of this Act and, except as otherwise provided in this section, all the provisions of the *Expropriation Act* are, *mutatis mutandis*, applicable to the taking, acquisition, sale or abandonment of lands by the Authority under this section.[88]

73. Second, section 2(d) of the federal *Expropriation Act* provides:

> 2. In this Act, […]
>
> > (d) "land" includes all granted and ungranted wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by Her Majesty under this Act;

74. Nyon asserts that the provincial law is inconsistent with the federal laws both because there is an impossibility of dual compliance and because the provincial law frustrates the purpose of the federal laws.[89] Neither of these arguments has any merit.

75. It is possible to comply with both the provincial law and the federal laws by expropriating land (i.e., "all real property, messuages, lands, tenements and hereditaments") ***but not*** any

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[87] *Electricity Act*, *1998*, s. 44.

[88] *St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242, s. 18(1) (enclosed as **Appendix 11**).

[89] Nyon response to interrogatory HONI – 06(d), (e).

property of a transmitter that has been affixed to realty. Nyon's argument hinges on its position that the federal acts *requires* expropriation of the property of a transmitter or distributor, but they do not. The federal acts simply permit expropriation of land.

76. Reading the federal laws consistent with the presumption of constitutional validity and in view of the Supreme Court's long-standing jurisprudence, it is clear that there is no operational inconsistency. The federal government, including the Seaway Authority, can expropriate land without expropriating the electricity transmission and distribution infrastructure on that land. Indeed, there are good reasons for the federal government to want to do that (consider the practical difficulties with the federal government becoming an electricity transmitter or distributor every time it expropriates some land with electrical infrastructure on it). Regardless, there is no plausible argument that dual compliance is impossible. To the contrary, the evidence in this case conclusively shows that it is possible – because that is what happened.

77. Nyon's argument that the provincial law frustrates the federal laws' purposes also lacks merit. Nyon must establish the purpose of the legislation with "clear proof".[90] Instead, Nyon merely adverts to section 10 of the *St. Lawrence Seaway Authority Act*,[91] which sets out the "purposes, capacities and powers ***of the Authority***" (i.e., not of the Act).[92] These purposes were twofold until 1956:

> 10. The Authority is incorporated for the purposes of
>
> > (a) acquiring lands for constructing, maintaining, and operating all such works as may be necessary to provide and maintain, either wholly within Canada or in conjunction with works undertaken by an appropriate authority in the United States, a deep waterway between the Port of Montreal and Lake Erie; and

[90] *Lamare Logging* at paras 25-27 (emphasis added).

[91] Nyon response to interrogatory HONI – 06(e).

[92] *St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242, s. 10 (enclosed as **Appendix 11**).

> (b) constructing, maintaining and operating all such works in connection with such a deep waterway as the Governor in Council may deem necessary to fulfil any obligation undertaken or to be undertaken by Canada pursuant to any present or future agreement.[93]

78. In 1956, section 10 was amended to add two further purposes:

> (c) acquiring lands for, and constructing, maintaining and operating, alone or jointly or in conjunction with an appropriate authority in the United States, bridges connecting Canada with the United States as authorized by this Act, and in connection therewith, or as incidental thereto, acquiring with the approval of the Governor in Council shares or property of any bridge company and operating and managing bridges; and
>
> (d) acquiring lands for, and constructing or otherwise acquiring, maintaining and operating such works or other property as the Governor in Council may deem to be necessarily incidental to works undertaken pursuant to this Act.[94]

79. Nyon makes no reference to the broader purpose of the *St. Lawrence Seaway Authority Act* (distinct from the purposes for which Seaway Authority was established) or the purpose of the *Expropriation Act*. In Hydro One's submission, the purpose of the *St. Lawrence Seaway Authority Act* was to undertake a national public work in the form of constructing a deep waterway. The purpose of the *Expropriation Act* is to enable the Crown to acquire land for public works or other public purposes (such as constructing a deep waterway) without the consent of its owner. None of these purposes are frustrated by section 45 of *The Power Commission Act*. The deliberate effort by the Seaway Authority to develop a plan with Hydro One and grant a license for the reconstruction of the transmission and distribution lines recognizes the need served by these lines, and demonstrates that Hydro One's continued ownership and operation of the lines did not impede the Seaway Authority's purposes.

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[93] *St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242, s. 10 (enclosed as **Appendix 11**).

[94] *An Act to amend the St. Lawrence Seaway Authority Act*, 1956, c. 11, s. 1 (enclosed as **Appendix 11**).

80. Section 45 of *The Power Commission Act* is not a general provision applying to all fixtures owned by anyone on any land. It does not impose a broad restriction or limitation on the expropriation authority of the federal government. To the contrary, it provides a specific and narrow rule that confirms that the property of electricity transmitters and distributors remains their property when it is affixed to land. In recognition of the significant public interest in ensuring the safe and reliable supply of electricity, the purpose of this provision is to ensure that ownership of works is retained by the transmitter or distributor despite the affixing of the property to land. It thereby ensures that land owners cannot claim ownership and interfere with the safe provision of electricity in the province.

81. Nyon has failed to articulate any basis for its assertion that this somehow frustrates the purposes of the *Expropriation Act* or the *Seaway Authority Act*. Again, as a matter of fact, in this case, both provisions operated in a coherent and consistent manner. There was no frustration of purpose – the Welland Canal was successfully realigned after expropriation despite operation of section 45 of *The Power Commission Act*.

g. There is no factual basis for Nyon's claims of ownership

82. Leaving aside the legal problems identified above, there are insurmountable factual problems with Nyon's claims of ownership.

83. As discussed above, Nyon acquired the Lands from the City of Port Colborne in 2006 on an "as is, where is" basis. The City of Port Colborne had acquired the Lands from the Canada Lands Corporation in 2005. When the City of Port Colborne acquired the Lands, the Agreement of Purchase and Sale provided that "no fixtures, building or chattels" are included in the Purchase Price. The very long-established *nemo dat* principle provides that "an assignor may not assign

more than it has".[95] Since the City of Port Colborne never acquired any fixtures, including the Existing Transmission Lines, it could never have transferred title in any fixtures to Nyon.

84. Furthermore, the transmission lines that Nyon claims were "expropriated" in the 1960s were actually largely reconstructed *after* the expropriation occurred. The Seaway Authority expropriated lands in 1960s, and the Existing Transmission Lines were constructed in their current location after the expropriation.[96] Nyon advances no argument to explain why it can sustain a claim of ownership of lines that were moved and affixed to the Lands after expropriation. Similarly, Nyon is unable to explain how it can claim ownership to the current Existing Transmission Lines given the components of which have largely been replaced over time through regular maintenance.

h. Nyon's conduct is wholly inconsistent with ownership

85. Nyon admits that it does not have any emergency response procedures in case of emergency for the Existing Transmission Lines; that it has not put in place any public safety measures; that it has no grounding and protection schemes; that it has taken no cybersecurity measures to support the Existing Transmission Lines; that it has no maintenance and inspection schedule, and is unable to produce any reports associated with inspections or evidence of investments made to address results of inspections; and that it has no documentation to validate that the Existing Transmission Lines are in compliance with all applicable standards.[97]

86. Nyon does not know whether the transmission infrastructure that was on the lands at the time of the Seaway Authority's expropriation was part of the IESO-controlled grid.[98] It is "not

[95] See *Green v. Green*, 2015 ONCA 541 at para 53.
[96] Exhibit I-1-4(a)(2) (Hydro One response to interrogatory OEB – 04).
[97] Nyon response to interrogatory HONI – 05(g).
[98] Nyon response to interrogatory HONI – 05(d).

familiar with" the NERC Reliability Standards and the IESO Marketing Rules.[99] It has never been a person authorized by the market rules to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid.[100] Nyon does not have Transmission Connection Procedures.[101]

87. Hydro One asked Nyon to provide a detailed financial breakdown of all investments made by Nyon to support ownership of the Existing Transmission Lines. Nyon was unable to provide any such evidence. Rather, it lamented that it had lost "millions of dollars in opportunity cost" because it was unable to develop the Lands due to the presence of the Existing Transmission Lines.[102] In reality, Nyon's proposed "Energy Park" project never took off, and it subsequently sold the majority of the land it originally acquired from the City of Port Colborne to third parties by power of sale.[103] Whereas Hydro One has been inspecting, maintaining, and replacing the Existing Transmission Lines for decades — conduct consistent with ownership — Nyon admits that it has made no capital improvements to the Existing Transmission Lines and is unable to point to any investment ever made by it in relation to the Existing Transmission Lines.[104]

88. Nyon attempts to sweep these admissions under the rug by suggesting that Hydro One is the "operator" of the Existing Transmission Lines, and that Nyon is their "owner".[105] Nyon proposes that this makes Hydro One the "transmitter" for the purposes of the *Electricity Act*, and

[99] Nyon response to interrogatory HONI – 05(e).
[100] Nyon response to interrogatory OEB – 01(d).
[101] Nyon response to interrogatory HONI – 10(a), (b).
[102] Nyon response to interrogatory HONI – 05(b).
[103] Appendix 3 to Exhibit A-1-1 (map of divested lands).
[104] Nyon response to interrogatory HONI – 05(c).
[105] Nyon response to interrogatory HONI – 05(e).

therefore Nyon's failure to comply with any of the laws and regulations imposed on "transmitters" is irrelevant. With respect, this position is unsupportable in law and in fact.

89. The *OEB Act* defines "transmitter" as "a person who ***owns or operates*** a transmission system."[106] The *Electricity Act* adopts an identical definition of "transmitter".[107] If Nyon claims to own the Existing Transmission Lines, then it is a "transmitter" under both Acts. Similarly, section 57(b) of the *OEB Act* provides that no person shall "***own or operate*** a transmission system" unless licensed to do so under Part V.[108] Nyon is not licensed, has never applied for or been issued a license,[109] and has no plans to become licensed.[110]

90. Nyon concedes that it is Hydro One — not Nyon — who is responsible for all regulatory compliance in respect of the Existing Transmission Lines. It is Hydro One — not Nyon — who is responsible for emergency response procedures, public safety measures, grounding and protection schemes, cybersecurity measures, maintenance and inspection, and ensuring adherence to all compliance standards.[111]

91. Nyon's position has morphed and evolved as these and related proceedings have advanced. In its civil action, Nyon asserts that Hydro One owes it "back rent" for use of its Lands, and that Hydro One is trespassing by using its Lands by its "use, maintenance and operation" of the Existing Transmission Lines.[112] However, over a year after commencing its claim and for the

[106] *OEB Act*, s. 3(1) ("transmitter") (emphasis added).
[107] *Electricity Act*, *1998*, s. 2 ("transmitter").
[108] *OEB Act*, s. 57(b) (emphasis added).
[109] Nyon response to interrogatory OEB – 01(b).
[110] Nyon response to interrogatory HONI – 05(h).
[111] Nyon response to interrogatory HONI – 05(g).
[112] Nyon response to interrogatory HONI – 05(b).

first time in response to written interrogatories in this proceeding, Nyon now claims that Hydro One is leasing the Existing Transmission Lines from it.[113]

92. In reality, Nyon does not have an ownership right in the Existing Transmission Lines. By its own admissions, Nyon is asserting an ownership right with the ultimate goal of extracting a payment from Hydro One and ratepayers. While Nyon vigorously asserts that it owns the Existing Transmission Lines, it simultaneously states that it does not intend to operate or maintain them, or to take them down.[114] Rather, it is "willing to sell the transmission infrastructure and lines to Hydro One" on aggressive terms,[115] or "intends to continue to lease the land and transmission infrastructure to Hydro One for fair market value".[116] Nyon also admits that the Lands are used exclusively by Hydro One, and that Nyon has no other current use of the Lands except purportedly leasing them to Hydro One.[117] Nyon apparently has no use for the Lands or the Existing Transmission Lines other than leveraging them to extract a windfall.

93. Nyon's assertion of an ownership interest is based on an unrealistic set of assumptions. Nyon assumes that it can own transmission infrastructure (i.e., be a "transmitter") without complying with any of the obligations or regulations applicable to transmitters. Nyon also assumes that if it is found to be the owner of the Existing Transmission Lines, then Hydro One would have to repurchase the Existing Transmission Lines from it. Neither assumption is grounded in reality. If Nyon indeed owns the Existing Transmission Lines — despite the governing agreements suggesting otherwise, despite the operation of section 44 of the *Electricity Act* and its predecessors, and despite the factual context consistent with Hydro One's enduring ownership of

[113] Nyon response to interrogatory HONI – 05(g).
[114] Nyon response to interrogatory HONI – 05(a), (h), (i).
[115] Nyon response to interrogatory HONI – 05(h). See also Nyon response to interrogatory OEB – 01(h).
[116] Nyon response to interrogatory HONI – 11(a).
[117] Nyon response to interrogatory HONI – 11(a).

the Existing Transmission Lines — then it is an unlicensed transmitter, who has failed to comply with any of the applicable regulations since 2015.

B. Issue 2: The status of Hydro One's original easements

94. When the Seaway Authority expropriated land for the purpose of relocating the Existing Transmission Lines, with one exception, Hydro One lost the original easements because the full fee simple interest was expropriated.[118] The exception is the Phillips Easement, which remains on title.[119] However, the easements were replaced with the Master Agreement and Supplemental Agreement between Hydro One and the Seaway Authority, as well as license agreements, as described above. Moreover, by operation of the *Electricity Act, 1998*, Hydro One continues to have rights of access to the Lands for the purpose of, among other things, inspecting, maintaining, and repairing the Existing Transmission Lines,[120] and continues to hold an ownership interest in the Existing Transmission Lines despite their affixture to the Lands.[121]

C. Issue 3: Replacement of Hydro One's original easements

95. Hydro One's position is that the Master Agreement and Supplemental Agreement remain in effect. However, Nyon has taken the position that it has terminated these agreements.[122] There is a risk that Nyon's actions (past or anticipated) will be legally successful and will result in the termination of the Master Agreement, Supplemental Agreement, and applicable license agreements.

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[118] *Forrestall v. Halifax County Condominium Corporation No. 142*, 2006 NSSC 387.

[119] See paragraph 19, above, and paragraph 113(a), below.

[120] *Electricity Act, 1998*, s. 40.

[121] *Electricity Act, 1998*, s. 44.

[122] Nyon response to interrogatory HONI-02 (in which Nyon purports to have already terminated the governing agreements or, alternatively, asserts that it wishes to do so).

96. In particular, in Nyon's civil action, Nyon seeks a permanent injunction preventing Hydro One from accessing Nyon's Lands for the purpose of "constructing, operating, maintaining or renewing" the Existing Transmission Lines, and a declaration that Hydro One's "use, maintenance and operation" of the Existing Lines is a trespass. Nyon also seeks a declaration that the Master Agreement, Supplemental Agreement and "Feeder Line Licence" are terminated.

97. Since commencing litigation, Nyon has also resorted to self help. On November 29, 2024, Nyon served Hydro One with a "Notice of Trespass" and advised that Hydro One is "not to access our clients' property for any purpose, whatsoever. Any breach of this will be relied on as evidence of [Hydro One's] ongoing intentional disregard of [Nyon's] property rights."[123]

98. Therefore, Hydro One's land rights, and the operation of the electrical grid, should be secured by an expropriation of easement interests as requested in this application to ensure that it is able to continue to comply with its obligations under the Transmission System Code and other mandatory obligations.

D. Issue 4: It is in the public interest for the Board to grant Hydro One authority to expropriate

99. Section 99(5) of the *OEB Act* provides that the Board may make an order authorizing expropriation if it "is of the opinion that the expropriation of the land is in the public interest."[124]

100. The expropriation authority requested herein is required in order for Hydro One to safely operate and maintain the Existing Transmission Lines and provide service for an estimated 37,000 customers served by these lines, which includes the entire City of Port Colborne. The

[123] Exhibit I-1-5(b) (Hydro One response to interrogatory OEB – 05).
[124] *OEB Act*, s. 99(5).

Existing Transmission Lines are the sole electricity supply to Port Colborne TS as well as several transmission connected customers.[125]

101. The Existing Transmission Lines are needed to maintain a safe, reliable and adequate supply of electricity in the Province. The rights in the Lands requested herein are integral to the continued uninterrupted use of the Existing Transmission Lines and therefore are necessary in the public interest.

102. No interested party in these proceedings has argued that the Existing Transmission Lines do not serve the public interest. Nyon was asked about the public interest through written interrogatories; it did not assert that the Existing Transmission Lines are not in the public interest, and deferred the public interest issue to Hydro One.[126] Nor has it argued that expropriation is contrary to the public interest, or asserted that it has any use for the Lands other than purportedly leasing them to Hydro One.[127] Rather, Nyon's sole complaint in this proceeding relates to compensation. But as the Board already observed, "to the extent that compensation may be an issue between [the parties], that is an issue for another day and a different tribunal, in the event that the OEB grants the requested expropriation authority."[128] Compensation is not an issue to be decided at this juncture, and it has no bearing on the public interest determination that the Board is required to make on this application.

[125] Exhibit I-2-11(a) (Hydro One response to interrogatory Nyon-11 and Attachment 1 thereto).
[126] Nyon response to interrogatory HONI – 05(j).
[127] Nyon response to interrogatory HONI – 11(a).
[128] Procedural Order No. 2, dated July16, 2025.

103. The only other property owners affected by the application has advised that it is willing to grant easement rights and has formally expressed support for this application in a letter to the Board.[129] The City of Port Colborne has also expressed support for this application, noting that:

> Adequate supply of electricity is essential to support anticipated demand from new residential, commercial and industrial growth in the City and surrounding area. Likewise a safe and reliable electricity supply is required for economic development.[130]

104. Given Nyon's aggressive and ever-evolving legal positions, its commencement of civil proceedings against Hydro One, its delivery of a Notice of Trespass to Hydro One,[131] and its purported cancellation of Hydro One's licenses,[132] the reliability of electricity transmission in the region is at risk. If Hydro One's access to these assets were denied, as proposed by Nyon, the impact on customers supplied by these circuits would be an increased frequency and duration of power outages up to and including a complete power shutdown in the area until alternate supply circuits are constructed that would bypass Nyon's property. Hydro One must therefore seek expropriation authorization from the Board to ensure it is able to operate the Existing Transmission Lines.

105. Hydro One seeks expropriation authorization over limited land interests, namely, only those required to safely and reliably operate the Existing Transmission Lines now and in the future.

106. In order to accommodate the Existing Transmission Lines, new permanent easement interests in land of a general width of 15 meters[133] from either side of the C2P and A6C

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[129] Letter from Asahi Kasei dated May 15, 2025 (online).

[130] Letter from City of Port Colborne dated May 16, 2025 (online).

[131] Exhibit I-1-5 (Hydro One response to interrogatory OEB – 05).

[132] Nyon response to interrogatory HONI-02 (in which Nyon purports to have already terminated the governing agreements or, alternatively, asserts that it wishes to do so).

[133] See Exhibit I-2-9 (Hydro One response to interrogatory Nyon-09).

transmission lines in a separate consolidated configuration with resulting adjustment for overlapping corridors or stranded lands will be required over the Nyon Lands, which comprises approximately 14.51 hectares. This taking will ensure the ongoing safe operation of the Existing Transmission Lines. The relief request in this application is consistent with the typical easement interests obtained by Hydro One for similar transmission infrastructure, and what has historically been required for the Existing Transmission Lines.

E. The Board has the jurisdiction to grant the relief sought

107. In Procedural Order No. 2, the Board noted that "[t]his is not a typical expropriation application, given that the subject transmission facilities already exist, and it raises unique issues."[134] Against that backdrop, Hydro One makes brief submissions on the Board's jurisdiction to grant the relief sought in this atypical application.

108. The Board's jurisdiction to hear and grant the relief sought in this application arises from section 99(1)1 of the *OEB Act*, which provides:

> **99** (1) The following persons may apply to the Board for authority to expropriate land for a work:
>
> 1. Any person who has leave under this Part or a predecessor of this Part.[135]

109. Prior to the enactment of the *OEB Act*, leave to construct was granted under Part III of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 (the "**1990 *OEB Act***"). Prior to the enactment of the 1990 *OEB Act*, authority for approving new transmission lines rested with the Lieutenant Governor in Council pursuant to the *Power Commission Act* or *Power Corporation Act*.

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[134] Procedural Order No. 2 dated July 16, 2025, at p. 2.

[135] *OEB Act*, s. 99(1).

110. In particular, the Lieutenant Governor could authorize Ontario Hydro (prior to 1973, the Hydro-Electric Power Commission of Ontario) to construct transmission lines. For example, section 24(2)(g) of the *Power Commission Act*, R.S.O. 1970, c. 354, gave the Lieutenant Governor in Council the power to authorize the Commission to:

> construct, maintain and operate, and acquire by purchase, lease or otherwise, or without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use all erections, machinery, plant and other works and appliances for the transmission, transformation, supply and distribution of power, and conduct, store, transmit, transform and supply power for the purposes of this Act, and with lines of wires, poles, conduits, pipes, motors, transformers or other conductors, equipment or devices, receive, conduct, convey, transmit, transform, distribute, supply or furnish such power to or from or for any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over, upon or under the land of any person;[136]

111. All predecessor statutes had substantively similar language.[137] This approval regime for the construction of transmission lines was the predecessor of Part III of the 1990 *OEB Act* and, later, Part VI of the current *OEB Act*.

112. The Lieutenant Governor has, from time to time, approved the Existing Transmission Lines as required by the predecessor acts. For example, on April 23, 1976, the Lieutenant Governor issued an Order in Council[138] approving portions of the Existing Transmission Lines.

113. Other documentary evidence confirms that the Existing Transmission Lines were constructed with leave under a predecessor of Part VI of the *OEB Act*. For example:

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[136] *Power Commission Act*, R.S.O. 1970, c. 354, s. 24(2)(g) (enclosed as **Appendix 8**).

[137] *The Power Commission Act*, R.S.O. 1914, c. 39, s. 8(c) (enclosed as **Appendix 1**); *The Power Commission Act*, R.S.O. 1927, c. 57, s. 20(1)(c) (enclosed as **Appendix 2**); *The Power Commission Act*, R.S.O. 1937, c. 62, s. 21(2)(f) (enclosed as **Appendix 3**); *The Power Commission Act*, R.S.O. 1950, c. 281, s. 24(2)(g) (enclosed as **Appendix 6**); and *The Power Commission Act*, R.S.O. 1960, c. 300, s. 24(2)(g) (enclosed as **Appendix 7**).

[138] Appendix 2C to Exhibit A-1-1 (Order in Council dated April 23, 1976).

(a) the Phillips Easement granted in 1929 by Charles C. Phillips to the Hydro-Electric Power Commission of Ontario for a portion of the Existing Transmission Lines provided that the Commission had made a survey and was to erect transmission infrastructure pursuant to the *Power Commission Act* and amendments thereto;[139]

(b) Other easements granted to the Hydro-Electric Power Commission of Ontario around the same time, prior to the construction of the Existing Transmission Line, and in the same area contain substantively identical language confirming that the construction of the Existing Transmission Lines was authorized under the *Power Commission Act* by an Order in Council;[140] and

(c) The Existing Transmission Lines are covered by Hydro One's Transmission License from the Board, and Hydro One is the only transmitter licensed to own, operate and maintain the Existing Transmission Lines.[141]

114. Since the Existing Transmission Lines were approved under the predecessor Acts, the Board has jurisdiction pursuant to section 99(1)1 of the *OEB Act* to authorize the expropriation of the Lands. This interpretation is consistent with the modern approach to statutory interpretation, a "longstanding, stable and uncontroversial" approach that requires statutory language to be interpreted "according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."[142]

115. The objectives of the *OEB Act* include protecting the consumer interest with respect to "prices and the adequacy, reliability and quality of electricity service" and "to promote economic

[139] Exhibit I-1-1(d) (Hydro One response to interrogatory OEB – 1(d) and Attachment 2 thereto).
[140] Exhibit I-1-1-2 (Hydro One response to interrogatory OEB – 1(d) and Attachment 2 thereto).
[141] Exhibit I-1-4 (Hydro One response to interrogatory OEB – 4).
[142] *R. v. Kim*, 2025 ONCA 478, at paras. 30-31, citing *Piekut v. Canada*, 2025 SCC 13, at para. 43.

efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."[143] Interpreting section 99(1) in light of those purposes, the reference to "a predecessor of this Part" includes the authorization power of the Lieutenant Governor in Council as set out above.

116. This situation is nearly identical to one considered by the Board in its EB-2011-0391 proceeding, which authorized expropriation for an existing natural gas distribution main that had been approved to be constructed long before the enactment of the 1990 *OEB Act*.[144] Like the Existing Transmission Lines, the natural gas pipeline had been constructed in the same geographic area on land owned by the Seaway Authority. At the time, the Seaway Authority entered into licence agreements with Enbridge's predecessor, giving them the right to install, operate, maintain and replace the pipelines. As explained by the Board in its 2012 decision:

> The St. Lawrence Seaway Authority was succeeded by the Seaway Authority Management Corporation, which then transferred the subject lands to the Canada Lands Corporation CLC Limited. The subject lands have since been transferred to private individuals.[145]

117. This is the same scenario facing Hydro One in respect of the Existing Transmission Lines. In its 2012 decision, the Board concluded that expropriating an easement over the lands of the private landowner was in the public interest, and granted authority to expropriate accordingly:

> The Board finds that Enbridge has provided adequate evidence to satisfy the Board that expropriating the subject lands owned by Party A and Party C is in the public interest. The Board notes that the pipelines were installed in the 1970s and provide natural gas service to the Town of Fort Erie and the City of Port Colbourne. ***The Board notes that eliminating the pipelines could***

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[143] *OEB Act*, s. 1(1).

[144] *Re Enbridge Gas Distribution Inc.*, 2012 CarswellOnt 11005 (OEB, EB-2011-0391). See Appendix 5 to Exhibit A-1-1 (copy of decision).

[145] *Re Enbridge Gas Distribution Inc.*, 2012 CarswellOnt 11005 (OEB, EB-2011-0391), at para. 6. See Appendix 5 to Exhibit A-1-1 (copy of decision).

> ***compromise natural gas service for a large number of customers. The Board also notes that no interested party argued that the pipelines do not serve the public interest.*** For all the above reasons, the Board finds that, in this case, expropriation of the subject lands owned by Party A and Party C is in the public interest.[146]

118. Finally, given the unique issues that have arisen on this application, it is important to note the broad and exclusive jurisdiction granted to the Board by the *OEB Act*.

119. The Board's jurisdiction is "very broad" and encompasses "the regulatory and quasi-judicial functions covering the entire field of energy within the Province of Ontario."[147] It is statutorily mandated to protect the interests of consumers with respect to prices and "the adequacy, reliability and quality of electricity service."[148] The highly regulated nature of Ontario's electricity system reflects a recognition of the public interest in electricity.[149]

120. Section 19(1) of the *OEB Act* confirms that the Board "has in all matters within its jurisdiction authority to hear and determine all questions of law and fact."[150] The Court of Appeal for Ontario observed:

> This ***generous and expansive conferral of jurisdiction*** ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. ***This includes, inter alia, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues***.[151]

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[146] *Re Enbridge Gas Distribution Inc.*, 2012 CarswellOnt 11005 (OEB, EB-2011-0391), at para. 16 (emphasis added). See Appendix 5 to Exhibit A-1-1 (copy of decision).

[147] *Re Ontario Energy Board*, 1985 CanLII 2086 (ON SC), at p. 6.

[148] *OEB Act*, s. 1(1)1 (emphasis added); see also *Toronto Hydro-Electric System Limited v. Ontario Energy Board,* 2010 ONCA 284, at para. 5, leave to appeal to SCC ref'd (33752); *Bennett v. Hydro One Inc.,* 2017 ONSC 7065, at para. 20, aff'd 2018 ONSC 7741 (Div. Ct.).

[149] *Kehl Kitchener Properties Inc. v. Kitchener-Wilmot Hydro Inc.*, 2004 CanLII 34794 (ON SC), at para. 65.

[150] *OEB Act*, s. 19(1).

[151] *Snopko v. Union Gas Ltd.*, 2010 ONCA 248, at para. 27 (emphasis added).

121. The Board therefore has the necessary jurisdiction to determine all questions of law and fact arising on this application, by virtue of its jurisdiction under section 99(1)1 and the "generous and expansive" jurisdiction confirmed by section 19 of the *OEB Act*.

F. Nyon's allegations of misrepresentation and abuse of process are without merit

122. On July 9, 2025, Nyon filed unsolicited correspondence with the Board alleging that Hydro One has made "deeply troubling misstatements" in its filings rising to the level of "a disturbing abuse of process". Hydro One had no notice of Nyon's concerns prior to receiving its letter, and Nyon did not contact Hydro One in advance of sending it.

123. Hydro One agrees with the Board's comment that "the allegations raised by Nyon and 117 in their July 9, 2025 correspondence may not be particularly helpful or relevant in determining" the issues arising in this application.[152] However, given the serious nature of the allegations made by Nyon and the unfortunate tone with which they were conveyed to the Board, Hydro One finds itself compelled to briefly respond.

124. Nyon asserts that the extent of the negotiations between Hydro One and Nyon was Nyon's provision of a draft Memorandum of Understanding ("**MOU**") in 2015, to which Hydro One purportedly never responded. Nyon's account of the parties' historical dealings and negotiations, which date back to 2013, is not accurate. Hydro One categorically rejects the suggestion that it misled the Board.

125. Between 2013 and 2015, Nyon and Hydro One engaged in reciprocal negotiations and discussions stemming from Nyon's April 2013 offer:

> You have asked if Nyon is willing to sell and convey by fee simple or easement interest, or combination thereof, parts of Lands which are under Hydro One's

[152] Procedural Order No. 2 dated July 17, 2025, at p. 2.

> electric transmission and distribution facilities and setback, in accordance with applicable law.
>
> Nyon mutually agrees to negotiate expeditiously and in good faith for the purpose of concluding an agreement ***to convey to Hydro One by way of fee simple or easement interest***, or a combination thereof, parts of the Lands which are ***under Hydro One's electric transmission and distribution facilities*** and setbacks, in accordance with applicable law.
>
> […]
>
> ***At this time we are not agreeing or consenting to an expropriation. If you wish to proceed to expropriate that is your prerogative.***[153]

126. Numerous draft MOUs were exchanged in 2013 onwards, and e-mail correspondence confirms that several meetings were held to discuss the parties' positions. For example, Nyon provided Hydro One with a draft MOU on November 21, 2013.[154] Consistent with Nyon's April 2013 letter (quoted above), this MOU contemplated that Nyon would convey an easement to Hydro One. The draft MOU included the following recitals:

> WHEREAS the City has entered into an agreement of purchase and sale with Nyon Oil Inc. Which has been assigned to Nyon Marine Fuelling Corporation for certain lands described in Schedule A-1 hereto (the "Lands") and Nyon is the beneficial owner thereof;
>
> …
>
> AND WHEREAS ***Hydro One has certain hydroelectric transmission and distribution facilities on the Lands*** ("Hydro facilities");
>
> AND WHEREAS, in light of the recent and proposed changes in ownership and proposed uses of the Lands, ***Hydro one is desirous of securing rights in registrable form to protect its facilities*** with appropriate setbacks in order to remain on the Lands;
>
> AND WHEREAS Nyon and Hydro one ("the Parties") have since May 2013 worked together to resolve the technical issues relating to the design and engineering of the tank farm in relation to the Hydro facilities including meetings on August 15, 2013; September 16, 2013; October 24, 2013, October 30, 2013

[153] Letter from Nyon Marine Fuelling Corporation dated April 12, 2013 (emphasis added) (enclosed as **Appendix 13**).

[154] Draft MOU dated November 21, 2013 (emphasis added) (enclosed as **Appendix 14**).

> and November 21, 2013 and have resolved Hydro One's concerns relating thereto as more particularly described below;[155]

127. The balance of the draft MOU, spanning about 5 pages in length, included terms relating to setbacks for wood pole lines and water pipelines, a storm water management pond, and fencing. It did not contain any terms requiring Hydro One to pay Nyon for the grant of fee simple or easement interests.

128. The parties continued to engage in discussions and correspondence into 2014 and 2015. In February 2015, Hydro One provided its standard easement terms for Nyon's review, at Nyon's request, and asked whether Nyon has time "to meet sometime soon to resume our discussions."[156]

129. In June 2015, Nyon changed its negotiating position. It circulated a new revised draft MOU, introducing substantial revisions to the recitals and terms. For example, the draft MOU now contemplated that Hydro One would pay $5,000,000 as a "down payment" with respect to "unpaid rent"; that Hydro One would pay monthly rent to Nyon; and that the parties would negotiate an agreement on the purchase price for Hydro One to acquire certain lands and easements.[157] This (and all other) draft MOUs exchanged between the parties remained in draft and were not agreed to or executed.

130. In Nyon's September 22, 2015 letter to Hydro One, which is in the record before the Board, Nyon recounted the parties' extensive negotiations and discussions over the course of several years.[158] Given the dramatic shift in approach taken by Nyon after years of negotiations, Hydro One engaged outside counsel. Nyon followed suit and correspondence between the parties was

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[155] Draft MOU dated November 21, 2013 (emphasis added) (enclosed as **Appendix 14**).

[156] E-mail from Hydro One dated February 10, 2015 (enclosed as **Appendix 15**).

[157] Draft MOU dated June 2015 (enclosed as **Appendix 16**).

[158] Appendix 2F to Exhibit A-1-1 (Letter from Nyon dated September 22, 2015).

taken over by their respective counsel. The parties eventually, through counsel, agreed to hold Nyon's letters of September 22, 2015, and the two attached notices, in abeyance.[159] Thereafter, Nyon went dormant and Hydro One did not hear further from it for a number of years.

131. As the Board is aware, about eight years later, without re-engaging in any good faith negotiation, Nyon commenced an action against Hydro One in the Ontario Superior Court of Justice.[160] On April 8, 2024, Hydro One wrote to Nyon to advise of its intention to bring an application before the Board under section 99 of the *OEB Act*. Nyon quoted from this correspondence at page 3 of its letter, but omitted that Hydro One extended an invitation for Nyon to consent to the expropriation so that compensation can be dealt with expeditiously by the Ontario Land Tribunal. Hydro One wrote, in part:

> If the expropriation is ordered, compensation will be determined by the Ontario Land Tribunal in accordance with the Expropriations Act. ***If your client is willing to consent to the expropriation, HONI expects that the Ontario Energy Board expropriation application can be advanced quickly and the parties can move to the Ontario Land Tribunal to determine compensation without significant delay***.[161]

132. Nyon did not accept this offer, and Hydro One commenced this application before the Board. To be clear, Hydro One remains willing to resolve this matter on consent and compensate Nyon for the taking of an easement in accordance with the compensation principles applied by the Ontario Land Tribunal.

133. The expropriation sought by Hydro One is in the public interest and necessary to ensure the reliable and efficient provision of electricity to tens of thousands of customers in the Port Colborne area. At all times, Hydro One has complied with the Board's rules and orders regarding

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[159] Exhibit I-1-3-1 (Attachment 1 to Hydro One's Response to Written Interrogatory, OEB Staff – 03).

[160] Schedule 28 of Nyon's Evidence. The Superior Court action was stayed to allow this application to proceed first: *Nyon Oil Inc. v. Hydro One Networks Inc.*, 2025 ONSC 1921.

[161] Letter from Sam Rogers, counsel for Hydro One, dated April 8, 2024 (enclosed as **Appendix 17**).

notice of the application and has participated fully in an interrogatory process including answering numerous interrogatories from Nyon. As set out above, Hydro One's evidence and answers to interrogatories were accurate and fair representations of a lengthy multi-year negotiation process. Nyon's inflammatory allegations are unsupported by the record, and there is no reason to stay or dismiss this proceeding.

PART V - CONCLUSION

134. Hydro One requests that the Board issues an Order(s):

(a) For a declaration that Hydro One owns the Existing Transmission Lines; and

(b) For authority to expropriate certain permanent easements, as described in Appendix 6 to Exhibit A-1-1, as may be updated by Hydro One to account for the recent consolidation of certain PINs.

135. The requested relief is in the public interest.

DATED THE 25TH DAY OF JULY, 2025, AT TORONTO, ONTARIO.

HYDRO ONE NETWORKS INC.
By its counsel

McCarthy Tétrault LLP
Per: Gordon Nettleton / Sam Rogers / Aya Schechner

APPENDICES

Appendix	Description
Legislation	
1.	*Power Commission Act*, R.S.O. 1914, c. 39, s. 8(c)
2.	*Power Commission Act*, R.S.O. 1927, c. 57, s. 20(1)(c)
3.	*Power Commission Act*, R.S.O. 1937, c. 62. s. 21(2)(f)
4.	*An Act to Amend the Power Commission Act*, 1939, c. 35, s. 2
5.	*An Act to Amend the Power Commission Act*, 1944, c. 46, s. 4
6.	*Power Commission Act*, R.S.O. 1950, c. 281, ss. 24(2)(g), 44(1)
7.	*Power Commission Act*, R.S.O. 1960, c. 300, ss. 24(2)(g), 45
8.	*Power Commission Act*, R.S.O. 1970, c. 354, ss. 24(2)(g), 44
9.	*An Act to Amend the Power Commission Act*, 1973, c. 57, ss. 1-2
10.	*Power Corporation Act*, R.S.O. 1980, c. 384, s. 43
11.	*St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242, ss. 10, 18(1)
Secondary Sources	
12.	Excerpts from Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2017)
Other Documents	
13.	Letter from Nyon Marine Fuelling Corporation dated April 12, 2013
14.	Draft MOU dated November 21, 2013
15.	E-mail from Hydro One dated February 10, 2015
16.	Draft MOU dated June 2015
17.	Letter from Sam Rogers, counsel for Hydro One, dated April 8, 2024

Tab 1

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c 39 Power Commission Act

Ontario

Salaries of other members of Commission.

(3) The members of the Commission, other than the Chairman or a member of the Assembly, shall be paid out of such money as may be appropriated by this Legislature for that purpose such annual salary or other remuneration as may be fixed by the Lieutenant-Governor in Council. 2 Geo. V. c. 14, s. 2.

Appointment of officers by Commission.

6.—(1) The Commission may appoint a chief engineer, an accountant and a secretary, and such other engineers, accountants, officers, servants and workmen as may be deemed requisite.

Salaries of officers, etc.

(2) The salaries or other remuneration of the persons so appointed shall be fixed by the Commission, subject to the ratification of the Lieutenant-Governor in Council, and shall be payable out of such money as may be appropriated by this Legislature for that purpose. 7 Edw. VII. c. 19, s. 6.

Report of Commission as to acquiring works, etc.

7. The Commission may from time to time report to the Lieutenant-Governor in Council, designating

(*a*) the land, waters, water privileges or water powers or the land, works, machinery and plant, or portion thereof, of any person owning or holding under lease or otherwise, or developing, operating or using a water privilege or water power, or transmitting electrical or other power or energy in Ontario, which in the opinion of the Commission should be purchased, acquired, leased, taken, expropriated, developed, operated or used by the Commission for the purposes of this Act; or

(*b*) the quantity of the product of any person generating electrical power or energy in Ontario or bringing such power or energy into Ontario for use or transmission therein which the Commission requires for the purposes of this Act. 7 Edw. VII. c. 19, s. 7.

Powers which may be given to Commission.

8. The Lieutenant-Governor in Council, upon the report of the Commission recommending the same, may authorize the Commission to

To acquire lands, water powers and works.

(*a*) acquire by purchase, lease or otherwise, or, without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use the land, waters, water privileges, water powers, works, machinery and plant of any person owning, holding under lease or otherwise, or developing, operating or using the same for generating, or adapted for generating electrical power or energy or for the transmission thereof in Ontario; and develop and use the same for any of the purposes of this Act; 7 Edw. VII. c. 19, s. 8, *part;*

To acquire easements.

(*b*) acquire by purchase, lease or otherwise or, without the consent of the owner thereof or person interested therein, enter upon, take possession of, expropriate and use a right or easement to construct, erect, maintain and operate transmission lines with all other plant, appliances and equipment required therefor to transmit electricity, at such voltage as the Commission may determine, through, over, under, along or across any land and premises, public highway or public place, stream, water, water-course, bridge, viaduct or railway; 9 Edw. VII. c. 19, s. 10;

To acquire plant for transmission of power.

(*c*) construct, maintain and operate, and acquire by purchase, lease or otherwise, or, without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use all erections, machinery, plant and other works and appliances for the transmission, supply and distribution of electrical power or energy; and conduct, store, transmit and supply electrical power or energy for the purposes of this Act, and, with lines of wires, poles, conduits, motors or other conductors or devices, receive, conduct, convey, transmit, distribute, supply or furnish such electrical power or energy to or from any person at any place through, over, under, along or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over or under the land of any person, and enter upon any land upon either side of such lines or conduits and fell or remove any tree or limb thereof, or obstruction, which, in the opinion of the Commission, it is necessary to fell or remove; 7 Edw. VII. c. 19, s. 8, *part;* 2 Geo. V. c. 14, s. 3, *part;*

To contract for supply of power to Commission.

(*d*) contract with any person generating, transmitting or distributing electrical power or energy, or proposing so to do, to supply electrical power or energy to the Commission; and require any person generating, transmitting or distributing electrical power or energy to supply so much thereof as the Commission may require; 7 Edw. VII. c. 19, s. 8, *part;*

To flood lands and improve water powers.

(*e*) enter upon, take and use, without the consent of the owner thereof, any land upon which any water power or privilege is situate, or any lake, river, stream or other body of water, which in the opinion of the Commission is capable of improvement or development for the purpose of providing water power, and construct such dams, sluices, canals, raceways and other works as may be

Tab 2

1927

c 57 Power Commission Act

Ontario

or developing, operating or using a water privilege or water power, or transmitting electrical or other power or energy in Ontario which, in the opinion of the Commission, should be purchased, acquired, leased, taken, expropriated, developed, operated or used by the Commission for the purposes of this Act; or,

(*b*) the quantity of the product of any person generating electrical power or energy in Ontario or bringing such power or energy into Ontario for use or transmission therein which the Commission requires for the purposes of this Act. 1927, c. 17, s. 19. Quantity of power.

20.—(1) The Lieutenant-Governor in Council, upon the recommendation of the Commission, may authorize the Commission to— Power may be given to Commission.

(*a*) acquire by purchase, lease or otherwise, or, without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use, the land, waters, water privileges, water powers and works, of any person owning, holding under lease or otherwise, or developing, operating or using the same for generating, or adapted for generating electrical power or energy or for the transmission thereof in Ontario; and develop and use the same for any of the purposes of this Act; To acquire lands, water powers and works.

(*b*) acquire by purchase, lease or otherwise, and construct, maintain and operate, works for the production of electrical power or energy by the use of coal, oil or any other means whatsoever; To acquire and construct works for production of electricity.

(*c*) construct, maintain and operate, and acquire by purchase, lease or otherwise, or, without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use, all erections, machinery, plant and other works and appliances for the transmission, supply and distribution of electrical power or energy; and conduct, store, transmit and supply electrical power or energy and steam for the purposes of this Act, and, with lines of wires, poles, conduits, pipes, motors or other conductors or devices, receive, conduct, convey, transmit, distribute, supply or furnish such electrical power or energy and steam to or from any person at any place through, over, under, along upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over or under the land of any person; To acquire plant for transmission of power.

Tab 3

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c 62 Power Commission Act

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(*b*) the quantity of the product of any person generating electrical power or energy in Ontario or bringing such power or energy into Ontario for use or transmission therein which the Commission requires for the purposes of this Act. R.S.O. 1927, c. 57, s. 19. Quantity of power.

21.—(1) The Lieutenant-Governor in Council may authorize the Commission at any time and from time to time, to acquire by purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, any land, lake, river, stream or other body of water or watercourse, and temporarily or permanently to divert or alter the boundaries or course of any lake, river, stream or other body of water or watercourse, or raise or lower the level of the same or flood or overflow any land. 1931, c. 13, s. 3, *part*. Power may be given to Commission.

(2) In particular, but without limiting the generality of subsection 1, the Lieutenant-Governor in Council, upon the recommendation of the Commission, may authorize the Commission to,— 1931, c. 13, s. 3, *part*. Power may be given to Commission.

(*a*) Acquire by purchase, lease or otherwise, land, waters, water privileges, water powers, and works, used for, or adapted or useful for, or capable of being used or made useful for generating, transforming or transmitting electric power or energy; enter upon, take possession of, expropriate, acquire and use such land, waters, water privileges, water powers and works, without the consent of the owner thereof, or of any person in any manner entitled to any right, title, interest, claim or demand therein; and have and hold the same, however acquired or obtained, and develop, utilize, use, maintain, operate and improve them for any of the purposes of this Act; 1937, c. 60, s. 5. To acquire lands, water powers and works.

(*b*) acquire by purchase the whole or any part of the property, assets and undertaking of Dominion Power and Transmission Company Limited, including shares held or owned by the said company in any other company or companies of any kind or nature whatsoever, and to acquire the whole or any part of the properties, assets and undertakings of such other company or companies and to maintain and operate any property or properties so acquired; To acquire Dominion Power and Transmission Company Limited.

(*c*) acquire by purchase, lease or otherwise, and construct, maintain and operate, works for the production of electrical power or energy by the use of coal, oil or any other means whatsoever; To acquire and construct works for production of electricity.

Works on inter-provincial boundaries.

(*d*) acquire by purchase, lease or otherwise, lands, waters, water privileges, water powers and works upon or adjacent to the boundary line between Ontario and any other province and situate in Ontario or in such other province, or partly in one and partly in the other of them, and erect, construct, maintain and operate upon any lands so acquired, works for the production and transmission of electrical power or energy, and enter into agreements with the Crown as representing such other province, or with any commission or department of the Government of such other province, or with any corporation or person interested in or affected by such works as to the terms and conditions upon which such works shall be carried on and any rights so acquired be exercised;

Acquiring shares in companies operating on such boundaries.

(*e*) acquire by purchase in the open market or otherwise shares or stock of any company owning or controlling any such lands, waters, water privileges, water powers or works;

To acquire plant for transmission of power.

(*f*) construct, maintain and operate, and acquire by purchase, lease or otherwise, or, without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use, all erections, machinery, plant and other works and appliances for the transmission, supply and distribution of electrical power or energy; and conduct, store, transmit and supply electrical power or energy and steam for the purposes of this Act, and with lines of wires, poles, conduits, pipes, motors or other conductors or devices, receive, conduct, convey, transmit, distribute, supply or furnish such electrical power or energy and steam to or from any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over or under the land of any person;

To contract for supply of power to Commission.

(*g*) contract with any person generating, transmitting or distributing electrical power or energy, or proposing so to do, to supply electrical power or energy to the Commission, and require any person generating, transmitting or distributing electrical power or energy to supply so much thereof as the Commission may require;

Tab 4

CHAPTER 35.

An Act to amend The Power Commission Act.

Assented to April 27th, 1939.
Session Prorogued April 27th, 1939.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1.—(1) Subsection 1 of section 12 of *The Power Commission Act* is amended by striking out the word "shall" in the second line and inserting in lieu thereof the word "may," and by striking out clause *c*, so that the said subsection shall now read as follows: Rev. Stat., c. 62, s. 12, subs. 1, amended.

(1) An account to be known as the "stabilization fund account" may be opened and maintained on the books of the Commission and the Commission may place to the credit of such account,— Stabilization fund account.

(*a*) such amounts as the Commission may determine and collect for the purposes of this section from its customers;

(*b*) interest at such rates as the Commission shall deem equitable and just upon balances remaining from time to time to the credit of the account.

(2) Subsection 2 of the said section 12 is repealed. Rev. Stat., c. 62, s. 12, subs. 2, repealed.

2. *The Power Commission Act* is amended by adding thereto the following section: Rev. Stat., c. 62, amended.

33*a*. Where works of the Commission have been affixed to realty, they shall remain subject to the rights of the Commission as fully as they were before being so affixed unless otherwise agreed by the Commission in writing. Ownership of works retained.

3. Section 71 of *The Power Commission Act* is repealed and the following substituted therefor: Rev. Stat., c. 62, s. 71, re-enacted.

Contracts for supply of power.

71.—(1) Subject to the approval of the Lieutenant-Governor in Council, the Commission may contract with the corporation of a township, or townships, or with the corporations of two or more townships, for the supply and distribution by the Commission of electrical power in the township or townships.

Defining areas.

(2) The Commission may lay out and define areas, called "rural power districts," in the township or townships for the distribution of electrical power.

Commission acts for corporation.

(3) The Commission may, on behalf of the corporation,—

(*a*) acquire, construct, extend, reconstruct, hold, maintain, operate and administer all lands and works necessary for the transmission to and the transforming and distributing in, any such rural power district of electrical power;

(*b*) supply electrical power to any customer of the corporation or at any premises in any such rural power district;

(*c*) perform, enjoy and enforce all contracts in which the corporation agrees to supply or sell electrical power to any customer or at any premises in such rural power district.

Alterations of boundaries

(4) The Commission may unite any two or more rural power districts in one rural power district and may join into a rural power district or may include in a rural power district one or more townships or any part or parts thereof whether already part of any rural power district or not and may alter the boundaries of any rural power district.

Signing of contracts.

(5) Contracts in which the municipal corporation agrees to supply or sell electrical power shall be sufficiently executed on behalf of the corporation if signed by its clerk or by such other officer as may be designated by the council of the corporation.

Powers given to Commission.

71*a*. For the purposes of this Part, the Commission may exercise any of the powers which the Commission may exercise or be authorized to exercise under Part I.

Rev. Stat., c. 62, s. 76, subs. 3, amended.

4. Subsection 3 of section 76 of *The Power Commission Act* is amended by striking out all the words in the first two lines and inserting in lieu thereof the words "In any such area, the Commission may," and by inserting after the word "all" in the second line of clause *a* the words "lands and", so that

the said subsection shall now read as follows:

Supply of power.

(3) In any such area, the Commission may,—

(*a*) acquire, construct, extend, reconstruct, hold, maintain, operate and administer all lands and works necessary for the transmission to and the transformation and distribution and supply of electrical power or energy in any such area;

(*b*) distribute and supply electrical power or energy in any such area;

(*c*) contract with any person, firm or corporation for the supply of electrical power or energy in any such area.

Rev. Stat., c. 62, s. 77, amended.

5. Section 77 of *The Power Commission Act* is amended by adding at the end thereof the words, "except where the contract is with a municipal corporation for the supply of power from any of the works mentioned in section 47," so that the section shall now read as follows:

Application of Part II as to annual payments.

77. All the provisions of Part II as to the annual payments to be made by the corporations which have entered into contracts with the Commission shall apply to a contract entered into under this Part, and shall extend to the works constructed under the contract for transforming, distributing and supplying electrical power or energy in a rural power district except where the contract is with a municipal corporation for the supply of power from any of the works mentioned in section 47.

Rev. Stat., c. 62, s. 78, amended.

6. Section 78 of *The Power Commission Act* is amended by striking out all the words after the word "Commission" in the third line and inserting in lieu thereof the words, "under this Act," so that the section shall now read as follows:

Rates to be fixed by Commission.

78. The rates to be charged to customers receiving electrical power or energy from the Commission in a rural power district shall be fixed by the Commission under this Act.

By-laws confirmed.

7. By-law number 1072 of the corporation of the town of Arnprior; By-law number 582 of the corporation of the village of Beamsville; By-law number 660 of the corporation of the village of Millbrook; By-law number 579 of the corporation of the village of Newcastle; By-law number 1030 of the corporation of the township of Clarke, and all debentures issued

or to be issued or purporting to be issued under any of the said by-laws are confirmed and declared to be legal, valid and binding upon the said corporations and the ratepayers thereof respectively, and shall not be open to question upon any ground whatsoever notwithstanding the requirements of *The Power Commission Act* or *The Municipal Act* or any amendments thereto or any other general or special Act of this Legislature.

Rev. Stat., cc. 62, 266.

By-law confirmed.

8. By-law number 132 for the year 1937 of the corporation of the city of Windsor and the agreement between the said corporation and The Windsor Utilities Commission thereby authorized are confirmed and declared to be legal, valid and binding upon the said corporation and the ratepayers thereof and The Windsor Utilities Commission.

Short title.

9. This Act may be cited as *The Power Commission Amendment Act, 1939.*

Tab 5

CHAPTER 46.

An Act to amend The Power Commission Act.

Assented to March 14th, 1944, except section 3.
Section 3 assented to April 6th, 1944.
Session Prorogued April 6th, 1944.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 1 of *The Power Commission Act* is amended by adding thereto the following clause: Rev. Stat., c. 62, s. 1, amended.

(*aa*) "Advisory Council" shall mean The Ontario Hydro-Electric Advisory Council. "Advisory Council".

2. *The Power Commission Act* is amended by adding thereto the following section: Rev. Stat., c. 62, amended.

6*a*.—(1) There shall be an advisory council to be known as The Ontario Hydro-Electric Advisory Council which shall consist of five members appointed by the Lieutenant-Governor in Council each of whom shall hold office for two years from the date of his appointment or such other period as the Lieutenant-Governor in Council may prescribe and every such member shall be eligible for re-appointment. Advisory Council.

(2) The members of the Advisory Council shall elect from amongst themselves a presiding officer whose term of office shall be one year, and who shall be eligible for re-election. Presiding officer.

(3) The Advisory Council shall meet on the call of its presiding officer on three days' written notice, and also whenever requested to do so by the Commission on similar notice. Meetings.

(4) The Advisory Council shall make a report for the consideration and assistance of the Commission upon every matter submitted to the Advisory Council by the Commission and upon any matter relative to the purposes of the Commission upon which the members of the Advisory Council deem it advisable to report. Reports.

Remuneration.

(5) The members of the Advisory Council shall be paid such per diem allowance and travelling expenses as the Lieutenant-Governor in Council shall from time to time decide.

Assistance.

(6) The Commission may provide the Advisory Council with such professional, technical, secretarial and other assistance as the Commission may see fit, and the cost thereof shall be deemed to be part of the administration expenses of the Commission.

Unqualified persons.

(7) No senator or member of the House of Commons of the Parliament of Canada, and no member of the Legislative Assembly of Ontario, and no person not entitled to vote at the election of members of the Legislative Assembly of Ontario shall be eligible to be a member of the Advisory Council.

Termination of appointment.

(8) The Lieutenant-Governor in Council may terminate the appointment of any member who in his opinion is incapable of performing his duties.

Council may act notwithstanding vacancy.

(9) The Advisory Council may act notwithstanding any vacancy in its membership and three members shall constitute a quorum at any meeting.

Rev. Stat., c. 62, s. 21, subs. 5, amended.

3. Subsection 5 of section 21 of *The Power Commission Act* is amended by striking out the word "authorize" in the second line and inserting in lieu thereof the word "authorized", so that the said subsection shall now read as follows:

Procedure.

(5) Except as otherwise provided in this Act the Commission shall, in the exercise of its compulsory powers authorized by this section and section 28, proceed in the manner provided by *The Public Works Act*, where the Minister of Public Works takes land or property for the use of Ontario, and all the provisions of that Act with respect to the fixing, payment and application of compensation shall *mutatis mutandis* apply.

Rev. Stat., c. 54.

Rev. Stat., c. 62, s. 33*a*, (1939, c. 35, s. 2) re-enacted.

4. Section 33*a* of *The Power Commission Act* as enacted by section 2 of *The Power Commission Amendment Act, 1939*, is repealed and the following substituted therefor:

Ownership of works retained.

33*a*.—(1) Notwithstanding anything in this Act or any other general or special Act, where works of the Commission have been affixed to realty they shall remain subject to the rights of the Commission as fully as they were before being so affixed and shall not become part of the realty unless otherwise agreed by the Commission in writing.

(2) Any person who without the consent of the Commission nails or otherwise attaches anything, or causes anything to be nailed or otherwise attached to or upon any property of the Commission shall incur a penalty of not less than $5 or more than $10. Affixing signs on property prohibited.

(3) The penalties imposed by or under subsection 2 shall be recoverable under *The Summary Convictions Act* and shall be paid over to the Commission. Recovery of penalties. Rev. Stat., c. 136.

5. Subsection 12 of section 87 of *The Power Commission Act* is amended by striking out the word "approved" in the second line and inserting in lieu thereof the word "proved". Rev. Stat., c. 62, s. 87, subs. 12, amended.

6.—(1) Subsection 1 of section 96 of *The Power Commission Act* is repealed and the following substituted therefor: Rev. Stat., c. 62, s. 96, subs. 1, re-enacted.

(1) Whenever it appears from the accounts of a municipal corporation or municipal commission that after providing for any payments required to be made on account of principal or interest of any debentures issued for the construction and equipment of works for the production, development or distribution of electrical power or energy, and in the case of a municipal corporation or municipal commission receiving electrical power or energy from the Commission for distribution, after providing for the payments required by this Act, there is a surplus at the credit of the municipal corporation or municipal commission derived from the production, development or distribution of electrical power or energy or from dealing in electrical fittings, fixtures, appliances, machines or equipment, such surplus shall be applied and disposed of in such manner as the Commission may by general regulation or special order direct,— When accounts of corporation show a surplus.

(*a*) in repaying to persons to whom electrical power or energy is being supplied by such municipal corporation or municipal commission moneys paid by them for electrical power or energy so supplied, such repayment being made either directly or by a credit on or reduction in bills for electrical power or energy; or In repayment to customers.

(*b*) in the reduction of any indebtedness incurred with respect to the construction and equipment of such works; or In reduction of indebtedness.

(*c*) in purchasing or otherwise acquiring a site and erecting thereon buildings for the occupation and use of the municipal commission as In erection of office buildings, etc.

offices and for other business purposes, subject to the approval by the Commission of the site and cost of the plans of any such building and subject to such approval, any such office building may be larger than is required for the immediate use of the municipal commission, and any part of such building not immediately required for the use of the municipal commission may be leased by it to the corporation or to any other municipal commission for the purposes of any public utility in the municipality; or

Larger buildings than required,—leasing part for other utilities.

In maintaining, repairing and extending works.

(*d*) in the maintenance, repair or renewal thereof; or

(*e*) in the extension of such works; or

(*f*) in the formation of a fund to be used at a future time for any of such purposes; or

To general purposes of municipal corporation.

(*g*) to the extent to which such surplus is derived from the supply of electrical power or energy for the public buildings of the corporation or the lighting of the streets of the municipality or for the operation of any street railway or electric railway or any public utility owned and operated by the corporation, by payment over of such surplus, or of such portion thereof as the Commission may deem proper, to the treasurer of the municipality to be applied to the general purposes of the corporation.

Rev. Stat., c. 62, s. 96, sub. 2, amended.

(2) Subsection 2 of the said section 96 is amended by adding thereto the words "and shall be deemed so to have applied and to have had effect since the 16th day of April, 1912", so that the said subsection shall now read as follows:

Application of sections notwithstanding special provisions.

(2) Subsection 1 shall apply to every municipal corporation or municipal commission which has entered into a contract with the Commission for the supply of electrical power or energy, and shall have effect notwithstanding any provision in any general or special Act and shall be deemed so to have applied and to have had effect since the 16th day of April, 1912.

Short title.

7. This Act may be cited as *The Power Commission Amendment Act, 1944.*

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21. The Commission, with the approval of the Lieutenant-Governor in Council, may enter into agreement with the corporation of any municipality receiving power from the Commission for including in the fund mentioned in section 20 employees of any commission established under *The Public Utilities Act*, or under this Act, for the management and control of works for the distribution of electrical power or energy in the municipality, upon such terms as to the contribution by the municipal corporation and otherwise as may be deemed expedient. R.S.O. 1937, c. 62, s. 18. Municipal employees may be included in fund. Rev. Stat., c. 320.

REPORT ON WATER POWERS

22. Whenever required by the Lieutenant-Governor in Council so to do, the Commission shall inquire into, examine and investigate water powers or water privileges in Ontario and report upon the value and capacity thereof, with such other information as the Lieutenant-Governor in Council may require. R.S.O. 1937, c. 62, s. 19. Commission to report on water powers, etc.

ACQUISITION OF PROPERTIES

23. The Commission may report to the Lieutenant-Governor in Council, designating, Acquisition of properties.

(*a*) the land, water, water privileges or water powers, or the land and works, or portion thereof, of any person owning or holding under lease or otherwise, or developing, operating or using a water privilege or water power, or transmitting electrical or other power or energy in Ontario which, in the opinion of the Commission, should be purchased, acquired, leased, taken, expropriated, developed, operated or used by the Commission for the purposes of this Act; or

(*b*) the quantity of the product of any person generating electrical power or energy in Ontario or bringing such power or energy into Ontario for use or transmission therein which the Commission requires for the purposes of this Act. R.S.O. 1937, c. 62, s. 20.

24.—(1) The Lieutenant-Governor in Council may authorize the Commission at any time and from time to time, to acquire by purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, any land, lake, river, stream or other body of water or watercourse, and temporarily or permanently to divert or alter the boundaries or course of any lake, river, stream or other body of water or watercourse, or raise or lower Power may be given to Commission.

the level of the same or flood or overflow any land. R.S.O. 1937, c. 62, s. 21 (1).

Power may be given to Commission,

(2) In particular, but without limiting the generality of subsection 1, the Lieutenant-Governor in Council, upon the recommendation of the Commission, may authorize the Commission to, R.S.O. 1937, c. 62, s. 21 (2), *part.*

to acquire lands, waters, powers and works;

(*a*) acquire by purchase, lease or otherwise, land, waters, water privileges, water powers, buildings and works used for, or adapted or useful for, or capable of being used or made useful for generating, transforming, transmitting, distributing or selling electric or other power or energy; enter upon, take possession of, expropriate, acquire and use any such land, waters, water privileges, water powers, buildings and works without the consent of the owner thereof, or of any person in any manner entitled to any right, title, interest, claim or demand thereto or therein; and have and hold them however acquired or obtained, and develop, utilize, use, maintain, operate and improve them for any of the purposes of this Act;

to acquire assets and undertaking of companies;

(*b*) acquire by purchase the whole or any part of the property, assets and undertaking of any corporation engaged in the production or sale of electric or other power or energy, including shares held or owned by the corporation in any other company or companies of any kind or nature whatsoever, and to acquire the whole or any part of the properties, assets and undertakings of such other company or companies and to hold, develop, utilize, use, maintain, operate and improve any property or properties so acquired; 1946, c. 73, s. 8.

to acquire and construct works for production and use of electricity;

(*c*) generate and produce electrical, pneumatic, hydraulic, mechanical or other power or energy at places in Ontario by the use of water, coal, steam or oil, or by any other means, and transform, transmit, make available for use, distribute, deliver, sell, supply and generally use for the purposes of the Commission the electrical, pneumatic, hydraulic, mechanical or other power or energy and connect the works constructed or installed for these purposes with any other power works and with any system;

to acquire and use real and personal property for the generation and use of electrical power;

(*d*) for the purposes of clause *c* acquire by purchase, lease or otherwise, hold, improve and use real and personal property, acquire by purchase or otherwise water, coal, steam, oil and other supplies, and construct, maintain and operate works, including without limit-

ing the generality of the foregoing, development works, generating plants, transformer stations, transmission lines, switching and regulating works, distribution lines, access and other roads, and all other equipment, plant and works and things required for or incidental to any of such purposes;

to acquire works on provincial boundaries;

(*e*) acquire by purchase, lease or otherwise, lands, works, waters, water privileges and water powers upon or adjacent to the boundary line between Ontario and any other province and situate in Ontario, or in such other province, or partly in one and partly in the other of them, and erect, construct, maintain and operate upon any lands so acquired, works for the generation, transformation and transmission of electrical, pneumatic, hydraulic, mechanical or other power or energy, and enter into agreements with the Crown in right of such other province or with any commission appointed by the Lieutenant-Governor in Council of such other province or otherwise lawfully appointed or any other person interested in or affected by such works as to the terms and conditions upon which such works shall be constructed and operated and any rights so acquired be exercised; 1949, c. 73, s. 5.

to acquire shares in companies operating on such boundaries;

(*f*) acquire by purchase in the open market or otherwise shares or stock of any company owning or controlling any such lands, waters, water privileges, water powers or works; R.S.O. 1937, c. 62, s. 21 (2), cl. (*e*).

to acquire plant for transmitting and transforming power;

(*g*) construct, maintain and operate, and acquire by purchase, lease or otherwise, or without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use all erections, machinery, plant and other works and appliances for the transmission, transformation, supply and distribution of electrical power or energy; and conduct, store, transmit, transform and supply electrical power or energy and steam for the purposes of this Act, and with lines of wires, poles, conduits, pipes, motors, transformers or other conductors, equipment or devices, receive, conduct, convey, transmit, transform, distribute, supply or furnish such electrical power or energy and steam to or from or for any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over, upon or under the land of any person; 1943, c. 22, s. 2 (1).

judge or of the Court of Appeal, such order shall be final and binding unless and until it shall appear to the Commission that owing to change of circumstances or conditions in respect of such works or improvements it is equitable that there should be a readjustment of the proportions theretofore fixed by the order of the judge and in that case, upon the application of any person liable to contribute to the cost of such works or improvements, made with the consent in writing of the Commission, the judge may make further inquiry and may readjust such proportions to be thereafter applied in such manner as he may deem just and equitable, subject to appeal as hereinbefore provided. R.S.O. 1937, c. 62, s. 32 (3-12).

Limitations Act not applicable.

43. Where possession of land of the Commission has been taken by some other person, the right of the Commission, or anyone claiming under it, to recover it, shall not be barred by reason of the lapse of time, notwithstanding the provisions of *The Limitations Act*, or of any other Act of the Legislature, or by reason of any claim based on possession adverse to it for any period of time which might otherwise be made lawfully at common law, unless it is shown that the Commission had actual notice in writing of such adverse possession, and such notice was had by it 10 years before it or the said person claiming under it commenced action to recover such land; provided that no claim shall be acquired by possession, prescription, custom, user or implied grant to any way, easement, watercourse or use of water or water right or privilege or flooding privilege of the Commission, or or to any way, easement, watercourse, or use of water, or right of drainage along, over, upon, on or from any land, or water, or water right, or privilege of the Commission, notwithstanding *The Limitations Act* or any other Act of the Legislature or any claim at common law based on lapse of time, or length of enjoyment or use. R.S.O. 1937, c. 62, s. 33.

Rev. Stat., c. 207.

Ownership of works retained.

44.—(1) Notwithstanding anything in this Act or any other general or special Act, where works of the Commission have been affixed to realty they shall remain subject to the rights of the Commission as fully as they were before being so affixed and shall not become part of the realty unless otherwise agreed by the Commission in writing.

Affixing signs on property prohibited.

(2) Every person who without the consent of the Commission nails or otherwise attaches anything, or causes anything to be nailed or otherwise attached to or upon any property of the Commission shall be guilty of an offence and on summary conviction shall be liable to a penalty of not less than $5 and not more than $10.

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(*k*) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this section. R.S.O. 1950, c. 281, s. 20 (1-6).

Cost to Commission chargeable to administration

(7) The fund shall be maintained and administered by the Commission and the cost to the Commission of maintaining and administering it shall be deemed to be part of the cost of the administration of the Commission and is chargeable accordingly and such fund may be invested in investments authorized by section 208 of *The Corporations Act* for joint stock insurance companies. R.S.O. 1950, c. 281, s. 20 (7); 1960, c. 85, s. 2.

R.S.O. 1960, c. 71

No attachment, etc.

(8) The interest of any person in the fund or in any benefit payable therefrom is not subject to garnishment, attachment or seizure or any legal process and is not assignable. R.S.O. 1950, c. 281, s. 20 (8).

Municipal employees may be included in fund

22. The Commission, with the approval of the Lieutenant Governor in Council, may enter into agreement with any municipal corporation receiving power from the Commission for including in the fund mentioned in section 21 employees of any commission established under *The Public Utilities Act*, or under this Act, for the management and control of works for the distribution of power in the municipality, upon such terms as to the contribution by the municipal corporation and otherwise as is deemed expedient. R.S.O. 1950, c. 281, s. 21.

R.S.O. 1960, c. 335

REPORT ON WATER POWERS

Commission to report on water powers, etc.

23. Whenever required by the Lieutenant Governor in Council, the Commission shall inquire into, examine and investigate water powers or water privileges in Ontario and report upon the value and capacity thereof, with such other information as the Lieutenant Governor in Council requires. R.S.O. 1950, c. 281, s. 22.

ACQUISITION OF PROPERTIES

Power may be given to Commission

24.—(1) The Lieutenant Governor in Council may authorize the Commission at any time and from time to time to acquire by purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, any land, lake, river, stream or other body of water or watercourse, and temporarily or permanently to divert or alter the boundaries or course of any lake, river, stream or other body of water or watercourse, or raise or lower the level of the same or flood or overflow any land.

Power may be given to Commission,

(2) In particular, but without limiting the generality of subsection 1, the Lieutenant Governor in Council, upon the

recommendation of the Commission, may authorize the Commission to,

to acquire lands, waters, powers and works

(*a*) acquire by purchase, lease or otherwise, land, waters, water privileges, water powers, buildings and works used for, or adapted or useful for, or capable of being used or made useful for generating, transforming, transmitting, distributing or selling power; enter upon, take possession of, expropriate, acquire and use any such land, waters, water privileges, water powers, buildings and works without the consent of the owner thereof, or of any person in any manner entitled to any right, title, interest, claim or demand thereto or therein; and have and hold them however acquired or obtained, and develop, utilize, use, maintain, operate and improve them for any of the purposes of this Act;

to acquire assets and undertaking of companies

(*b*) acquire by purchase the whole or any part of the property, assets and undertaking of any corporation engaged in the production or sale of power, including shares held or owned by the corporation in any other company or companies of any kind or nature whatsoever, and to acquire the whole or any part of the properties, assets and undertakings of such other company or companies and to hold, develop, utilize, use, maintain, operate and improve any property or properties so acquired;

to acquire and construct works for production and use of power

(*c*) generate and produce power at places in Ontario by the use of water, coal, steam or oil, or by any other means, and transform, transmit, make available for use, distribute, deliver, sell, supply and generally use for the purposes of the Commission such power and connect the works constructed or installed for these purposes with any other power works and with any system;

to acquire and use real and personal property for the generation and use of power

(*d*) for the purposes of clause *c* acquire by purchase, lease or otherwise, hold, improve and use real and personal property, acquire by purchase or otherwise water, coal, steam, oil and other supplies, and construct, maintain and operate works, including without limiting the generality of the foregoing, development works, generating plants, transformer stations, transmission lines, switching and regulating works, distribution lines, access and other roads, and all other equipment, plant and works and things required for or incidental to any of such purposes;

to acquire works on provincial boundaries

(*e*) acquire by purchase, lease or otherwise, lands, works, waters, water privileges and water powers upon or

adjacent to the boundary line between Ontario and any other province and situate in Ontario, or in such other province, or partly in one and partly in the other of them, and erect, construct, maintain and operate upon any lands so acquired, works for the generation, transformation and transmission of power, and enter into agreements with the Crown in right of such other province or with any commission appointed by the Lieutenant Governor in Council of such other province or otherwise lawfully appointed or any other person interested in or affected by such works as to the terms and conditions upon which such works shall be constructed and operated and any rights so acquired be exercised;

to acquire shares in companies operating on such boundaries

(*f*) acquire by purchase in the open market or otherwise shares or stock of any company owning or controlling any such lands, waters, water privileges, water powers or works;

to acquire plant for transmitting and transforming power

(*g*) construct, maintain and operate, and acquire by purchase, lease or otherwise, or without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use all erections, machinery, plant and other works and appliances for the transmission, transformation, supply and distribution of power, and conduct, store, transmit, transform and supply power for the purposes of this Act, and with lines of wires, poles, conduits, pipes, motors, transformers or other conductors, equipment or devices, receive, conduct, convey, transmit, transform, distribute, supply or furnish such power to or from or for any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over, upon or under the land of any person;

to contract for supply of power to Commission

(*h*) contract with any person generating, transmitting or distributing power, or proposing so to do, to supply power to the Commission, and require any person generating, transmitting or distributing power to supply so much thereof as the Commission requires;

to flood lands and improve water powers

(*i*) enter upon, take and use, without the consent of the owner thereof, any land upon which any water power or privilege is situate, or any lake, river, stream or other body of water that, in the opinion of the Commission, is capable of improvement or development for the purpose of providing water power, and construct such dams, sluices, canals,

claim at common law based on lapse of time, or length of enjoyment or use. R.S.O. 1950, c. 281, s. 43.

Continuance of easements, etc.

44. Notwithstanding any other Act, where any right, interest, way, privilege, permit or easement has heretofore been, or is hereafter acquired by the Commission, in, through, over, under, along, upon, across or affecting any land, unless it is otherwise agreed, the land continues subject thereto for the term thereof and it is binding upon the owner at the time of acquisition and all subsequent owners of the land until expiration or release by the Commission. 1952, c. 77, s. 3.

Ownership of works retained

45. Notwithstanding this Act or any other general or special Act, where works of the Commission have been affixed to realty they remain subject to the rights of the Commission as fully as they were before being so affixed and do not become part of the realty unless otherwise agreed by the Commission in writing. R.S.O. 1950, c. 281, s. 44 (1).

Affixing signs on property prohibited

46.—(1) Every person who without the consent of the Commission nails or otherwise attaches anything, or causes anything to be nailed or otherwise attached to or upon any property of the Commission is guilty of an offence and on summary conviction is liable to a fine of not less than $5 and not more than $10.

Disposition of fines

(2) The fines recovered for offences against subsection 2 shall be paid over to the Commission. R.S.O. 1950, c. 281, s. 44 (2, 3).

TAXATION

Easement over lands sold for taxes not affected

47. Notwithstanding any other Act, where land that was or is subject to easements, ways, rights of way or entry, flooding rights, licences or rights to maintain works thereon, owned by or belonging to the Commission, has been or is sold for taxes, or in respect of which a tax arrears certificate has been or is registered, such easements, ways, rights of way or entry, flooding rights, licences, or rights to maintain works shall be deemed not to have been or be affected by the sale or registration. R.S.O. 1950, c. 281, s. 45 (4).

Tax exemption R.S.O. 1960, c. 23

48.—(1) Notwithstanding *The Assessment Act* or any other general or special Act the Commission and its property is not subject to taxation for municipal or school purposes, except for local improvements.

Annual payments to municipalities

(2) The Commission shall pay in each year to any municipality in which are situated lands owned by and vested in the Commission or buildings used exclusively for executive and administrative purposes and owned by and vested in the Com-

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(iii) disability, or

(iv) death,

and the terms and conditions upon which, and the person or persons to whom, such payments shall be made;

(*j*) providing for payment out of the fund of the cost of any benefits provided under any agreement referred to in subsection 5;

(*k*) prescribing the intervals of time within which an actuarial valuation of the fund shall be made;

(*l*) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this section. R.S.O. 1960, c. 300, s. 21 (6); 1965, c. 100, s. 3 (1); 1968, c. 98, s. 1 (2).

Cost to Commission chargeable to administration

(7) The fund shall be maintained and administered by the Commission, and the cost to the Commission of maintaining and administering it shall be deemed to be part of the cost of the administration of the Commission and is chargeable accordingly, and the Commission may invest in, purchase, acquire, hold and sell investments and loans authorized by *The Pension Benefits Act* and any regulations made thereunder. 1965, c. 100, s. 3 (2).

R.S.O. 1970, c. 342

No attachment, etc.

(8) The interest of any person in the fund or in any benefit payable therefrom is not subject to garnishment, attachment or seizure or any legal process and is not assignable. R.S.O. 1960, c. 300, s. 21 (8).

Municipal employees may be included in fund

22. The Commission, with the approval of the Lieutenant Governor in Council, may enter into agreement with any municipal corporation receiving power from the Commission for including in the fund mentioned in section 21 employees of any commission established under *The Public Utilities Act*, or under this Act, for the management and control of works for the distribution of power in the municipality, upon such terms as to the contribution by the municipal corporation and otherwise as is considered expedient. R.S.O. 1960, c. 300, s. 22.

R.S.O. 1970, c. 390

REPORT ON WATER POWERS

Commission to report on water powers, etc.

23. Whenever required by the Lieutenant Governor in Council, the Commission shall inquire into, examine and investigate water powers or water privileges in Ontario and report upon the value and capacity thereof, with such other information as the Lieutenant Governor in Council may require. R.S.O. 1960, c. 300, s. 23.

ACQUISITION OF PROPERTIES

Power may be given to Commission

24.—(1) The Lieutenant Governor in Council may authorize the Commission at any time and from time to time to acquire by

purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, any land, lake, river, stream or other body of water or watercourse, and temporarily or permanently to divert or alter the boundaries or course of any lake, river, stream or other body of water or watercourse, or raise or lower the level of the same or flood or overflow any land.

Power may be given to Commission,

(2) In particular, but without limiting the generality of subsection 1, the Lieutenant Governor in Council, upon the recommendation of the Commission, may authorize the Commission to,

to acquire lands, waters, powers and works

(*a*) acquire by purchase, lease or otherwise, land, waters, water privileges, water powers, buildings and works used for, or adapted or useful for, or capable of being used or made useful for generating, transforming, transmitting, distributing or selling power; enter upon, take possession of, expropriate, acquire and use any such land, waters, water privileges, water powers, buildings and works without the consent of the owner thereof, or of any person in any manner entitled to any right, title, interest, claim or demand thereto or therein; and have and hold them however acquired or obtained, and develop, utilize, use, maintain, operate and improve them for any of the purposes of this Act;

to acquire assets and undertaking of companies

(*b*) acquire by purchase the whole or any part of the property, assets and undertaking of any corporation engaged in the production or sale of power, including shares held or owned by the corporation in any other company or companies of any kind or nature whatsoever, and to acquire the whole or any part of the properties, assets and undertakings of such other company or companies and to hold, develop, utilize, use, maintain, operate and improve any property or properties so acquired;

to acquire and construct works for production and use of power

(*c*) generate and produce power at places in Ontario by the use of water, coal, steam or oil, or by any other means, and transform, transmit, make available for use, distribute, deliver, sell, supply and generally use for the purposes of the Commission such power and connect the works constructed or installed for these purposes with any other power works and with any system;

to acquire and use real and personal property for the generation and use of power

(*d*) for the purposes of clause *c* acquire by purchase, lease or otherwise, hold, improve and use real and personal property, acquire by purchase or otherwise water, coal, steam, oil and other supplies, and construct, maintain and operate works, including without limiting the generality of the foregoing, development works, generating

plants, transformer stations, transmission lines, switching and regulating works, distribution lines, access and other roads, and all other equipment, plant and works and things required for or incidental to any of such purposes;

(*e*) acquire by purchase, lease or otherwise, lands, works, waters, water privileges and water powers upon or adjacent to the boundary line between Ontario and any other province and situate in Ontario, or in such other province, or partly in one and partly in the other of them, and erect, construct, maintain and operate upon any lands so acquired, works for the generation, transformation and transmission of power, and enter into agreements with the Crown in right of such other province or with any commission appointed by the Lieutenant Governor in Council of such other province or otherwise lawfully appointed or any other person interested in or affected by such works as to the terms and conditions upon which such works shall be constructed and operated and any rights so acquired be exercised; to acquire works on provincial boundaries

(*f*) acquire by purchase in the open market or otherwise shares or stock of any company owning or controlling any such lands, waters, water privileges, water powers or works; to acquire shares in companies operating on such boundaries

(*g*) construct, maintain and operate, and acquire by purchase, lease or otherwise, or without the consent of the owner thereof or of any person interested therein, enter upon, take possession of, expropriate and use all erections, machinery, plant and other works and appliances for the transmission, transformation, supply and distribution of power, and conduct, store, transmit, transform and supply power for the purposes of this Act, and with lines of wires, poles, conduits, pipes, motors, transformers or other conductors, equipment or devices, receive, conduct, convey, transmit, transform, distribute, supply or furnish such power to or from or for any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over, upon or under the land of any person; to acquire plant for transmitting and transforming power

(*h*) contract with any person generating, transmitting or distributing power, or proposing so to do, to supply power to the Commission, and require any person generating, transmitting or distributing power to supply so much thereof as the Commission may require; to contract for supply of power to Commission

(*i*) enter upon, take and use, without the consent of the owner thereof, any land upon which any water power or to flood lands and improve water powers

Continuance of easements, etc.

43. Notwithstanding any other Act, where any right, interest, way, privilege, permit or easement has heretofore been, or is hereafter acquired by the Commission, in, through, over, under, along, upon, across or affecting any land, unless it is otherwise agreed, the land continues subject thereto for the term thereof and it is binding upon the owner at the time of acquisition and all subsequent owners of the land until expiration or release by the Commission. R.S.O. 1960, c. 300, s. 44.

Ownership of works retained

44. Notwithstanding this Act or any other general or special Act, where works of the Commission have been affixed to realty they remain subject to the rights of the Commission as fully as they were before being so affixed and do not become part of the realty unless otherwise agreed by the Commission in writing. R.S.O. 1960, c. 300, s. 45.

Affixing signs on property prohibited

45.—(1) Every person who without the consent of the Commission nails or otherwise attaches anything, or causes anything to be nailed or otherwise attached to or upon any property of the Commission is guilty of an offence and on summary conviction is liable to a fine of not less than $5 and not more than $10.

Disposition of fines

(2) The fines recovered for offences against subsection 1 shall be paid over to the Commission. R.S.O. 1960, c. 300, s. 46.

TAXATION

Easement over lands sold for taxes not affected

46. Notwithstanding any other Act, where land that was or is subject to easements, ways, rights of way or entry, flooding rights, licences or rights to maintain works thereon, owned by or belonging to the Commission, has been or is sold for taxes, or in respect of which a tax arrears certificate has been or is registered, such easements, ways, rights of way or entry, flooding rights, licences, or rights to maintain works shall be deemed not to have been or be affected by the sale or registration. R.S.O. 1960, c. 300, s. 47.

Tax exemption R.S.O. 1970, c. 32

47.—(1) Notwithstanding *The Assessment Act* or any other general or special Act the Commission and its property is not subject to taxation for municipal or school purposes, except for local improvements.

Annual payments to municipalities

(2) The Commission shall pay in each year to any municipality in which are situated lands owned by and vested in the Commission or buildings used exclusively for executive and administrative purposes and owned by and vested in the Commission or buildings owned by and vested in the Commission and rented by the Commission to other persons the total amount that all rates, except, subject to subsections 4 and 5, rates on business assess-

Tab 9

1973

c 57 The Power Commission Amendment Act, 1973

Ontario

CHAPTER 57

An Act to amend The Power Commission Act

Assented to June 22nd, 1973
Session Prorogued March 5th, 1974

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. The title to *The Power Commission Act*, being chapter 354 of the Revised Statutes of Ontario, 1970, is repealed and the following substituted therefor: Title, re-enacted

"The Power Corporation Act"

2. Except as otherwise provided in this Act, the said Act is amended by striking out "Commission" and "Commission's" wherever they occur and have reference to The Hydro-Electric Power Commission of Ontario and inserting in lieu thereof in each instance "Corporation" or "Corporation's", as the case may be. Where Commission changed to Corporation

3.—(1) Clause *a* of section 1 of the said Act is repealed and the following substituted therefor: s. 1 (*a*), re-enacted

(*a*) "Board" means the Board of Directors of the Corporation.

(2) Clause *b* of the said section 1 is amended by striking out "Commission" in the second line and inserting in lieu thereof "Corporation". s. 1 (*b*), amended

(3) Clause *c* of the said section 1 is repealed and the following substituted therefor: s. 1 (*c*), re-enacted

(*c*) "chairman" means the chairman of the Board and chief officer of the Corporation;

(*ca*) "Corporation" means the body corporate continued by subsection 1 of section 2;

(*cb*) "director" means a member of the Board.

(4) The said section 1 is amended by adding thereto the following clauses: s. 1, amended

(*da*) "Minister" means the Minister of Energy;

. . . . . .

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c 384 Power Corporation Act

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or right of drainage along, over, upon, on or from any land, or water, or water right, or privilege of the Corporation, notwithstanding the *Limitations Act* or any other Act of the Legislature or any claim at common law based on lapse of time, or length of enjoyment or use. R.S.O. 1970, c. 354, s. 42; 1973, c. 57, s. 2.

R.S.O. 1980, c. 240

Continuance of easements, etc.

42. Notwithstanding any other Act, where any right, interest, way, privilege, permit or easement has heretofore been, or is hereafter acquired by the Corporation, in, through, over, under, along, upon, across or affecting any land, unless it is otherwise agreed, the land continues subject thereto for the term thereof and it is binding upon the owner at the time of acquisition and all subsequent owners of the land until expiration or release by the Corporation. R.S.O. 1970, c. 354, s. 43; 1973, c. 57, s. 2.

Ownership of works retained

43. Notwithstanding this Act or any other general or special Act, where works of the Corporation have been affixed to realty they remain subject to the rights of the Corporation as fully as they were before being so affixed and do not become part of the realty unless otherwise agreed by the Corporation in writing. R.S.O. 1970, c. 354, s. 44; 1973, c. 57, s. 2.

Affixing signs on property prohibited

44.—(1) Every person who without the consent of the Corporation nails or otherwise attaches anything, or causes anything to be nailed or otherwise attached to or upon any property of the Corporation is guilty of an offence and on conviction is liable to a fine of not less than $5 and not more than $10.

Disposition of fines

(2) The fines recovered for offences against subsection (1) shall be paid over to the Corporation. R.S.O. 1970, c. 354, s. 45; 1973, c. 57, s. 2.

TAXATION

Easement over lands sold for taxes not affected

45. Notwithstanding any other Act, where land that was or is subject to easements, ways, rights of way or entry, flooding rights, licences or rights to maintain works thereon, owned by or belonging to the Corporation, has been or is sold for taxes, or in respect of which a tax arrears certificate has been or is registered, such easements, ways, rights of way or entry, flooding rights, licences, or rights to maintain works shall be deemed not to have been or be affected by the sale or registration. R.S.O. 1970, c. 354, s. 46; 1973, c. 57, s. 2.

Tax exemption

R.S.O. 1980, c. 31

46.—(1) Notwithstanding the *Assessment Act* or any other general or special Act the Corporation and its property is not

Tab 11

CHAPTER 242.

An Act to establish the St. Lawrence Seaway Authority.

SHORT TITLE.

1. This Act may be cited as the *St. Lawrence Seaway Authority Act*. 1951 (2nd Sess.), c. 24, s. 1. Short title.

INTERPRETATION.

2. In this Act, Definitions.

(a) "Authority" means The St. Lawrence Seaway Authority established by this Act; "Authority."

(b) "canal" means a canal, lock or navigable channel and all works and property appertaining or incident to such canal, lock or channel; "Canal."

(c) "deep waterway" means adequate provision for navigation requiring a controlling channel depth of twenty-seven feet with a depth of thirty feet over lock sills in general in accordance with paragraph *(j)* of the preliminary article of the Agreement between Canada and the United States providing for the Development of Navigation and Power in the Great Lakes-St. Lawrence Basin, dated the 19th day of March, 1941; "Deep waterway."

(d) "member" means a member of the Authority; "Member."

(e) "Minister" means the Minister of Transport; "Minister."

(f) "President" means the President of the Authority. "President."
1951 (2nd Sess.), c. 24, s. 2.

CONSTITUTION OF AUTHORITY.

3. (1) There is hereby established a corporation called "The St. Lawrence Seaway Authority", consisting of a President and two other members as provided in this Act. The St. Lawrence Seaway Authority.

(2) Except as provided in section 9, the Authority is for all purposes an agent of Her Majesty in right of Canada and its powers under this Act may be exercised only as an agent of Her Majesty. An agent of H.M.

Power to enter into contracts.

(3) The Authority may, on behalf of Her Majesty, enter into contracts in the name of Her Majesty or in the name of the Authority.

Property of H.M.

(4) Property acquired by the Authority is the property of Her Majesty and title thereto may be vested in the name of Her Majesty or in the name of the Authority. 1951 (2nd Sess.), c. 24, s. 3.

Actions, suits, etc.

4. Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Authority on behalf of Her Majesty, whether in its name or in the name of Her Majesty, may be brought or taken by or against the Authority in the name of the Authority in any court that would have jurisdiction if the Authority were not an agent of Her Majesty. 1951 (2nd Sess.), c. 24, s. 4.

Appointment of members, tenure of office and salaries.

5. (1) The Governor in Council shall appoint the members of the Authority to hold office during good behaviour for a term not exceeding ten years, who shall be paid such salaries as may be fixed by the Governor in Council.

Reappointment.

(2) A member, on the expiration of his term of office, may be reappointed for a further term not exceeding ten years.

Appointment of temporary substitutes.

(3) Where a member of the Authority is absent or incapable for any reason of performing the duties of his office or the office thereof is vacant, the Governor in Council may appoint a temporary substitute member to hold the office upon such terms and conditions as the Governor in Council may prescribe. 1951 (2nd Sess.), c. 24, s. 5.

Head office.

6. The head office of the Authority shall be at the City of Ottawa or in such other place in Canada as the Governor in Council may designate. 1951 (2nd Sess.), c. 24, s. 6.

CONDUCT OF BUSINESS OF AUTHORITY.

President to be chief executive.

7. (1) The President is the chief executive officer of the Authority, is charged with the general direction and control of the business of the Authority, and shall have such other powers as may be conferred on him by the by-laws.

Absence or incapacity of President.

(2) During incapacity or absence for any reason of the President or a vacancy in the office of the President, one of the other members designated by the Governor in Council may exercise and perform all the powers and functions of the President.

In case of vacancy.

(3) The exercise of the powers of the Authority is not impaired by reason of a vacancy in its membership. 1951 (2nd Sess.), c. 24, s. 7.

8. The Authority with the approval of the Governor in Council may make by-laws not inconsistent with this Act with respect to By-laws.

(a) the management of the affairs of the Authority and the conduct of its business, and

(b) the establishment of a pension fund for the officers and employees of the Authority employed in a continuing capacity and for the members, and for their dependents, and authorizing contributions to be made to it out of the funds of the Authority. 1951 (2nd Sess.), c. 24, s. 8.

9. The Authority may employ such officers and employees for such purposes and on such terms and conditions as may be determined by it and the officers and employees so employed are not officers or servants of Her Majesty. 1951 (2nd Sess.), c. 24, s. 9. Officers and employees.

PURPOSES, CAPACITIES AND POWERS OF AUTHORITY.

10. The Authority is incorporated for the purposes of Purposes.

(a) acquiring lands for and constructing, maintaining and operating all such works as may be necessary to provide and maintain, either wholly in Canada or in conjunction with works undertaken by an appropriate authority in the United States, a deep waterway between the Port of Montreal and Lake Erie, and

(b) constructing, maintaining and operating all such works in connection with such a deep waterway as the Governor in Council may deem necessary to fulfil any obligation undertaken or to be undertaken by Canada pursuant to any present or future agreement. 1951 (2nd Sess.), c. 24, s. 10.

11. Subject to this Act, the Authority, for the purposes set out in section 10, has the capacities and powers of a natural person as if it were a corporation incorporated for such purposes by Letters Patent under the Great Seal. 1951 (2nd Sess.), c. 24, s. 11. Capacities and powers.

12. The Authority, with the approval of the Governor in Council, may lease to any person any lands, property or water power held in the name of the Authority or held in the name of Her Majesty under the control of the Authority. 1951 (2nd Sess.), c. 24, s. 12. Power to lease lands, property or water power.

13. The Authority, with the approval of the Governor in Council, may, from time to time, borrow money from Her Majesty or otherwise for the purposes for which it is Power to borrow money.

incorporated, but the aggregate of the amounts borrowed under this Act and outstanding shall not at any time exceed three hundred million dollars. 1951 (2nd Sess.), c. 24, s. 13.

Management and operation of canals and works.

14. The Governor in Council may entrust to the Authority the management and operation of any canals or works similar or related to the works mentioned in section 10 upon such terms and conditions as the Governor in Council approves. 1951 (2nd Sess.), c. 24, s. 14.

TOLLS.

Tariffs of tolls.

15. (1) The Authority may, subject to sections 16 and 17, establish tariffs of tolls to be charged by it with respect to

(a) vessels entering, passing through, or leaving a canal or works under its administration;

(b) passengers, goods or cargo carried in such a vessel;

(c) goods or cargo landed, shipped, trans-shipped or stored in a canal or on canal lands under its administration;

(d) the use of any wharf, building, plant, property or facilities under its administration; and

(e) any service performed by the Authority.

For use of whole or part.

(2) The tolls that may be charged by the Authority pursuant to this section may be for the use of the canals and works administered by it as a whole or for the use of any particular part thereof or for any particular service rendered by the Authority.

Filing of tariffs.

(3) Every such tariff or amendment thereto shall be filed with the Board of Transport Commissioners and becomes operative from the date of such filing.

Complaints to be made to the Board of Transport Commissioners.

(4) Any person interested may at any time file a complaint with the Board of Transport Commissioners that there is unjust discrimination in an existing tariff and the Board shall thereupon consider such complaint and make a finding thereon which shall be reported to the Authority.

Application of s. 53 of the *Railway Act*.

(5) Section 53 of the *Railway Act* applies, *mutatis mutandis*, in the case of every report of the Board of Transport Commissioners as if the same were a decision made pursuant to the *Railway Act*. 1951 (2nd Sess.), c. 24, s. 15.

Tolls to be fair and reasonable.

16. The tolls that may be charged by the Authority shall be fair and reasonable and designed to provide a revenue sufficient to defray the cost to the Authority of its operations in carrying out the purposes for which it is incorporated, which costs shall include

(a) payments in respect of the interest on amounts borrowed by the Authority to carry out such purposes;

(b) amounts sufficient to amortize the principal of amounts so borrowed over a period not exceeding fifty years; and

(c) the cost of operating and maintaining the canals and works under the administration of the Authority, including all operating costs of the Authority and such reserves as may be approved by the Minister. 1951 (2nd Sess.), c. 24, s. 16.

In case of works constructed, etc., in conjunction with works undertaken by the U.S.

17. Where the works have been constructed and are maintained and operated by the Authority to provide, in conjunction with works undertaken by an appropriate authority in the United States, the deep waterway mentioned in section 10, tolls may be established pursuant to sections 15 and 16 or by agreement between Canada and the United States and, in the event of such an agreement, shall be charged by the Authority in accordance with directions given by the Governor in Council. 1951 (2nd Sess.), c. 24, s. 17.

EXPROPRIATION.

Taking or acquiring lands.

18. (1) With the prior approval of the Governor in Council, the Authority may, without the consent of the owner, take or acquire lands for the purposes of this Act and, except as otherwise provided in this section, all the provisions of the *Expropriation Act* are, *mutatis mutandis*, applicable to the taking, acquisition, sale or abandonment of lands by the Authority under this section.

Signed by the President.

(2) For the purposes of section 9 of the *Expropriation Act* the plan and description may be signed by the President of the Authority.

Compensation.

(3) The Authority shall pay compensation for lands taken or acquired under this section or for damage to lands injuriously affected by the construction of works erected by it and all claims against the Authority for such compensation may be heard and determined in the Exchequer Court of Canada in accordance with sections 46 to 49 of the *Exchequer Court Act*.

Payment.

(4) The Authority shall pay out of the funds administered by it the compensation agreed upon or adjudged by the Court to be payable. 1951 (2nd Sess.), c. 24, s. 18.

REGULATIONS.

Regulations.

19. (1) The Authority may, with the approval of the Governor in Council on the recommendation of the Minister,

BLUE SHEET

4-5 ELIZABETH II.

CHAP. 11

An Act to amend the St. Lawrence Seaway Authority Act.

[*Assented to 7th June, 1956.*]

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: R.S., c. 242; 1953-54, c. 44; 1955, c. 58.

1. Section 10 of the *St. Lawrence Seaway Authority Act* is amended by deleting the word "and" at the end of paragraph *(a)* thereof and by adding after paragraph *(b)* thereof the following paragraphs:

"*(c)* acquiring lands for, and constructing, maintaining and operating, alone or jointly or in conjunction with an appropriate authority in the United States, bridges connecting Canada with the United States as authorized by this Act, and in connection therewith, or as incidental thereto, acquiring with the approval of the Governor in Council shares or property of any bridge company and operating and managing bridges; and

(d) acquiring lands for, and constructing or otherwise acquiring, maintaining and operating such works or other property as the Governor in Council may deem to be necessarily incidental to works undertaken pursuant to this Act."

2. Section 12 of the said Act is amended by adding thereto the following subsection:

"(2) The Minister of Finance shall out of the Consolidated Revenue Fund pay to the Authority an amount equal to the net proceeds realized from the disposition of any property held in the name of the Authority or held in the name of Her Majesty under the control of the Authority." Proceeds of disposition.

3. The said Act is further amended by adding thereto, immediately after section 14 thereof, the following section:

"**14A.** (1) The Authority may, alone or jointly or in conjunction with the Saint Lawrence Seaway Development Corporation Authority may construct bridge over Pollys Gut.

Tab 12

Constitutional Law of Canada, 5th Ed. § 15:13

Constitutional Law of Canada, 5th Edition
Peter W. Hogg, Wade Wright

Part II. Distribution of Power

Chapter 15. Judicial Review on Federal Grounds

V. Characterization of Laws

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§ 15:13. Presumption of constitutionality

Judicial restraint in determining the validity of statutes may be expressed in terms of a "presumption of constitutionality". [1] Such a term transfers from the law of evidence the idea that a burden of demonstration lies upon those who would challenge the validity of a statute which has emerged from the democratic process. The presumption of constitutionality carries three legal consequences. One is the point made in the previous section of the chapter: in choosing between competing, plausible characterizations of a law, the court should normally choose that one that would support the validity of the law. [2] Secondly, where the validity of a law requires a finding of fact (for example, the existence of an emergency), that finding of fact need not be proved strictly by the government; it is enough that there be a "rational basis" for the finding. [3] Thirdly, where a law is open to both a narrow and a wide interpretation, and under the wide interpretation the law's application would extend beyond the powers of the enacting legislative body, the court should "read down" the law so as to confine it to those applications that are within the power of the enacting legislative body. [4] These three doctrines have the effect of reducing interference by unelected judges with the affairs of the elected legislative branch of government. Where a law is challenged on Charter grounds, as opposed to federal grounds, there is no presumption of constitutionality, except for the third doctrine, "reading down", which also applies in Charter cases. Other than the reading down doctrine, determinations of law and fact in Charter cases are subject to their own set of rules, and those rules are not compatible with a presumption of constitutionality. [5]

The application of the presumption of constitutionality in the division of powers context occasionally gives rise to disagreement in the courts. The decision of the Supreme Court of Canada in *Re Impact Assessment Act* (2023) [6] is illustrative. In that case, the Court was asked to address the constitutionality of the federal environmental impact assessment scheme set out in the Impact Assessment Act and an associated regulation (the Physical Activities Regulations), [7] both of which were enacted in 2019. The Court was unanimous that one part of the Act (dealing with projects carried out or financed by federal authorities on federal lands or outside Canada) was constitutional, but it divided as to whether another part of the Act (dealing with "designated projects") was constitutional. The part of the Act dealing with designated projects contained broad language and required the consideration of a variety of different factors at different decision-making junctures, only some of which fell within federal legislative power. Karakatsanis and Jamal JJ., writing in dissent, held that the designated projects part of the Act was nonetheless constitutional, interpreting the text of the Act narrowly. In doing so, they relied heavily on the presumption of constitutionality, taking the view that the courts should presume that the Act would be applied in a constitutionally compliant manner, and that judicial review would be an adequate safeguard against constitutional overreach in any individual case. [8] However, Wagner C.J., writing for the five-judge majority of the seven-judge bench, held that the designated projects part of the Act was unconstitutional, interpreting the text of the Act widely. In doing so, he emphasized that "the presumption of constitutionality is not an impermeable shield that protects legislation from constitutional review by the courts", and that the courts cannot "employ the presumption of constitutionality to rewrite legislative text as they see fit in order to bring it into compliance with the Constitution". [9] He also emphasized that "a court cannot circumvent its duty to meaningfully review the constitutionality of legislation by suggesting

that, insofar as an administrative decision maker applies a law unconstitutionally, the application of that law may be judicially reviewed". [10]

The majority opinion in *Re Impact Assessment Act* could be read to reject entirely the "presumption of constitutionally conforming administration" invoked in the dissenting opinion. The presumption of constitutionally conforming administration is a subset of the presumption of constitutionality. However, the better reading of the majority opinion in *Re Impact Assessment Act* is that it does not reject the presumption of constitutionally conforming administration altogether, but only the *application* of the presumption where the text of the law is not open to competing plausible characterizations, or to wide and narrow interpretations. This reading is supported by the various passages in which the majority opinion dismisses the characterization and interpretation of the Act by the dissenting opinion as inconsistent with the express wording of the Act. [11]

Footnotes

1 N.S. Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662, 687–688; J.E. Magnet, "The Presumption of Constitutionality" (1980) 18 Osgoode Hall L.J. 87; Strayer, The Canadian Constitution and the Courts (3rd ed., 1988), 251–254; Charles, Cromwell and Jobson, Evidence and the Charter of Rights and Freedoms (1989), 35–47; P. Daly, "Canada: Legal Coherence versus Legal Certainty", in M. Klatt (ed.), Constitutionally Conforming Interpretation – Comparative Perspectives, Vol. 1 - National Reports (2023), ch. 12.

2 Re Firearms Act, [2000] 1 S.C.R. 783, para. 25; Siemens v. Man., [2003] 1 S.C.R. 6, para. 33; Re Impact Assessment Act, 2023 SCC 23, paras. 69-72.

3 See ch. 60, Proof, under heading § 60:13, "Standard of proof".

4 See § 15:15, "Reading down", later in this chapter.

5 See ch. 38, Limitation of rights, under heading § 38:5 "Presumption of constitutionality".

6 Re Impact Assessment Act, 2023 SCC 23. Wagner C.J. wrote the opinion for the five-judge majority of the seven-judge bench of the Court. Karakatsanis and Jamal JJ. wrote a dissenting opinion.

7 Impact Assessment Act, S.C. 2019, c. 28, s. 1; Physical Activities Regulations, S.O.R./2019-285.

8 Re Impact Assessment Act, 2023 SCC 23, para. 230 (framing this subset of the presumption of constitutionality as the "presumption of constitutionally conforming administration").

9 Re Impact Assessment Act, 2023 SCC 23, para. 73.

10 Re Impact Assessment Act, 2023 SCC 23, para. 74.

11 Re Impact Assessment Act, 2023 SCC 23, paras. 174, 192-193.

BLUE SHEET

Constitutional Law of Canada, 5th Ed. § 16:1

Constitutional Law of Canada, 5th Edition
Peter W. Hogg, Wade Wright

Part II. Distribution of Power

Chapter 16. Paramountcy

I. Problem of Inconsistency

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§ 16:1. Problem of inconsistency

Every legal system has to have a rule to reconcile conflicts between inconsistent laws. The solution of the common law, which is applicable in unitary states such as the United Kingdom or New Zealand, is the doctrine of implied repeal: where there are two inconsistent (or conflicting) statutes [1] the later is deemed to have impliedly repealed the earlier to the extent of the inconsistency. [2] The doctrine of implied repeal applies in Canada to resolve conflicts between laws enacted by the same legislative body, for example, conflicts between two statutes of the federal Parliament [3] or two statutes of the Ontario Legislature. [4] But in a federal system there is also the possibility of conflict between the statutes of different legislative bodies within the federation. [5]

In Canada, conflict between the statutes of different provincial Legislatures is unlikely to occur because the legislative authority of each province is confined within its own territory. [6] But conflict between a statute of the federal Parliament and a statute of a provincial Legislature is bound to occur from time to time because federal and provincial laws are applicable in the same territory, and by virtue of the double aspect and pith and substance (incidental effect) doctrines may be applicable to the same facts. [7] The doctrine of implied repeal is of no help in resolving a federal-provincial conflict, because neither the federal Parliament nor a provincial Legislature has the power to repeal either expressly or impliedly each other's laws. For the same reason, the order in which the two laws were enacted is irrelevant: there is no reason to prefer the later over the earlier, or vice versa.

The rule that has been adopted by the courts is the doctrine of "federal paramountcy": [8] where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law [9] which prevails. [10] A similar rule has been adopted in the United States and Australia, [11] and apparently by most modern federal constitutions. [12] The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent.

Most of this chapter will be devoted to the difficulty of determining when two laws are inconsistent for the purpose of paramountcy, but it should not be overlooked that the issue does not arise unless each law has first been held to be valid as an independent enactment. In determining the validity of each law, the existence and terms of the other law are irrelevant. Validity depends upon the principles discussed in the previous chapter: does the "matter" (or pith and substance) of the law come within the "classes of subjects" (or heads of power) allocated to the enacting Parliament or Legislature? If one law fails this test, then the problem is resolved without recourse to the doctrine of paramountcy. It is only if each law independently passes the test of validity that it is necessary to determine whether the laws are inconsistent. This may appear to be labouring the obvious, but there are a startling number of judicial opinions which confuse the issue of consistency with the antecedent, and entirely different, issue of validity. [13]

Footnotes

1 The rule applies only to statute law, because the normal development of the common law eliminates inconsistencies. Where two inconsistent rules of common law are announced by the courts, a later court will choose one of them as "correct", either overruling the other decision as wrong or declaring it to be applicable only to some narrow set of facts or even "its own" facts.

2 Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed., 2002), 275–280; Côté, The Interpretation of Legislation in Canada (3rd ed., 2000), 348–365; J. Burrows, "Implied Repeal" (1976) 3 Otago L. Rev. 601. An exception of uncertain scope is where the earlier statute is "special" and the later statute is "general"; in that case the general yields to the special, on the basis that the general statute should be construed as allowing an exception for the special statute; e.g., Re B.C. Teachers' Federation (1985), 23 D.L.R. (4th) 161 (B.C.C.A.); Lévis v. Fraternité des policiers de Lévis, [2007] 1 S.C.R. 591 (one statute was both later and special).

3 E.g., Can. v. Schmidt, [1987] 1 S.C.R. 500.

4 E.g., Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150. In all these cases, there is a threshold question as to whether there is a conflict between the two laws, and whether it can be reconciled by interpretation: Lévis v. Fraternité des policiers de Lévis, [2007] 1 S.C.R. 591 (where the Court divided on this issue). In 114957 Canada v. Hudson, [2001] 2 S.C.R. 241, paras. 36, 46, the Court used the rule of express contradiction that governs federal-provincial controversies to decide that a Quebec provincial statue and a Quebec municipal by-law were not in conflict.

5 The doctrine of implied repeal also resolves conflicts between a federal statute or a provincial statute and a pre-confederation statute, where the pre-confederation statute is upon a subject within the competence of the body that enacted the post-confederation law: Moore v. Johnson, [1982] 1 S.C.R. 115.

6 In Interprovincial Cooperatives v. The Queen, [1976] 1 S.C.R. 477, an apparent conflict between the laws of two provinces was resolved in three different ways, but each opinion assumed that the two laws could not both be applicable to a single set of facts, and that one of the laws had to be held either invalid or inapplicable by reason of the extraterritorial limitation on provincial legislative power. This case is discussed in ch. 13, Extraterritorial Competence, under heading § 13:6, "Regulation of extraprovincial activity".

7 These doctrines are described, along with the three constitutional provisions that explicitly confer concurrent powers (ss. 92A(2), 94A, 95), in ch. 15, Judicial Review on Federal Grounds, under heading § 15:25, "Concurrency".

8 W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill L.J. 185; B. Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963) 41 Can. Bar Rev. 234; Laskin, Canadian Constitutional Law (5th ed., 1986 by Finkelstein), 262–291; E. Brouillet, "The Federal Principle and the 2005 Balance of Powers in Canada" (2006) 34 Supreme Court L.R. (2d) 307; B. Ryder, "The End of Umpire: Federalism and Judicial Restraint" (2006) 34 Supreme Court L.R. (2d) 345; R. Elliot, "Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 Supreme Court L.R. (2d) 629.

9 There is a strong argument that federal paramountcy should be attributed only to statutes enacted by the federal Parliament (and to regulations or orders made thereunder). There is, however, some authority that paramount status is possessed by pre-confederation laws in fields of federal jurisdiction: Hellens v. Densmore, [1957] S.C.R. 768, 784; *Re Broddy* (1982), 142 D.L.R. (3d) 151, 157 (Alta. C.A.). There was also some authority that paramount status is possessed by common law rules in fields of federal jurisdiction: Bisaillon v. Keable, [1983] 2 S.C.R. 60, 108. But the Supreme Court of Canada has since decided that common law rules and other non-statutory laws in fields of federal jurisdiction do not possess paramount status: Marine Services International v. Ryan Estate, [2013] 3 S.C.R. 53, paras. 66-67; Desgagnés Transport v. Wärtsilä Canada, 2019 SCC 58, paras. 101-103; both cases are discussed in greater depth in ch. 22, Transportation and Communication, under heading § 22:12, "Transportation by Water".

10 The Constitution Act, 1867 is curiously silent on the point, though there have been occasional suggestions that paramountcy flows from the notwithstanding clause in the opening words of s. 91 or the concluding clause of s. 91: Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004, 1031; Laskin, Canadian Constitutional Law (5th ed., 1986 by Finkelstein), 263. Two of the three provisions conferring concurrent powers, namely, ss. 92A and 95, expressly stipulate that the federal power is to be paramount. The third provision, s. 94A, conferring federal power over old age pensions and supplementary benefits, arguably goes beyond the recognition of concurrency and confers "reverse paramountcy" on conflicting provincial laws: so held in Hislop v. Can. (2009), 95 O.R. (3d) 81 (C.A.), para. 61;

although the reverse paramountcy was held to be inapplicable in that case. Accord, Que. v. Lacombe, [2010] 2 S.C.R. 453, para. 95 per Deschamps J. (obiter dictum that "where old age pensions are concerned, provincial legislation is paramount"). Laskin, Canadian Constitutional Law (5th ed., 1986 by Finkelstein), 263–264 (not referred to in *Hislop* or *Lacombe)*, denies that s. 94A confers reverse paramountcy.

11 The result has been held to be implicit in the "supremacy clause" in the United States' Constitution, art. 6, cl. 2; and is explicit in s. 109 of the Australian Constitution.

12 Wheare, Federal Government (4th ed., 1963), 74. While most federal states seem to have some form of *federal* paramountcy, this is not true of all federal states: see e.g. Constitution of the Republic of Iraq, 2005, Articles 115, 121.

13 For further discussion, see § 16:7, "Constitutional significance".

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Constitutional Law of Canada, 5th Ed. § 16:3

Constitutional Law of Canada, 5th Edition
Peter W. Hogg, Wade Wright

Part II. Distribution of Power

Chapter 16. Paramountcy

III. Express Contradiction

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§ 16:3. Impossibility of dual compliance

The only clear case of inconsistency, which I call express contradiction, [1] occurs when one law expressly contradicts the other. For laws which directly regulate conduct, an express contradiction occurs when it is impossible for a person to obey both laws; or, as Martland J. put it in *Smith v. The Queen* (1960), [2] "compliance with one law involves breach of the other".

In *Multiple Access v. McCutcheon* (1982), [3] the question was whether the insider-trading provisions of provincial securities law were in conflict with the insider-trading provisions of federal corporate law. The Supreme Court of Canada answered "no". Dickson J. for the majority of the Court had this to say about the conflict that would trigger the rule of federal paramountcy: [4]

> In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation, as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

Since the federal and provincial laws provided essentially the same remedy for essentially the same conduct, namely, profiting from inside knowledge in the trading of stocks and bonds, there was no express contradiction. On the contrary, the two laws were in harmony, imposing the same standards of conduct on persons dealing in corporate securities. It followed that the rule of federal paramountcy did not apply. The provincial law was operative, despite its duplication of federal law. [5]

It is not always clear whether two laws are in conflict. This may involve interpretation. Where it is possible to interpret either the federal law or the provincial law so as to avoid the conflict that would trigger paramountcy, then that interpretation should be preferred to an alternative that brings about a conflict between the two laws. This is essentially the same presumption of constitutionality that applies in other kinds of federalism cases: where two possible interpretations of a law are possible, and one would make the law unconstitutional, the court should normally choose the one that supports the constitutional validity of the law. [6]

In *Marine Services International v. Ryan Estate* (2013), [7] the plaintiffs brought a tort action for maritime negligence arising from an accident at sea. They were covered by a provincial workers' compensation statute and had applied for and received workers' compensation for the accident. The question was whether there was a conflict between a *federal* marine liability law that entitled persons who were injured or killed at sea by the negligence of another to bring an action in tort for maritime negligence and the *provincial* workers' compensation law that barred actions in tort arising out of an accident for which workers' compensation benefits were payable. At first blush, the federal law said "yes" and the provincial law said "no" to a plaintiff who was covered by workers' compensation and who wanted to bring an action for maritime negligence. If paramountcy applied, the federal "yes" would prevail because the provincial "no" would inoperative. That was not the answer given by the Supreme Court. The Court emphasized that there was a threshold issue of interpretation: "when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction that

would bring about a conflict between the two statutes". [8] In this case, the federal law used language that restricted the right to bring a maritime negligence action to "circumstances" that would have "entitled" a person "to recover damages". The Court held that the provincial bar was a circumstance that *disentitled* the plaintiffs from recovering damages. Therefore the federal law did not apply to persons who were covered by provincial workers' compensation. This was not an implausible interpretation because the bar on tort actions was universal in Canadian workers' compensation schemes and a federal law should not be lightly interpreted as negating the rule in maritime cases. In the result, therefore, the Court held that there was no conflict between the two laws: the provincial workers' compensation law was a valid provincial law that was operative in its application to maritime workers, [9] and the plaintiffs were accordingly barred from bringing a tort action for maritime negligence. [10]

The decided cases offer only a few examples of impossibility of dual compliance. Where there are insufficient assets to pay a person's debts, it is impossible to comply with a federal law stipulating the order of priority of payment and a provincial law stipulating a different order of priority. [11] Where a federal law stipulates that Japanese citizens in Canada are to be afforded the same employment opportunities as Canadian citizens, and a provincial law stipulates that Japanese are not to be employed in mines, another express contradiction occurs. [12] Where two spouses are separated, and a court order made under federal law grants custody of their child to the wife, while a court order made under provincial law grants custody to the husband, another express contradiction occurs. [13] Where a federal law stipulates that defined standard weights and measures be used and a provincial law requires purchasers of natural gas to pay a tax by reference to a non-standard unit of measurement, another express contradiction occurs. [14] Where a federal law provides that federal pension benefits cannot be assigned or charged and a provincial class-action law provides that legal fees are a first charge on a monetary award, if the monetary award in a class action is of federal pension benefits, another express contradiction occurs. [15] Where a federal law provides that Canada Post will determine the locations of "community mail boxes" and a municipal law provides that the municipality will determine the locations within the municipality, another express contradiction occurs. [16]

In *M & D Farm v. Manitoba Agricultural Credit Corporation* (1999), [17] the question arose whether the Manitoba Agricultural Credit Corporation, which held a mortgage on the farm owned by the plaintiffs, had validly foreclosed on the mortgage. Under the federal Farm Debt Review Act, the plaintiffs had obtained a 120-day stay of proceedings to halt any proceedings to recover the arrears owing by them to the corporation under the mortgage. (The purpose of the stay was to provide an opportunity for a consensual settlement with a farmer's creditors.) While the stay was in force, the corporation obtained a court order under the provincial Family Farm Protection Act granting permission to foreclose on the mortgage. The corporation did nothing more until the federal stay expired, and then continued the proceedings for foreclosure to a conclusion culminating in the corporation obtaining title to the farm. When the plaintiffs were faced with a demand by the corporation for possession of the farm, they argued that the court order granting permission to foreclose was a nullity, and that all the steps that followed were consequently also void. The Supreme Court of Canada agreed with the plaintiffs, and held that the foreclosure was invalid. The Court held that the effect of the stay, issued under federal law, was to prohibit any proceedings to enforce the mortgage, and an application for permission to foreclose was one of the prohibited proceedings. Therefore, the court order granting permission to foreclose was directly prohibited by the federal law. Since the court order permitting foreclosure proceedings was made under provincial law, and the court order staying proceedings was made under federal law, the doctrine of paramountcy required that the federal law prevail. There was an express contradiction between two court orders, one of which, made under federal law, prohibited enforcement proceedings for 120 days, and the other of which, made under provincial law within the 120-day period of the stay, was itself an enforcement proceeding.

The opposite result was reached in the *Saskatchewan Breathalyzer* case (1958). [18] In that case, a federal law provided that "no person is required to give a sample of…breath" as evidence of driving while intoxicated, and a provincial law suspended the driving licence of any person who refused to comply with a police request for a sample. In the Supreme Court of Canada, three judges held that the provincial law "required" the giving of a sample, which meant that the provincial law expressly contradicted the federal law ("no person is required"). But the majority decided otherwise. They held that the provincial sanction for a refusal to give a sample was not severe enough—merely the denial of "a questionable privilege"—to amount to a requirement of giving a sample. Therefore, the provincial law did not contradict the federal law, and was not rendered inoperative by paramountcy.

Is there an impossibility of dual compliance if a federal law requires the consent of a federal agency for a particular project and provincial law requires the consent of a provincial agency for the same project? In principle, the answer would seem to be no. Both levels of government may give their consent, which would obviate any conflict. Even if one level of government imposes stricter conditions on the project than the other, compliance with the stricter conditions obviates any conflict. Only if one level of government denies consent and the other grants consent, is there an impossibility of dual compliance, which would cause the federal decision to prevail over the provincial decision in that particular case. In *British Columbia v. Lafarge Canada* (2007), [19] it was clear that it was necessary to obtain approval from the Vancouver Port Authority (established under federal law) for the development of a marine facility on a site in the (federally-regulated) port of Vancouver. However, the site was also within the boundaries of the City of Vancouver (established under provincial law), and the question was whether the development also needed the approval of the City under its land-use by-law. Binnie and LeBel JJ, who wrote the majority opinion in the case, held that the mere requirement of municipal approval would give rise to "operational conflict", and therefore it was not even necessary to seek the permission of the City (which had already informally approved the project). [20] Bastarache J., who based his concurring reasons on interjurisdictional immunity, was surely correct in pointing out that "until the City refuses a permit, dual compliance is not 'impossible' here". [21]

In 2015, the Supreme Court decided three cases on the question whether the federal Bankruptcy and Insolvency Act (BIA) contradicted provincial laws. There was no doubt about the independent validity of the BIA, which was authorized by the federal power over "bankruptcy and insolvency" (s. 91(21)), or the three provincial laws, each of which was authorized by the provincial power over "property and civil rights in the province" (s. 92(13)).

In the first case, *Alberta v. Moloney* (2015), [22] the apparent conflict was between the fresh-start provision of the BIA, which provides that when a bankrupt debtor is discharged from bankruptcy, the debtor is released from all debts that are claims provable in bankruptcy, and Alberta's Traffic Safety Act, which provides that, if an uninsured driver fails to pay a damages award to the victim of an accident (in which case the province pays the award), the driver's vehicle permit and licence to drive are suspended until the driver has repaid the province the amount of the damages award. In this case, Moloney, a truck driver, caused an accident while driving without insurance. The victim of the accident sued Moloney and obtained judgment for $194,875. The province of Alberta paid the judgment debt and received an assignment of the debt, as provided by Alberta law. Moloney did not pay the debt to the province. Some time later Moloney went bankrupt. After three years, he was discharged from bankruptcy. The judgment debt was one of his debts provable in bankruptcy. In fact it was his largest debt and the reason for his financial difficulties. After his discharge from bankruptcy, because the judgment debt had not been paid, the province suspended his driving privileges, relying on the Traffic Safety Act. Moloney took the position that he was now released from the judgment debt, relying on the BIA's fresh-start provision. The Supreme Court held that there was a conflict between the two laws and the federal BIA therefore prevailed to discharge the judgment debt and render inoperative the provisions of the Traffic Safety Act denying driving privileges to Moloney. Gascon J., who wrote for the majority, held that the two laws could not operate concurrently: "This is a case where the provincial law says 'yes' ('Alberta can enforce this provable claim'), while the federal law says 'no' ('Alberta cannot enforce this provable claim')". [23] He also held that the second branch of paramountcy (frustration of federal purpose) [24] was satisfied. An important purpose of the fresh-start provision was to give the former bankrupt a fresh start in life, no longer encumbered by the debts that had overwhelmed them. The provincial law frustrated debts that the BIA discharged. [25] Côté J. disagreed that dual compliance was impossible. In her view, it was possible for Moloney to obey both laws, either by giving up driving or by paying the judgment debt. [26] However, she agreed that the provincial law frustrated the fresh-start objective of the BIA and she therefore concurred in the result.

The second 2015 case, *407 ETR Concession Co. v. Canada* (2015), [27] raised a similar issue to *Moloney.* The claimed conflict was between the fresh-start provision of the BIA (again) and the provision for enforcing payment of highway tolls in Ontario's Highway 407 Act. Highway 407 is a private toll highway that does not use toll booths to block entry to vehicles that have not paid the toll. It is an open-access highway: an electronic system reads each car's licence plate (or a transponder in the car) at the points of entry and exit and calculates the toll payable for that journey. An invoice is then mailed to the address of the owner

of the licence plate (or transponder). If the invoice is not paid, the owner of the highway (ETR) is authorized by the Act to notify the province's Registrar of Motor Vehicles. Until the Registrar is advised that the debt has been paid, the Act requires the Registrar to refuse to issue or renew the debtor's vehicle permit. Mr. Moore used Highway 407 1,973 times running up a toll debt of $34,977. He then went bankrupt. After he was discharged from bankruptcy, the Registrar continued to refuse to issue or renew his vehicle permit. He sought an order compelling the Registrar to issue his vehicle permit. The Supreme Court followed *Moloney* to hold that there was a conflict between the two laws rendering inoperative the Highway 407 Act's provisions for the enforcement of the toll debt. Gascon J. again wrote for the majority and again held that the two laws could not operate concurrently: "the 407 Act says 'yes' to the enforcement of a provable claim, while [the fresh-start provision] of the BIA says 'no', such that the operation of the provincial law makes it impossible to comply with the federal law." [28] Gascon J. also again held that the provincial law frustrated the purpose of the fresh-start provision of the BIA. [29] Côté J. again wrote a concurring opinion, denying that it was impossible to comply with both laws: "If a debtor chooses not to drive, the province simply cannot enforce its claim. The same is true if [ETR] opts not to notify the Registrar of Motor Vehicles of the debtor's failure to pay …". [30] However, she again agreed with Gascon J. that the Highway 407 Act frustrated the purpose of the fresh-start provision of the BIA. [31] Therefore, she ended up concurring with the majority in the result.

In the third case, *Saskatchewan v. Lemare Lake Logging* (2015), [32] the claimed conflict was between the power of a secured creditor to apply for the appointment of a receiver over the debtor's assets under the BIA, which required a 10-day period of advance notice to the debtor, and, since the debtor was a farmer in Saskatchewan, the provincial Saskatchewan Farm Security Act, which required a 150-day period of advance notice to the debtor coupled with a mandatory review and mediation process. In this case, the Court was unanimous that there was no express contradiction: the creditor applying for a receiver could comply with both Acts by complying with the longer waiting period and other requirements of the provincial law. The Court also held, by a majority, that the provincial law did not frustrate the purpose of the federal law. [33]

In *Moloney* and *407 ETR* (but not in *Lemare Lake*, which turned more on frustration of federal purpose), Gascon and Côté JJ. adopted different approaches to the impossibility of dual compliance test. As Côté J. noted in her concurring opinions in both cases, it was not actually impossible to comply with the relevant federal and provincial laws. In *Moloney*, it was possible for Moloney to comply with both the federal BIA and Alberta's Traffic Safety Act, either by giving up driving or paying the judgment debt. Similarly, in *407 ETR*, it was possible for a debtor (like Moore) to comply with both the federal BIA and Ontario's Highway 407 Act, either by giving up driving or paying any toll debt. However, in both cases, Gascon J. held that there was an impossibility of dual compliance. He emphasized that an impossibility of dual compliance analysis "cannot be limited to asking whether [a party] can comply with both [federal and provincial] laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law". [34] The focus of the analysis must, he said, be "on the effect of the provincial law", which requires looking at its "substance … rather than its form", with an eye to determining whether it is allowing a province to "do indirectly what it is precluded from doing directly" by the federal law. [35] Côté J. criticized Gascon J.'s approach to impossibility of dual compliance, arguing that it blurred the lines between an impossibility of dual compliance and frustration of federal purpose analysis, and would lead to more provincial laws being rendered inoperative under the federal paramountcy doctrine. She defended a stricter approach to impossibility of dual compliance, one that looks at whether there is an "express conflict" between the "actual words" used in the relevant federal and provincial laws, read in their "literal" sense. [36]

Gascon and Côté JJ. did ultimately reach the same conclusion about federal paramountcy in *Moloney* and *407 ETR*; although Côté J. found there to be no impossibility of dual compliance in both cases, she agreed with Gascon J. that there was a conflict due to a frustration of federal purpose. This may suggest that Gascon and Côté JJ.'s different approaches to impossibility of dual compliance will not make a significant difference in practice. However, their decisions do reveal an element of (and may also generate additional) uncertainty about when an impossibility of dual compliance will be held to occur – uncertainty that Gascon J.'s majority opinion does little to resolve, since it is not entirely clear how to apply his substantive approach to impossibility of dual compliance. In addition, Gascon J.'s substantive approach to impossibility of dual compliance could make a difference in some cases, because it seems possible that it will lead to conflicts being found to occur due to an impossibility of dual

compliance where there is no frustration of federal purpose. And if this is right, Côté J.'s claim that Gascon J.'s approach to impossibility of dual compliance will result in more provincial laws being rendered inoperative would be vindicated.

The Court should abandon Gascon J.'s approach to impossibility of dual compliance, and (re)affirm Côté J.'s stricter approach to impossibility of dual compliance. The concern that animated Gascon J. in *Moloney* – that a provincial law may allow a province to do indirectly what a federal law precludes it from doing directly – should be addressed as a potential frustration of federal purpose. Under this approach, a provincial law that appeared to allow a province to do indirectly what a federal law precludes it from doing directly would be rendered inoperative under the federal paramountcy doctrine *only if the result would be to frustrate the purpose of the federal law*. This approach may not produce absolute clarity – an approach that turns so much on identifying federal purposes hardly can, as the discussion in the next section clearly shows – but it would help alleviate the uncertainty introduced by *Moloney*, which, as Côté J. noted, blurred the line between an impossibility of dual compliance and frustration of federal purpose analysis.

The Supreme Court of Canada had the opportunity to consider another alleged conflict between the federal Bankruptcy and Insolvency Act (BIA) and provincial (in this case, environmental) law in *Orphan Well Association v. Grant Thornton* (2019). [37] Alberta law governing oil drilling imposed end-of-life duties on a licensed operator who had exhausted an oil well. The well had to be "abandoned" in compliance with Alberta law which required the sealing of the well and the remediation of the site —costly obligations. Redwater Energy was an insolvent oil company that owned some valuable producing wells as well as "orphan" wells that were at the end of their life and were subject to unfulfilled abandonment obligations. The company's trustee in bankruptcy wanted to disclaim the orphan wells and sell the valuable wells so as to maximize the value of the estate for the creditors. The Alberta Energy Regulator took the position that this was not permissible, claiming that a sufficient portion of the sale proceeds from the valuable wells had to be set aside to meet the cost of remediating the orphan wells. The trial judge and the majority of the Alberta Court of Appeal agreed with the trustee that the end-of-life remediation obligations imposed by Alberta law conflicted with the BIA, and thus were rendered inoperative by the federal paramountcy doctrine. When the case reached the Supreme Court, the majority of the Court reached the opposite conclusion, agreeing with the Alberta Energy Regulator – and with their new colleague, Justice Martin, who had been in dissent in the Alberta Court of Appeal – that the end-of-life remediation obligations did not conflict with the BIA. [38]

Wagner C.J., who wrote for the majority of the Court, rejected two impossibility of dual compliance arguments offered by the trustee. First, he rejected the trustee's argument that Alberta's extension of its end-of-life remediation obligations to trustees that sought to disclaim assets of a bankrupt estate conflicted with s. 14.06 of the BIA, which provides that a trustee is "not personally liable for failure to comply" with an order "to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy" if the trustee disclaims the property within a prescribed timeframe. He said that, properly interpreted, s. 14.06 is only "concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering". [39] There was thus no impossibility of dual compliance, because the trustee could be – and was being – required to satisfy the environmental liabilities that resulted from Alberta's end-of-life remediation obligations out of Redwater Energy's assets, not its own assets. The trustee argued that, even if s. 14.06 only shielded it from personal liability for Redwater Energy's environmental liabilities, a conflict still arose because, under Alberta law, it was *possible* for the Alberta Energy Regulator to hold it personally liable for the costs of satisfying Redwater Energy's end-of-life remediation obligations in the future. Wagner C.J. dismissed this variation on the trustee's first impossibility of dual compliance argument as well, emphasizing that provincial laws should not be rendered inoperative under the federal paramountcy doctrine "by the mere theoretical possibility of a conflict". [40]

Wagner C.J. also rejected the trustee's second impossibility-of-dual compliance argument – that Alberta's end-of-life remediation obligations conflicted with the distribution scheme for the settlement of debts in the BIA. He said that the environmental liabilities that resulted from Alberta's end-of-life remediation obligations were not "claims provable in bankruptcy", and so were not subject to the distribution scheme set out in the BIA; rather, they resulted from statutory duties, which served the public interest. It was true that these environmental liabilities would diminish the value of the bankrupt estate for its creditors, but its value had to account for the costs of complying with the general law of Alberta. [41]

Côté J. dissented in *Orphan Well*. She agreed with the trustee that there was an impossibility of dual compliance. Unlike Wagner C.J., she read s. 14.06 of the BIA to allow a trustee to walk away from the environmental liabilities of an estate that it is administering by disclaiming assets, and she said that there was "an unavoidable operational conflict" because Alberta's end-of-life remediation obligations did "not recognize these disclaimers as lawful". [42]

In *Orphan Well*, neither Wagner C.J. nor Côté J. attempted to resolve the disagreement in *Moloney* about the impossibility of dual compliance test for conflict. Indeed, whereas Wagner C.J. distinguished *Moloney*, [43] Côté J. criticized the majority in *Orphan Well* for failing to respect *Moloney*, by allowing the province to "do indirectly what it is precluded from doing directly". [44]

Footnotes

1 Laskin, Canadian Constitutional Law (5th ed., 1986 by Finkelstein), 264, uses the term "operating incompatibility", but he evidently has in mind a broader test than express contradiction because he includes in the test the negative implication which arises when a federal penal law is more restrictive than a provincial penal law. I prefer "express contradiction" because it clearly excludes negative implication and duplication, and makes it easier to analyze the three situations separately.

2 Smith v. The Queen, [1960] S.C.R. 776, 800.

3 Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161.

4 Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161, 191.

5 For more discussion of duplication, see §§ 16:7 to 16:9, "Overlap and duplication".

6 Chapter 15, Judicial Review on Federal Grounds, under heading § 15:13, "Presumption of constitutionality".

7 Marine Services International v. Ryan Estate, [2013] 3 S.C.R. 53, 2013 SCC 44. LeBel and Karakatsanis JJ. wrote the opinion of the Court.

8 Marine Services International v. Ryan Estate, [2013] 3 S.C.R. 53, 2013 SCC 44, para. 79.

9 The Court also rejected the plaintiffs' arguments based on frustration of federal purpose (para. 84) and interjurisdictional immunity (para. 64).

10 See also Desgagnés Transport v. Wärtsilä Canada, 2019 SCC 58, holding that part of a provincial law (the Civil Code of Quebec) was not rendered inoperative in the context of a maritime contract claim, because the federal law was non-statutory, and so the federal paramountcy doctrine did not apply.

11 Royal Bank of Can. v. LaRue, [1928] A.C. 187; Re Bozanich, [1942] S.C.R. 130; A.-G. Ont. v. Policyholders of Wentworth Insurance Co., [1969] S.C.R. 779; Sun Indalex Finance v. United Steelworkers, [2013] 1 S.C.R. 271, 2013 SCC 6, paras. 53–60, 242, 265.

12 A.-G. B.C. v. A.-G. Can. (Employment of Japanese), [1924] A.C. 203.

13 Gillespie v. Gillespie (1973), 36 D.L.R. (3d) 421 (N.B.C.A.); discussed in ch. 27, The Family, under heading § 27:10, "General principles".

14 Re Minister of Finance (B.C.) and Pacific Petroleums (1979), 99 D.L.R. (3d) 491 (B.C. C.A.).

15 Hislop v. Can. (2009), 95 O.R. (3d) 81 (C.A.). Note the interesting argument that this case was governed by the "reverse paramountcy" rule of s. 94A of the Constitution Act, 1867; the Court held otherwise and applied the general rule of federal paramountcy (paras. 61–63).

16 Canada Post Corp. v. Hamilton (2016), 134 O.R. (3d) 502, 2016 ONCA 767, para. 87.

17 M & D Farm v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961. Binnie J. wrote the judgment of the Court.

18 Re s. 92(4) of the Vehicles Act 1957 (Sask.), [1958] S.C.R. 608.

19 B.C. v. Lafarge Canada, [2007] 2 S.C.R. 86.

20 B.C. v. Lafarge Canada, [2007] 2 S.C.R. 86, paras. 81–82. As a separate point, Binnie and LeBel JJ. argued (paras. 83–85) that municipal permission would frustrate the purpose of the federal law governing land use at the port, but they never explained what that purpose was. In the absence of an identifiable, conflicting federal purpose, this is either a reversion to the discredited covering-the-field test (§ 16:5, "Covering the field") or it is just interjurisdictional immunity in disguise. The interjurisdictional-immunity point of the case is discussed in ch. 15, Judicial Review on Federal Grounds, under heading § 15:18, "Federally-regulated undertakings".

21 B.C. v. Lafarge Canada, [2007] 2 S.C.R. 86, para. 113.

22 Alta. v. Moloney, [2015] 3 S.C.R. 327. Gascon J. wrote the opinion of the majority. Côté J. (with McLachlin C.J.) wrote a concurring opinion.

23 Alta. v. Moloney, [2015] 3 S.C.R. 327, para. 63.

24 The frustration of federal purpose analysis in the decision is discussed in the next section of the book: see § 16:4, "Frustration of federal purpose".

25 Alta. v. Moloney, [2015] 3 S.C.R. 327, para. 77.

26 Alta. v. Moloney, [2015] 3 S.C.R. 327, para. 123.

27 407 ETR Concession Co. v. Can., [2015] 3 S.C.R. 397, 2015 SCC 52. Gascon J. wrote the opinion of the majority. Côté J. (with McLachlin C.J.) wrote a concurring opinion.

28 407 ETR Concession Co. v. Can., [2015] 3 S.C.R. 397, 2015 SCC 52, para. 24.

29 The frustration of federal purpose analysis in the decision is discussed in the next section of the book: see § 16:4, "Frustration of federal purpose".

30 407 ETR Concession Co. v. Can., [2015] 3 S.C.R. 397, 2015 SCC 52, para. 39.

31 407 ETR Concession Co. v. Can., [2015] 3 S.C.R. 397, 2015 SCC 52, para. 41.

32 Sask. v. Lemare Lake Logging, [2015] 3 S.C.R. 419, 2015 SCC 53. Abella and Gascon JJ. wrote the opinion of the majority. Côté J. wrote a dissenting opinion.

33 The frustration of federal purpose analysis in the decision is discussed in the next section of the book: see § 16:4, "Frustration of federal purpose".

34 Alta. v. Moloney, [2015] 3 S.C.R. 327, para. 60; see also para. 69.

35 Alta. v. Moloney, [2015] 3 S.C.R. 327, para. 28.

36 Alta. v. Moloney, [2015] 3 S.C.R. 327, paras. 97, 105, 108.

37 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150. Wagner C.J. wrote the opinion for the five-judge majority of the seven-judge bench. Côté J. wrote a dissenting opinion, which was joined by Moldaver J.

38 Martin J. was not part of the Supreme Court panel that heard the appeal due to her earlier involvement.

39 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 7.

40 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 105. Wagner C.J. did say (para. 107) that the federal paramountcy doctrine would be triggered due to an "operational conflict" if the Alberta Energy Regulator did attempt to hold the trustee personally liable in the future.

41 Wagner C.J. also rejected the trustee's argument that Alberta's end-of-life remediation obligations would frustrate the purpose of the BIA's disclaimer provisions and distribution scheme. This aspect of his opinion is discussed later in this chapter: see § 16:4, "Frustration of federal purpose".

42 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 169.

43 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 106.

44 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 280. This criticism came in the context of Côté J.'s discussion of frustration of federal purpose, and so her approach in *Orphan Well* was consistent with her suggestion in *Moloney* – and the approach recommended in this book – that this concern about allowing a province to do indirectly what it cannot do directly should be addressed as a potential frustration of federal purpose.

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Constitutional Law of Canada, 5th Ed. § 16:4

Constitutional Law of Canada, 5th Edition
Peter W. Hogg, Wade Wright

Part II. Distribution of Power

Chapter 16. Paramountcy

III. Express Contradiction

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§ 16:4. Frustration of federal purpose

Canadian courts also accept a second case of inconsistency, namely, where a provincial law would frustrate the purpose of a federal law. Where there are overlapping federal and provincial laws, and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law, that is also a case of inconsistency.[1] As we shall see, this form of inconsistency started its life as a subset of express contradiction, but it is best treated as a separate kind of inconsistency. It is certainly much less "express" than the impossibility of dual compliance, and accordingly much more vulnerable to judicial discretion. The courts have to interpret the federal law to determine what the federal purpose is, and then they have to decide whether the provincial law would have the effect of frustrating the federal purpose.

In *Bank of Montreal v. Hall* (1990),[2] the question arose whether there was a conflict between the federal Bank Act, which provided a procedure for the foreclosure of a mortgage held by a bank, and a provincial Act, which stipulated, as a prelude to foreclosure proceedings, that the creditor must serve on the debtor a notice giving the debtor a last opportunity to repay the loan. In this case, the bank had taken foreclosure proceedings in compliance with the federal law, but had not served the notice in compliance with the provincial law. Note that it was not impossible for the bank to obey both laws. If the bank had served the notice required by the provincial law, the bank would not have been in breach of the federal law. The sole effect of compliance with the provincial law would be to delay the bank in realizing its security. Nevertheless, the Supreme Court of Canada held that the bank was not obliged to obey the provincial law, because it was inconsistent with the federal law. La Forest J., who wrote the opinion of the Court, claimed that there was an "actual conflict in operation" and that "compliance with the federal statute necessarily entails defiance of its provincial counterpart".[3] What he seemed to mean by these statements was that the *purpose* of the federal law would be frustrated if the bank had to comply with the provincial law.[4]

The theory that it is a sufficient conflict to trigger federal paramountcy if a provincial law is incompatible with the purpose of a federal law[5] was reinforced (and better explained) in *Law Society of British Columbia v. Mangat* (2001).[6] In that case, the federal Immigration Act provided that, in proceedings before the Immigration and Refugee Board, a party could be represented by a non-lawyer. British Columbia's Legal Profession Act provided that non-lawyers were prohibited from practising law (and appearing before a federal administrative tribunal would come within the definition of the practice of law). Gonthier J., who wrote the opinion of the Supreme Court of Canada, acknowledged that a party before the Board could comply with both laws by obeying the stricter provincial one and retaining a lawyer as counsel. But he pointed out that the purpose of the federal law was to establish an informal, accessible and speedy process, and that purpose required that parties before the Board be able to retain counsel who spoke their language, understood their culture and were inexpensive. That purpose would often be defeated if only lawyers were permitted to appear before the Board. Therefore, compliance with the provincial law "would go contrary to Parliament's purpose in enacting [the representation provisions] of the Immigration Act".[7] In that sense, there was a conflict in operation between the provincial and the federal law, and the provincial law was therefore inoperative in its application to proceedings before the Immigration and Refugee Board.[8]

In *Rothmans, Benson & Hedges v. Saskatchewan* (2005),[9] the federal Tobacco Act prohibited the promotion of tobacco products, except as authorized elsewhere in the Act, and the Act went on to provide that "a person may display, at retail, a tobacco product". The Saskatchewan Tobacco Control Act banned the display of tobacco products in any premises in which persons under 18 years of age were permitted. The Supreme Court of Canada, speaking through Major J., interpreted the federal permission to display as intended to circumscribe the prohibition on promotion, and not to create a positive "entitlement" to display. That meant that a retailer could comply with both laws, either by refusing to admit persons under 18 or by not displaying tobacco products. But what about the frustration of the federal purpose? Did not the express permission to display indicate a federal purpose to allow retailers to display tobacco products? No, answered the Court. Both the general purpose of the Tobacco Act (which was "to address a national health problem") and the specific purpose of the permission to display (which was "to circumscribe the Tobacco Act's general prohibition on promotion") "remain fulfilled".[10]

With respect, there is much to be said on the other side of this issue. Parliament did, no doubt, recognize a national health problem, but it chose to "regulate" tobacco use only by restricting Charter-protected commercial expression. Parliament had to do so within the reasonable limits allowed by s. 1 of the Charter of Rights.[11] The express permission to retailers to display the product was an effort to impose a reasonable limit on the prohibition of commercial speech about a product that retailers were lawfully entitled to sell. By narrowing the federal limit on the prohibition of commercial speech, the provincial law arguably frustrated an important *general* purpose of the federal Act, which was to comply with the Charter of Rights.[12] And, having regard to the impracticality of excluding persons under 18 from the supermarkets, convenience stores, news stands, gas stations and other retail outlets where cigarettes are sold, the provincial law surely frustrated the *specific* purpose of the explicit permission to display. The Court, however, decided otherwise, holding that the provincial law did not frustrate the purpose of the federal law, and, therefore, was not rendered inoperative by paramountcy. The Court acknowledged that it was influenced[13] by the curious decision of the Attorney General of Canada (normally so careful to protect federal turf) to intervene in the litigation on the side of the province, despite the fact that the provincial law undermined a federal law that expressly granted permission to display tobacco products at retail.

Two of the three paramountcy cases decided in 2015, which are discussed in the previous section of this chapter as cases of impossibility of dual compliance, were also decided on the ground of frustration of federal purpose. In both *Alberta v. Moloney*[14] and *407 ETR Concession Co. v. Canada*,[15] the issue was whether a provincial law which provided a process for enforcing payment of a debt incurred by a driver for causing an accident (*Moloney*) or for road tolls (*407*) was inconsistent with the federal Bankruptcy and Insolvency Act. The method of enforcement of the provincial laws was to deny driving privileges (registration of vehicle or driver's licence or both) to the debtor as long as the debt remained unpaid. In both cases, the driver had later become bankrupt and had later still been discharged from bankruptcy, but, because the road-related debt had never been paid, the province continued to deny driving privileges to the debtor. The Supreme Court held that the fresh-start provision of the Bankruptcy and Insolvency Act, under which, on discharge from bankruptcy, a debtor is released from all debts that are claims provable in bankruptcy, prevailed over the provincial enforcement provisions, rendering them inoperative by reason of paramountcy. As explained in the previous section of the chapter, a majority of the Court (Gascon J.) held that there was an impossibility of dual compliance, but a minority of the Court (Côté J.) held that a provincial law that simply withheld driving privileges could be complied with by not driving so that there was no impossibility of dual compliance. However, the Court was unanimous that the provincial laws frustrated the purpose of the fresh-start provision. The fresh-start provision reflected an important purpose of bankruptcy law, which was to free debtors from the debts that had driven them into bankruptcy so that they could make a fresh start in their economic and personal lives. Whether or not the provincial laws directly contradicted the fresh-start provision (the point on which the Court divided), the effect of the provincial laws was to keep a debt alive that had been discharged by the federal Act. All judges agreed that the provincial laws frustrated the purpose of the federal law.

The *Moloney* and *ETR* cases are rather clear examples of frustration of federal purpose (as is the earlier case of *Mangat*),[16] but the federal purpose is often unclear, and courts are faced with the question whether to frame what they think is the purpose narrowly or broadly. In the third 2015 paramountcy decision, *Saskatchewan v. Lemare Lake Logging*,[17] the issue was whether

the provincial Saskatchewan Farm Security Act was rendered inoperative by a remedial provision of the federal Bankruptcy and Insolvency Act that allowed a secured creditor to apply for the appointment of a national receiver to take control of an insolvent or bankrupt debtor's business assets. The BIA required ten days of advance notice to the debtor before the application for the remedy could be made. In this case, the debtor was a farmer in Saskatchewan and the provincial Act required any action by a creditor with respect to farmland to be preceded by 150 days of advance notice to the debtor, during which time mandatory review by a provincial Farm Land Security Board and mandatory mediation assisted by the Board were to take place. It was clear that both laws could be complied with by following the long process mandated by the provincial law, but did that long process frustrate the purpose of the federal law? The decision of the majority of the Supreme Court was no. Abella and Gascon JJ., who wrote the opinion of the majority, emphasized "the guiding principle of cooperative federalism [that] paramountcy must be narrowly construed" and said that "harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility". [18] Their conclusion from the legislative history of the amendment to the BIA that created the national receivership remedy was that the purpose was simply to provide for a national receiver so as to eliminate the former need for multiple provincial receivers. It followed that "Parliament's purpose of providing bankruptcy courts with the power to appoint a national receiver is not frustrated by the procedural and substantive conditions set out in the provincial legislation". [19] Côté J. dissented. She agreed that cooperative federalism was "an important principle", but "a yearning for a harmonious interpretation of both federal and provincial legislation cannot lead this Court to disregard obvious purposes that are pursued in federal legislation and that are, by this Court's jurisprudence, paramount." [20] She pointed out that the receivership remedy and the 10-day waiting period had been in the BIA for more than a decade before receivership was expanded to a national remedy, and the federal purpose could not be restricted to the creation of a national remedy. In her view, the federal purpose was to provide for a receivership remedy that would be timely, flexible and responsive to the context of insolvency. She emphasized the urgency that often attends creditors' remedies on the insolvency of a debtor, including the appointment of a receiver to protect secured assets. She did not claim that the BIA excluded all provincial regulation of creditors' remedies in insolvency, but the Saskatchewan law placed such "important obstacles" in the way of secured creditors that the provincial law frustrated "the federal purpose of providing a timely, flexible and context-sensitive remedy for secured creditors." [21]

In *Orphan Well Association v. Grant Thornton* (2019), [22] which has already been discussed in the previous section of this chapter, there was another disagreement in the Supreme Court of Canada about whether the purpose of an aspect of the BIA would be frustrated by the operation of a provincial law. Recall that, in this case, a trustee in bankruptcy wanted to disclaim the exhausted "orphan" wells of Redwater Energy, an insolvent oil company, so that it could maximize the value of the company's valuable producing wells for its creditors. The Alberta Energy Regulator disapproved of this plan. It took the position that an adequate share of the sale proceeds from the valuable wells had to be set aside to satisfy the cost of meeting the end-of-life remediation obligations that Alberta law imposed on the licensed operators of orphan wells. The trustee challenged Alberta's end-of-life remediation obligations, arguing that they conflicted with the BIA, and thus were rendered inoperative by the federal paramountcy doctrine. The Supreme Court of Canada held that Alberta's end-of-life remediation obligations did not conflict with the BIA.

The trustee, as explained in the previous section of this chapter, made two impossibility of dual compliance arguments, both of which were rejected by Wagner C.J., writing for the majority of the Court. The trustee also made two frustration of federal purpose arguments, which mirrored its impossibility of dual compliance arguments. Wagner C.J. rejected these two frustration of federal purpose arguments as well. First, he rejected the trustee's argument that Alberta's extension of its end-of-life remediation obligations to trustees that sought to disclaim assets of a bankrupt estate conflicted with s. 14.06 of the BIA, which provides that a trustee is "not personally liable for failure to comply" with an order "to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy" if the trustee disclaims the property within a prescribed timeframe. The purpose of this provision was to "protect trustees from personal liability", [23] not to allow trustees to walk away from the environmental liabilities of the estates that they are administering. This purpose was not being frustrated because the Alberta Energy Regulator was not seeking to hold the trustee liable *personally* for the environmental liabilities resulting from Redwater Energy's end-of-life remediation obligations. It was seeking to ensure that Redwater Energy's assets would be used for this purpose. Second, Wagner C.J. also rejected the trustee's argument that allowing Alberta's end-of-life remediation obligations to

operate in this context would frustrate the purpose of the distribution scheme in the BIA for the settlement of debts. The purpose of the BIA's distribution scheme was not frustrated because the environmental liabilities that resulted from Alberta's end-of-life remediation obligations were not "claims provable in bankruptcy", and so were not subject to the distribution scheme; rather, they resulted from statutory duties, which served the public interest and were imposed by "valid provincial laws which define the contours of the bankrupt estate available for distribution". [24] Indeed, allowing Alberta's end-of-life remediation obligations to operate would actually "facilitate" one of the specific purposes of the BIA – "to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation". [25]

In *Murray-Hall v. Quebec* (2023), [26] the Supreme Court of Canada was asked to consider whether the purpose of the federal Cannabis Act [27] was frustrated by two provisions in the Quebec Cannabis Regulation Act. [28] The federal Cannabis Act decriminalized, but also maintained various restrictions on, the recreational use of cannabis. Two provisions in the federal Cannabis Act made it an offence for an individual to possess or cultivate more than four cannabis plants at home, but the two Quebec provisions completely prohibited the possession and cultivation of cannabis plants at home, without the exception in the federal Cannabis Act for four cannabis plants. The Court held that the two Quebec provisions did not frustrate the purpose of the federal Cannabis Act, and therefore that the two Quebec provisions were not inoperative under the federal paramountcy doctrine. The general purposes of the federal Cannabis Act were to protect the health and security of the public, reduce the presence of criminal organizations in the cannabis market, and ensure a supply of quality-controlled cannabis products, while the specific purpose of the two federal provisions was to exclude the possession and cultivation of four cannabis plants from the scope of the offences in the federal Cannabis Act. While the two federal provisions and the two Quebec provisions took a different approach to the possession and cultivation of cannabis plants at home, the two Quebec provisions did not frustrate the general purposes of the federal Cannabis Act. On the contrary, the same general objectives guided the provisions of both levels of government.

In reaching its conclusion in *Murray-Hall*, the Court followed *Rothmans* (discussed earlier in this section) in rejecting an argument that the two federal provisions created a positive statutory right to possess and cultivate four cannabis plants at home. The Court said that such an interpretation of the two federal provisions was not supported by the text of the two provisions, and the federal Cannabis Act more broadly. However, citing *Rothmans*, the Court also said that, if Parliament relies on the federal criminal law power (s. 91(27)) to prohibit a practice but carves out an exception for a related practice that it does not wish to prohibit, "this 'only means that a particular practice is not prohibited, not that the practice is positively allowed by the federal law'". [29] To conclude otherwise, the Court said, "would be inconsistent with the fact that 'the criminal law power is essentially prohibitory in character'". [30] Since Parliament often carves exceptions out of prohibitions enacted under s. 91(27), the Court's holding in *Rothmans* and *Murray-Hall* that such exceptions cannot create positive statutory rights to engage in a particular practice (because this would exceed the limits of s. 91(27)) restricts the impact of the federal paramountcy doctrine in the criminal law context. This is because any federal criminal law that actually had a purpose to create a positive statutory right to engage in a particular practice that could be frustrated by a more restrictive provincial law relating to the practice would likely exceed the limits of s. 91(27), and therefore could not trigger the federal paramountcy doctrine.

Footnotes

1 The frustration of federal purpose test was first articulated clearly in Law Society of British Columbia v. Mangat, [2001] 3 S.C.R. 113, para. 72. However, it is the best explanation of two early paramountcy cases, namely, Tennant v. Union Bank of Canada, [1894] A.C. 31 (provincial law limiting legal effect of warehouse receipts frustrated purpose of federal law providing that title to goods could pass by warehouse receipt) and Crown Grain Co. v. Day, [1908] A.C. 504 (provincial law barring appeal from mechanics lien decision frustrated purpose of federal law providing for appeal to the Supreme Court of Canada from any final judgment in a province). The same test explains the cases striking down provincial attempts to provide for the punishment of young offenders in the face of federal procedures: A.-G. B.C. v. Smith, [1967] S.C.R. 702; R. v. T.W. (1980), 119 D.L.R. (3d) 558 (B.C.C.A.); A.-G. Que. v. Lechasseur,

[1981] 2 S.C.R. 253. For a more complex explanation, based on conflict between "secondary rules", see E. Colvin, "Legal Theory and the Paramountcy Rule" (1979) 25 McGill L.J. 82 (written before the *Mangat* case).

2 Bank of Montreal v. Hall, [1990] 1 S.C.R. 121.

3 Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, 152, 153.

4 Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, 152, 154–155, referring to "legislative purpose".

5 Compare Tennant v. Union Bank of Canada, [1894] A.C. 31, which could be explained by this theory.

6 Law Society of British Columbia v. Mangat, [2001] 3 S.C.R. 113.

7 Law Society of British Columbia v. Mangat, [2001] 3 S.C.R. 113, para. 72.

8 Folld. in Que. v. Can., [2011] 3 S.C.R. 635 (provincial law exempting workers compensation payments from seizure would frustrate the purpose of the federal employment insurance law authorizing recovery of employment insurance overpayments from third-party creditors; paramountcy applied).

9 Rothmans, Benson & Hedges v. Sask., [2005] 1 S.C.R. 188. Major J. wrote the opinion of the Court.

10 Rothmans, Benson & Hedges v. Sask., [2005] 1 S.C.R. 188, para. 25. The Supreme Court also found no frustration of federal purpose in Que. v. Canadian Owners and Pilots Assn., [2010] 2 S.C.R. 536, paras. 62–74, 92 (federal permissive legislation on location of aerodromes; provincial restriction on location; no conflict).

11 The previous version of the Act had been struck down as an unreasonable limit on freedom of expression, as guaranteed by s. 2(b) of the Charter of Rights: RJR-MacDonald v. Can., [1995] 3 S.C.R. 199. The new version of the Act was also under challenge in the Quebec courts as a breach of s. 2(b).

12 The Court did not address the interesting question of whether the imposition by federal law of reasonable limits on a Charter right could be undermined by supplementary provincial laws that expand the violation of the Charter right beyond the federally-set limits.

13 Rothmans, Benson & Hedges v. Sask., [2005] 1 S.C.R. 188, para. 26.

14 Alta. v. Moloney, [2015] 3 S.C.R. 327.

15 407 ETR Concession Co. v. Can., [2015] 3 S.C.R. 397, 2015 SCC 52.

16 Law Society of British Columbia v. Mangat, [2001] 3 S.C.R. 113.

17 Sask. v. Lemare Lake Logging, [2015] 3 S.C.R. 419, 2015 SCC 53.

18 Sask. v. Lemare Lake Logging, [2015] 3 S.C.R. 419, 2015 SCC 53, para. 21.

19 Sask. v. Lemare Lake Logging, [2015] 3 S.C.R. 419, 2015 SCC 53, para. 73.

20 Sask. v. Lemare Lake Logging, [2015] 3 S.C.R. 419, 2015 SCC 53, para. 78.

21 Sask. v. Lemare Lake Logging, [2015] 3 S.C.R. 419, 2015 SCC 53, paras. 119.

22 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150. Wagner C.J. wrote the opinion for the five-judge majority of the seven-judge bench. Côté J. wrote a dissenting opinion, which was joined by Moldaver J.

23 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 110.

24 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 160.

25 Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 159. Côté J., in dissent, said that the environmental liabilities that resulted from Alberta's end-of-life remediation obligations were "claims provable in bankruptcy", and thus were subject to the BIA's distribution scheme. She said that an "essential purpose" of the BIA – to distribute the value of a bankrupt estate in accordance with this distribution scheme – would thus be frustrated by the operation of these obligations: Orphan Well Association v. Grant Thornton, [2019] 1 S.C.R. 150, para. 170.

26 Murray-Hall v. Que., 2023 SCC 10. Wagner C.J. wrote the opinion of the Court.

27 Cannabis Act, S.C. 2018, c. 16.

28 Cannabis Regulation Act, C.Q.L.R., c. C-5.3, ss. 5, 10.

29 Murray-Hall v. Que., 2023 SCC 10, para. 90.

30 Murray-Hall v. Que., 2023 SCC 10, para. 90.

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BLUE SHEET

Constitutional Law of Canada, 5th Ed. § 16:10

Constitutional Law of Canada, 5th Edition
Peter W. Hogg, Wade Wright

Part II. Distribution of Power

Chapter 16. Paramountcy

VI. Effect of Inconsistency

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§ 16:10. Effect of inconsistency

Once it has been determined that a federal law is inconsistent with a provincial law, the doctrine of federal paramountcy stipulates that the provincial law must yield to the federal law. The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency. Notice that the paramountcy doctrine applies only to the extent of the inconsistency. The doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law, unless of course the inconsistent parts are inseparably linked up with the consistent parts. [1] There is also a temporal limitation on the paramountcy doctrine. It will affect the operation of the provincial law only so long as the inconsistent federal law is in force. If the federal law is repealed, the provincial law will automatically "revive" (come back into operation) without any reenactment by the provincial Legislature. [2]

It is not accurate to describe the effect of the paramountcy doctrine as the "repeal" of the provincial law. The federal Parliament cannot repeal a provincial law. Moreover, a repealed law does not revive on the repeal of the repealing law. Nor is it accurate to describe the effect of the paramountcy doctrine as rendering the provincial law ultra vires, invalid or unconstitutional. Such a description confuses validity with consistency. The federal Parliament cannot unilaterally take away from a provincial Legislature any power that the Constitution confers upon the Legislature. [3] The provincial power to enact the law is not lost; it continues to exist (so does the provincial law), although it remains in abeyance until such time as the federal Parliament repeals the inconsistent federal law. This is why the only satisfactory description of the effect of the paramountcy doctrine is that it renders inoperative the inconsistent provincial law.

It is even misleading to describe the effect of the paramountcy doctrine as rendering a provincial law "inapplicable". This description is not literally wrong, but it invites confusion with the doctrine of interjurisdictional immunity. The doctrine of interjurisdictional immunity is a limitation on the power of the provincial Legislatures to enact laws that extend into core areas of exclusive federal jurisdiction. In the *Quebec Minimum Wage* case (1966), [4] for example, it was held that Quebec's minimum wage law could not constitutionally apply to the Bell Telephone Company. This was not based on the existence of an inconsistent federal law; there was no federal minimum wage law in existence at that time. [5] The decision was based on the rule that a provincial law cannot affect a "vital part" of an undertaking within federal jurisdiction (such as a telephone company). In a case of this kind, the law is said to be inapplicable, not inoperative, which makes clear that the provincial law is yielding not merely to an inconsistent federal law, but to an implied prohibition in the Constitution which makes the application of the law ultra vires. [6]

Footnotes

1 This would depend upon the ordinary rules as to severance: ch. 15, Judicial Review on Federal Grounds, under heading, § 15:14, "Severance".

2 It is otherwise of course if the provincial Legislature has formally repealed the law in the meantime.

3 Compare A.-G. N.S. v. A.-G. Can. (Nova Scotia Inter-delegation), [1951] S.C.R. 31, holding that neither Parliament nor Legislature can confer additional powers on each other; a fortiori, neither can take existing powers away.

4 Commission du Salaire Minimum v. Bell Telephone Co., [1966] S.C.R. 767; discussed in ch. 15, Judicial Review on Federal Grounds, under heading §§ 15:16 to 15:21, "Interjurisdictional immunity".

5 Even if there had been a federal minimum wage law, the existence of a different federal standard has been held not to qualify as an inconsistency: Construction Montcalm v. Minimum Wage Commission, [1979] 1 S.C.R. 754.

6 It is sometimes unclear whether a provincial law has been held to be *inapplicable* on account of interjurisdictional immunity or *inoperative* on account of inconsistency with federal law. A line of cases that holds that provincial law cannot alter the ranking of debts in bankruptcy could be explained *either* on the (ultra vires) basis that the law affects a vital part of bankruptcy (a federal head of power) *or* on the (paramountcy) basis that the law is inconsistent with the Bankruptcy Act (a federal law). The cases are discussed in Husky Oil Operations v. M.N.R., [1995] 3 S.C.R. 453, where Gonthier J. for the majority (at para. 87) uses the word "inapplicable" for some (but not all) paramountcy conflicts. Iacobucci J. for the dissenting minority (at para. 213) criticizes Gonthier J.'s usage as "[confusing] the doctrines of vires and paramountcy, as these have been traditionally understood".

End of Document

Tab 13

NYON MARINE FUELLING CORPORATION

[redacted]
Office line:
Direct dial:
Facsimile:
Cellular:
E-Mail:

April 12, 2013

[redacted]

Dear Sirs,

Re: Hydro One Networks Inc. ("Hydro One") and the rezoning of lands in the City of Port Colborne (the "City")

The City has entered into an agreement of purchase and sale of certain lands (the "Lands") with Nyon Oil Inc. which agreement has been assigned to Nyon Marine Fuelling Corporation ("Nyon");

Nyon has appealed to the Ontario Municipal Board (the "Board") under ss. 22(7) and 34(11) of the *Planning Act*, R.S.O. 1990, c.P.13, as amended, from the City's refusal or neglect to enact proposed amendments to the City's Official Plan and Zoning By-law No. 1150/97/81 (the "Appeals") to implement proposed development of an energy park on the Lands consisting in part of 56 petroleum storage tanks and related infrastructure.

Nyon and Hydro have agreed on a bylaw that Nyon will support at the OMB.

You have asked if Nyon is willing to sell and convey by fee simple or easement interest, or combination thereof, parts of Lands which are under Hydro One's electric transmission and distribution facilities and setbacks, in accordance with applicable law

Nyon mutually agrees to negotiate expeditiously and in good faith for the purpose of concluding an agreement to convey to Hydro One by way of fee simple or easement interest, or a combination thereof, parts of the Lands which are under Hydro One's electric transmission and distribution facilities and setbacks, in accordance with applicable law.

The specific dimensions of the property and the property to be conveyed shall be determined through negotiation.

Nyon and Hydro One shall agree upon the compensation payable for the required conveyances and to do so at fair market value and the principles applicable in determining compensation are to be the same as in an expropriation including, without limitation, injurious affection.

At this time we are not agreeing or consenting to an expropriation. If you wish to proceed to expropriate that is your prerogative.

This agreement shall be null and void in the event of any fraud, misrepresentation, threat, coercion or arbitrary action on the part of Hydro One.

In the event your client, directly or indirectly, seek OMB status or an adjournment, makes representations or otherwise interferes in the OMB hearing scheduled for April 15, 2013 or any adjournment thereof, Nyon will be unwilling to sell the subject property and this offer to negotiate in good faith shall be null and void.

Yours very truly,

[redacted]
President

Accepted and Agreed
Hydro One Networks Inc

_____
Per:

Tab 14

Hydro One Networks Inc. ("Hydro One") With Regards To Technical Issues And Comments As A Commenting Agency In Relation To The Development Of The Port Colborne Energy Park

BETWEEN:

HYDRO ONE NETWORKS INC. (herein after "Hydro One")

- and -

NYON MARINE FUELLING CORPORATION (herein after "Nyon")

WHEREAS the City has entered into an agreement of purchase and sale with Nyon Oil Inc. Which has been assigned to Nyon Marine Fuelling Corporation for certain lands described in Schedule A-1 hereto (the "Lands") and Nyon is the beneficial owner thereof;

AND WHEREAS Nyon had commenced rezoning of the subject lands in 2005 and the Ontario Municipal Board (the "Board") under ss. 22(7) and 34(11) of the *Planning Act*, R.S.O. 1990, c.P.13, as amended, approved on June 11, 2013 amendments the City's Official Plan and Zoning By-law No. 1150/97/81 to implement proposed development of an energy park on the Lands;

AND WHEREAS Hydro One has certain hydroelectric transmission and distribution facilities on the Lands ("Hydro facilities");

AND WHEREAS, in light of the recent and proposed changes in ownership and proposed uses of the Lands, Hydro one is desirous of securing rights in registrable form to protect its facilities with appropriate setbacks in order to remain on the Lands;

AND WHEREAS Nyon and Hydro one ("the Parties") have since May 2013 worked together to resolve the technical issues relating to the design and engineering of the tank farm in relation to the Hydro facilities including meetings on August 15, 2013; September 16, 2013; October 24, 2013, October 30, 2013 and November 21, 2013 and have resolved Hydro One's concerns relating thereto as more particularly described below;

NOW THEREFORE in consideration of the matters contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **SITE PLAN.** The parties have reviewed in detail and approved the final site plan dated November 2013 (the "Site Plan") attached hereto as Schedule "A". As a commenting agency, with regards to the circulation of the site plan, Hydro One hereby approves the site plan and acknowledges that it has no further comments or amendments thereon. In

the event there are amendments or changes to the Site Plan consistent with the general principles as set forth in paragraphs 2 to 9 inclusive hereof ("General Principles") such amendments or changes shall be deemed to be approved by Hydro One. In the event of any amendment or change to the Site Plan that is inconsistent with the General Principles and require comment by Hydro One, Hydro One shall respond on a timely basis acting in good faith and reasonably, and in the event, Hydro One has not provided comments within 10 days of submission of the amendments or changes to Hydro One, the amendments or changes will be deemed to be consented to by Hydro One. Hydro One shall take no action, which is prejudicial to the ownership or development of the tank farm. Hydro One shall take no action which is prejudicial to the value of the Lands, except as otherwise stated in this Memorandum of Understanding ('MOU").

GENERAL PRINCIPLES

2. **PIPELINES FROM DOCK 10 TO TANK FARM AND PIPELINE FROM TANK FARM TO RAILWAY TRACKS.** The east-west pipelines from the Seaway property will inside the setback and be buried except where they come up for valves and cleaning. Pipelines will be buried under the setback for the pole line to Welland. The water line from the canal to the fire water pond will be buried. The internal pipeline network in the tank farm will be above ground and outside the setback. The pipeline to the railway will be above ground outside of the Hydro One required setback. The railway loading and unloading facilities will be above ground. The aforesaid pipelines and setbacks are set forth on Schedule A period

3. **WOOD POLE LINES.** With regards to the wood pole line to Welland, or any other pole lines, there is a 25-meter setback on each side of pole line. Roads, berms, and tanks will be outside of the setbacks of pole lines and towers. The setbacks proposed in drawings, attached as **Schedule A** are acceptable. Access for maintenance will be as follows:

   (a) The base line is 6.7 meters.

   (b) Minimum clearance is 6.7 meters, unless Hydro One is travelling into the area with large equipment, then it is increased to 10 meters.

   (c) Clearance is made for the maximum sag of lines.

   (d) Nyon must inform Hydro One with regard as to the biggest equipment Nyon will be using under the line.

4. **WATER PIPELINE FROM CANAL TO TANK FARM.** The pipeline will be below grade and although within the setbacks for the towers, it will be outside the 25-meter setback from the towers pump house to be built away from Hydro lines and towers.

   (a) The pipeline will not respect the setbacks as it will be buried;

   (b) The pump house will be drawing water from the canal;

   (c) The water pipeline will be below grade:

      (i) It will be buried 6 feet so that heavy equipment can drive over it;

      (ii) The road on Nyon property will be designed to meet the Ontario Highway bridge code.

5. **STORM WATER POND.** Generally setbacks are required to protect the footings of the towers or polls. Location of the pond may encroach on the setback areas from footings of the towers provided the pond is lined to ensure against leakage and as long as the pond doesn't affect the maintenance of the towers or the poles.

   (a) The storm water management pond will encroach on the setbacks, as set forth in the Site Plan.

   (b) The storm water management pond, as set out in the Site Plan, does not interfere with the maintenance of Hydro One's towers or poles.

   (c) The location for the pond is set out on Schedule A.

   (d) The pond is approximately square meters.

   (e) The pond will be approximately feet (meters) deep.

   (f) The pond will hold water and then water will dissipate.

   (g) When the pond is empty Nyon will pump water from the canal and when there is a storm it will drain into the canal.

   (h) Nyon will use the existing drainage ditch to drain the pond.

   (i) The ponds as shown on Schedule A approved by Hydro One.

   (j) The swale near tower 12 shall be rerouted so that it is a minimum of 15 m from tower 12.

6. **RAIL LOADING SYSTEM.** There are no Hydro One issues with the rail loading system, as it is not near any Hydro One facilities; provided, however, the rail loading

facility shall not be located within 25 m on each side of the overhead Hydro transmission line crossing (the "overhead corridor") above the railway to Welland and any pipeline in the overhead corridor will be belowground.

7. **FENCING.** Nyon will fence the whole perimeter as set forth on the Site Plan.

   (a) Hydro One would prefer chain link fencing; the organization that does the grounding and induction study can make recommendations with respect to fencing, which will be reviewed with Hydro One prior to construction.

   (b) The fencing will be grounded.

   (c) Gates will be constructed to provide for access by Nyon and Hydro One will be provided access for any of its infrastructure included within the fencing either through being provided with keys for the locks or double locking and having its own key. One gate will provide access to Nyon's internal road system from the West. One gate will provide access to the Hydro corridor from the West. Keys will also be available on-site. Hydro One may also have secondary access from Hwy 140 through Nyon's internal ring road and system on the east side of the tank farm. Hydro One will enter into an indemnity agreement with regards to the use of the Nyon access and roads prior to the use thereof.

   (d) The internal road will be outside the 25-meter setback but within the 100 m setback in respect of the towers and.

   (e) Hydro One will continue to have access from the Seaway to its towers which are not fenced and will not be enclosed by fencing by Nyon.

   (f) The pole line to Welland will be inside the perimeter fencing and access shall be provided by a gate within the setback area on the west fencing..

8. **CATHODIC ISSUES.** The pipelines described above satisfy this issue.

9. **ELECTRICAL VALIDATION AND INDUCTION COORDINATION STUDIES.** Nyon will commission an electrical validation study and an induction coordination and grounding study and implement the recommendations.

MISCELLANEOUS

10. **ENFORCABILITY.** The responsibilities and rights contained herein are in the nature of an enforceable agreement between the Parties, and shall enure to the benefit of and be binding upon each of the Parties and their respective successors and assigns.

11. **EXECUTION.** This MOU shall come into force once executed by all of the Parties. This MOU may be signed in counterparts and may be executed by Counsel for the respective Parties.

12. **GOVERNING LAW.** This MOU shall be construed and enforced in accordance with the rights of the Parties and shall be governed by the laws of the Province of Ontario, and those of Canada applicable thereto. The Parties submit to the jurisdiction of the Courts of the Province of Ontario.

13. **ENTIRE AGREEMENT.** This MOU constitutes the entire technical agreement between the Parties and there are no covenants, promises, agreements, conditions or understandings, whether oral or written, between the parties concerning this MOU or any other related matter, except those that are set out in this MOU, and this MOU supersedes all prior agreements, arrangements and undertakings of the parties in respect of the subject matter hereof. No alteration, amendment, change or addition to this MOU is binding unless it is in writing and signed by the parties.

IN WITNESS WHEREOF the parties have executed this Memorandum of Understanding:

DATED: November 21st, 2013

HYDRO ONE NETWORKS INC.

_____

Per:

I have authority to bind the Corporation.

NYON MARINE FUELLING CORPORATION

Per: [redacted]

I have authority to bind the Corporation.

Tab 15

[redacted]

From: [Hydro One] [redacted]
Sent: Tuesday, February 10, 2015 11:05 AM
To: [Nyon] [redacted]
Subject: RE: standard form easement agreement

Dear Mr. [redacted],

Further to your request, I am attaching copies of our standard easement terms for your review. I trust that you will find these helpful.

Please advise if you have time to meet sometime soon to resume our discussions. Presently, except for the 2nd, 3rd, 9th and 11th, I am very available in early March. Thanks.

Best Regards

[redacted]

Hydro One Networks Inc.
483 Bay Street, 5th Floor, South Tower
Toronto, Ontario, M5G 2P5
[redacted]

From: [Nyon] [redacted]
Sent: Tuesday, January 27, 2015 4:42 PM
To: [Hydro One] [redacted]
Subject: standard form easement agreement

[redacted], nice to see a I think we saw you last time there. Do you have a standard form easement agreement or precedent for easements for us to look at.

Please note our new address.
E-mail,phone and fax numbers remain the same.
This historical building is on the northeast corner of Victoria St. and Lombard St.in the "Old City".

[redacted]

Tab 16

PORT COLBORNE ENERGY PARK
MEMORANDUM OF AGREEMENT (the" Agreement")

BETWEEN:

HYDRO ONE NETWORKS INC. (herein after "HONI")

- and -

NYON OIL INC. (herein after "the Corporation")

RECITALS:

WHEREAS Nyon has acquired certain lands described in Schedule "A" hereto (the "Property") as of April 30, 2015 (the "Closing") from the Corporation of the City of Port Colborne (the "City") with the conveyance of the Property to Nyon and its related, affiliated or associated corporations (as defined in the Ontario Business Corporations Act) (collectively herein referred to as Nyon);

AND WHEREAS Nyon had a beneficial interest in the Lands from January 30, 2006 until the Closing, pursuant to an agreement of purchase and sale with the City.

AND WHEREAS on Closing all past unpaid rents due and owing on the Property were assigned to Nyon pursuant to an assignment agreement with the City, attached hereto as Schedule "B";

AND WHEREAS the St. Lawrence Seaway Authority by instrument number 37309 B dated December 3, 1965 and registered in the registry division of the County of Welland December 6, 1965 expropriated all of the right, title and interest in lands as set out therein including all improvements and infrastructure. The expropriated lands included the Property, including the lands on which the power transmission and distribution lines and electricity supply facilities (herein referred to as the "Expropriated Infrastructure") were owned, operated and maintained by Ontario Hydro;

AND WHEREAS Ontario Hydro was granted permission to operate and maintain the hydroelectric transmission and distribution facilities on the Lands by the St. Lawrence Seaway Authority through the Master Agreement dated October 6, 1969 with regards to the Expropriated Infrastructure, and the Supplemental Agreement dated June 1, 1976 and the Licence dated April 4, 1977 which license permitted the construction of a single pole line set out therein (said pole line and related infrastructure herein referred to as the "Welland Infrastructure") neither of which agreements constitutes a grant of an easement, transfer of title or any interest in lands and neither of which are binding on successors or assigns of the lands (such limited rights are herein defined as "HONI's Rights").

AND WHEREAS HONI's Rights expired on July 7, 1994 on Part 38 of Reference Plan 59R – 15312 (attached hereto as Schedule "C" and lands on said reference plan attached as Schedule

"C" are referred to herein as "Site A"). Nyon and the City gave notice to HONI in June 2013 terminating any potential possessory rights of passage of time.

AND WHEREAS HONI's Rights expired on February 14, 2006, on the remaining Parts in the Hydro corridor on Site A.

AND WHEREAS HONI's Rights expired on February 14, 2006 to the Parts in the hydro corridor on Reference Plan 59R – 15310, (attached as Schedule "D", and lands on said reference plan attached as Schedule "D" are referred to as Site B);

AND WHEREAS HONI represents and warrants that it is the successor to Ontario Hydro with respect to transmission and distribution facilities in the Province of Ontario, including the aforesaid transmission and distribution facilities located on and/or in the Lands;

AND WHEREAS from the respective dates of the expiry of any HONI Rights and any other rights that it may have had, HONI has been operating and utilizing the Expropriated Infrastructure and the Welland Infrastructure (herein collectively referred to as the "Infrastructure") for its own benefit and profit without paying any compensation or rent;

AND WHEREAS, in light of the change in ownership and the proposed uses of the Lands, on March 28, **2013** HONI demanded the transfer of the freehold interests to the Hydro Corridor and ownership of the Infrastructure on or before April 15, 2013 as well as setbacks to be determined by HONI; thereby attempting to secure HONI's ownership of the Infrastructure and lands in the Hydro Corridor;

AND WHEREAS Nyon had appealed to the Ontario Municipal Board (the "Board") under ss. 22(7) and 34(11) of the *Planning Act*, R.S.O. 1990, c.P.13, as amended, from the City's refusal or neglect to enact proposed amendments to the City's Official Plan and Zoning By-law No. 1150/97/81 (the "Appeals") to implement proposed development of an energy park on the Lands;

AND WHEREAS the Board had scheduled a hearing for the Appeals commencing on Monday, April 15th (the "Hearing") and on the demand of HONI to Nyon that setbacks stipulated by HONI had to be included in the bylaw, the draft bylaw was amended to include the setbacks demanded by HONI, and was approved by Order of the Board on July 11, 2013 (the lands within the setbacks being herein referred to as the "Hydro Corridor");

AND WHEREAS the Hydro Corridor and the Infrastructure are an integral part of HONI's transmission and distribution system and business in the Niagara Region;

AND WHEREAS the parties had been negotiating extensively including the exchange of engineering drawings and a draft technical agreement, the latter being dated March 26, 2014, with a view to resolving the technical issues related to the coexistence of hydro infrastructure and the proposed petroleum storage tank farm; however, HONI has failed to provide final comments, although HONI advised it had only a few minor word changes to the draft agreement of March 26, 2014 but no changes of substance, and despite several requests by Nyon to finalize and execute the said draft agreement, HONI has not done so;

AND WHEREAS HONI has occupied the Hydro Corridor and has used the Infrastructure as a tenant by sufferance without payment or compensation or rent of any kind since the respective dates of the termination of the various HONI Rights as set forth in the Recital above.

AND WHEREAS Nyon and HONI (the "Parties") wish to resolve outstanding issues, including the coexistence with the tank farm and HONI's desire to secure the right to own and operate the Infrastructure and the Hydro Corridor set out in agreements in registrable form;

AND WHEREAS Nyon is prepared to sell certain lands and to grant easements to HONI for the Parts of the Hydro Corridor as set forth and described in Schedule "E" hereto, subject to the easements in favor of Nyon as set forth and described in Schedule "E" (hereinafter described as the "Acquired Assets").

AND WHEREAS Nyon is agreeable to negotiating an agreement for a combination of purchase and sale of the freehold interests and easements in respect of the Hydro Corridor and the Infrastructure to secure the right of HONI to own and operate the Infrastructure on the Hydro Corridor set out in agreements in registrable forms;

NOW THEREFORE in consideration of the matters contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

RECITALS

1. The above Recitals are true.

2. On execution this agreement, HONI shall deliver to Nyon an executed Technical Agreement, satisfactory to Nyon in its sole discretion, relating to the resolution of the technical issues with regards to cohabitation of the Infrastructure and the petroleum storage tank farm.

RENT

3. On execution of this agreement HONI shall deliver a certified cheque or bank draft in the amount of five million dollars ($5,000,000.00) as a down payment respect to the unpaid Rent.

4. The rent calculated monthly, payable in advance, from the respective dates as set forth in the recitals above in respect of the lands and Infrastructure in the Hydro Corridor (the "Rent") needs to be settled and paid forthwith. The parties agree to exchange, without prejudice, and in confidence, their calculations of unpaid Rent, including interest, to and including June 1, 2015, by June 30th, 2015. The Parties' calculations of the unpaid Rent shall be averaged (the "Averaged Unpaid Rent") and HONI shall pay on account to Nyon sixty percent (60%) of the Averaged Unpaid Rent less the $5 million referred to in paragraph 3 on or before July 15, 2015.

5. From April 30, 2015, the rent shall be a monthly net carefree rent and all taxes, and costs and expenses related to the Hydro Corridor and the Infrastructure shall be paid by HONI to Nyon and reimbursed to Nyon within 10 days of being invoiced to HONI.

6. The monthly rent to be paid in advance for July 1, 2015 and so long as rent is payable shall be as determined as the average of the average monthly rent for the 12 months ending June 1, 2015 as calculated by each of the parties in their submissions on June 16 2015 pursuant to paragraph 4 above. Such monthly rent shall be adjusted to the monthly rent for June 1, 2015 finally agreed to or determined by mediation or arbitration, as the case may be.

7. The parties agree to negotiate expeditiously and in good faith for the purpose of concluding an agreement as to the unpaid Rent due and owing and the Purchase Price (as hereinafter defined in paragraph 11).

8. If the parties have not negotiated an agreement, in accordance with paragraph 7 herein and in the purchase referred to in paragraph 11, by August 15 2015, either party may request confidential mediation and if there is no settlement result of mediation then within 10 days of the end of the mediation either party may request final and binding arbitration (the choice of mediator or arbitrator as the case may be shall be at the sole discretion of Nyon and it shall advise HONI of its decision within three (3) business days of a request being made), before the mediator or arbitrator chosen by Nyon for at least two (2) days of mediation or arbitration in respect of the unpaid Rent due and owing by HONI and the Purchase Price (the unpaid Rent determined by negotiation or by mediation or arbitration shall hereinafter be referred to as the "Determined Unpaid Rent").

9. If the Determined Unpaid Rent is more than the amount already paid pursuant to paragraphs 3 and 4 above, the difference shall be paid within ten (10) days.

10. If the Determined Unpaid Rent is less than the amount already paid pursuant to paragraph 3 and 4, the difference shall be applied to accrued but not yet paid Rent and then the balance will be considered an adjustment in favour of HONI on its purchase of the Acquired Assets, and excess monies, if any, shall remain as a security deposit for damages or remediation in respect of the lands on Site A for which HONI is responsible.

PURCHASE

11. The Parties agree to negotiate expeditiously and in good faith for the purpose of concluding on an " as is basis where is" free of any registered encumbrances or liens except for mutual easements and any utility easements an agreement on the purchase price (the "Purchase Price") for HONI to acquire the Acquired Assets if not agreed by August 15 2015 the Purchase Price shall be determined by mediation or by final binding arbitration, as the case may be, shall take place as provided in paragraph 8 above.

12. On execution of this agreement HONI shall deliver a certified cheque or bank draft in the amount of five million dollars ($5,000,000.00) as a down payment against the Purchase Price.

13. The purchase of the Acquired Assets shall be completed 10 days after receipt of the mediators or arbitrators award or report , as the case may be, on the Determined Rent and the Purchase Price but not later than November 30, 2015; the only extension thereof being until 10 business days after receipt of the mediation or arbitration award/report making the final determination, if not received before October 20, 2015.

14. As part of the acquisition of the Acquired Assets and the Purchase Price, HONI covenants and agrees Nyon shall be compensated and paid for all headings of compensation or payment or reimbursement that would have been paid if the Hydro Corridor and the Infrastructure where deemed expropriated including injurious affection, costs etc..

15. The Parties shall exchange, without prejudice and on a confidential basis, for negotiation and settlement purposes only, independent appraisals or opinions of value for the Hydro Corridor and the Infrastructure on or before June 30, 2015. HONI shall provide its comments to Nyon, if any, on or before July 10, 2015 and Nyon shall provide its comments , if any, to HONI, if any, by July 15, 2015.

16. Although the Expropriation Act provides that HONI shall pay one hundred percent (100%) of the market value immediately; the Parties agree that HONI shall pay a down payment to Nyon equal to seventy five percent (75%) of the average of the appraisals or opinions of value in respect the Acquired Assets, less the five million dollars ($5,000,000.00) referred to in paragraph 12, on July 15 2015 (the "Down Payment"), and such Down Payment shall be credited against the Purchase Price.

17. The Down Payment to the extent it exceeds the Purchase Price will be refunded only after HONI remediates that portion of the Hydro Corridor on Site A is may be required with regards to the construction of the tank farm r.

REIMBURSEMENT

18. HONI shall reimburse Nyon for all its costs and expenses, including, without limitation legal fees, planning, consulting, surveying and engineering costs and expenses relating to designing and redesigning the tank farm around Hydro infrastructure and the storm water pond, appraisals and all negotiations with HONI and the OMB hearings, including with regard to the setbacks and bylaw incorporating the setbacks and their approval at the OMB on June 11, 2013 and the city's new Official Plan on November 25, 2013, since March 28 2013, within ten (10) days of receipt of an invoice for same.

19. In the event that HONI fails to make any payment provided for herein, at the option of Nyon, HONI should be considered an overholding month-to-month tenant and thereafter

any Rent payable shall be doubled and interest shall be payable thereon at the same rate that HONI charges its retail customers for overdue payments.

20. In the event that HONI should contest or dispute any cost or expense referred to in paragraph 18 it shall first pay the account and then if the account has been paid have it mediated and if that fails arbitrated on the same basis and at the same time as the unpaid Rent and/or the Purchase Price.

CONFIDENTIALITY

21. All information between the Parties, including, but not limited to, information respecting Nyon, the Lands or the Hydro Corridor, unpaid Rent, Determined Unpaid Rent, ongoing rent, and any proceeds payable with regard to any rent or acquisition contemplated herein or information obtained by HONI hereunder will be retained in confidence by it and used only for the purpose of the transactions contemplated herein. Any additional information obtained by HONI hereunder that does not relate to the Hydro Corridor will continue to be treated as confidential by it, and will not be used by it without the prior written consent of the transferor. However, these restrictions on disclosure and use of information will not apply, insofar as information:

(a) is or becomes publicly available through no act or omission of the transferee or its consultants or advisors;

(b) is subsequently obtained lawfully from a third party, which, after reasonable inquiry, HONI does not reasonably believe is obligated to the transferor to maintain that information as confidential;

(c) is already in HONI's possession at the time of disclosure to it hereunder, without restriction on disclosure; or

(d) is required to be disclosed under the Regulations or by the direction of any court, tribunal or other regulatory body having jurisdiction.

However, specific items of information will not be considered to be in the public domain merely because more general information respecting the Lands is in the public domain.

After Closing, the Parties will cooperate with each other in releasing to third parties information concerning this Agreement and the transaction contemplated herein. However, a Party may only provide information about this transaction to any governmental agency, any regulatory authority or to the public, insofar only as it is required by law to do so and prior to doing so the Party shall advise the other Party of the disclosure to be made.

INDEMNITY

22. HONI covenants and agrees at all times to indemnify and to hold Nyon and its successors, assigns and its respective directors, officers, employees, and agents (Nyon)

harmless against and from any and all claims, liabilities, suits, actions, debts, damages, costs, losses, obligations, judgments, orders, charges, and expenses, of any nature whatsoever, suffered or incurred by any such party as a result of the presence of any contamination upon, in, or below the Hydro Corridor and adjacent lands, drainage systems or waterways or the release of any contamination arising out of or occurring in respect of HONI's or its predecessors occupancy of the Hydro Corridor (including without limitation the Ontario Hydro Commission and Ontario Hydro), including without limitation, the construction, use or maintenance of any Infrastructure, which may have occurred or which may occur in the future. The obligations under this Indemnity are to remediate the Hydro Corridor and or any contaminated adjacent lands to a pristine state and extends to any migration, release, deposit, transfer, and or spill beyond the Hydro Corridor.

23. In the event Nyon incurs any expense, cost, fine, or penalty with regard to the contamination and/or remediation, including any costs associated with the supervision by Nyon's consultants or agents, HONI shall pay same forthwith upon being invoiced by Nyon with interest at the rate HONI charges its customers.

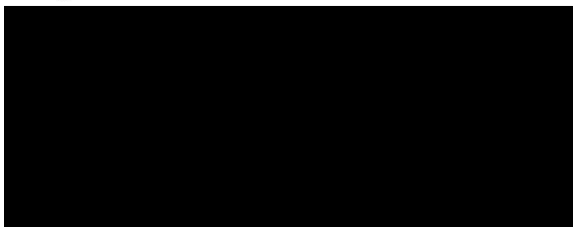
24. In the event that any remediation is necessary or required, HONI shall provide a work plan on a timely basis, including a system by which HONI produces a remediation plan that is acceptable and approved by Nyon, acting reasonably, on the basis of professional advice. Such remediation shall be carried out on a timely basis relative to the circumstances.

NOTICE

25. Any notice, instruction, document or other thing required or permitted to be given or served by this Agreement or by law may be given personally or by telex, fax, or email (where the intended recipient is equipped to receive such a form of telecommunication) or by prepaid courier or registered mail to the intended recipient at its address as set out below and either Party may by notice given in accordance with this section change its address for the purposes of this subsection. Any notice instruction, document or other thing given, served or sent as provided above shall be deemed (in the absence of evidence of prior receipt) to have been received by the intended recipient the same day if personally served, the next business day if sent by telex or fax, and on the third business day next following where sent by courier or by registered mail.

If to Nyon at: [redacted]

If to HONI at: Hydro One Networks Inc.:



GENERAL

26. Time shall be of the essence in the performance of all obligations by all Parties to this Agreement.

27. The responsibilities and rights contained herein are in the nature of an enforceable agreement between the Parties, and shall enure to the benefit of and be binding upon each of the Parties and their respective successors and assigns.

28. This Agreement shall come into force once executed by all Parties.

29. This Agreement is a binding agreement and shall be construed and enforced in accordance with, and the rights of the Parties and shall be governed by, the laws of the Province of Ontario and of Canada applicable thereto, and the Parties hereby submit to the jurisdiction of the Courts of the Province of Ontario.

30. This Agreement constitutes the entire agreement between the Parties and there are no covenants, promises, agreements, conditions or understandings, whether oral or written, between the parties concerning this Agreement or any other related matter, except those that are set out in this Agreement, and this Agreement supersedes all prior agreements, arrangements and undertakings of the parties in respect of the subject matter hereof. No alteration, amendment, change or addition to this Agreement is binding unless it is in writing and signed by the parties.

31. This Agreement may be signed in counterparts and may be executed by Counsel for the respective Parties.

32. This Agreement is open for acceptance by HONI on or before 12 noon on Tuesday June 23rd, 2015.

IN WITNESS WHEREOF the parties have executed this Agreement:

DATED: June , 2015

HYDRO ONE NETWORKS INC.

_____

per:

I have authority to bind the Corporation

_____

per:

I have authority to bind the Corporation

DATED: June, 2015

NYON OIL INC.

_____

per:

I have authority to bind the Corporation

SCHEDULE "A"

Lands acquired by Nyon from the City on Closing

SCHEDULE "B"

Assignment Agreement between Nyon and the City

SCHEDULE "C"

Reference Plan 59R – 15312

SCHEDULE "D"

Reference Plan 59R – 15310

SCHEDULE "E"

Acquired Assets

Tab 17

McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

Sam Rogers
Partner | Associé
[redacted]

mccarthy tétrault

April 8, 2024

Via Email [redacted]

Scott Lemke
Partner
Massey LLP
[redacted]

Dear Scott:

Re: Hydro One Networks Inc. ("HONI") and Nyon Oil / 1170367 Ontario Inc. (together, "Nyon")

We are counsel to HONI. We write further to your letter of February 22, 2024.

HONI disagrees with Nyon's position regarding the ownership of the transmission assets and its right to operate those assets on the land now owned by Nyon. HONI's position regarding ownership and its rights have not substantively changed since Ms. Batner's letters of October 8, 2015 and November 5, 2015. Your letter raises certain new issues including an allegation of environmental contamination. HONI has not had an opportunity to investigate these new allegations, but nothing in this letter should be taken as HONI's agreement with any allegation in your letter.

As you note, HONI and Nyon agree to hold all letters and notices in abeyance pending agreement on a process for a resolution of the dispute. Nyon never responded to Ms. Batner's letter of November 5, 2015, and Nyon's attempt to now claim back rent for an 8 year period is wholly without merit and contrary to the prior agreement between counsel.

In any event, HONI disagrees that either litigation or alternative dispute resolution are the appropriate method for resolving this matter. The transmission lines have been operated on the land in question by HONI for over 90 years and are critical infrastructure supporting the Ontario electricity transmission grid. There is significant public interest in their continued operation.

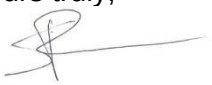
HONI intends to bring an application before the Ontario Energy Board under section 99 of the *Ontario Energy Board Act* for expropriation of the land necessary to continue to operate its transmission infrastructure. The Ontario Energy Board has previously ordered expropriation of land in nearly identical circumstances based on public interest in *Enbridge Gas Distribution Inc.*, EB-2011-0391.

If the expropriation is ordered, compensation will be determined by the Ontario Land Tribunal in accordance with the *Expropriations Act*. If your client is willing to consent to the expropriation, HONI expects that the Ontario Energy Board expropriation application can be advanced quickly

and the parties can move to the Ontario Land Tribunal to determine compensation without significant delay.

Finally, we note that some of the infrastructure referenced in your letter is not owned by HONI, but rather are distribution assets owned by another LDC.

Yours truly,



Sam Rogers
Partner | Associé

ec Gord Nettleton (McCarthy Tétrault)